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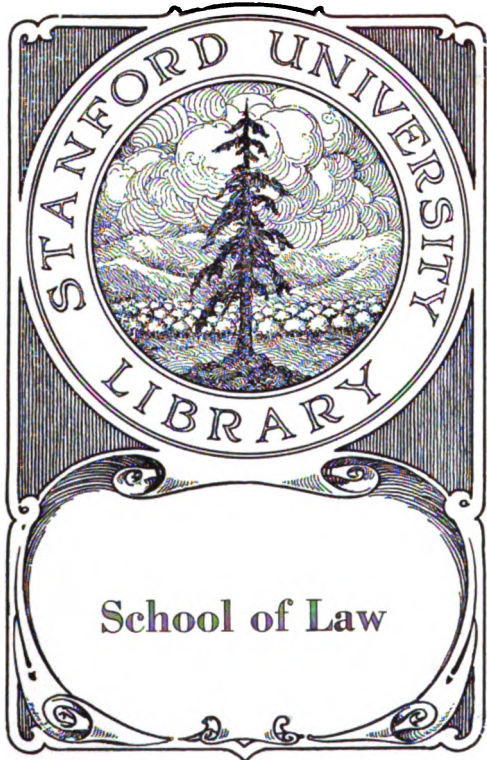
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* Beginning October 12, 1912.

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THE
PACIFIC REPORTER
VOLUME 136.

WENDL et al. v. FUERST et al.†

(Supreme Court of Oregon. Nov. 11, 1913.)

1. WILLS (§ 289*)—PROBATE—BURDEN OF PROOF.

The burden of proof is on the proponent of a will to establish every fact necessary to show the proper execution of a valid will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653-661; Dec. Dig. § 289.*]

2. WILLS (§ 302*)—SIGNATURE BY TESTATOR—EVIDENCE.

Evidence in a will contest *held* insufficient to show that the signature of decedent to the will was a forgery.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

3. EVIDENCE (§ 570*)—WEIGHT OF EVIDENCE—EXPERT TESTIMONY.

The evidence of experts in all cases should be received and weighed with caution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. § 570.*]

4. WILLS (§ 227*)—RIGHT TO ASSESS VALIDITY—ESTOPPEL—REPRESENTATIONS.

Representations by the authorities of an abbey that deceased, dying at the abbey, had made over all his property to it, and had left no will, will not estop the authorities from claiming that the will was executed, where such representations were not believed by the heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 549; Dec. Dig. § 227.*]

5. WILLS (§ 302*)—EXECUTION—VALIDITY—SUFFICIENCY OF EVIDENCE.

Evidence in a will contest *held* sufficient to establish the due execution of a will within L. O. L. § 7319, requiring a will to be in writing, signed by the testator, or by some person under his direction, in his presence, and attested by two or more competent witnesses subscribing their names to the will in his presence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

Department 1. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Will contest by John B. Wendl and another against Rt. Rev. Placidus Fuerst, Abbot of St. Benedict's Abbey of Mt. Angel, Or., and others. Instrument admitted to probate, and contestants appeal. Affirmed.

Frank Holmes, of Salem, Jas. L. Conley, of Portland (Conley & De Neffe, of Portland, on the brief), for appellants. M. E. Pogue, of Salem (W. T. Slater, of Salem, on the brief), for respondents.

RAMSEY, J. Rev. Emmeran D. Wendl, a Roman Catholic priest, died at Mt. Angel, Marion county, Or., on the 23d day of November, 1910, at the age of 67 years. He had never been married, and he left surviving him as his sole heirs at law the contestants, John B. Wendl, his brother, and Regina Wendl, his sister. The contestants are not residents of this state. They, too, are members of the Roman Catholic Church.

Rt. Rev. Placidus Fuerst is the abbot of St. Benedict's Abbey, at Mt. Angel, and Very Rev. Adelhelm Odermatt, O. S. B., is the prior of said abbey.

The decedent, Emmeran D. Wendl, was an oblate but not a member of the Order of St. Benedict. He made his home there for about two years immediately prior to his death, although he had done some clerical work during that time in Portland. While he was at work in Portland, he was stricken with nervous prostration caused by overwork. He was in St. Vincent's Hospital for a while, but returned to the abbey at Mt. Angel, and became an oblate of the Order of St. Benedict, and remained at the abbey until his death, which occurred November 23, 1910.

The decedent left no real estate but owned, when he returned to the abbey from Portland, a \$3,000 mortgage and several hundred dollars in money, deposited in banks, and a \$300 life insurance policy, and a small library. The evidence fails to show that he had any other property. Jas. L. Conley was appointed administrator of the estate of the decedent by the county court of Marion county, and letters of administration upon said estate were issued to him.

On February 8, 1911, Very Rev. Adelhelm Odermatt, prior of said abbey, presented to the county court of Marion county his petition in due form, alleging *inter alia* that said decedent, Rev. Emmeran D. Wendl, died at the Mt. Angel Abbey, Marion county, Or., on the 23d day of November, 1910, and that he executed a certain instrument of writing purporting to be his last will and testament, dated November 17, 1910, which was duly subscribed, executed, and witnessed, as required by law. The witnesses who subscrib-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—1

† Rehearing denied December 30, 1913.

ed said will as attesting witnesses being Rev. Thomas Meier, O. S. B., and Rev. Urban, O. S. B., both residing at said abbey. Said petition alleged all the facts necessary to be set forth in such a petition and annexed thereto a copy of said will and prayed for an order of said county court admitting said will to probate. Said petition asked also that Very Rev. Adelhelm Odermatt, prior of said abbey, who was named in said will as executor thereof, be appointed executor of said will, without bonds, according to the terms of said will, and praying also for an order revoking the appointment of said Jas. L. Conley as administrator of said estate, etc. The county court of Marion county admitted said will to probate in common form and made an order revoking the letters of administration granted to said Jas. L. Conley and generally granted the prayer of said petition.

On March 31, 1911, John B. Wendl and Regina Wendl, as the heirs at law of said decedent, filed in the county court of Marion county their petition in due form for the contest of said will, alleging the necessary facts for such contest. As grounds for such contest, said petition alleged that said instrument, purporting to be the will of said decedent and admitted to probate as stated, supra, was not the will of the decedent; that he did not sign said instrument; that it was not witnessed, signed, or published by him as his will; that it was not attested at his request or in his presence; and that it was not executed by him at all. The said petition for the contest of said will alleged also that the name of the decedent was forged thereto. It also alleged that the decedent was in such a condition mentally that he was unable to comprehend the meaning, scope, or effect of said instrument, and that said will was procured to be so executed by the decedent by the undue influence of the proponents, etc. The proponents denied the material averments of said petition, and then set up the due execution of said will and asked that it be re-probated in solemn form.

The evidence was taken in the county court, and that court made and entered an order holding that said will was duly executed and readmitting said instrument to probate as the last will and testament of said decedent, etc. The contestants appealed from said order to the circuit court of Marion county, and that court affirmed the order of the county court admitting said instrument to probate. The contestants appeal to this court.

Owing to the large amount of evidence, it is impracticable to do more than to refer to the substance of it.

1. The proponents of the will show by many witnesses that the decedent, during his last illness, and at the time that the will was executed, was of sound and disposing mind and memory, and the contestants offer-

ed no evidence on that point. There was no evidence offered tending to prove that the execution of said will was obtained by undue influence or fraud.

The sole question for determination is: Did the decedent execute as his last will and testament the paper propounded by the respondents and which was admitted to probate by the county court of Marion county? This document is in proper form and fair on its face.

[1] The burden of proof is on the proponents of the will to establish, by a preponderance of the evidence, every fact necessary to show the proper execution of a valid will. *Hubbard v. Hubbard*, 7 Or. 44; *Duper v. Werts*, 19 Or. 126, 23 Pac. 850; *Mendenhall's Will*, 43 Or. 548, 72 Pac. 318, 73 Pac. 1033. To be valid, a will must be in writing, signed by the testator, or by some other person under his direction in his presence, and attested by two or more competent witnesses subscribing their names to the will in the presence of the testator. L. O. L. § 7319.

[2] Attesting witnesses must sign the will as witnesses in the presence of the testator. The attesting witnesses to this will are Thomas Meier, O. S. B., and Urban Fisher, O. S. B., both residing at Mt. Angel. The third and fourth paragraphs of this will are as follows:

"Thirdly. In consideration of Rt. Rev. Abbot Placidus Fuerst and his consultors having given me a comfortable home, for life, to take care of me in days of health and sickness, in life, and after death, to treat and bury me like one of their own community, I hereby give and bequeath to the said Rt. Rev. Placidus Fuerst, abbot of St. Benedict's Abbey of Mt. Angel, Oregon, all my property and belongings, among which is one mortgage of three thousand dollars (\$3,000.00) which I hold in the city of Milwaukee, Wis.

"Fourthly. My brother John B. Wendl of Milwaukee, Wis., and my sister Regina Wendl of Chicago, Ill., shall each receive fifty dollars (\$50.00)."

When the will was executed there were present in the decedent's room with him at the abbey Thomas Meier and Urban Fisher, the attesting witnesses, and Very Rev. Prior Adelhelm Odermatt. Each of these persons was sworn, and each testified in detail as to the execution of the will. The evidence of these witnesses shows that the decedent desired to execute a will and that Father Urban was sent for to write the instrument. He was a notary public and accustomed to writing wills, and he had printed forms for wills. After Father Urban arrived in the decedent's room, the latter dictated the contents of the will, and Father Urban wrote the instrument in the presence of the decedent and of the attesting witnesses. The decedent then subscribed his name to the will in the presence of said witnesses and de-

clared it to be his last will and testament and requested the two witnesses to sign the will as attesting witnesses, and they so signed in the presence of the deceased and of each other. If the evidence of these witnesses is true, the will was duly executed.

After the will was executed, it passed into the hands of Father Jerome, the secretary of the abbey, for safe-keeping. A few days after the will was made, the decedent asked Father Jerome whether he had seen his will, and Father Jerome told him that he had read it, and this witness says that the decedent, when he told him that he had read his will, expressed his satisfaction that he had turned over everything to the abbey and said that he could now die satisfied. Father Jerome testified that he knew the decedent's handwriting, and that the signature to the will was his genuine signature.

Benedict Hinz testified that the decedent told him, a few days before his death, that he was getting pretty weak and that he should like to see Father Prior or one of the superiors, saying that he had some papers to sign yet. The deceased told this witness that he would let the abbey have whatever property he had left. A few days before his death the decedent told Dr. J. E. Webb, his attending physician, that he expected to die and that he had settled his business.

Rt. Rev. Abbot testified that he was acquainted with the handwriting of the deceased, and that the name of the decedent at the end of the will was the genuine signature of the deceased. The decedent talked with him several times about making a will and talked to him about it after he had made it.

Joseph Keber, cashier of the bank at Mt. Angel, testified that the deceased did business with him at the bank, and that in his opinion the signature to the will is genuine.

Father Gall Eugester testified that he knew the decedent's handwriting and that the signature to the will is his genuine signature.

Father Paul Manion testified that the signature to the will was the genuine signature of the decedent.

There were present, besides the decedent, when the will was executed, three persons, and each of them testifies that the decedent signed the will with his own hand, and three other witnesses, who knew his handwriting, testified that the signature to the will was his genuine signature. He talked to two persons, after he had made the will, and told them that he had made a will and talked about it to them. The evidence for the execution of the will is strong.

The evidence offered by the contestants to show that the name of the decedent at the end of the will is a forgery is the evidence of his brother, who testified that it is not his signature, and the evidence of W. W. Williams and M. A. Albim, who testify that they are handwriting experts. They testify that

they have for many years studied handwriting and have appeared as expert witnesses in a number of important cases. Each swears that the signature to the will is a forgery. Mr. Williams swears that it is not possible that he is in error when he pronounces the signature a forgery. Ev. p. 259.

Two or three of the officials at the monastery informed John B. Wendl and Mr. Conley, when they were at the abbey, that the decedent left no will. Very Rev. Prior explains why they said that he left no will thus (Ev. p. 155): "It (the will) was in existence for our own protection but according to the instructions of a dying man, Rev. Emmeran D. Wendl. He told me to keep that will secret and confidential and not to probate it in case the mortgage was paid. It did not exist in case the mortgage was paid. But it did exist from the 17th day of November at 3 o'clock in the afternoon to protect us (St. Benedict's Abbey) against every one who would contest the property that he had turned over to us on the mortgage or the last will. I think this will cover it all. This John B. Wendl told me, with his own lips (we were in the graveyard), if Father Wendl wanted to give Father Placidus (the abbot) this mortgage because you gave him a home he could do so; that was his own business; leaving me under the impression that he was willing for the abbot to get the mortgage and collect the mortgage," etc.

It was shown by the evidence that in the fall of 1910, after he returned from Portland, Father Wendl, the decedent, made a contract with the abbot that he would turn over to the abbey all of the property that he had, and in consideration thereof the abbot, for the abbey, agreed that the abbey would give him a permanent home at the abbey all his remaining days and support and care for him and bury him the same as one of their own order, although he was only an oblate. In addition to supporting and caring for the decedent during his life and burying him after he was dead, the abbot agreed that 1,000 masses should be said for the repose of the decedent's soul. These masses for the dead are celebrations of the Holy Eucharist with prayers for the repose of the soul of the dead person. These masses for the dead are devoutly believed in by the Catholic Church. This contract was made some time before his death. He was to turn over to the abbey the \$3,000 mortgage referred to, supra, and all other property by him then owned.

It appears from the evidence that they sent to Wisconsin for some papers for the purpose of making a regular transfer of the mortgage to the abbey and that there was some delay in getting these papers. However, they arrived about five days after the will was made, and the decedent executed them and a check for what money he had some hours before his death and turned them over to the abbey.

The evidence shows that the decedent wanted to turn over to the abbey all of his remaining property before his death, and that he did not want the will made public or probated unless the abbey should have trouble in collecting the mortgage or with his heirs.

John B. Wendt in his evidence, says that he had not seen the decedent often since boyhood. The deceased told John B. Wendt (Ev. pp. 160, 161) that he had given his sister \$1,000, and John B. Wendt then asked him why he did not give him money. He says that the deceased told him that he would leave all his property to him and Regina.

John B. testified that he always expected that his brother would leave him and Regina whatever he had. He says that the decedent told him that he was a poor man. He says he once asked the decedent what he was worth, and the latter said, "Oh, I have got a little money, not much." The witness then adds (Ev. p. 165): "Just might as well talk to this table as to talk to him about finance. He wouldn't tell anybody." There was no evidence tending to prove that the decedent had any property excepting the \$3,000 mortgage and a few hundred dollars in the bank and an insurance policy for \$300 and a small library. All of those he turned over to the abbey.

The evidence of the handwriting experts and the evidence of John B. Wendt are all the testimony produced to prove that the will was not executed by the decedent. These witnesses had no knowledge in relation thereto. What they testified to was opinion evidence only. They asserted with vehemence that the signature to the will was not genuine. Is it reasonable to ask a court on such evidence to hold that the signature of the decedent to the will is a forgery, in the face of the positive evidence of the three witnesses who swear that they saw him sign the will, and the evidence of two witnesses who testify that he told them that he had made a will, and the evidence of several other witnesses who swear that they know his signature and that the signature to the will is genuine?

In volume 5 of Ency. of Evidence, p. 643, that work says: "Generally the testimony of an expert will not be allowed to overthrow positive and direct evidence of credible witnesses, who testify from their personal knowledge."

In Grigsby v. Clear Lake W. Co., 40 Cal. 405, speaking of expert witnesses, the court says: "A contrary practice, however, is now probably too well established to allow the more salutary rule to be enforced, but it must be painfully evident to every practitioner that these witnesses (experts) are generally but adroit advocates of the theory upon which the party calling them relies rather than impartial experts upon whose superior judgment and learning the jury can safely

rely. * * * Such evidence should be received with great caution by the jury."

In the case of Tracy Peerage, 10 Cal. Fin 191, Lord Campbell says: "Hardly any weight is to be given to the evidence of what are called scientific witnesses. They come with a bias on their minds to support the cause in which they are embarked."

In Foster's Will, 34 Mich. 25, the court says: "Every one knows how very unsafe it is to rely upon any one's opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge, whose notions are pure speculations. * * * Every degree of removal beyond personal knowledge, into the domain of what is sometimes called with great liberality scientific opinion, is a step toward greater uncertainty, and the science which is so generally diffused is of very moderate value."

In Cowan v. Beall, 1 McArthur (D. C.) 270, 274, the court says: "The signatures of these papers are claimed not to be genuine, and here we are treated to the opinions of half a dozen men who claim to be experts and who come up and give us their views as to the genuineness of these signatures. Of all kinds of evidence admitted in a court, this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence."

In Wright v. Williams' Estate, 47 Vt. 234, the court says: "It would be trite to repeat the very uniform expression of judges and the books as to the small value of this kind of evidence (expert evidence), yet it is warrantable to say that such expression is corroborated by our observation and experience in judicial administration."

In U. S. v. Darnaud, 3 Wall. Jr., 183, Fed. Cas. No. 14,913, Justice Grier says: "Whether the signatures appear to be done by the same hand, that, I think, is a question you can put to an expert. Though the testimony is of rather a dangerous character and not much to be relied on."

In Mutual Benefit Life Ins. Co. v. Brown, 30 N. J. Eq. 201, the court says: "All doubt respecting the competency of the opinion of experts in handwriting, based upon mere comparison, as evidence has been removed by statute; but it still must be esteemed proof of low degree. Very learned judges have characterized it as much too uncertain, even when only slightly opposed, to be the foundation for a judicial decision."

[3] Rogers on Expert Testimony, pp. 65, 66, says: "But in all cases the testimony of experts is to be received and weighed with great caution. As a judge in one of the Irish courts has expressed it: 'Such evidence ought, as all evidence of opinion ought, to be received and considered with narrow scrutiny and with much caution.'"

We believe that the rule stated by Rogers,

supra, is the correct one, and that the evidence of experts in all cases should be received and weighed with caution.

[4, 5] Taking that view of such testimony, we find that the evidence greatly preponderates in favor of the validity of the will. The evidence for the will is strong, and that tending to prove that the will is a forgery is weak.

The contestants claim that the officials of the abbey are estopped to claim that a will was executed by the fact that they represented to the contestant John B. Wendl and Mr. Conley that there was no will, but we think that there is nothing in this claim of estoppel. The authorities told them that the decedent had made over all of his property to the abbey and that there was no will. The contestants did not believe that statement or act on it, as they petitioned the county court for the appointment of an administrator and claimed that the deceased had property at the time of his death. If they had believed the statements made to them by the authorities of the abbey as a whole and had acted on it, they would not have applied for administration on the decedent's estate. There is no plea of estoppel in this case.

The fact that three officers of the abbey told the contestant John B. Wendl and Mr. Conley that the decedent left no will is a material fact to be considered in weighing the evidence of those persons, but it does not affect the evidence of the subscribing witnesses to the will or the evidence of several other witnesses who have given evidence tending to prove that the will was executed by the decedent. If the evidence of the persons who denied that the decedent left a will were eliminated from the case, there would still be sufficient evidence to prove that the will was duly executed.

We find that the document referred to in the pleadings as the will of the decedent was in all respects duly signed by the decedent Emmeran D. Wendl on the 17th day of November, 1910, in the presence of the two subscribing witnesses thereto and declared by him to be his last will and testament, and that said witnesses, in the presence of said decedent and in the presence of each other, at the request of the decedent, subscribed their names to said will as attesting witnesses thereto, and that the decedent was at the time that he executed said will of a sound and disposing mind and memory and free from undue influence and fraud, and that said instrument is his last will and testament.

We approve the findings and the decree of the court below and the order of the county court of Marion county admitting said will to probate.

The decree of the court below is affirmed.

McBRIDE, MOORE, and BURNETT, JJ., concur.

SCHULTE v. PACIFIC PAPER CO.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—UNGUARDED ELEVATOR WELL.

Where plaintiff was injured by being struck by a descending elevator car as he was leaning into the elevator well, which was not inclosed five feet high on each floor as required by statute, the omission to construct the inclosure to the statutory height at other places than where the injury was received was immaterial, since the negligent act or omission of duty for which damages might be recovered must be the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

2. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—ELEVATOR WELL—INSUFFICIENT GUARDS—STATUTES.

Where, in an action for injuries to a servant by defendant's failure to guard an elevator well as required by statute, if the court was of the opinion that the complaint was brought under the statute, and also alleged elements of liability not included therein, but constituting a ground of liability at common law, it should have distinguished such grounds of recovery in its instructions, and specifically stated the issues of fact and the defense admissible under each, instead of submitting them to the jury to determine the issue of law and to adopt its own view for its application to the facts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.*]

On rehearing. Denied.

For former opinion, see 135 Pac. 527.

EAKIN, J. The liability of a defendant in an action for injuries to the person may depend upon violations of a statute and also upon elements contributing to the injury that disclose a liability at common law not covered by the statute. The issues of fact would not be the same under each, and what these issues are must be determined by the court and stated to the jury. It must not be left to determine the law for itself, and to apply it to the facts indiscriminately.

[1] Counsel urge that under the statute the elevator shaft or well was not inclosed five feet high on each floor, and that for such omission the jury might find defendant liable without regard to whether such negligence was the proximate cause of the injury; but the condition of the inclosure of the well at other places than where the injury was received was wholly immaterial. The negligent act or the omission of the duty for which the damages may be recovered must be the proximate cause of the injury. 29 Cyc. 600; Wallace v. Suburban Railway Co., 26 Or. 174, 37 Pac. 477, 25 L. R. A. 663; Hartvig v. N. P. L. Co., 19 Or. 522, 25 Pac. 358.

[2] If the court was of the opinion that the complaint was brought upon the statute, alleging also elements of liability not included in the statute, but constituting a ground for liability at common law, it should

have distinguished them in its instructions, and specifically stated the issues of fact and the defense admissible to each, instead of submitting them to the jury to determine the issue of law and to adopt its own view for the application of it to the facts.

The petition is denied.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

COUCH v. MARVIN, Sheriff, et al.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. MUNICIPAL CORPORATIONS (§ 29*)—ANNEXATION OF TERRITORY—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 11, § 2, provides that the legal voters of every city and town may amend their municipal charters, and the people of a particular locality may, by vote, adopt a charter or amend those already in existence; L. O. L. § 3209, provides for separate elections, by voters of a municipality and in territories sought to be annexed, on the question of annexation, which may be authorized on the securing of a majority of the voters of each locality. *Held*, that the state still retains sovereignty over its municipalities to some extent, and that it had not delegated to them the power to exercise dominion over areas outside of their boundaries, so as to authorize annexation, except when the territory proposed to be annexed is populated and there can be a fair expression of legal voters residing in such area; and hence a city had no power to annex territory which did not contain sufficient legal voters residing on land to be annexed to hold the required election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 66-75; Dec. Dig. § 29.*]

2. MUNICIPAL CORPORATIONS (§ 29*)—LOCAL SELF-GOVERNMENT—CONSTITUTIONAL PROVISIONS—"LOCAL"—"SPECIAL"—"MUNICIPAL."

The words "local," "special," and "municipal," as used in Const. art. 11, § 2, and article 4, § 1a, conferring on municipalities local self-government, with the right to legislate in municipal matters of local and special concern, have a plain signification, and refer to enactments intended to affect certain persons only, or to operate in specified localities; and an act is local when it relates to a part of the people only, or to their property, or when it operates within a single city, county, or other particular division, and such provisions did not confer on cities delegated power over areas outside their limits, with a right to include the same within the city's boundaries, except as provided by general law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 66-75; Dec. Dig. § 29.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4202; vol. 7, p. 6565; vol. 5, pp. 4618, 4619; vol. 8, p. 7728.]

In Banc. Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Suit by L. Couch against Edgar Marvin, as Sheriff and Tax Collector of Wallowa County, and the City of Lostine. Decree for complainant, and defendants appeal. Affirmed.

This is a suit to enjoin the collection of a tax levied by the city of Lostine upon cer-

tain lots and blocks of land owned by plaintiff, situated in the town of Evans, Wallowa county. The complaint shows that the plaintiff is the owner of the real estate assessed for the year 1911 for state, county, and school district taxes, for which payment has been tendered, and resists the tax levied by the city of Lostine for that year for the reason that the property is not within the limits of the municipality. The complaint describes the limits of the city of Lostine as established by an act of the Legislature of December 28, 1903, and shows that the real estate of plaintiff is outside the city limits as defined by the charter of that date. The answer admits many of the allegations of the complaint, and as a defense it is alleged that an election was held in the city of Lostine on November 10, 1910, at which the charter of the city was revised and so amended as to include within the boundaries of the city the lots and blocks of plaintiff. Exhibits are attached to the answer, showing the procedure adopted in revising the charter. The answer shows that at this election the electors of the city voted to extend the limits of the municipality by adding a few acres on the east, and also by annexing a narrow strip, 320 feet wide, extending from the north boundary of the corporate limits a distance of about three-fourths of a mile, and then spreading out the lines so as to embrace all of the town site of Evans, with the exception of blocks 1, 2, and 3, thereby annexing the lots and blocks described in the complaint and the depot grounds of the Oregon Railroad & Navigation Company.

J. A. Burleigh, of Enterprise, for appellants. A. S. Cooley, of Enterprise (Sheahan & Cooley, of Enterprise, on the brief), for respondent.

BEAN, J. (after stating the facts as above).

[1] The legality of the acts of the city in making the extension of its boundaries is the sole question involved upon this appeal. The trial court sustained a demurrer to the answer, and defendants, refusing to plead further, entered a decree enjoining the collection of the taxes, for the reason that the acts of the city in annexing the new territory did not comply with the requirements of the law. The question of the amendment of the charter of the city and the extension of the boundaries was submitted to the legal voters of the city by the council thereof. No election for this purpose was held within the limits of the territory proposed to be annexed. It appears that by not including said blocks 1, 2, and 3, there were only two legal voters residing within such area. These two electors requested to be taken within the city, and were permitted to vote at the election. The notices of election referred to the amendments of the city charter, and did not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

describe the territory proposed to be annexed, or refer to any record where the same could be found, or in any manner comply with the requirements of section 3209, L. O. L. Under the ruling in *Thurber v. McMinnville*, 63 Or. 410, 128 Pac. 43, the election as to the acquisition of new territory was invalid.

It is claimed by counsel for the defendant city that in the proceedings for the annexation of the proposed land there was a substantial compliance with the statute of 1893 (L. O. L. § 3209); that there could not be a strict compliance with that law for the reason that there was not a number of voters, residing within the territory desired to be added, sufficient to hold an election. It is contended by counsel for plaintiff that the procedure by the city was not in compliance with the statute or Constitution of the state, and further that the undertaking was not a reasonable exercise of legislative authority on the part of the city of Lostine. By section 2, art. 11, Constitution of Oregon, adopted by the people June 4, 1900, the legal voters of every city and town were granted the power to enact and amend their municipal charter. Section 1a, art. 4, is as follows: "The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum nor more than fifteen per cent. to propose any measure, by the initiative, in any city or town." These amendments to our fundamental law give to incorporated cities the exclusive control and management of their own internal affairs by legislating within their borders. *Straw v. Harris*, 54 Or. 424, 436, 103 Pac. 777, 782. In that case it is said: "Whatever may be the literal import of the amendments it cannot be held that the state has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control over them."

[2] The sections of the Constitution re-

ferred to do not grant to cities or towns any extra municipal authority. *Riggs v. City of Grants Pass*, 134 Pac. 776. The words "local," "special," and "municipal" legislation as used in the Constitution have a plain signification, and refer to enactments intended to affect certain persons only, or to operate in specified localities. An act is "local" when the subject relates to a part of the people only, or to their property, or when it operates within a single city, county, or other particular division. 36 Cyc. 987; *Acme Dairy Co. v. Astoria*, 49 Or. 520, 90 Pac. 153; *Schubel v. Olcott*, 60 Or. 503, 120 Pac. 375. In order to empower a city to reach out, as it were, with a chain and subject territory not included within its limits to its laws, there must be authority given therefor by some general act of the Legislature, or by legislation by the people of the whole state by means of the initiative. The legislation by which the land of plaintiff was attempted to be annexed to the city of Lostine did not operate within the city only, and, as affecting the municipality, was not local within the meaning of the Constitution. Such enactment as to the area annexed was unauthorized. *State v. Port of Tillamook*, 62 Or. 332, 124 Pac. 637; *State v. Gilbert*, 134 Pac. 1038; *Leach v. Port of Tillamook*, 62 Or. 345, 124 Pac. 642; *Landess v. City of Cottage Grove*, 64 Or. 155, 129 Pac. 537. The state still retains sovereignty over its municipalities to a certain extent. It has never delegated to them the power to exercise dominion over areas of considerable extent outside of their boundaries, except when such territory so proposed to be annexed is populated and there can be a fair expression by the legal voters residing within such area, thus obtaining their consent in this manner. In other words, the law contemplates that there are a number of legal voters residing upon land to be annexed to a city sufficient to hold the required election.

It follows that the judgment of the lower court should be affirmed, and it is so ordered.

SMITH v. ALGONA LUMBER CO.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. APPEAL AND ERROR (§ 597*)—"TRANSCRIPT"—DEFINITION.

L. O. L. § 554, as amended by Laws 1913, p. 618, provides that on an appeal being perfected, appellant within 30 days shall file with the clerk of the appellate court a transcript, or such an abstract as the law or the rules of the appellate court may require, of so much of the record as may be necessary to intelligibly present the question to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service, and of the undertaking on appeal. *Held*, that while the word "transcript" in its usual and restricted acceptance means an exemplification, and as applied to a transcript

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of record denotes a writing or composition composed of the same words as the original, yet as defined by such act it means an abstract, such as is required by law or rules of the appellate court, of so much of the record as may be necessary intelligibly to present the question to be decided on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2638; Dec. Dig. § 597.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7062, 7063.]

2. APPEAL AND ERROR (§ 597*)—RECORD ON APPEAL—ORIGINALS—"PLEADING."

L. O. L. § 554, as amended by Laws 1913, p. 618, requires the filing of a transcript, or such an abstract of the record as the law and rules of the appellate court may require to intelligibly present the question to be decided by an appellate tribunal, and Laws 1913, p. 656, declares that when an appeal is perfected, the original pleadings and the original bill of exceptions shall be sent by the clerk, or other officer, of the trial court to the clerk of the Supreme or appellate court, and shall be a part of the transcript, etc. *Held*, that while the original pleadings and bill of exceptions may be sent up as part of the transcript on appeal, the term "pleading" is not sufficiently broad to embrace the judgment or decree appealed from, the notice of appeal, proof of service, and the undertaking appeal, which must be brought into the record by copies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2638; Dec. Dig. § 597.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5409-5411; vol. 8, p. 7756.*]

3. APPEAL AND ERROR (§ 659*)—TRANSCRIPT—DEFECT—DIMINUTION OF RECORD.

Supreme Court rule 40 (117 Pac. xiv) provides that to correct any error or defect in the transcript either party may suggest the same in writing to the Supreme Court, and on good cause shown obtain an order that the proper clerk certify up the whole or part of the record as may be required, or the same may be corrected by stipulation of counsel, in writing, filed with the clerk before argument. *Held*, that the failure of the clerk to include in the transcript copies of the judgment, notice of appeal, proof of service, and undertaking on appeal, where the originals had been sent up instead, was not jurisdictional, and that the court had power, on suggestion of diminution of the record, to order copies of such originals sent up in their stead, and to refuse to dismiss the appeal because of such objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834-2843; Dec. Dig. § 659.*]

Department 2. Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Action by Hattie Roy Smith against the Algonia Lumber Company. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal. Denied.

C. M. Oneill and H. M. Manning, both of Klamath Falls, for appellant. W. C. Hale, of Grants Pass, for respondent.

McNARY, J. This is a motion to dismiss an appeal for various assigned reasons; the material ones alone being herein considered. On October 6, 1913, appellant filed with the clerk of this court a collection of documents

bearing the legend, "Original files on appeal," consisting of the original complaint, amended complaint, summons, demurrer, answer to amended complaint, reply, verdict of jury, judgment, cost bill, notice of appeal, undertaking, and order of the circuit court extending the time of filing the transcript of record. Attached thereto is a sufficient certification and authentication by the county clerk.

[1] Plaintiff's counsel, in his motion to dismiss, urges with much fervor that this character of record does not satisfy the statute, and is insufficient to confer jurisdiction on this court to hear and determine the matters arising on the appeal, citing section 554, L. O. L., as amended by chapter 320 of the General Laws of Oregon for 1913: "Upon the appeal being perfected the appellant shall, within 30 days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the law or the rules of the appellate court may require, of so much of the record as may be necessary to intelligibly present the question to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal." The thought of counsel is that the files on appeal are not certified to by the clerk to be copies of or a transcript of the original documents, and in consequence thereof this court is without jurisdiction to hear the cause. The word "transcript" in its usual and restricted acceptation means an exemplification, and, as applied to a transcript of record, denotes a writing or composition consisting of the same words as the original. But the Legislature has seen fit to define the term differently in its relation to an appeal, as, "such an abstract as the law or the rules of the appellate court may require, or so much of the record as may be necessary intelligibly to present the question to be decided." *Backhaus v. Buells*, 43 Or. 558, 72 Pac. 976, 73 Pac. 342.

[2] Significantly bearing upon this question is the legislative enactment found in chapter 335, of the Session Laws of 1913, which provides: "When an appeal is perfected the original pleadings and the original bill of exceptions shall be sent by the clerk, or other proper officer of the trial court, to the clerk of the Supreme Court or appellate court, and shall be a part of the transcript in the Supreme Court or appellate court so long as it may be needed there, and if the said papers are later required for use in the trial court, said papers shall be returned to the trial court and kept of record therein, the object being to require one original record to answer the purpose of each court, and the Supreme Court or appellate court is instructed to promulgate the necessary

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rules for the custody of the original record to accomplish this purpose."

Construing the two enactments together, and keeping in mind the evident intent of the law body to curtail the record on appeal and render less burdensome the costs incident thereto, we are free to declare that a party appellant has complied with the statutes when he has caused the clerk, or other proper officer of the trial court, to send the original pleadings and the original bill of exceptions to the clerk of this court. It would be a work of supererogation to require the appellant to transmit to this court both the original pleadings and copies thereof. However, the term "pleading" is not sufficiently elastic to embrace the judgment or decree appealed from, the notice of appeal and proof of service thereof, and the undertaking on appeal; and for that account copies of these documents, rather than the originals, must be supplied agreeably to the provision of section 1 of chapter 320, supra.

[3] Pending the disposition of the motion to dismiss, appellant suggested to the court a diminution of the record, and asked for a rule on the clerk of the circuit court to transmit to this court copies of the original judgment, notice of appeal and proof of service thereof, and undertaking on appeal, which it is alleged were omitted from the transcript by misapprehension of the county clerk as to the effect of chapter 335, supra. The foundation of this request of respondent is in rule 40, of the rules of the Supreme Court (117 Pac. xiv) promulgated in 1911, which is, in substance, a replica of section 555, L. O. L.: "For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and, upon good cause shown, obtain an order that the proper clerk certify up the whole or part of the record, as may be required; or the same may be corrected by stipulation of counsel, in writing, filed with the clerk before argument. If the attorney of the adverse party be absent, or if the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged."

Counsel for respondent urges the want of jurisdiction on account of the omission of the documents hereinbefore specified, while counsel for appellant insists this court has jurisdiction by reason of having in its custody all of the original documents, including those papers of which it is maintained copies should have been made. We think the failure of the clerk to include in the transcript copies of the judgment, notice of appeal and proof of service thereof, and undertaking on appeal, is not jurisdictional, in view of the fact that this court, is in possession of the originals, and which fact distinguishes this case from the one of *Burchell v. Aver-*

Ill Machinery Co., 55 Or. 113, 105 Pac. 403. In that case, the judgment appealed from, notice of appeal, and proof of service thereof, and the undertaking on appeal were not included in the abstract. This court held the omission of these essential requirements could not be supplied by amendment because they were jurisdictional. In this case no essential part of the record is omitted. The form of a part of that record is not as required by statute, and to dismiss an appeal for nonobservance of form when the substance is supplied would be carrying rule beyond reason, and giving effect to form rather than substance. While vexatious appeals should be discouraged, yet the opportunity for litigants to have their issues tried in the higher courts should not be hindered by technical constructions, which too frequently lead to the subversion of justice.

Respondent contends that this appeal should be dismissed for further reason that he was not apprised, by 10 days' notice, of the settling of the bill of exceptions. We are not aware that the statute or rules of court require any notice to be given when the bill of exceptions is to be presented to the trial judge for allowance. The record here shows the attorney for respondent was given several days' notice, though falling short of 10 days. Good practice suggests that the bill of exceptions be settled at a time convenient to all concerned, yet not sufficiently remote as to render dim the remembrance of the facts adduced at the trial.

Other objections are interposed, but we deem them not fatal to this appeal.

The motion to dismiss will be denied, and appellant's suggestion for a diminution of the record will be allowed, and the rule issued to supply copies of the record adverted to, with direction to return the originals thereof to the clerk of the trial court.

Motion to dismiss denied.

Motion to supply record allowed.

HAALAND et al. v. MILLER.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. PLEADING (§ 148*)—CROSS-BILL—MATTERS OF "DEFENSE"—COUNTERCLAIM.

Under L. O. L. § 390, providing that, in an action at law, where defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his "defense," he may file a complaint in equity in the nature of a cross-bill, matters constituting a counterclaim may not be so pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 299; Dec. Dig. § 148.*]

2. PRINCIPAL AND AGENT (§ 78*)—ACCOUNTING—DEMAND.

A complaint by a principal against his agent for an accounting is bad; it not alleging a demand for an accounting, or facts rendering a demand unnecessary.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162-177; Dec. Dig. § 78.*]

3. ACCOUNT (§ 1*)—ACTION FOR ACCOUNTING—REMEDY AT LAW.

The makers of a note, sued thereon by the payee, cannot file a complaint in equity in the nature of a cross-bill, under L. O. L. § 390, for an accounting for the proceeds of sales of lumber which they intrusted to him to sell, with an agreement that he should credit the proceeds on the note, which he failed to do; fraud not being alleged, nor a discovery sought, and it not appearing the account is so complicated that it cannot be settled in an action at law.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 1-8; Dec. Dig. § 1.*]

En Banc. Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

This is a suit in equity in the nature of a cross-bill by Christian S. Haaland and another against M. P. Miller. The court below sustained a demurrer to the second amended complaint in the nature of a cross-bill, and, the plaintiffs not desiring to amend, a decree was rendered dismissing the plaintiffs' complaint. The plaintiffs appeal. Affirmed.

A. S. Cooley, of Enterprise (O. M. Corkins, of Enterprise, on the brief), for appellants. Thos. M. Dill, of Enterprise, for respondent.

RAMSEY, J. On December 16, 1912, M. P. Miller, as plaintiff, began an action at law in the court below against Christian S. Haaland, Swen Haaland, and Carl E. Haaland, as partners, doing business under the firm name of Haaland Bros., to recover from them the sum of \$2,000 and interest (less \$700 paid thereon) upon a promissory note executed to him by said firm on the 1st day of November, 1910, and falling due three months from the date thereof, and also \$967 and interest upon another promissory note made by said firm to said Miller on the 28th day of March, 1911; said last-named note being payable on demand, and a payment of \$75 thereon being credited by said M. P. Miller in his complaint in said action.

The defendants in said action filed an answer denying that Swen Haaland was a member of said firm or had anything to do with the execution of either of said notes. They admitted that said notes were executed by Christian S. and Carl E. Haaland, that they were past due, and that they had paid thereon only the sums alleged in the complaint. Said firm also denied part of the attorney's fees claimed by M. P. Miller in said action. Said firm set forth the following affirmation matter in their said answer in said action at law: "And for a further separate partial defense to this cause of action defendants Christian S. Haaland and Carl E. Haaland file their equitable cross-bill in connection with the answer." And they repeated said affirmative allegation as to the filing of said cross-bill as a part of their answer to each of the two counts of the complaint in said action at law.

Said Christian S. Haaland and Carl E.

Haaland then filed in the court below their second amended complaint in equity in the nature of a cross-bill. The following is a copy of the body of said cross-bill in equity: "That these plaintiffs and defendant are brothers-in-law, the wife of said defendant being the sister of these plaintiffs. That these plaintiffs since the fall of 1909 have been and now are engaged in the lumbering business in the timbered country to the northeast of the city of Wallowa, this county. That in order to carry on said business the defendant has furnished them money, evidenced by the promissory notes described in the said law action, and have assisted them in a financial way to carry on said business, and to purchase land, machinery, and personal property of various kinds in connection with said business. That by reason of such relationship and the intimate business connection between plaintiffs and defendant defendant was intrusted with a large amount of lumber, the property of plaintiff, to sell and dispose of and to account to plaintiff and credit the same on the aforesaid promissory notes. That defendant took possession of a large amount of such lumber, and disposed of it to various parties, and has failed to account to plaintiff for the proceeds thereof, or to credit the same or any part thereof on said notes. That plaintiffs are informed and believe and therefore allege that defendant has disposed of a part of such lumber to one Frank Melotte, another part of it to parties at Lostine, Oregon, to be used in a church building at that point, and another portion to parties at Enterprise, which was used in the construction of sidewalks at such place, as a more detailed statement of which plaintiffs are unable to make. That the transaction as to such lumber involves the examination of a long account, and is largely within the knowledge of defendant. That plaintiffs do not know how much lumber defendant has thus disposed of and failed to account for or to credit on said promissory notes, and plaintiffs have no plain, speedy, or adequate remedy at law. And answering defendant's second cause of action by way of cross-bill and as a partial defense, plaintiffs allege the above facts, and make it an answer to defendant's second cause of action in the law case."

M. P. Miller, the plaintiff in said action at law and defendant in said second amended complaint in the nature of a cross-bill, demurred to the latter, upon the ground that it appears upon the face thereof that the court has no jurisdiction of the subject-matter thereof, and for the reason that the amended complaint does not state facts sufficient to require the interposition of a court of equity, or to constitute cause of suit. The trial court sustained said demurrer, and dismissed said cross-bill; the plaintiffs not desiring to amend.

The question for determination is, Was said demurrer properly sustained?

[1] The right to file a complaint in equity in the nature of a cross-bill, where one has been sued at law, is based on section 390, L. O. L., which is as follows: "Bills of revivor and bills of review, * * * and cross-bills, except as hereinafter mentioned, are abolished; * * * and in an action at law, where the defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his defense, he may, upon filing his answer therein, also as plaintiff, file a complaint in equity, in the nature of a cross-bill, which shall stay the proceedings at law," etc. When one has been sued at law, in order that he may properly file a complaint in equity in the nature of a cross-bill, he must be entitled to relief that arises out of facts which require the interposition of a court of equity, and this relief must be material to his defense. A "defense" within the meaning of section 390, L. O. L., includes every matter of fact tending to diminish or entirely defeat the plaintiff's cause of action. *Baier v. Humpall*, 16 Neb. 127, 20 N. W. 108; 2 Words and Phrases, pp. 1839, 1940; *Pomeroy's Code Remedies* (4th Ed.) § 27.

Prof. Pomeroy, in his *Code Remedies*, § 27, says: "In its judicial signification, a defense is something which simply prevents or defeats the recovery of a remedy in an action or suit, and not something by means of which the party who interposes it can obtain relief for himself. If the codes had merely in express language authorized the defendant to set up equitable defenses, but had not enacted any further provisions in reference to the subject-matter, the granting of affirmed equitable remedies to the defendant could not have been inferred from such permission."

A counterclaim is not a "defense" within the meaning of section 390, supra. *Fettretch v. McKay*, 47 N. Y. 427; *Baum's Castorine Co. v. Thomas*, 92 Hun, 1, 37 N. Y. Supp. 913; *Lafond v. Lassere*, 26 Misc. Rep. 77, 56 N. Y. Supp. 459; *Freeman v. Fleming*, 5 Iowa, 463. In *Fettretch v. McKay*, supra, the court says: "Nor can this counterclaim be stricken out as an irrelevant defense. It is not a defense. There is a distinction between a counterclaim and a defense." In *Baum's Castorine Co. v. Thomas*, supra, the court says: "But a counterclaim is not a defense, as the word is used in relation to pleadings. In section 500 it is provided that an answer may contain a statement of new matter constituting a 'defense or counterclaim,' thus making a clear distinction between the two. The same distinction is found in section 507, and the very definition of a 'counterclaim,' as given in section 501, shows that it is not included within the term 'defense.'"

We conclude that the facts that can be

pleaded under section 390, supra, in a complaint in the nature of a cross-bill are facts constituting a defense or a partial defense, and not a counterclaim.

[2] The second amended complaint set out, supra, alleges that the plaintiffs and the defendant are brothers-in-law, and that the plaintiffs are engaged in the sawmill business, and that the defendant furnished them money to enable them to carry on said business, and that the loan of said money is evidenced by the promissory notes described in the said action at law. They allege, also, that by reason of said relationship and the intimate business connections between the plaintiffs and the defendant the defendant was intrusted with a large amount of lumber, the property of the plaintiffs, to sell and to account to the plaintiffs for the proceeds of such sale, and credit the same on the aforesaid promissory notes. The said amended complaint also states that the defendant took possession of a large amount of such lumber, and disposed of it to various parties, and has failed to account to the plaintiffs for the proceeds thereof, or to credit the same or any part thereof on said notes. Said complaint avers, also, that the plaintiffs are informed and believe and therefore allege that the defendant has disposed of a part of said lumber to Frank Melotte, another part to persons in Lostine to be used in a church building at that point, and another portion of said lumber to parties at Enterprise, which was used in the construction of sidewalks at that place. The complaint avers, also, that the plaintiffs are unable to make a more detailed statement concerning said lumber; that they do not know how much lumber the defendant has disposed of, and failed to account for, or to credit on said promissory notes; and that the transaction as to said lumber will involve the examination of a long account largely within the knowledge of the defendant.

It will be seen by an examination of this second amended complaint that it does not state when the defendant was intrusted with lumber to sell, how much the plaintiffs turned over to him, or how much he sold. It is alleged that he took possession of a large amount of lumber, and disposed of it, and failed to account for any part of the proceeds thereof; but it is not alleged that the plaintiffs ever requested or demanded an account of said sales or of the proceeds, nor is it alleged that the defendant refused or neglected to account. It is not stated when he sold any lumber or received any money for lumber. The sales may have been only a few days before the complaint was filed. There is nothing stated indicating any neglect or refusal to account for any money received. When a pleading is demurred to, it is construed most strongly against the pleader. *Darr v. Guaranty Loan Ass'n*, 47 Or. 88, 81 Pac. 565; *Fishburn v. Londershausen*, 50 Or. 363, 92 Pac. 1090, 14 L. R. A. (N. S.) 1234,

15 Ann. Cas. 975. As the plaintiffs do not allege that they demanded or requested of the defendant an accounting, we have the right to conclude that they did not, and, as they do not allege that they made any efforts to ascertain what sales the defendant had made, it is not unreasonable to infer that they made none. Ordinarily, before an action or a suit can be maintained against an agent by a principal for an accounting, the principal must demand an account from the agent. 1 Cyc. p. 429; *Mechem on Agency*, § 531; *Clark & Skyles on Agency*, § 423.

Clark & Skyles on Agency, § 423, *supra*, says: "As a general rule a principal cannot maintain an action against his agent for an accounting or to recover money or property received by the agent until he has made a demand upon the agent, and the latter has failed or refused to comply with such demand. As in other cases, however, the circumstances may be such as to render a demand unnecessary, as, for instance, when the agent has repudiated the agency and asserted a claim to the property or funds against the principal, or when he agreed beforehand to pay over the money when collected," etc.

Mechem on Agency, referred to, *supra*, says: "No action can ordinarily be maintained against an agent for money received by him for his principal until after a demand has been made upon him for its payment, with which he has refused or neglected to comply. Such a demand and refusal or neglect to pay are essential averments in the declaration or complaint, without which the action cannot ordinarily be sustained."

In this case no demand for an accounting is alleged, nor are any facts alleged which render a demand unnecessary. The amended complaint is therefore fatally defective, even assuming that the subject-matter thereof is cognizable in a court of equity.

If the defendant received from the plaintiffs lumber to sell, with the agreement that the proceeds of the sales would be accounted for and credited on the notes described in the pleadings in the action at law, and he made sales, and received the proceeds thereof, and failed to credit them on said notes, he is liable to the plaintiffs therefore in an action at law for money had and received. If the proceeds of the sales of such lumber were credited on the notes, such credit operated as payment of said notes, *pro tanto*.

[3] A defendant in an action at law cannot properly file a complaint in equity in the nature of a cross-bill under section 390, *supra*, and set up matters of defense which really constitute a counterclaim against the plaintiff in the action at law, unless the facts set up contain matters that come within some recognized head of equity jurisdiction. A mere right of action for money had and received cannot be thus set up in a cross-bill.

In this case the defendants in the action at law attempted to plead in their cross-bill a

right to an accounting with the defendant as their agent for the sale of lumber and its proceeds. According to their pleading, the defendant, as their agent, received from them some lumber, and sold part of it, and received the proceeds of the sales, and failed to account for any part thereof. It does not appear from this pleading that there are mutual accounts to be adjusted, nor does it appear that there are great complications or difficulties in adjusting the accounts; the only allegation of the amended complaint tending to show any complication in the accounts being the statement that it will involve the examination of a long account which is largely within the knowledge of the defendant. There is no averment that the plaintiffs have made any effort to ascertain the items of the account of the sales of said lumber, or that such information could not have been obtained by ordinary diligence. There is much conflict of decisions as to the right of a principal to sue his agent in equity for an accounting.

In 6 *Pomeroy's Equity*, § 932, the author says: "The principal difficulty is in determining in what cases equity will take jurisdiction of an accounting between principal and agent. The mere relation of principal and agent, without more—the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law—is insufficient to enable a principal to maintain the action against his agent. But, where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction."

In *Mechem on Agency*, § 532, the author says: "It seems to be well settled that the mere relation of principal and agent is not sufficient to authorize the principal to come into a court of equity for an accounting. For very many of the questions arising between them, the ordinary legal remedies are entirely adequate, and, when this is the case, resort cannot be had to equity. When, however, the agency is one of a strictly fiduciary character, involving a question of confidence between the parties, and fraud is alleged or a discovery sought, or where the account is so complicated that it cannot be settled at law without great difficulty, a bill in equity may be maintained."

In this case fraud is not alleged, nor is a discovery sought, nor does it appear that the account between the plaintiff and the defendant is so complicated that it cannot be settled in an action at law. The account between the parties can be as easily settled at law as in equity.

The plaintiffs have a plain, speedy, and adequate remedy at law for the adjustment of their claim against the defendant, and the demurrer to the second amended complaint was properly sustained by the court below.

The decree of the court below sustaining said demurrer and dismissing the plaintiffs' complaint is affirmed.

DE LORE v. SMITH.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. WITNESSES (§ 37*)—COMPETENCY—SOURCE OF KNOWLEDGE—EAVESDROPPING.

Where a witness called to testify concerning a telephonic conversation between others qualified himself by testifying that he recognized the voice of the speaker, he was not disqualified because he heard the conversation by means of eavesdropping or "cutting in" on the phone.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE.

In replevin the court charged that a wrongful taking meant a taking without right and lawful authority, and that if G. traded the property in dispute, of which he was not the owner to defendant, defendant's possession would be wrongful, though he believed that G. was the owner, and if he returned the property to G., after demand by plaintiff and prior to suit, and plaintiff had no knowledge of the return, such condition would constitute an unlawful detention by defendant, but if it appeared that after demand for return of the property, and prior to the commencement of the action, defendant delivered the property to G. and plaintiff had knowledge, such situation would be a defense. *Held*; that such instruction covered a request to charge that if defendant obtained possession of the property from G. by a contract which was subject to plaintiff's approval, and plaintiff refused to accept the trade and demanded possession, and defendant refused to deliver, the verdict should be for plaintiff, and any transfer or surrender of the property by defendant to G. after demand and before the commencement of the action would constitute no defense.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. REPLEVIN (§ 10*)—NATURE OF ACTION—REQUISITES—POSSESSION.

To maintain replevin defendant must have had either actual or constructive possession of the property at the commencement of the action, so that, if judgment was rendered against him, he might deliver it to plaintiff.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 69-82; Dec. Dig. § 10.*]

En Banc. Appeal from Circuit Court, Grant County; Dalton Biggs, Judge.

Action by M. E. De Lore against Joseph L. Smith. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 132 Pac. 521.

S. A. Lowell, of Pendleton (Errett Hicks and Otis Patterson, both of Canyon City, on the brief), for appellant. A. D. Leedy, of Canyon City, for respondent.

McNARY, J. This is an action of replevin whereby plaintiff seeks to recover from defendant the possession of two cows claimed to have been taken unlawfully from plaintiff on June 17, 1912. Demand was made upon defendant for their return 12 days later. Defendant after denying, upon information and belief, plaintiff's ownership and posses-

sion of the property asserted as a separate defense that prior to the 17th day of June, 1912, defendant obtained the cows by exchange of other property from one Floyd Gilcrest to whom, the property was redelivered on July 2, 1912. Plaintiff replied by general denial. The trial of the case resulted in a verdict for defendant.

[1] During the progress of the trial defendant, for the purpose of showing knowledge upon the part of plaintiff of the return of the cattle to Gilcrest, gave testimony to the effect that he overheard a conversation between plaintiff and her daughter wherein the former was told the cows had been redelivered to Gilcrest. Plaintiff's counsel objected to the testimony for the reason that the witness was an eavesdropper and thereby committed "an act of gross impropriety and a moral wrong and a witness testifying to such a conversation could not show any of the elements or conditions which must first be shown in order to admit evidence of such a conversation." Defendant overheard the conversation, to which objection was made, at a point on the telephone intermediate between the home of plaintiff and her daughter, who is the wife of Gilcrest. In qualifying himself as a witness, defendant stated that by chance he took down the receiver of the telephone when the parties were engaged in conversation and that he heard the declaration and knew the voices of the parties conversing. Since a time practically concurrent with the use of the telephone as a medium of communication, the courts have held that a conversation had over the telephone was admissible when the witness could testify he recognized the voice of the party speaking. While the practice of eavesdropping or "cutting in" on a telephone is most despicable, yet we cannot say as a rule of evidentiary law that the practice of this impropriety disqualifies a person who has qualified himself by testifying he recognized the voice of the speaker. Under the circumstances, the question whether the conversation did take place, its nature, and whether defendant correctly identified the voices engaged in the conversation was a fact for the jury.

[2] Complaint is made that the court erred in its refusal to give the following instruction: "The court instructs the jury that if you find from a preponderance of the evidence that defendant obtained possession of these cows from Floyd Gilcrest in a trade for a wagon, but such trade was made subject to the approval of the plaintiff, and if plaintiff refused to accept such trade and demanded possession of these cows from defendant, and defendant refused to deliver them to plaintiff, your verdict should be for plaintiff, and any transfer or surrender of said cows by defendant to the said Gilcrest after said demand and before the commence-

ment of this action, in order to avoid this action, would not avail him anything and the verdict should be for the plaintiff."

The court did advise the jury at length by saying in substance that a wrongful taking means a taking without right and without lawful authority; that if Gilcrest traded the property in dispute to defendant, when he (Gilcrest) was not the owner thereof, the possession of defendant would be wrongful, even though he believed that Gilcrest was the owner or had a right to dispose of the property; that if defendant returned the property to Gilcrest, after demand by plaintiff, and prior to the commencement of the action, and that plaintiff had no knowledge of the return of the property, such condition would constitute an unlawful detention by defendant, but if it appeared that after demand had been made for the return of the cows, and prior to the commencement of the action, defendant delivered the property to Gilcrest and plaintiff had knowledge thereof, such situation would be a defense to the action.

We think the court's counsel was even more favorable to plaintiff than the law contemplates, and that no error was committed in refusing to pass to the jury the instructions requested by plaintiff. There was no dispute in the testimony that defendant seasonably after the demand made by plaintiff, and prior to the institution of the action, returned the property to Gilcrest, from whom it had been procured.

[3] As an abstract proposition of law, this court has become wedded to the rule that, in order to maintain replevin, defendant should have either the actual or constructive possession of the property sought to be recovered at the time of the commencement of the action, so that defendant, if judgment be rendered against him, might make delivery thereof to plaintiff. *Krebs Hop Co. v. Taylor*, 52 Or. 627, 97 Pac. 44, 98 Pac. 494; *Jenkins v. Ontario*, 44 Or. 72, 74 Pac. 466, 102 Am. St. Rep. 625.

Judgment affirmed.

MALZER v. SCHISLER.

(Supreme Court of Oregon. Nov. 11, 1913.)

FRAUDS, STATUTE OF (§ 139*)—SALE OF LAND—ACTION FOR PRICE.

The statute of frauds is no defense to an action against the purchaser of land for the purchase price, where the deed has been executed, delivered, and accepted, though at direction of the purchaser the deed was to a third person.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 334-341; Dec. Dig. § 139.*]

In Banc. Appeal from Circuit Court, Wal-lowa County; J. W. Knowles, Judge.

Action by Charles H. Malzer against Henry Schisler. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover a balance due on the purchase price of land. Plaintiff sold a certain tract of land to defendant for the consideration of \$1,700, and by defendant's direction conveyed the tract directly to Denny. Defendant paid \$700 cash at the time of the contract, and assumed and agreed to pay a mortgage then existing on the land in the sum of \$800. This left a balance of \$200, which defendant agreed to pay within a few days. The complaint alleges that he has not paid the \$200, and neglects and refuses so to do. After a demurrer to the complaint was overruled, defendant answered, denying the allegations of the complaint, and as an affirmative defense pleaded the statute of frauds, to which a demurrer was sustained. Defendant then filed an amended answer, which is a specific denial of every allegation of the complaint, except that he has not paid the \$200. Upon the trial the defendant objected to the proof offered by the plaintiff to establish the agreement of sale and promise to pay, for the reason that it is an attempt to prove by parol an agreement for the sale of real estate, which objection was overruled. Upon trial verdict was rendered for the plaintiff. Defendant appeals.

Thomas M. Dill, of Enterprise, for appellant. J. A. Burleigh, of Enterprise, for respondent.

EAKIN, J. (after stating the facts as above). Defendant makes but one point upon the appeal, namely, that the agreement of sale was in parol, and therefore that a promise by defendant to pay the \$200 cannot be established. We understand the rule in such a case to be that where there is an oral agreement for the sale of land, and the property has been conveyed to the vendee, the agreement is so far executed that it is thereby taken out of the statute of frauds. In an action to recover the balance of the purchase price the agreement to pay may be shown by parol, including the consideration for the promise to pay. In 39 Cyc. 1918, it is stated: "As a general rule the statute of frauds is a good defense to an action by a vendor on an oral contract of sale of land to recover the purchase price, unless the deed has been executed and delivered to or accepted by the purchaser. A purchaser in possession under a contract for the title cannot resist payment of the purchase price on the ground that he did not sign the contract." See, also, *Walker v. Owen*, 79 Mo. 563; *Cagger v. Lansing*, 43 N. Y. 550; *King v. Smith*, 33 Vt. 22. In 20 Cyc. 294, where many authorities are cited, it is said: "The statute is no bar to an action to recover for the price of land actually conveyed, where the deed has been accepted or title has otherwise passed, although the grantor could not have been compelled to convey, or the gran-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tee to accept a deed, because the contract was oral." Defendant also suggests the point that the deed was not made to him, and that the property was not in his possession; but he made the contract of purchase and directed that the deed be made to Denny. Acceptance of the deed by Denny was acceptance by defendant. Plaintiff had no contract with Denny, and defendant's liability on his contract for the price is the same as though the deed were to himself. Our Supreme Court assumes the existence of this rule, and, going further, holds that a promise to pay the price to a third party is also binding upon the vendee, and may be proved by parol. See *Kiernan v. Kratz*, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506; *Feldman v. McQuire*, 34 Or. 312, 55 Pac. 872; *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296. And this question was also involved in *McLeod v. Despain*, 49 Or. 536, 90 Pac. 492, 92 Pac. 1063, 19 L. R. A. (N. S.) 276, 124 Am. St. Rep. 1066.

The judgment of the circuit court is affirmed.

MILLER v. MILLER.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. DOMICILE (§ 1*)—DEFINITION.

The domicile or habitancy of a person is that fixed place of abode to which he intends to return habitually when absent.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2168-2179; vol. 8, pp. 7641, 7642.]

2. DIVORCE (§ 63*)—JURISDICTION—SEPARATE DOMICILE OF WIFE.

A wife, whose husband by his misconduct has rendered life with him unbearable, may acquire a separate domicile, based on which she may institute a divorce suit.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 201, 217; Dec. Dig. § 63.*]

3. DIVORCE (§ 125*)—DOMICILE OF WIFE—EVIDENCE—ADMISSION.

Statement of a wife, in a complaint for divorce, which she caused to be prepared in one state, that she was a resident thereof is not conclusive against her in a subsequent divorce suit instituted by her in another state, but is only an admission against interest.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 399-402; Dec. Dig. § 125.*]

4. DIVORCE (§ 124*)—JURISDICTION—DOMICILE—PLACE OF VOTING.

That one, after registering as a voter in Oregon went into another state and there voted, is not conclusive of his domicile there, as regards jurisdiction of an action for divorce; L. O. L. § 3318, providing "if a person shall go from this state into any other state * * * and there exercise the right of suffrage, he shall be * * * held to have lost his residence in this state," being a rule governing judges of election in determining right to vote in the state.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 392-398, 450, 455, 456; Dec. Dig. § 124.*]

5. DIVORCE (§ 124*)—DOMICILE OF PARTIES—EVIDENCE.

Evidence, in a divorce suit as to temporary purpose of absence and intention to return, held to show the domicile of the parties, who, having had a permanent home in the state, went to another state and then returned, to be in the state, within L. O. L. § 509, requiring plaintiff in a suit for divorce, at the time of instituting it, to be, and for a year prior thereto to have been, an inhabitant of the state.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 392-398, 450, 455, 456; Dec. Dig. § 124.*]

6. DIVORCE (§ 295*)—DECREE—SUPPORT OF CHILDREN.

The question of support of the children may be left open by the decree of divorce, there being no evidence as to what is proper or requisite therefor; L. O. L. § 514, authorizing modification of a divorce decree, at any time after it is given, as to support of the children.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 778; Dec. Dig. § 295.*]

In Banc. Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Suit by Christine Miller against M. P. Miller. Complaint dismissed, and plaintiff appeals. Reversed and rendered.

Christine Miller brings this suit against M. P. Miller, her husband, for the dissolution of a marriage contracted between them in the state of Minnesota, October 31, 1889. She alleges "that for more than one year last past plaintiff has been, and now is, a resident and inhabitant of Wallowa county, in the state of Oregon." After setting out the marriage and the births and ages of their children, she states, in substance, that although she has been a good and dutiful wife, the defendant has treated her in a cruel and inhuman manner, rendering her life burdensome, specifying various false charges of promiscuous unchastity, and sundry assaults and batteries committed by the defendant upon the plaintiff. She gives a list of the defendant's real property and sundry items of personalty, with the valuation in each case, and avers that she has no means of support or maintenance for herself and the minor children mentioned, except such as she can derive from her own labor and a small assistance from her eldest son. She prays for alimony pendente lite, for a dissolution of the marriage contract, and for the care and custody of her eight minor children mentioned; that she be decreed to be the owner of an undivided one-third interest in the lands described, and for the gross sum of \$2,500 for the support and education of the minor children, and for further relief. The answer of the defendant contains no denial of any of the allegations of the complaint, but states affirmatively "that said plaintiff is the wife of this defendant, and that the said plaintiff is now, and for more than two years last past she has been, a resident and inhabitant of the state of Idaho, residing in the county of Latah, in said state; that the said defendant is now, and

for more than two years last past he has been and now is, a resident and inhabitant of the state of Idaho, residing in Latah county, said state." The other allegations of the answer simply amplify the averments already quoted. The reply denied the answer, except that the plaintiff is the wife of the defendant. On this state of the pleadings, the circuit court heard the testimony on the issue of the habitancy of the plaintiff and took testimony in behalf of both parties on the allegations of the complaint, and on July 31, 1913, entered a decree to the effect that the complaint be dismissed for want of jurisdiction of the court over the parties. The plaintiff appeals.

A. S. Cooley, of Enterprise (O. M. Corkins and Sheahan & Cooley, all of Enterprise, on the brief), for appellant. Chas. Thomas, of Enterprise, for respondent.

BURNETT, J. (after stating the facts as above). The principal question to be determined is whether or not the plaintiff has shown enough to confer jurisdiction upon the court over the subject-matter of the suit within the meaning of section 509, L. O. L., reading thus: "In a suit for the dissolution of the marriage contract, the plaintiff therein must be an inhabitant of the state at the commencement of the suit, and for one year prior thereto; which residence shall be sufficient to give the court jurisdiction, without regard to the place where the marriage was solemnized, or the cause of suit arose."

In Reed's Will, 48 Or. 500, 87 Pac. 763, Mr. Chief Justice Bean says: "'Domicile,' strictly speaking, is the relation the law creates between an individual and a particular place or country, and each case is dependent upon its own particular facts. It is not in a legal sense synonymous with 'residence.' A person may have more than one residence and more than one home, in the ordinary acceptance of those terms, but he can have only one domicile, and the law requires that for the purpose of the succession of his property he be domiciled somewhere."

[1] The domicile or habitancy of a person is that fixed place of abode to which he intends to return habitually when absent. Owing to the element of intention to return, the difficulty is not so much in definition as in the application of the principle to the particular facts involved in any given case. *Dormitzer v. German Savings & Loan Society*, 23 Wash. 132, 62 Pac. 862. In the case at bar both parties agree that for about eight years they lived and had their home and habitation and permanent residence in Wallowa county, in this state. It remains to determine whether the situation was changed in a legal sense by what follows. The parties with their children, in the latter part of June, 1911, took part of their household goods, consisting of some bedding and

a table, and went to Idaho for the purpose, as stated by the defendant, of educating some of the older children at a denominational school in that state. A number of the witnesses testify that at the closing exercises of a school near their home in Wallowa county, shortly before they departed for Idaho, the defendant, in an address, publicly stated that he was going to Idaho to educate his children, but that he intended to return. It appears in evidence, and he admits, that he posted a notice on the door of their dwelling in Wallowa county to the effect that he had gone to Idaho and would return in about four weeks. He remained in that state until some time in February, 1912, when he returned to Wallowa county, Or., and remained there two months. During that time he registered as a voter in that county, and engaged in the business of selling some lumber which he had on hand. Returning to Idaho after the expiration of that two months, he stayed there until about the 1st of November, 1912, when he returned to Wallowa county, and has remained there continuously since then, engaged in selling the lumber mentioned.

The plaintiff herself, after going into Idaho with the defendant, remained there continuously until April 29, 1913, when she returned and filed the complaint in this suit on the following day. During the time the defendant was in Idaho the last time, he voted at an election there, although he had previously registered in Oregon. On August 19, 1912, the plaintiff consulted an attorney in Idaho, and he drew up for her a complaint against the defendant for a divorce upon substantially the same grounds as the complaint in this action, in which she alleged that she "is and has been a resident of the state of Idaho for more than six months immediately preceding the commencement of this action." This complaint was verified by her before a notary public of that state, but was never filed in any court. As a reason for not filing it she states that on the promises of the defendant to amend his conduct she returned and lived with him in Idaho about two months. She then, as she says, corroborated by other testimony, on account of the continued ill treatment of her by the defendant, moved out of the house in which they resided, and went to stay with her eldest son, in a house which he had rented for the accommodation of the other children and herself. About this time the defendant had returned to Oregon, as above stated, where he has since remained. He engaged in no permanent business in the state of Idaho so far as the record discloses. Concerning her own mental attitude, she says, speaking of what she considered the most definite place to which she might eventually arrive: "Why, I have thought of Oregon more than anything else. We had our property there, and had our folks there." In respect to her verification of the plead-

ing prepared in Idaho, she says that she did it "simply because I had been wanting to start one (a suit) for years and years back, and I had been held back by force. I had been ready to go and leave the place two or three times, but he has held me back by force, and, the children being small, I couldn't do anything"; and, further, in substance that the attorney explained that all that was necessary was that she had been personally in that state six months. Speaking of their living together in Idaho, she says: "I was staying in Idaho six months. We lived there and kept house there. We had our home in Oregon here, and intended to stay here"—and she says that the defendant, in speaking of the house in which they lived in Idaho, said that "it would do as a place to hang up on." This statement is not denied by the defendant.

[2] In determining the residence or permanent habitation of the plaintiff necessary to give the court jurisdiction, the principal canon to be applied is, To what place did the plaintiff intend to return after the object of her going to Idaho for the education of her children had been accomplished? It is contended by the plaintiff that this must be worked out by the domicile of the husband. This, however, is not an invariable rule of construction. It is possible for a wife, whose husband by his misconduct has rendered life with him unbearable, to acquire a separate domicile, based upon which she may institute a suit to dissolve the marriage contract. *White v. White*, 18 R. I. 292, 27 Atl. 506; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Hopkins v. Hopkins*, 35 N. H. 474; *Cheever v. Wilson*, 9 Wall. (U. S.) 108, 123, 19 L. Ed. 604; *Ditson v. Ditson*, 4 R. I. 87; *Perzel v. Perzel*, 91 Ky. 634, 15 S. W. 558; *Craven v. Craven*, 27 Wis. 418; *Harding v. Alden*, 9 Greenl. (Me.) 140, 23 Am. Dec. 549.

As said by Mr. Justice Beard in *Duxstad v. Duxstad*, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. Rep. 1138: "We think the rule is that the wife's residence is that of her husband, save in exceptional cases, when she can, on account of necessity, establish and claim a separate residence. One of such exceptions is when he has given her cause for divorce. In that case it has been generally held that she may acquire a separate residence in another jurisdiction which will entitle her to maintain an action for divorce in that jurisdiction. This she may do; but her husband cannot by his wrongful acts and by mistreating her compel her to do so; * * * she may still claim his residence as hers, at least until she has established a residence elsewhere."

Considering, however, the domicile of the wife as governed by the general rule that it is determined by that of the husband, we recall that the original domicile of the parties was confessedly in the state of Oregon; that for the purpose of educating the children they migrated into Idaho; that by a

great preponderance, in numbers, the witnesses said that he announced his intention to return, and that his absence would be only temporary. These statements and this intention are illustrated by the actual fact that he finally did return to Oregon, and has since remained here. However long continued, the education of the children was manifestly a mere temporary purpose. The defendant's business and property were in the state of Oregon. His *animo revertendi* was clearly demonstrated by his actions.

[3, 4] Much stress was laid in argument for the defendant upon his voting in Idaho, and that the plaintiff had caused the preparation of the complaint there in which she avowed a residence in that state. Her statement on that point is only an admission against her present interest, and is not conclusive upon her. In our judgment, its effect is overcome by other evidence, and the circumstances under which it was made. As to his voting, we cannot say, in the absence of the laws of Idaho from the record, that it has any effect one way or the other in establishing his domicile there. It is true that, among the rules governing judges of election in the determination of the right of a person to exercise the electoral franchise here, it is laid down that "if a person shall go from this state into any other state or territory and there exercise the right of suffrage, he shall be considered and held to have lost his residence in this state." L. O. L. § 3318, subd. 7. This regulation is a conventional one, applicable in its full force only to elections, and was not intended to be controlling over any other subject. At best, it is only a circumstance to be weighed with other evidence on the present issue. Considered in connection with the defendant's previous registration in Oregon, his voting in Idaho savors strongly of a self-serving declaration, and as such is of no consequence.

[5] Considered then in the light of the husband's domicile governing that of the wife, the weight of the testimony is in favor of the plaintiff. Added to this is her own declaration that she constantly had in mind a return to this state where their property and relatives were situated. The actions of the defendant speak louder than his mere words. He not only had the purpose of returning, but actually did return. We think from a careful review of all the testimony and the actions of the parties that the legal domicile of both of them in the state of Oregon is established by a decided preponderance of the evidence, and that the court had authority over the parties and the subject-matter of the suit.

[6] As a matter of pleading, the defendant stakes his whole case in an attack upon the jurisdiction of the court. He makes no denial of the plaintiff's allegations of cruel and inhuman treatment. Without attempting to analyze in detail the testimony given by the plaintiff in support of her allegations in

that respect, and of the defendant's showing in opposition thereto, it is sufficient to say that her complaint is thoroughly established on the merits. She does not pray for an allowance for the support of herself alone, as she might have done, and there is no testimony as to what is proper or requisite for the support of the children. Under these circumstances we must leave the question of support for the children open, under the authority of *McFarlane v. McFarlane*, 43 Or. 477, 486, 73 Pac. 203, 75 Pac. 139, holding that the courts on proper notice may require parties in fault to contribute to the future support of their minor children, and to pay a reasonable sum for their past support, as the duty of parents to care for and educate their offspring is not affected by a divorce. Section 514, L. O. L., provides that "at any time after a decree is given, the court or judge thereof, upon the motion of either party, shall have power to set aside, alter, or modify so much of the decree as may provide for the appointment of trustees for the care and custody of the minor children, or the nurture and education thereof, or the maintenance of either party to the suit." Under this section and the precedent noted, we may well leave to the circuit court the task of determining what is necessary and requisite to be done respecting the maintenance of the children. A decree will be here entered granting to the plaintiff a dissolution of the marriage contract, one-third of the real property of the defendant described in the complaint, the custody of the minor children of the parties, and the costs and disbursements of this litigation.

The decree of the circuit court is reversed in the manner indicated.

IRVINE et al. v. IRVINE et al.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. WILLS (§ 597*)—DEVISE OF FEE—HEIRS.

Under the express provisions of L. O. L. §§ 7103, 7344, the term "heirs" or other words of inheritance are not necessary to create or convey an estate in fee, but a devise of real property will be construed to be a devise of all the estate or interest of the testator, subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319-1326; Dec. Dig. § 597.*]

2. WILLS (§ 601*)—SEPARATE CLAUSES—CONSTRUCTION.

Where an estate in fee is given in one clause of a will in clear and explicit terms, the devisee's interest thus obtained cannot be diminished by subsequent vague or general expressions of doubtful import, or by any inference deducible therefrom, that may be repugnant to the estate given.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.*]

3. WILLS (§ 601*)—CONSTRUCTION—ESTATE DEVISED—FEE—"SAME"—"ALSO."

Testator devised to his wife all his real estate situated in the Cook donation land claim

known as the "home place"; also giving to her all testator's land situated in the Williams donation land claim and 10 acres of timber land, to have and to hold the "same" during her natural life, she to have the proceeds and income of the real estate and at her death to be sold and the proceeds to be divided among testator's children. *Held*, that under the rule that the word "same" refers to the next antecedent, and the word "also," when employed in wills at the beginning of a new clause, means no more than "item" or "in addition," the word "same," in the clause providing that the wife should hold the "same" during her natural life, should be limited to the land situated in the Williams donation claim, and the will construed as vesting a fee in part of the Cook claim known as the "home place," in the widow.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6319, 6320; vol. 1, pp. 357-360.]

Department 1. Appeal from Circuit Court, Polk County; William Galloway, Judge.

Bill by Jesse T. Irvine and others against Lizzy Irvine and others. Decree for complainants, and defendants appeal. Affirmed.

John A. Carson, of Salem, and Oscar Hayter, of Dallas, for appellants. Martin L. Pipes, of Portland, and James McCain, of McMinnville (McCain, Vinton & Galloway, of McMinnville, on the brief), for respondents.

MOORE, J. This is an appeal by the defendants from a decree partitioning real property. The question involved is the construction of a clause of the last will of Josiah Johnston, deceased, to wit: "Second.—I give and bequeath to my beloved wife, Nancy Johnston, all my real estate, situated in the C. P. Cook donation land claim, in Polk county, Oregon, said land being known as our 'home place,' consisting of one hundred (100) acres, more or less; also give, devise and bequeath to my said wife, all my land situated in the Leonard Williams donation land claim, in Polk county, Oregon, consisting of one hundred and five (105) acres of prairie land, and ten (10) acres of timber land, more or less, to have and to hold the same during her natural life, and she is to have the proceeds and income from said real estate, and at her death the said land is to be sold, and the proceeds of said sale is to be divided equally among my children living at the time of my said wife's death." If by the language quoted a title in fee to the real estate in the Cook donation land claim was intended to be devised to Nancy Johnston, the plaintiffs as her devisees secured an undivided three-fourths of the premises, and the defendants obtained by purchase the remainder, which tract, known as the "home place," was divided by referees appointed by the court for that purpose into two parts of the equivalent relative value of the portions stated. If, however, such testamentary disposition gave to the widow only a life estate in the "home place," the plaintiffs have no interest there.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in, and the defendants are seised of the whole thereof.

[1] In Oregon the term "heirs" or other words of inheritance are not necessary to create or convey an estate in fee simple. L. O. L. § 7103. An enactment, declaring when a freehold estate of inheritance, absolute and unqualified, passes by will, reads: "A devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest." Id. § 7344. Seeking in the light of these statutory rules to discover the testator's intention, which is the cardinal method for the interpretation of his wishes as to the disposition of his property after his death, it is argued by defendant's counsel that, though the clause of the will quoted contains distinct descriptions of real property, the devises are not separate and independent, but are connected, thus making the limitation of the life estate applicable to both tracts of land. It is maintained by plaintiff's counsel, however, that the language employed to effectuate the devises consists of two complete and separate sentences, and though the mark adopted to indicate the pause dividing the written composition is a semicolon, and the scrivener began the second sentence with a lower case letter, an examination of the entire clause of the will discloses an unmistakable purpose of the testator to make the limitation of a life estate refer only to the real property in the Williams donation land claim.

[2] It is a well-recognized rule that where an estate in fee is given in one clause of a will in clear and explicit terms, the interest which the devisee thus obtains in the lands cannot be taken away or diminished by any subsequent vague or general expression of doubtful import, or by any inference deducible therefrom, that may be repugnant to the estate given. Underhill, Wills, § 689; McIsaac v. Beaton, 3 Ann. Cas. 615; Mee v. Gordon, 187 N. Y. 400, 80 N. E. 353, 116 Am. St. Rep. 613, 10 Ann. Cas. 172; Lohmuller v. Mosher, 74 Kan. 751, 87 Pac. 1140, 11 Ann. Cas. 469.

[3] The language employed by the testator to express the devise of the real property in the Cook donation land claim, standing alone, undoubtedly evidences a gift in fee. The interest thus disposed of ought not to be cut down unless it is manifest from an inspection of the entire clause of the will that the testator intended to make the life estate also a limitation upon the land first hereinbefore described.

It will be kept in mind that the will referring to the premises devised to Mrs. Johnston provided that she was "to have and to hold the same during her natural life." "The relative 'same' refers to the next antecedent." 2 Kent's Com. *555. Applying this

rule of construction to the term "same" as used in the clause of the will under consideration, the word thus employed evidently relates to "all my land situated in the Leonard Williams donation land claim," though such general description necessarily includes the more specific designation of prairie and timber land. This arrangement would seem to render the word "same" inapplicable to the devise of any part of the land in the Cook donation land claim.

In Finney ex dem. v. Collings, 4 Maule & S. 58, in construing the language of a will, Lord Chief Justice Ellenborough observed: "This is a question for a grammarian rather than a lawyer, or which a schoolmaster might decide as well as a judge."

It is impossible to reconcile the many conflicting decisions that have been rendered upon the question under consideration. It is believed, however, that under a statute like ours, requiring a devise of real property to be construed as a gift of all interest of the testator therein, subject to his disposal, unless it clearly appears from the will that he intended to bestow a less interest (L. O. L. § 7344), an estate in fee was given by the will to Nancy Johnston of the "home place" in the Cook donation land claim. This conclusion is based upon the term "also" as used in the second sentence employed to effectuate the gift, when such word is considered in connection with the context of a devise of a life estate in the Williams donation land claim. While the word "also" has several meanings, one signification when the term is employed in wills as the beginning of a new clause is no more than "item" or "in addition," if the clauses are separate and independent. Underhill, Wills, § 321. In the case at bar what appears to make the term "also" the commencement of a separate sentence is the fact that it immediately precedes the words "give, devise and bequeath to my said wife," which latter expression was unnecessary if the testator had intended to give only a life estate in the Cook donation land claim.

In Platt v. Brannan, 34 Colo. 125, 81 Pac. 755, 114 Am. St. Rep. 147, 150, the following is the clause of a will in controversy: "I give and devise to my husband, Samuel Platt, all of my right and interest of, in and to that certain lot or parcel of land known and described as lot numbered eighteen (18) in block numbered one (1) in Titus addition to the city of Denver, in Arapahoe county, Colo., in which property I own an undivided one-half as tenant in common with my said husband. Also all of my right and interest of, in and to lots numbered one hundred and four (104) and the west half (½) of lot numbered one hundred and five (105), Vernon Place, in the city of Independence, Jackson county, Missouri, in which property I own an undivided one-half as tenant in common with my said husband, together with the improvements and appurtenances, to have and to hold the said interests in the said

described parcels of land to the said Samuel Platt together with the rents, incomes and profits thereof, and the sole use and benefit thereof, during the term of his natural life. And upon his death to my six children," naming them. In construing the language last quoted it was held that the devise took only a life interest in all of the lands. In deciding that case Mr. Justice Campbell, referring to a word found in the devise, says: "'Also' does not mark the beginning of a new sentence. It will be observed that there is but one set of operative words. 'I give and devise' occur but once, and then at the beginning of the item. They are not repeated after 'Also.' The portion of the item following that word must therefore be carried back to the operative words that the devise may become effective. Unless we do so there are no operative words applicable to the Missouri lots so far as concerns Samuel Platt. And if we do not recur to them, the Missouri lots, which are one of the objects of the devise, have no verb or predicate, and that verb has no subject."

In the case of *Morgan v. Morgan*, 41 N. J. Eq. 235, 3 Atl. 63, in a clause of a will giving personal property, also an interest in the income of an estate during widowhood, it was held that the donee took only an interest in the personal property *durante viduitate*. In that case the granting words were not repeated after the word "also." To the same effect are the cases of *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102; *Rose v. Hale*, 185 Ill. 378, 56 N. E. 1073, 76 Am. St. Rep. 40; *Montgomery v. McPherson*, 86 Miss. 4, 38 South. 196; *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756; *Noble v. Ayers*, 61 Ohio St. 491, 56 N. E. 199. In each of these cases there were no words governing the transactions intended to be consummated by the writings, repeated after the term "also" as used in the several wills, and hence the portion of the item following that word was necessarily carried back to the operative words in order that the several devises might become effective.

In *Loring v. Hayes*, 86 Me. 351, 29 Atl. 1093, clauses of a will were as follows:

"Second. I give, bequeath and devise to my wife, Betsey Loring, my house with all the buildings and the land adjoining the buildings, also all the furniture and housekeeping articles contained in my dwelling house in said Yarmouth to have and to hold the same for her use during her natural life, also my horse, carriage, sleigh, harness, farming tools, also my watch and jewelry, Pew No. 9 first Parish Church I also give and bequeath to my said wife, Betsey Loring Forty-five hundred dollars (4500) to be paid to her in cash or in such personal securities as she may select from my estate."

"Fifth. And upon the decease of my said wife I give bequeath and devise all that may

remain unexpended of the real and personal or mixed estate given to my said wife in the second clause of this will, to Jacob L. Hayes and others [naming them] to be divided equally between them share and share alike, to have and to hold to them, and each of them in severalty, their heirs and assigns forever."

In construing the language last quoted it was held that the testator made an absolute gift to his wife of \$4,500, and that so far as the devise or bequest over applied to the unconditional donation of that sum, it was void. In that case it will be noted that the operative words "give and bequeath" are used immediately after the word "also," to effectuate the gift to the wife of \$4,500 in cash or securities as she might select, thereby evidencing a separate and independent bequest.

Believing that the devise of the real property in the Cook donation land claim was a gift in fee, the decree should be affirmed; and it is so ordered.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

SHARPE v. CATRON.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. ADVERSE POSSESSION (§ 7*)—LAND GRANT.

Land selected by a road company under a military road grant was approved by the Department of Interior, December 19, 1879, and patent was issued therefor July 10, 1883. C. entered on the land in 1873, and during that year fenced it. Thereafter until his death, which occurred in 1893, he used and occupied it, and claimed title thereto adversely and exclusively as owner against defendant and his predecessors in interest, and after C.'s death his wife and son continued to occupy the premises as owners until 1903, when they conveyed their right to plaintiff. *Held*, that the statute of limitations commenced to run against the allottee from the date its selection under the grant was approved by the Interior Department, to wit, December 19, 1879, from which time the allottee could have maintained ejectment against C., and hence his subsequent possession for ten years vested in him and his heirs a fee-simple title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.*]

2. ADVERSE POSSESSION (§ 7*)—TITLE BY ADVERSE POSSESSION—RIGHTS OF OWNER.

One claiming title to land by adverse possession for ten years against all persons, but recognizing the superior title of the United States, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be an owner under a prior grant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7.*]

In Banc. Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by I. W. Sharpe against C. C. Catron. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a suit to quiet title to real estate. Plaintiff alleges that he and his predecessors in interest have been since 1882 in possession of the land in question here and described in the complaint, and that he is the owner thereof in fee simple and in possession thereof, that the defendant claims some interest therein adversely to the plaintiff, and asks that defendant be required to set forth the nature and extent of his interest, and that plaintiff be adjudged the owner thereof, and his title quieted. Defendant denies plaintiff's right, title, and possession, and alleges that he is the owner of the premises. Among the facts found by the court, and which are not controverted, are the following: That Sherman Castle entered upon the land in question in 1873, and during that year fenced it, and thereafter, until his death, which occurred in 1893, used and occupied it, and claimed title thereto openly, adversely, and exclusively as owner against the defendant and his predecessors in interest and against all the world during said period; that after the death of Sherman Castle his wife and son continued to claim and occupy the premises as owners thereof until November, 1908, when they conveyed all their right, title, and interest therein to the plaintiff, and delivered to him the possession thereof, and that he has claimed and occupied the same until the commencement of this suit; that from April 1, 1902, until April 1, 1906, plaintiff held leases of the premises from the California & Oregon Land Company, without the knowledge or consent of Martha Barton and Ray Castle, the widow and son of Sherman Castle, deceased, and was during that period holding under a license from them. The premises in question here are a part of the land granted by the Congress of the United States to the state of Oregon to aid in the construction of a wagon road from Eugene, Or., to the eastern boundary of the state, and was transferred by the state of Oregon to the Oregon Central Military Wagon Road Company. The selection of the land by the road company was approved by the Department of the Interior December 19, 1879, and patent was issued therefor on July 10, 1883; the defendant claiming this tract by mesne conveyances under said grant. Upon the facts found and conclusions drawn therefrom, a decree was rendered in favor of plaintiff. Defendant appeals.

Geo. W. Hayes, of Vale (C. M. Crandall, of Vale, on the brief, for appellant. W. H. Brooke and Ralph W. Swagler, both of Ontario, for respondent.

EAKIN, J. (after stating the facts as above). [1, 2] The court found and the evidence discloses that the claim and possession of Castle was continuous, adverse, open, notorious, and exclusive during all his occupancy thereof, and the statute of limitations commenced to run against the road company

from the date its selection under the grant was approved by the Department of the Interior, namely, December 19, 1879, from which date the road company was in a position to maintain ejectment against Castle. See *Boe v. Arnold*, 54 Or. 52, 102 Pac. 290, 20 Ann. Cas. 533, and *Altschul v. Clark*, 39 Or. 315, 65 Pac. 991. Such adverse possession for the period of ten years is evidence of a fee-simple title in the adverse holder. This was the holding in *Joy v. Stump*, 14 Or. 361, 12 Pac. 929, and followed by this court ever since, so that Castle's title to the land was complete at the time of his death, and passed to his heirs. The question of tacking the possession of the widow and son to the possession of Castle as an element of adverse possession is not involved, and the conveyance by the widow and son to plaintiff, even though only by a quitclaim deed, was sufficient to pass all the right, title, and interest held by the grantors. *Dolph v. Barney*, 5 Or. 191; *Baker v. Woodward*, 12 Or. 3, 6 Pac. 173. In *Boe v. Arnold*, supra, the case of *Altschul v. Clark*, supra, is overruled, in so far as it holds that the occupant of government land claiming ownership as against all the world, except the United States, cannot claim title by adverse possession against the true owner, holding: "That one claiming title to land by adverse possession for a period of ten years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant."

The judgment of the circuit court is affirmed.

IVANHOE v. IVANHOE.†

(Supreme Court of Oregon. Nov. 11, 1913.)
HUSBAND AND WIFE (§ 283*)—SUPPORT—SEPARATION—MUTUAL FAULT.

The proceeding, under L. O. L. §§ 7040-7042, for an order on a husband for support of his wife, being essentially equitable in its nature, a wife living separate from her husband, through fault of both, may not have such an order.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 576-581, 583; Dec. Dig. § 283.*]

In banc. Appeal from Circuit Court, Union County; Gustav Anderson, Judge.

This is a suit by S. E. Ivanhoe, a wife, to compel F. S. Ivanhoe, her husband, to contribute to her support. From a decree making an allowance to the plaintiff much less than she claimed, both parties have appealed. Reversed and dismissed.

T. H. Crawford and Robert S. Eakin, Jr., both of La Grande, for appellant. C. H. Finn and Geo. T. Cochran, both of La Grande, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 30, 1913.

BURNETT, J. Section 7040, L. O. L., says that: "It shall be lawful for any married woman to apply to the circuit court of the county in which she resides for an order upon her husband to provide for her support and the support of her minor children, if any, by said husband living with her." By the next section the court is empowered to hear the parties, and, if the husband is found to be remiss in his duty to support his wife, to make such a decree enforcing his matrimonial obligation in that respect "as shall be equitable in view of the circumstances of both parties." Section 7042 says: "The practice in such cases shall conform as nearly as may be to the practice in divorce cases, and the court shall have power to enforce its orders as in a suit for divorce, or other suits in equity. * * *" It thus appears that the proceeding is essentially equitable in its nature. The complaint alleges "that on or about the said 20th day of April, 1909, the defendant, without just cause or provocation, abandoned, deserted, and refused to longer live with plaintiff. * * *" This is traversed by the answer.

There are no minor children of the parties involved. The learned judge who presided at the hearing made the following findings of fact, among others: "That for a number of years last past plaintiff and defendant have had serious domestic differences and disagreements, which culminated in April, 1909, in their separation, since which time they have been and still are living separate and apart from each other; the defendant paying, when plaintiff lived at home, from month to month, plaintiff's household expenses, consisting of groceries, meats, provisions, light, water, fuel, etc., in the sum of about \$32 on the average per month, defendant insisting that plaintiff, from her separate income, pay all her personal expenses. That both parties were at fault for the separation, the plaintiff by her habit of constantly nagging, finding fault with defendant, and of innuendoes and insinuations calculated to arouse defendant's anger, and also orally and by written letters, charging him with lewd associations with dissolute women, and those of ill repute, and in a letter written to him as district attorney since the separation, on August 5, 1909, she uses language unnecessarily calculated to be exasperating to the defendant under the circumstances, and all without sufficient justification. On the other hand, defendant has not been temperate in his language and conduct towards plaintiff, often flying into a passion, and cursing and swearing at plaintiff, and at one time, a number of years before the last separation, and while the parties lived in Wallowa county, defendant, when in anger, he claims was provoked by plaintiff, seized and threw plaintiff with great force upon the bed. The testimony shows

that both parties were at fault in their language at the time of the separation at La Grande, Oregon, in April, 1909." Other findings disclose that, with what the defendant has conveyed to her, and what she has accumulated by 14 years of teaching, to the neglect of her home duties, the plaintiff has money and realty of the value of \$7,500, besides household furniture in her residence, while the defendant owns property worth \$4,350, and is receiving a salary of \$3,000 per annum as district attorney.

It is not the purpose of this opinion to burden the reports with a rehearsal of the testimony. It is sufficient to say that it amply supports the findings quoted. The record fairly seethes with anger long pent up, and the parties seem to have made this litigation a mere pretext to vent their wrath against each other. Neither of them comes into court with clean hands as required by one of the standard maxims of equity. This court, in an opinion by Mr. Justice Bean, in *Fowler v. Fowler*, 31 Or. 65, 49 Pac. 589, has thus established a rule governing such cases: "To entitle a wife living separate and apart from her husband to prevail in a proceeding under this statute, she must not only allege, but must show by competent evidence, that the separation is without her fault, and that the husband has, without just cause, neglected or refused to support her. * * * The husband's duty to support his wife is conditioned upon her not breaking up the marital relation without his fault or consent, and therefore, if she is living separate and apart from him, she must allege and prove that the estrangement is without her fault before she can compel him to contribute to her support, under the provisions of the statute"—citing authorities. See, also, *Kingman v. Kingman*, 150 Ill. App. 456. Hence, although we might consider the allegation that "the defendant, without just cause or provocation, abandoned, deserted, and refused to longer live with plaintiff" equivalent to an averment that plaintiff was living separate from her husband without her fault, yet, in view of the findings of the circuit court, she has failed to prove that indispensable allegation, and the circuit court drew an erroneous conclusion from the facts reported in the findings. If the plaintiff would enforce one of the incidents of the marriage relation against her spouse, she must show that she is not wanting in the loving kindness due from wife to husband as an essential of that relation, and which common experience shows to be woman's most potent influence in the control of the sterner sex. In brief, where both parties are at fault, equity will leave them where it finds them.

The decree of the circuit court is reversed, and the proceeding dismissed, without costs or disbursements to either party.

BAKER CITY MERCANTILE CO. v. IDAHO GLAZED CEMENT PIPE CO.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. EVIDENCE (§ 83*)—PRESUMPTION.

It is presumed that an official duty has been performed, and hence that city commissioners required a contractor with the city to give a bond pursuant to the contract, and as contemplated by L. O. L. § 6286.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

2. CONTRACTS (§ 187*)—PARTIES—ACTION BY THIRD PERSONS.

Where one receives a consideration from another to enter into an undertaking with such other, which is primarily for the benefit of a third person, such third person may maintain an action on the contract, so that one who contracted with a city for the construction of a pipe line, and undertook to pay for the labor and necessary supplies used in constructing the line, was primarily liable for such supplies, though furnished to a subcontractor, and could be sued for the price thereof by the person furnishing them, who was not a party to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

3. PRINCIPAL AND AGENT (§ 132*)—CONTRACTS—EXISTENCE OF RELATION.

Where defendant, who had a contract with a city for the construction of a pipe line, had the work done by A. under an arrangement by which defendant paid the men employed by A. to do the work, and paid the merchant who furnished supplies for the men while working, A. was in substance, a mere overseer or foreman for defendant, so as to make defendant, and not A., liable for such supplies.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 439, 467-471; Dec. Dig. § 132.*]

4. MONEY RECEIVED (§ 9*)—MONEY RECEIVED TO BE PAID TO PLAINTIFF.

Where defendant, who contracted with a city to construct a pipe line and employed A. to do the work, deducted from the wages of the laborers employed by A. a sufficient amount to pay for the supplies furnished by plaintiff in maintaining the men, defendant in equity and good conscience should pay plaintiff for such supplies, under the equitable doctrine of liability for money had and received.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 31; Dec. Dig. § 9.*]

5. CONTRACTS (§ 198*)—CONSTRUCTION—"MATERIAL."

Supplies furnished by plaintiff for boarding and maintaining men engaged in constructing a pipe line, pursuant to a contract for its construction by defendant for a city, were embraced within the terms of the original contract, which required defendant to furnish all "material" and do all the work required to construct the line.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-877, 879-883; Dec. Dig. § 198.*]

For other definitions, see Words and Phrases, vol. 5, p. 4404.]

In Banc. Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Action by the Baker City Mercantile Company against the Idaho Glazed Cement Pipe Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for the recovery of the value of goods, wares, and merchandise fur-

nished by the plaintiff and its assignors in the furtherance of the construction of a pipe line by the defendant for the city of Baker. The cause was tried before a jury, which rendered a verdict in favor of plaintiff for the following sums, to wit:

| | |
|---|------------|
| For the claim of Baker City Mercantile Co. | \$ 838 10 |
| For Perkins Bros.' claim assigned to plaintiff | 37 65 |
| For Oregon Mill & Grain Co.'s claim assigned to plaintiff | 109 42 |
| For the claim of M. Weil & Co. assigned to plaintiff | 29 20 |
| For the claim of Baker City Packing Co. assigned to plaintiff | 623 55 |
| Total | \$1,637 92 |

From a judgment entered thereon, defendant appeals.

The complaint declares upon five separate causes of action. For the first plaintiff alleges that the defendant entered into a contract with the city of Baker, a municipal corporation of Oregon, to construct a conduit in connection with the gravity water system of such city, and employed men to do the manual labor in the construction thereof at an agreed price; that while these men were so employed, the defendant, by J. A. Atchison, bought goods of plaintiff of the reasonable value of \$840.10 for the use of the laborers; that it was stipulated and agreed between plaintiff and defendant that the latter would hold, out of the wages of the laborers employed in the construction of the conduit, sufficient to pay the aforesaid sum; that in compliance therewith defendant, in the settlement with such laborers, with their consent did withhold such sum for the use and benefit of plaintiff, and now holds the same. The other causes of action are substantially the same, with the further allegation of an assignment to plaintiff. The fifth cause of action upon the account of the Oregon Mill & Grain Company contains no allegation that the amount thereof was deducted from the wages of the laborers. The defendant denied the gist of the allegations of the complaint, and pleaded in effect that J. A. Atchison was an independent contractor and purchased the goods on his own credit without any authority from defendant. When plaintiff rested its case defendant moved for a nonsuit, which was denied, and at the close of the case requested the court to instruct the jury to return a verdict in favor of defendant. This was refused. These rulings are assigned as errors.

Claude O. McColloch, of Baker (McColloch & McColloch, of Baker, on the brief), for appellant. O. B. Mount, of Baker, for respondent.

BEAN, J. (after stating the facts as above). It appears from the record that on July 17, 1911, the Idaho Glazed Cement Pipe Compa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ny, a corporation of the state of Idaho, entered into a contract with the city of Baker for the excavation of a trench and the laying of a new pipe line in connection with the city's gravity water system, according to the plans and specifications provided therefor, at an estimated cost of about \$80,000. It was the chief desire of the defendant to sell the pipe which it manufactured, but, in order to secure the contract, it was necessary for the company to undertake the excavation work. This the pipe company first made arrangements for with one Edna, but towards the fall of 1911, his work proving unsatisfactory to the city commissioners, this engagement was canceled. Defendant then arranged for the excavation work with one J. A. Atchison. Messrs. Storey, Fawcett, and Twogood, the principal spirits in the cement pipe company, executed an agreement in writing with Atchison to do a portion of the excavating involving about \$13,000. Atchison began work under his contract at once, and during the remainder of the year 1911 the pipe company boarded his men at the camp which it maintained on the works. At the close of that year the company informed Atchison that if he continued work during the coming year, he must employ and pay his own men, and also board and camp them, but no notice of any change of methods was given to the parties furnishing the materials sued for. In the spring of 1912 the work proceeded, and at the end of each month Atchison's bookkeeper would submit a pay roll of amounts due for labor, with the sums to be deducted for board at a camp established by Atchison exclusively for men working on the conduit, and for supplies furnished to the men from a commissary kept by him. The company would pay the men for their labor, deducting the above amounts, and pay the merchants, among whom were the plaintiff and its assignors, for the supplies furnished the men and materials used in the construction of the pipe line. When the goods were supplied they were charged to "J. A. Atchison Camp," or "J. A. Atchison Pipe Line Camp"; only a small amount being paid direct to Atchison. This system prevailed until the conduit was completed in August, 1912. For the month of July and a portion of August the company paid the laborers for their work, deducting \$1,561.70 therefrom for board and commissary supplies furnished them. During this time plaintiff and its assignors furnished the goods sued for in the same manner as before, and they were used in the promotion of the work.

Defendant pleads and its counsel insist with earnestness that upon the evidence introduced the defendant is not liable to these merchants for the supplies, consisting of flour, meat, tobacco, clothing, etc., furnished the men under the arrangement, and a small amount of feed supplied for the teams employed upon the work. By the terms of the defendant's contract with the city the

former agreed to furnish all material and do all the work necessary to construct the conduit. The contract provided in part that the contractor should not sublet, assign, or transfer the contract, or any part thereof, without the consent of the board of commissioners that the contractor was to take entire charge of the work during its progress, subject to the supervision of the engineer and of the board of commissioners; that the contractor with its sureties should be liable for any damages caused by any negligence; that if any person employed by the contractor on the work should appear to the engineer to be incompetent or to act in an improper manner, he should be discharged. A bond in the sum of \$30,000 was required to be furnished by the contractor conditioned upon a full performance of the contract.

[1] Section 6286, L. O. L., as it then existed, directed that a corporation entering into a formal contract with any municipality within this state for the prosecution and completion of any work should be required, before commencing the work, to execute the usual penal bond with good, sufficient sureties, with the additional obligation that such contractor should properly make payments to all persons supplying him with labor or materials for any prosecution of the work provided for in the contract, and further required that any person furnishing labor or materials for the prosecution of such work, the payment for which had not been made, should have a right of action in the name of the municipality against such contractor and sureties. It is a presumption that official duty has been performed, and that the city commissioners required such bond to be given according to the stipulation of the contract. This statute emphasizes the force of the contract made by the defendants with the municipality. Under the statute as amended in 1913 (Laws 1913, p. 59) in case of a failure to have the required undertaking executed, the municipality and the officers authorizing the contract would be jointly liable to the persons furnishing such materials.

[2] The law is well settled in this state that where one has received from another some fund or property or thing in consideration of which he has promised to or entered into an undertaking with such other directly and primarily for the benefit of a third person, an action thereon may be maintained by such person though not a party to the transaction. *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872; *Ore. Mill & Grain Co. v. Kirkpatrick*, 133 Pac. 69, 71. The defendant by its contract with the city undertook to pay for the labor, materials, and necessary supplies used in the construction of the city pipe line, and was primarily liable therefor.

[3] As to any third parties furnishing labor or materials for the work, the arrangement

by the defendant company with Atchison constituted the latter a mere overseer or foreman in prosecuting the work under the contract with the city. Had defendant desired otherwise it should have protected itself by seeing that Atchison was responsible, or by requiring a bond from him.

[4] Defendant has no cause for complaint for the reason that plaintiff seeks to recover from it alone instead of bringing action against the sureties on the bond required by the statute. The defendant deducted from the wages of the laborers a sufficient amount to pay for the supplies furnished by plaintiff and its assignors in boarding the men, and maintaining the commissary. In equity and good conscience it should be required to pay this money over to plaintiff. It was not error for the court to submit the case in part to the jury upon the theory of money had and received, which is an action of an equitable character. *Edwards v. Mt. Hood Construction Co.*, 130 Pac. 49.

[5] The uncontradicted evidence shows that all the goods sued for were furnished to board the men employed upon the work and supplied to them in payment for their labor in the construction of the aqueduct. Mr. Frank Fawcett, one of the officers of the defendant company, in his evidence given on behalf of defendant, stated that the company paid all laborers under Atchison's charge, giving as a reason that "we was made responsible for the labor on the contract (with Baker City), therefore we wanted to be sure the labor was paid. We thought this was the surest method to know it was paid. Issued checks directly to the men who did the work." To the question, "Was that the agreement with Mr. Atchison?" he answered: "That was the agreement we had on the start; he didn't put up any bond, and that was the agreement we had, we would issue the checks to the men, in lieu of his giving a bond." Defendant also admits its liability for the payment of all material furnished in the construction of the work. It is pleased, however, not to term the goods supplied to the laborers in payment for their work and board as "materials." All the goods supplied by the plaintiff and its assignors, whatever we may term them, were necessary in the construction of the conduit, and were embraced within the terms of the original contract with the city.

The court, among other instructions to the jury, gave the following: "If you find that the defendant in this case authorized and sanctioned Atchison to procure the goods to apply on the payment of wages, and that the defendant undertook and agreed to pay for all labor used in the construction of the conduit referred to in this case, knowing that a portion thereof was paid for in goods or merchandise, and you should further find that any of the goods mentioned were delivered

or furnished to the laborers and not paid for, and the amount thereof deducted and retained by the defendant out of the amount due for such labor, knowing that such goods had not been paid for, then plaintiff would be entitled to recover the amount of such goods as you may find were so furnished and not paid for, and actually so deducted and retained by the defendant, if you find any were so deducted and retained." Defendant by its counsel duly excepted to this instruction. Under our view of the contract between the defendant and the city, this instruction was as favorable to the defendant as it could reasonably expect.

The question of the agency of Atchison was also submitted to the jury, and much evidence was introduced in regard thereto. All the evidence is contained in the record. As we view it, when the arrangement made between the officers of the company and Atchison, and the method of conducting the business connected with his work, was shown, and the contract with the city was introduced in evidence, this was sufficient to show the liability of the defendant for the goods furnished. There was no error in overruling the motion for a nonsuit and denying the request of defendant for a directed verdict. Section 3, art. 7 of the Constitution of Oregon directs that: "If the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial." Upon the evidence contained in the record, the defendant, by virtue of its contract, is liable for the full amount of the judgment.

The complaint describes the transaction in full, and the evidence supports the allegations of the complaint; therefore it becomes unnecessary to examine the record as to the other errors assigned.

The judgment of the lower court is affirmed.

WINNIFORD et al. v. MacLEOD et al.†
(Supreme Court of Oregon. Nov. 11, 1913.)

1. DAMAGES (§ 217*)—INSTRUCTIONS—DOUBLE LIABILITY.

Where, in an action for injuries to a building in course of construction by an excessive blast set off by defendant contractor on adjoining property, it appeared that the restoration of the shingling, plastering, and other work would necessarily include the time involved in their installation, and that that time would be all that would be necessarily lost by plaintiffs, an instruction authorizing a recovery not only of the whole amount which plaintiffs claimed would be required to make the repairs, but also for loss of time occasioned by the blast, was erroneous as authorizing a double recovery for the same item.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 556-559; Dec. Dig. § 217.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 30, 1913.

2. DAMAGES (§ 40*)—LOSS OF PROFITS.

Where contractors for the construction of a building sued for damages sustained as the result of defendant's excessive blasting, and defendant suffered a recovery of an amount sufficient to restore plaintiffs to the situation they occupied at the time of the explosion, defendant performed his whole duty, and was not liable for profits alleged to have been lost by plaintiffs in the construction of the building.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

3. MASTER AND SERVANT (§ 320*)—ACTS OF INDEPENDENT CONTRACTOR.

The rule that, where work is committed in all its details to a contractor, and he is responsible to his employer, not for details, but only for a finished result, the contractor alone is answerable for injury resulting to third persons in the prosecution of the work is subject to the exception that the employer must also respond, if the manner provided for carrying out the contract is in itself injurious, or if the project is manifestly dangerous to others, and an injury ensues on account of either the method prescribed or the nature of the undertaking.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1261; Dec. Dig. § 320.*]

4. MASTER AND SERVANT (§ 316*)—INDEPENDENT CONTRACTOR—LIABILITY OF PRINCIPAL.

Where defendant corporation employed L. to grade certain streets and lots, and in doing so he set off an excessive powder blast, by which a building in process of construction by plaintiffs was injured, the corporation was not liable in the absence of proof of privity of contract or concurrence of action between it and L.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

5. MASTER AND SERVANT (§ 316*)—INDEPENDENT CONTRACTOR—CONTRACT—CONSTRUCTION.

Where a corporation contracted with L.'s predecessors to grade certain streets and lots, the corporation retaining no control over the details or manner of prosecuting the work, its whole connection with the scheme being merely to furnish the survey and pay the compensation specified, the remainder of the task being imposed on the contractor, the work being a lawful and harmless undertaking, L. was an independent contractor, and the corporation was not liable for injuries resulting from an excessive blast set off by him in the prosecution of the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

6. MASTER AND SERVANT (§ 316*)—CONTRACT FOR IMPROVEMENT—EMPLOYER'S LIABILITY.

Where a work of grading certain streets and lots or the manner of executing it as provided by the contract was not a nuisance, the employer was not guilty of maintaining a nuisance by reason of the method in which the contractor did the work, where such owner did not retain control of the premises.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by D. R. B. Winniford and another, doing business under the name of Winniford & Mays, against A. L. MacLeod and the Lewis-Wiley Hydraulic Company. Judgment for plaintiffs, and defendant MacLeod ap-

peals. Reversed for new trial as to defendant MacLeod.

The plaintiffs, a firm of building contractors, bring this action against the defendant MacLeod, a general contractor, and Lewis-Wiley Hydraulic Company, a corporation, and owner of what is known as West-over Terrace, in Portland, Or. The complaint recites an ordinance of the city of Portland forbidding the explosion of gunpowder or other like material in the city limits without first having received a permit from the city engineer. It says also that prior to the explosion complained of MacLeod had obtained from the proper officer a permit to use powder for blasting in an amount not to exceed five pounds upon the tract mentioned. At the time of the grievance complained of the plaintiffs were engaged in the erection of a dwelling house for another near the scene of the blasting operations they describe, but had not yet completed their contract. The complaint contains these allegations: "That for more than a year prior to October 29, 1911, the defendant A. L. MacLeod had been carrying on blasting operations in a careless, negligent, malicious, and wanton manner for the defendant Lewis-Wiley Hydraulic Company upon the land owned by the defendant company, and the defendant company well knew and appreciated that the defendant A. L. MacLeod was carrying on these blasting operations in a careless, negligent, malicious, and wanton manner, and in such a manner as to endanger the property in the surrounding neighborhood; that on October 29, 1911, at about the hour of 3:30 p. m., the defendants, A. L. MacLeod and Lewis-Wiley Hydraulic Company, negligently, carelessly, maliciously, and wantonly, through their servants, set off and exploded at one time 50 pounds of powder at a point about 150 feet west of the said house hereinabove described; that the said explosion threw a great number of rocks at terrific speed against and into the said house; that the walls and roof and all portions of the house on the west side were damaged." After stating as grounds of negligence that the defendants used an excessive amount of powder, and failed to warn the plaintiffs of the blast, together with other specifications of fault, the complaint concludes with the allegation: "That by reason of the negligent acts of the defendants, and each of them, the plaintiffs have been compelled to expend the sum of \$600 for putting the house into the same condition in which it was prior to October 29, 1911; that the plaintiffs have also sustained damage in addition to the damages hereinabove enumerated, in that plaintiffs have lost a week's time of the value of \$300, and have lost profit to the value of \$600." The defendant MacLeod admits obtaining a permit from the city engineer to engage in blasting, but otherwise denies the complaint in toto. The an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

swer of the Lewis-Wiley Hydraulic Company traversed the complaint in nearly all particulars, and then ascribed the alleged injuries to the act of its codefendant MacLeod, asserting, in effect, that he was an independent contractor who had engaged with the defendant corporation to grade certain streets and lots in the Westover tract, assuming entire responsibility for all details, and rendering to the defendant corporation only a completed result; and that the Lewis-Wiley Hydraulic Company had no control whatever over the means or details used in working out a completion of the contract. This in turn was denied by the reply. A jury trial resulted in a verdict and judgment against both defendants for the sum of \$1,500, and each of them appeals.

John McCue and Wm. A. Williams, both of Portland (Moser & McCue, of Portland, on the brief), for appellant. B. H. Bennett, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for respondents. M. M. Matthiessen, of Portland (Wood, Montague & Hunt, of Portland, on the brief), for defendant Lewis-Wiley Hydraulic Co.

BURNETT, J. (after stating the facts as above). As a preliminary, it may be stated that the court submitted to the jury the question of whether or not the plaintiffs would be entitled to recover exemplary in addition to compensatory damages, and the jury found a verdict acquitting the defendants of that charge.

[1] As to the defendant MacLeod, he complains of error in the court in giving the jury these instructions, to the effect that the plaintiffs would be entitled to recover not only what it would cost them to put the house back into the condition in which it was before the blast, but also for the loss of time occasioned by the blast, and, moreover, for the loss of profits which they anticipated they would reap as the fruits of their contract in building the house. Practically the only testimony given by the plaintiffs on this point was that of the plaintiff Mays, who, without giving any accurate figures, estimated that the shingling required in making repairs amounted to \$75, tinwork \$30, plastering \$100, material work \$35, painting \$10, carpentering \$100, total \$350. He also stated that the electric wiring and the plumbing were involved, and these were estimated by him at \$10 and \$50, respectively; but he admitted on cross-examination that the wiring was not injured, and that he was not responsible for the plumbing.

The cardinal principle of damages is compensation, and the defendant would fulfill his whole duty to the plaintiffs in that respect if he paid such a sum as would fairly compensate them for the injury complained of. The restoration of the shingling, plastering, and other work would necessarily include the time involved in their installation, and

that time would be all that would be necessarily lost by the plaintiffs. To allow them an additional item of \$300 for loss of time would be to pay them twice for the same thing.

[2] The testimony about the profits was purely speculative. The plaintiffs claimed that they expected to make a profit, but could not give any light on whether they either made or lost by the transaction. Their gain depended upon whether they could construct the house according to their engagement for less than the contract price. If the defendant has sufficiently compensated them so as to restore them to the situation which they occupied at the time of the explosion, he has performed his whole duty, and they were made whole, so that the profit is not affected further by the act of the defendant. The court was in error in instructing the jury as it did on the measure of damages.

It remains to consider the appeal of the defendant Lewis-Wiley Hydraulic Company. At the close of plaintiffs' case this defendant moved to enter judgment of nonsuit in its favor, on the grounds that the allegations against it had not been sustained by the evidence, that there was no testimony tending to show that it had participated in the explosion of any blast, particularly the one causing the injury complained of, and that no liability had been proven against it. The court overruled this motion. Later, at the close of the whole case, the defendant company moved for a directed verdict in its favor upon substantially the same grounds, and also because the testimony showed that A. L. MacLeod was an independent contractor in the prosecution of the work, over whom this defendant had no control.

[3] The general rule is that, where work is committed in all its details to a contractor, and he is responsible to his employer, not for details, but only for a finished result, the former alone is answerable for injury happening to third parties in the prosecution of the work. There are exceptions to this rule. The employer must also respond if the manner provided for carrying out the contract is in itself dangerous, or if the project is manifestly dangerous to others, and an injury ensues on account of either the method prescribed or the nature of the undertaking itself. These exceptions are well illustrated by the authorities cited for the plaintiffs here. For instance, in *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482, the contract itself contemplated excavating below the foundation of an adjoining house. In *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386, the contractor was employed to burn brush and logs adjoining the plaintiff's land, as a result of which fire was communicated to the premises and property of the plaintiff to his damage. In *Falender v. Blackwell*, 39 Ind. App. 121, 79 N. E. 393, cited in 14 L. R. A. (N. S.) 914, note, the con-

tractor was employed to break up castings by the use of dynamite in a place where many people were exposed to the danger of the explosion. In the *Ohio S. R. Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701, the contract itself involved the digging of a ditch across a public traveled street. In all these cases either the undertaking itself or the manner prescribed for accomplishing it was intrinsically and manifestly dangerous to other parties, and the employer was held liable as a party to the ensuing tort.

[4] In the matter of nonsuit, all the testimony proved or tended to establish was that the defendant MacLeod, while grading streets and lots upon the property of the codefendant, used blasting powder to aid him in removing the earth, and in so doing, on the occasion complained of, injured the house in question by an excessive blast. In order to charge the defendant company, it was necessary to go further and show some privity of contract or concurrence of action between the two defendants. This the testimony wholly failed to disclose, and the nonsuit should have been allowed.

[5] The contract under which the grading of the property mentioned was carried on was introduced in evidence. It was originally made between Lewis-Wiley Hydraulic Company, as party of the first part, and E. N. Timmons and John Celish, parties of the second part, with whom the defendant MacLeod signed as guarantor. The contract provided that: "In consideration of the agreements of the first party herein contained, the second parties hereby agree to furnish all the labor, superintendence, equipment, and materials whatsoever necessary for the completion of certain grading at and about Westover Terrace, in the city of Portland, county of Multnomah, and state of Oregon, as more particularly set forth in the specifications for such grading hereinafter contained, as a part of which said specifications and of this instrument express reference is hereby made to a certain map or plat of said Westover Terrace, and lands contiguous thereto, hereto attached and marked 'A.' Said specifications are as follows, to wit: Grade Melinda avenue and River View Drive from the end of the present existing pavement on Melinda avenue to a junction with the operations of the first party at the intersection of River View Drive and Mountain View Drive. [Then follows a long list of similar specifications relating to different lots, blocks, and streets.] The first party agrees to stake out said work, so as to show all street lines, cuts, fills, and slopes as set forth in the foregoing specifications, and as approximately shown on said map or plat hereto attached, and will from time to time furnish, on application of the second parties therefor, such additional information as may be required for the guidance and information of the second parties in the con-

duct of said work, and the second parties agree to make all cuts and fills in accordance with such staking, and in each and every instance to dress the streets and slopes to the true line and surface without back filling. Slopes in excavation shall be between one on one and one on one-half, and slopes on embankment shall, in general, be as steep as they can be made consistently with stability, and considering the nature of the material used; but, whether in excavation or in embankment, they shall in all cases conform to the staking of the first party and to any requests which the first party may from time to time during the progress of the work make of the second parties." The remainder of the contract relates to the rate of payment. It appeared that the principal second parties failed in their undertaking, and that the work was assumed by the defendant MacLeod under the contract quoted. This contract was the rule of action affecting the parties to it, and governed their relations. It also established their liabilities and responsibilities respecting the work in hand. The defendant company retained no control over the details or the manner of prosecuting the work. Its whole connection with the scheme was to furnish the survey and pay the compensation. The remainder of the task was incumbent upon the contractor. The contract was for grading. It was a lawful, harmless undertaking. There was nothing about it intrinsically dangerous to any one. The fallacy of the argument for the plaintiffs consists in the assumption that the contract required blasting and the use of dangerous quantities of powder. So far as the defendant company was concerned, it mattered not whether the contractor excavated the earth by the use of large steam shovels, by hydraulic process, or by picks and shovels, or whether he removed it by trains of cars, by wheelbarrows, or in bags. The method of performing a harmless work was left to the contractor, and the latter alone is responsible for damages involved and arising out of the manner of accomplishment. Whether we consider the question as one of failure of proof entailing a nonsuit, or as a question of directed verdict, it should be decided in favor of the defendant company.

[6] At the argument, the plaintiffs counted on their allegation that the defendant MacLeod had been carrying on blasting operations on the premises in question for more than a year prior to the happening of the injury, all of which was well known to the defendant company. The contract under which the work was performed bore date April 18, 1911, while the injury happened October 29, 1911. The argument was that the landowner was liable for the negligence of an independent contractor where the work constituted a continuing nuisance. This argument, however, must be qualified by the principle that, unless the project it-

self or the manner of executing it as provided in the contract constitutes such a nuisance, the employer will not be guilty of maintaining it, unless he retains such control of the premises as would make him responsible in the first instance. This distinction is made clear in *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, cited by plaintiffs, where Mr. Chief Justice Bartley sums up the discussion in this language: "It is very true, if the owner of real estate should willfully allow a nuisance to be created or to be continued by another on or adjacent to his premises, in the prosecution of a business for his benefit and under his authority, when he had full power to prevent or abate the nuisance, he would be justly liable for any injury which might result therefrom to another person." The present case, however, is distinguishable from the doctrine there laid down. Here the nuisance, if any, arose from the manner of prosecuting an undertaking originally harmless in its nature. Measuring the defendant company's authority by the legitimate contract appearing in evidence, the nuisance was not created by its authority, without which it could not prevent nor abate the nuisance; that feature being under the entire control of the contractor.

The judgment of the circuit court will be reversed for new trial as to the defendant MacLeod, with directions to dismiss the action as to the defendant Lewis-Wiley Hydraulic Company.

BEAN, EAKIN, and McNARY, JJ., concur.

BOOTH-KELLY LUMBER CO. v. CITY OF EUGENE et al.

(Supreme Court of Oregon. Nov. 11, 1918.)

1. WATERS AND WATER COURSES (§ 157*)—DIVERSION BY CITY—ASSENT OF OWNER—EFFECT.

A millowner's implied assent to a city's diversion of water at a point above his "waterway" does not give the city a right to deprive the owner of his property in the stream or make his assent an irrevocable parcel license to continue the diversion, if done without authority.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. § 157.*]

2. INJUNCTION (§ 24*)—GROUNDS FOR DENIAL—INJURY TO PUBLIC.

Where the enjoining of a particular act might seriously affect the public, the injunction is usually denied, so that, at the suit of a millowner, the diversion by a city of water, at a point above the millway, which might be used for drinking purposes or the extinguishment of fires would not be enjoined.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 23; Dec. Dig. § 24.*]

Department 1. Appeal from Circuit Court, Lane County; John S. Coke, Judge.

Action by the Booth-Kelly Lumber Company against the City of Eugene and others.

From a judgment of dismissal, plaintiff appeals. Modified so as to dismiss without prejudice.

This is a suit to enjoin interference with the flow of a stated quantity of water in the channel of a nonnavigable stream. The complaint alleges in effect: That the plaintiff, a corporation, has expended \$240,000 in erecting at Coburg, Or., a mill in which are sawed logs that are cut from its lands situate on and near the banks of the McKenzie river. That a "waterway" connects the mill site with the river, down which stream are floated during the summer sawlogs that are run into the "waterway" and there held until they are manufactured into lumber. That the McKenzie river is suitable for floating logs to market only in the summer and in the winter that stream flows so rapidly that it is impossible safely to drive logs therein. That after the river had been used in driving logs in the summer for 30 years by the plaintiff and its predecessors, and after the plaintiff had secured about 1,000,000 feet of merchantable saw timber along the banks and within the watershed of that stream, the defendants, the city of Eugene and its officers, caused a canal to be dug from the McKenzie river, commencing at a point above Coburg, and diverted from that stream large quantities of water in order to operate a hydroelectric plant which is employed in pumping from the Willamette river water which is supplied to the inhabitants of that city, and which plant is also used in generating electricity that is furnished to such citizens for illumination and power. That the diversion will in the summer so interfere with the flow of water in the channel of the river below the intake of the canal as to prevent the floating of logs to the plaintiff's mills to its irreparable injury, for the redress of which it has no plain, speedy, or adequate remedy at law. A demurrer to the complaint on the ground that it did not state facts sufficient to justify equitable intervention having been sustained, the suit was dismissed, and the plaintiff appeals.

Woodcock & Smith and C. A. Hardy, all of Eugene, for appellant. G. F. Skipworth, of Eugene, and John M. Pipes and M. L. Pipes, both of Portland, for respondents.

MOORE, J. (after stating the facts as above). It is not alleged in the complaint that the plaintiff or its predecessors in interest made a prior appropriation of the water of the McKenzie river sufficient to transport in the summer in the channel of that stream, and in the waterway connected therewith, sawlogs to its mills at Coburg. It will be assumed, however, from the averment that the river had been used for that purpose by the plaintiff and its predecessors 30 years, which period antedates the defend-

ant's diversion, that facts are set forth in the complaint adequate to show a prima facie right in the plaintiff to the relief sought, if application therefor had been seasonably made.

[1] It appears from the complaint that the defendant's canal had been completed and was in operation before any attempt was made to prevent the diversion. It must be accepted, therefore, as true that the plaintiff, tacitly at least, acquiesced in the change of the flow of a part of the water. Such implied assent cannot, under the rule adopted in this state, form a basis of a right to deprive the plaintiff of its property in the stream or make the apparent submission the foundation of an irrevocable parcel license to continue the diversion, if it was done without authority. *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384; *National Fire Al. Co. v. Portland*, 59 Or. 409, 117 Pac. 285. The question of an oral permission to turn the water out of its natural channel is not involved herein and is adverted to only to ascertain whether or not discretion was abused in denying an injunction, for it is reasonable to suppose that, if application therefor had been made in proper time, the diversion would have been temporarily restrained until the right was determined.

[2] The bestowal of the chiefest good upon the greatest number of persons, though often granted by a legislature, can seldom form the basis of judicial determination. Where, however, the issuing of a writ requiring a party to refrain from a particular act might seriously affect the public, the injunction is usually denied. 16 Am. & Eng. Ency. Law (2d Ed.) 864; 22 Cyc. 784. Thus, by reason of the great injury which would fall upon a city by restraining the continuous use of its sewage system when established, it was held that the granting of an injunction would be inequitable. *Simmons v. Paterson*, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642.

Where an exclusive right to furnish a city with water had been granted for a definite time, before the expiration of which, and in violation of the privilege originally conferred, another party pursuant to a charter provision also began supplying water, it was ruled in a suit to prevent the latter service that, since a restraining order might cause serious harm to the people of the city, an injunction pendente lite should be denied. *Stein, Ex'r, v. Bienville Water Supply Co.* (C. C.) 32 Fed. 876. So, too, where the owner of a water power without objection and without the assessment or prepayment of damages suffered a city to erect waterworks designed to be fed from the same stream, it was determined that he could not have an injunction against the use of the water on the ground of the injury to his power. *City*

of *Logansport v. Uhl*, 99 Ind. 531, 50 Am. Rep. 109.

In the case at bar, whether or not the furnishing of illumination is such an employment of electricity as to render the deprivation thereof harmful to the public is not now necessary to determine, for the granting of an injunction herein might deny to the inhabitants of the city of Eugene the use of water to quench thirst, thereby impairing the public health, or it might prevent the employment of water to extinguish fires in burning buildings and in consequence thereof the property of many citizens might become imperiled. As these supposed effects may be reasonably expected, the resultant injury to the public counterbalances the strict legal right of the plaintiff; and, such being the case, no discretion was abused in denying an injunction, which relief alone was sought by the complaint, and, in sustaining a demurrer thereto, no error was committed.

As it is possible that the plaintiff may desire in an action at law to establish its alleged right to a continuous flow in the natural channel of the water of the river and to recover damages for the diversion, the decree should be modified so as to dismiss the suit without prejudice, and it is so ordered.

MCBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

BAKER v. MORAN et al.

(Supreme Court of Oregon. Nov. 11, 1913.)

1. GIFTS (§ 82*)—MORTIS CAUSA—EVIDENCE.

In an action where plaintiff claimed two bank drafts as a gift causa mortis, evidence held to show that deceased intended to make the gift in question.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 154, 155; Dec. Dig. § 82.*]

2. GIFTS (§ 64*)—MORTIS CAUSA—WHAT CONSTITUTES—"GIFT CAUSA MORTIS."

Where deceased, after being practically told that he could not recover, handed plaintiff, his best friend, two undorsed drafts, telling him that whatever happened they were for him, there was a complete gift causa mortis, which is a gift of personalty made by a person in the expectation of imminent death but to take effect only in event of the donor's death without previous revocation; an actual delivery of possession being necessary to perfect such a gift, which differs from a gift inter vivos only in the possibility of revocation.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 133, 139-144; Dec. Dig. § 64.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3087-3091; vol. 8, p. 7670.]

3. BILLS AND NOTES (§ 209*)—GIFTS (§ 64*)—PASSAGE OF TITLE—INDORSEMENT.

Upon a sale or gift, where a negotiable instrument is actually delivered, title passes without indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423, 425-427, 497, 498, 501; Dec. Dig. § 209.* Gifts, Cent. Dig. §§ 133, 139-144; Dec. Dig. § 64.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. GIFTS (§ 64*)—MORTIS CAUSA.

Where deceased delivered unto plaintiff two undorsed drafts as a gift mortis causa and thereafter wrote a letter to the bank in which he kept deposits, referring more to the deposits than to the drafts, his retention of that letter until after his death will not defeat the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 133, 139-144; Dec. Dig. § 61.*]

5. GIFTS (§ 60*)—MORTIS CAUSA—CONTENTS.

While gifts mortis causa should be closely scrutinized with a view to preventing fraud, yet where the intention of donor is clear, mere formal objections should not be allowed to defeat it.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 109; Dec. Dig. § 60.*]

In banc. Appeal from Circuit Court, Baker County; Gilbert W. Phelps, Judge.

Action by William Baker against O. E. Moran and another, as administrators with the will annexed of Andrew A. Manser, deceased, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a suit, the practical effect of which is to determine the validity of an alleged gift causa mortis, made by one Andrew Manser to plaintiff, of two drafts for \$2,000 each. The evidence tends to show that Manser was an unmarried man, a miner by occupation, and at the time of the alleged gift the owner of money and property of the value of from \$13,000 to \$15,000; that he was somewhat penurious in his habits and not on very kindly terms with his relatives. He became acquainted with plaintiff in Baker City in 1907. They were both members of the same lodge of Odd Fellows and became very intimate friends. In 1909 Baker had an attack of typhoid fever, which left him in somewhat impaired health, and in December of that year Manser became sick with tuberculosis. At his request Baker visited him and thereafter called on him frequently. They discussed the condition of their health and finally planned a trip to California. Manser, not wishing to be exposed to the damp climate of the Willamette Valley, went by way of Salt Lake, while Baker went by way of Portland, reaching San Diego, which was the agreed meeting place, about New Year's, 1910. The time of Manser's arrival is not disclosed by the testimony, but Mr. McRae, who was Noble Grand of the Odd Fellows Lodge in that city, states that he found Manser at his room in the Willard Hotel on the 6th or 7th of February, who stated that soon after his arrival in San Diego he had been compelled to go to the hospital for about two weeks, and that thereafter he returned to the hotel, which indicated that he had probably arrived some time between the 1st and 15th of January, 1910. Being asked by McRae if he wanted a nurse or needed help, he answered that there was a man down there by the name of Baker who was a very dear friend of his and requested McRae to find him, as he wished him to come and take care of him. McRae had previously met Baker in the Odd Fellows

Lodge and found him and accompanied him to Manser's room, and when Manser saw Baker he said: "Billy, for God's sake never leave me now until I am either croaked or get better." From that time on Baker remained with Manser, in attendance upon him, looking after his wants, until Manser's death, on the 19th day of February, 1910. At different times McRae wanted Manser to get another nurse to help Baker, but he always refused, saying that he did not want any one except Baker. Manser was asked by McRae if he wanted the lodge there to pay the necessary wages and expenses for taking care of him and to send a bill to the lodge at Baker, as was usually done, and Manser said that he did not; that Baker would take care of him; and that he would see that Baker was well paid for doing so. Subsequent to this time, and on or about the 13th day of February, 1910, Manser suffered a very severe hemorrhage, necessitating the calling in of a doctor, and he asked the doctor, after the doctor had made his examination, whether or not he had any chance to recover. The doctor told Manser that he would not be able to stand many more hemorrhages and that unless they were stopped he might pass away at any time. After the doctor left, Manser sat on the couch in the room with his head in his hands for several minutes and finally said to Baker, "That is an awful bad verdict." He thought a few minutes longer and then pulled out the two drafts in question, handed them over to Baker, and said: "Whatever we do—whatever may happen, they are for you to use for yourself. They are for you. I want you to have them to use for your own use. They are yours. I want you to have these anyway." He also told Baker he was to have whatever money there remained on deposit to his credit in the bank at Dillon at his (Manser's) death. Baker then took the drafts, placed them in an envelope, and, putting them in his pocket, kept them in his possession and control until after he had been appointed as the executor of the will, when he went to Montana and exchanged the two drafts for certificates of deposit, which were turned over by him to the clerk upon the order of the county judge. At the time the drafts were given to Baker by Manser, Baker asked Manser if he did not want to indorse them. Manser replied: "It isn't necessary. I will write a letter and have it fixed so you are sure of getting the money. If any one should steal them now without any indorsement they can't cash them." A letter was subsequently dictated by Manser and written by Claude Woolman to the Dillon State Bank at Dillon, Mont., as follows: "San Diego, California, Feb. 14, 1910. Mr. A. L. Stone, Cashier Dillon State Bank, Dillon, Montana—Dear Sir: This day I have made out and signed my last and only will,

and have named one Mr. William Baker as executor without bonds. Recently I wrote you regarding a certain mortgage, and desire at this time to request you to call in the loan at once, or should you find it necessary, to bring action to recover. After my death I desire Mr. William Baker to, upon demand, withdraw any portion of the money credited to my account, and on deposit in the Dillon State Bank. Herewith you will find signature of Mr. William Baker, witnessed by myself and two residents of the city of San Diego, members of the I. O. O. F. Andrew A. Manser (Wm. Baker). Witness: Claude Woolman, Councilman, San Diego, Cal." Before writing this letter Manser had executed a will, by which he had made specific bequests to certain of his relatives of an amount about sufficient to cover the residue of his estate, exclusive of the drafts claimed by Baker. There was no residuary clause in the will. The will was probated in Baker county, and plaintiff was appointed as executor. Later he was removed, and defendant Moran was appointed in his stead. Baker brought this suit to compel Moran to deliver to him certain certificates of deposit which had been substituted for the drafts originally placed in his possession by Manser and obtained a decree, from which defendants appeal.

Claude C. McCulloch, of Baker (McCulloch & McCulloch and Clifford & Correll, all of Baker, on the brief), for appellants. A. A. Smith, of Baker (John L. Rand, of Baker, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] At the outset it may be stated that it is clearly established that Manser intended that Baker should be his beneficiary to the extent of the drafts claimed by him. This fact is established by the testimony of the plaintiff and is corroborated by the testimony of McRae, who testifies that Baker showed him the drafts in Manser's presence and told him that Manser had given them to him, to which statement Manser made no objection. It is true that the witness would not say positively that Manser heard the conversation, but the evidence shows that it took place in the room in which Manser was lying and under circumstances that rendered it improbable that he failed to hear what was said. At all events, this testimony dispels any doubt which might be raised that Baker was acting secretly or in an underhand manner in respect to the alleged gift of the drafts. Had such been his intention, he would not have stated that Manser had given him the drafts when Manser was in a position where he was likely to hear the declaration and, if false, deny it. The evidence also discloses such an intimacy between the two men as renders such a disposition of the property reasonable. There can be no doubt that this friendship was remarkably close.

Witnesses at Baker City testify as to their close friendly relations there; one witness saying that they were as intimate with each other as men could be, not to be twin brothers. They had planned the trip to California for the mutual benefit of their health, and, when the Noble Grand of the Odd Fellows Lodge suggested a nurse, Manser stated that he had a very dear friend named Baker, whom he desired to take care of him. And later, when the same witness asked if the lodge at San Diego should pay for nursing him in his sickness and send the bill to Manser's lodge, he stated that he would pay Baker fully himself. Again, in conversing with this witness about his property, he said: "His relatives never treated him very good, and he did not think they were entitled to very much of his money, but he said that outsiders were kinder to him than even his own relatives, and he said that he ought to reward those that were good to him in his illness rather than his relatives." This expression could refer to no one but plaintiff, who had been more than a brother to Manser, waiting upon him in his sickness, answering every demand upon his strength, and ministering to his every want. As before remarked, the intent of Manser to give Baker these drafts is beyond peradventure; and, unless there is some technical objection to the manner of the gift that renders that intention fruitless, we ought to effectuate it.

[2] Let us now consider the language used by Manser in making the gift, as told by Baker: "He thought a few minutes longer and then he pulled out the two drafts and handed them to me and said: 'Whatever we do—whatever may happen, they are for you to use for yourself. They are for you. I want you to have them to use for your own use. They are yours. I want you to have these anyway.'" Standing alone here is the language of a complete gift, and, coupled with a delivery of possession, it passed the present title as a gift *inter vivos*. Taken in connection with other circumstances it was sufficient to constitute a complete gift *causa mortis*. So for the purposes of this case the distinction would seem immaterial. After the drafts were so delivered, Baker suggested an indorsement, but Manser told him it was unnecessary; that if any one should steal them without an indorsement they would be unable to cash them; and that he would write a letter and have it fixed so that Baker could get the money. The failure of Manser to indorse the drafts is the principal argument urged by defendants' counsel in favor of the theory that there was no intention to make an absolute gift of the drafts to plaintiff, but that the delivery was conditional in character and therefore testamentary in its nature, and, not being executed in a manner sufficient to constitute a valid will, it is void. As before stated, the language used was sufficient

to constitute a gift either *inter vivos* or *causa mortis*, but taken in connection with all the circumstances it is fair to assume that it was a gift *causa mortis*, and that if by any miracle Manser had recovered from his illness he would have expected and demanded the return of the drafts; the contingency upon which they were given having failed to come to pass. It is therefore proper to consider what constitutes a valid gift *causa mortis*.

"A gift *causa mortis* is defined to be a gift of personal property made by a person in expectation of death then imminent and upon an essential condition that the property shall belong fully to the donee, in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked, but not otherwise." 20 Cyc. 1228.

"A donation *mortis causa* is that which is made to meet the case of death, as when anything is given upon condition that, if any final accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor should receive back the thing given." Just. Ins. lib. 2, tit. 7, quoted in 20 Cyc. *supra*.

From these definitions it appears that, to constitute a valid gift *causa mortis*, three things must concur: (1) The gift must be made with a view to the donor's death; (2) it must be conditioned to take effect only on the owner's death or by reason of an existing illness; (3) there must be an actual delivery of the possession of the thing given to the donee. The only difference between a gift *causa mortis* and a gift *inter vivos* is that in the first the donor retains the power of revocation, and the death of the donee occurring before that of the donor works revocation, while in the latter the whole title passes irrevocably with delivery of possession.

Now let us apply these elementary propositions to the case at bar. The words of the gift were absolute: "Whatever happens I want you to have these anyway. These are yours to use for your own use." The delivery was complete, and Manser's declining to indorse them was not put upon the ground that he wished to retain any further dominion over them but because such indorsement was unnecessary and because he thought a letter to the bank would be safer and avoid the danger of an indorsed draft falling into wrong hands.

[3] There is nothing to indicate that he used the pretext of writing a letter to defeat or defer the gift but rather to effectuate and render more convenient and safe the execution of it. He was right in saying that the indorsement was unnecessary, for it has frequently been held that the gift or sale of a

negotiable instrument accompanied by an actual transfer of possession passes the title. Woerner, Am. Law of Adm. vol. 1, § 59; First National Bank v. McCullough, 50 Or. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758; Bates v. Kempton, 73 Mass. (7 Gray) 382; Turpin v. Thompson, 2 Metc. (Ky.) 420; Westerlo v. De Witt, 36 N. Y. 340, 98 Am. Dec. 517; Brown v. Brown, 18 Conn. 410, 46 Am. Dec. 328. The case of Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, is much relied upon by defendants and contains an exhaustive review of the authorities, but it is not in point as applied to the case at bar. In that case one Chaney, being ill and under apprehension of death, made the following indorsement upon a certificate of deposit and at the same time delivered it to Basket: "Pay to Martin Basket, of Henderson, Kentucky; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself. H. M. Chaney." It does not appear that there was any evidence of an intent on the part of Chaney to make a gift of the money to Basket beyond the fact that he made the indorsement quoted and delivered the certificate. The indorsement was restrictive and ambiguous. The nature of the possession was interpreted in the light of the indorsement, which prevented his having control of the fund during the donor's life. It amounted to a mere order or check on the bank to the extent of the fund, evidenced by the certificates, and indicated an intent on the part of the assignor to retain control of the money during his life. The case carries the doctrine of judicial hostility to gifts *causa mortis* to the very extreme, and no court should go beyond it.

It is impractical to discuss at length all the authorities upon this branch of the subject. In our judgment the true criteria by which to judge the validity of a gift *causa mortis* is to be found in the case of Leyson v. Davis, 17 Mont. 220, 42 Pac. 775, 31 L. R. A. 429, which is a most exhaustive and learned review of the whole subject, and in the case of Johnson v. Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

[4, 5] The fact that after making his will the deceased caused the letter quoted to be written, and that he kept it in his possession with the intent that it should be forwarded after his death, in our judgment does not in any way bear upon his intent in delivering the drafts to plaintiff. It is to be remembered that Manser had other money in the bank besides that represented by these drafts, and this seems to have been the principal matter referred to in the letter. It is probable that he intended to include in its terms the money due on the drafts, but, if so, that intention is very imperfectly expressed. There is nothing in the letter or in the fact of his retaining possession of it that indicates an inten-

tion of limiting the rights conveyed by the delivery of the drafts or the words accompanying their delivery. It is true that claims of gifts causa mortis should be closely scrutinized with a view to preventing fraud; but, when the intention of the donor is clear, mere formal and technical objections should not be allowed to defeat such intent.

The decree of the circuit court is affirmed.

**W. H. STANCHFIELD WAREHOUSE CO.
v. CENTRAL R. OF OREGON.**

(Supreme Court of Oregon. Nov. 11, 1913.)

1. PLEADING (§ 418*)—WAIVER OF OBJECTIONS BY PLEADING OVER.

A demurrer to an answer was abandoned, and any error in overruling it waived, by filing a reply to the new matter contained in the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

2. PLEADING (§ 418*)—WAIVER OF OBJECTIONS BY PLEADING OVER.

Plaintiff, by pleading over after a demurrer to the answer was overruled, did not waive the objection that the answer did not state facts sufficient to constitute a defense, and such objection could be raised at any time during the trial or on appeal.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

3. CARRIERS (§ 94*)—ACTIONS FOR MISDELIVERY—EVIDENCE.

In an action against a carrier for misdelivery of a shipment of cement consigned by the shipper to itself, where there was evidence that the shipper, after learning of the misdelivery, waited more than three months before making any complaint to the carrier, evidence that it charged the cement on its books to the party to whom the carrier delivered it, and endeavored to collect the value thereof from such party, was admissible as tending to prove a sale of the cement by the shipper, and as tending to show that it approved or ratified the delivery by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

4. CARRIERS (§ 94*)—ACTIONS FOR MISDELIVERY—EVIDENCE.

In an action against a carrier for misdelivery of a shipment of cement which the shipper consigned to itself, and in which the carrier claimed that the shipper had ratified such delivery, a check by which the party to whom the shipment was delivered paid the freight thereon was properly admitted to support the carrier's contention.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of such check, if error, could not have injured the shipper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4160; Dec. Dig. § 1050.*]

6. CARRIERS (§ 94*)—ACTIONS FOR MISDELIVERY—INSTRUCTIONS.

In a shipper's action for misdelivery of a shipment of cement consigned to itself, where the carrier pleaded, and there was evidence tend-

ing to show, that the shipper had sold the cement to M., D. & Co.; that the carrier delivered it to such company, who receipted therefor in the name of the shipper; that the shipper charged it on its books to M., D. & Co., sent a bill and statement of the sale to such company, and made no objection to the delivery for more than three months, and thereby ratified the delivery—instructions that it was the duty of a common carrier to deliver the goods only to the consignee named in the bill of lading, or some one authorized by him to receive them, and not to deliver them without the production of the bill of lading; that if the carrier delivered the cement to M., D. & Co. without the production of the bill of lading, and without the shipper's consent or direction, and if the shipper did not, subsequent to such delivery, ratify it, and if the shipper was the owner of the cement, to find for plaintiff; that if the shipper expressly or impliedly consented to the delivery, or after the delivery ratified and approved thereof, to find for the carrier; that if the cement was delivered to M., D. & Co., and the shipper immediately or shortly thereafter had notice and knowledge thereof, and thereupon charged it to M., D. & Co., and wrote them admitting and stating that they had shipped it to that company, and never made any claim against the carrier for wrongful delivery until three months later; and if the shipper intended to release the carrier from liability for the misdelivery, and take M., D. & Co. for payment, to find for the carrier—were correct as applied to the facts of the case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

7. CARRIERS (§ 94*)—ACTIONS FOR MISDELIVERY—BURDEN OF PROOF.

The consignee of goods is prima facie entitled to have them delivered to him, and there is a disputable presumption that they belong to him, and the burden is therefore on the carrier delivering them to a person other than the consignee or lawful holder of the bill of lading to show that such person is the true owner.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

8. CARRIERS (§ 82*)—TO WHOM DELIVERY MAY BE MADE.

A carrier of goods is always justified in delivering them to their true owner, though not the consignee or lawful holder of the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 299-315; Dec. Dig. § 82.*]

9. CARRIERS (§ 94*)—ACTIONS FOR MISDELIVERY—BURDEN OF PROOF.

A carrier which delivered a shipment consigned by the shipper to itself, to another party, who did not produce the bill of lading, had the burden of showing that, with knowledge of such delivery, the shipper ratified it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

10. CARRIERS (§ 94*)—MISDELIVERY OF GOODS—RATIFICATION.

Ratification may be shown by express words, or it may be implied from words, acts, or silence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.*]

11. CARRIERS (§ 93*)—LIABILITY FOR MISDELIVERY—RATIFICATION.

A shipper of goods consigned to itself, which consented to or authorized a delivery by the carrier to another, or ratified such delivery with knowledge that it had been made, could not sue the carrier for the misdelivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 299, 356-362; Dec. Dig. § 93.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

12. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERRORS.

In a shipper's action for misdelivery of a shipment of cement, the failure of an instruction that the shipper had a right to consign the shipment to itself, and that the carrier had no right to deliver it to another unless the shipper authorized such delivery, to state that, if the shipper ratified the delivery with knowledge that it had been made, such ratification would relate back to the delivery and validate it, could not have misled the jury where this fact was explicitly stated in other instructions, especially where the jury found for the carrier.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

13. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

An instruction, faulty by reason of the omission of some essential matters, may be cured by other instructions which set forth the omitted matters.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

En Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by the W. H. Stanchfield Warehouse Company against the Central Railroad of Oregon for the recovery of \$349.80 damages for the nondelivery to the plaintiff of 424 sacks of Portland cement. Verdict and judgment were rendered for the defendant. The plaintiff appeals. Affirmed.

R. J. Green and Eugene Ashwill, both of La Grande, for appellant. L. Z. Terrall, of Union, and Crawford & Eakin, of La Grande, for respondent.

RAMSEY, J. On the 21st day of August, 1912, the plaintiff shipped from La Grande to Union, Or., a distance of less than 20 miles, over the Oregon-Washington Railroad & Navigation Company, and the defendant, 424 sacks of Portland cement. The first-named company carried said cement from La Grande to Union station, and the defendant received it at that point and carried it to the town of Union, its final destination. This cement was consigned by the plaintiff to itself at Union, and the bill of lading was issued by the Oregon-Washington Railroad & Navigation Company to the plaintiff. No other bill of lading was issued.

The defendant on the 28th day of August, 1912, delivered said cement at Union to Mack, Duke & Co., and they receipted for it for the plaintiff. The defendant did not notify the plaintiff of the arrival of said cement at Union. On December 7, 1912, the plaintiff, at Union, presented to the defendant said bill of lading and demanded of the defendant the delivery of said cement to it, but the defendant failed to deliver to the plaintiff said cement or any part thereof, having previously delivered it to said Mack, Duke & Co. The plaintiff did not demand the delivery of said cement until December 7, 1912. The freight on said cement was

paid by said Mack, Duke & Co. when it was delivered to them.

The amended complaint demands judgment for \$349.80 damages for the failure of the defendant to deliver said cement to the plaintiff. The answer admits portions of the amended complaint and denies other parts thereof, and then sets up affirmative matter. The plaintiff demurred to the new matter of the answer, alleging that it does not state facts sufficient to constitute an estoppel or a defense. This demurrer was overruled, and the plaintiff replied, denying parts of the new matter of the answer.

The pleadings admit that the plaintiff shipped the 424 sacks of cement to Union, on August 21, 1912, consigned to the plaintiff. The answer alleges that the plaintiff on August 21, 1912, sold and shipped said cement to Mack, Duke & Co. at Union, and that the defendant received said shipment of cement and delivered it to said Mack, Duke & Co. at Union, on August 28, 1912, by direction of the plaintiff, and that the plaintiff immediately charged said cement to said Mack, Duke & Co., and that plaintiff sent a bill and statement to them, showing that said cement was charged to them. The answer claims, also, that the plaintiff, after learning that said cement had been by the defendant delivered to Mack, Duke & Co., fully ratified said delivery, and that said Mack, Duke & Co., with the knowledge and consent of the plaintiff, used up all of said cement in making sidewalks and other structures, etc.

The appellant assigns various alleged errors for which it asks a reversal of the judgment of the trial court.

[1] 1. The first point made is that the court below erred in overruling the plaintiff's demurrer to the amended answer. The plaintiff, after said demurrer was overruled, filed a reply to the new matter contained in the said answer. This precludes our examining said first assignment of error. Error in overruling a demurrer is waived by pleading over. *Huffman v. McDaniel*, 1 Or. 261; *Richards v. Fanning*, 5 Or. 358; *Wells v. Applegate*, 12 Or. 209, 6 Pac. 770; *Young v. Martin*, 8 Wall. 357, 19 L. Ed. 418; *Olds v. Cary*, 13 Or. 365, 10 Pac. 786. In *Young v. Martin*, supra, where a demurrer to an answer was overruled and the plaintiff filed a reply, the court says: "Nor is any order overruling the demurrer shown; a statement of the clerk in his entries that such was the fact is all that appears. But, independent of this consideration, the ruling of the court on this point would not be noticed, for it appears that the plaintiffs, instead of relying upon the sufficiency of the alleged demurrer, filed a replication to the answer. They thus abandoned their demurrer, and it ceased to be a part of the record." In *Wells v. Applegate*, supra, the court says: "Then the rule

is, when a demurrer is overruled and the party pleads over, the demurrer is abandoned, and it ceases to be a part of the record." When the plaintiff filed a reply to the answer, after the demurrer thereto was overruled, it abandoned or waived the demurrer and it ceased to be a part of the record.

[2] However, while pleading over, after a demurrer is overruled, waives the demurrer, the point that an answer does not state facts sufficient to constitute a defense can be raised at any time during the trial, or upon the appeal, because that point is never waived and can be raised without a demurrer.

[3-5] 2. The appellant contends that the trial court erred in admitting in evidence defendant's Exhibits, 1, 2, 3, 4, and 6. Exhibit 1 is a slip or filing made out by the plaintiff and kept by it, on which it charged said cement to Frank Mack. It is dated August 21, 1912, and it charges Frank Mack with "106 barrels cement, \$349.80." This slip was identified by W. H. Stanchfield, manager of the plaintiff, and he stated that the plaintiff charged the cement to Frank Mack after the company learned that the defendant had delivered it to Mack, Duke & Co.; Frank Mack being one of said firm. Mr. Stanchfield says that they did not learn that said cement had been delivered to Mack, Duke & Co. until some time after it had been shipped from La Grande.

Defendant's Exhibit 2 is a statement of account made by the plaintiff and sent by it to Mack, Duke & Co., and dated September 1, 1912, in which the plaintiff charged Mack, Duke & Co. with 106 barrels of cement, \$349.80. The cement referred to in said exhibit is admitted by the manager of the plaintiff to be the same cement referred to in the amended complaint, and which is the basis of this action, and, while said account is dated September 1, 1912, the charge of 106 barrels of cement, \$349.80, is dated August 21, 1913.

Defendant's Exhibit 3 was identified by the manager of the plaintiff as a letter written by him September 16, 1912, to said Mack, Duke & Co., concerning the car load of cement which is the basis of this action. In this letter the plaintiff expresses disappointment that Mack, Duke & Co. had not paid for the cement, urges payment, incloses a bill for the cement, and promises to credit them with any cement that they should return.

Defendant's Exhibit 4 is a letter written by the plaintiff to Frank Mack on September 25, 1912, concerning the claim for cement, and in this letter the plaintiff again expresses disappointment that the bill had not been paid, urges payment, and incloses another bill covering the 106 barrels of cement and some items not relevant to the issues in this case.

The defendant's Exhibit 6 is a check for

\$19.25 by which Mack, Duke & Co. paid the freight on said cement from La Grande to Union. The check is dated August 28, 1912, and appears to have been paid. The evidence tends to prove that the defendant delivered said cement to Mack, Duke & Co. on said day, and that they paid the freight at that time.

The defendant's Exhibits 1, 2, 3, and 4 show that, after the defendant delivered the 106 barrels of cement to Mack, Duke & Co., the plaintiff charged said cement to said firm on the plaintiff's books and made frequent efforts to collect from said firm the price of said cement. The manager of the plaintiff admits that he knew, as early as September 1, 1912, that said cement had been delivered to said firm, and that he never made any claim to the defendant that it had wrongfully delivered said cement to said firm until December 7, 1912. In other words, the plaintiff waited more than three months after it knew that the cement had been delivered to said firm before making any complaint to the defendant of said delivery, and in the meantime endeavored to collect the value of the cement from said firm.

Said Exhibits 1, 2, 3, and 4 were admissible as evidence as tending to prove a sale of the cement to said firm, and as tending to prove, also, that the plaintiff approved or ratified the delivery of said cement by the defendant to said Mack, Duke & Co. after it knew of such delivery.

Exhibit 6 tended to show that said firm paid the freight on said cement. As the cement was consigned to the plaintiff, the freight was properly chargeable to it. The plaintiff admits that it did not pay the freight. We think that said exhibit was admissible as a circumstance tending to support the defendant's theory. However, it was not a reversible error, if error at all, as its admission could not injure the plaintiff.

The third assignment of error is the admission of the evidence of A. I. Bidler to prove that Mack, Duke & Co. paid the freight on said cement. The admission of that evidence was not error.

[6] 4. The giving of the following charges to the jury is assigned as error:

(1) "I instruct you, gentlemen of the jury, that it is the duty of a common carrier of goods to deliver the goods only to the consignee named in the bill of lading, or some one authorized by the consignee to receive the same. It is the duty of a railroad company not to deliver freight without the production of the bill of lading. If you find from the evidence in this case that the defendant delivered the cement to Mack, Duke & Co. without the production of the bill of lading, and without plaintiff's consent or direction, and that defendant did not, subsequent to the delivery of said cement to Mack, Duke & Co., ratify said delivery to said Mack, Duke & Co., and if you further find

that the plaintiff was the owner of the cement at the time it was delivered to Mack, Duke & Co., then you will find for the plaintiff for the reasonable value thereof."

(2) "If you find from the evidence in this case that the plaintiff either expressly or impliedly consented to the delivery of said carload of cement to Mack, Duke & Co., or that after the same was so delivered to them they ratified and approved of said delivery, then your verdict must be for the defendant."

(3) "If you find from the evidence in this case that said car load of cement upon its arrival at Union, Or., was delivered to Mack, Duke & Co. by the defendant, and that the plaintiff immediately or shortly thereafter had notice and knowledge of such delivery, and thereupon charged up said car of cement to Mack, Duke & Co., and thereafter wrote to them admitting and stating that they had shipped said car load of cement to them and never made any claim against the railroad company for wrongful delivery of said cement until the 7th day of December, 1912, and that plaintiff intended to release the defendant company from liability for misdelivery, and take the said Mack, Duke & Co. for payment, then it will be your duty to return a verdict for the defendant."

(4) "I instruct you, gentlemen of the jury, that plaintiff had a right to have the cement consigned to itself at Union, Or., and that the defendant had no right to deliver the cement to Mack, Duke & Co. unless the plaintiff authorized the railroad company to deliver the cement to Mack, Duke & Co."

The answer alleges, *inter alia*, that on August 21, 1912, the plaintiff sold and shipped the cement in question to the firm of Mack, Duke & Co., and that the defendant on the 28th day of August, 1912, delivered said cement to said firm at Union, and that said firm receipted for said cement by the authority of the plaintiff in the name of W. H. Stanchfield (its manager), and that the plaintiff charged on its books said cement to said firm at the price of \$349.80, and sent a bill and statement of such sale to said firm, and that the defendant was immediately advised of said delivery to said firm and made no objections thereto until December 7, 1912, and that the plaintiff fully ratified said delivery to said firm, etc.

The evidence tends to show that said cement was delivered to said firm on August 28, 1912. Mr. Stanchfield, manager of the plaintiff, admits that he made out a statement of account against said firm for said cement charging them therewith as of the date of August 21, 1912, the date of said shipment, and this statement was given or sent to said firm, and it bears date of September 1, 1912, four days after said cement was delivered by the defendant to said firm. He admits, also, that he from time to time sent to said firm other statements of said account, urging them to pay for said cement, and that he

never complained to the defendant of said delivery of said cement to said firm until December 7th, more than three months after such delivery. On pages 16 and 17 of the evidence, Mr. Stanchfield testifies that he consigned said cement to himself with the intention of going to Union and delivering the cement to himself, and either to collect for it or make arrangements for the collection. He admits that he had some talk with Mack, Duke & Co. about this cement before it was shipped, and about the use of it, if they complied with certain conditions. This witness says that it must have been two weeks before he learned that said firm had obtained possession of the cement, and he says that when he learned that they had obtained the cement he commenced to "punch" them up for payment for the cement, and gave them "hall Columbia" over the telephone, and that he wanted to know how they obtained the cement without having the bill of lading. He demanded payment for the cement as soon as he learned that they had it. He did not at that time demand of the defendant to know why it had delivered the cement to said firm. There must have been some reason for the plaintiff's failure to call the defendant to account for delivering the cement to said firm, they not being the consignees and not having the bill of lading. There were facts in evidence from which the jury could properly find that the plaintiff had sold the cement to Mack, Duke & Co., and that the plaintiff ratified and approved the delivery of the cement to them. It was for the jury to determine from the evidence what the facts were; they, and not the court, weigh the evidence.

[7] The consignee of goods is *prima facie* entitled to have the goods delivered to him, and there is a disputable presumption that the consigned goods belong to the consignee. 4th Am. & Eng. Ency. L. (2d Ed.) 536.

[8] However, a carrier of goods is always justified in delivering them to their true owner. But, when he delivers them to a person other than the consignee or the lawful holder of the bill of lading, the onus is on him to show that the person to whom he delivers them is the true owner. 5 Am. & Eng. Ency. L. (2d Ed.) 196; 6 Cyc. 471.

[9] In this case the plaintiff consigned the goods to itself, and a bill of lading was issued to the plaintiff and retained by it. Hence the onus was on the defendant to show that the cement belonged to Mack, Duke & Co., or that it was delivered to said firm by authority of the plaintiff, or that, after the plaintiff had knowledge that the cement had been delivered by the defendant to said firm, it ratified such delivery.

[10] Ratification may be proved by express words, or it may be implied from words, acts, or silence. Discussing the subject of implied ratification, Clark & Skyles in their work on Agency, vol. 1, § 134, says: "As has been seen, except where an agent's authority

is required to be given in a special form, as by instrument under seal, or by simple writing, it may be given by parol. And as the ratification of an unauthorized act is, in effect, giving authority after the act is performed, and may be made in the same manner in which the original authority could have been given, so a ratification, except when required to be in a special form, may be by parol, and may be implied from the acts, words, or silence of the principal. If the principal by his conduct, by his words, or by his silence, has led others to believe that he has sanctioned an unauthorized act performed in his behalf, by his agent, or by an assumed agent, he will be held to have ratified such act, whether it was his intention to do so or not." See, also, Mechem on Agency, § 146.

The first, second, and third charges set out, *supra*, state the law correctly. The first charge instructs the jury that it is the duty of a carrier to deliver the goods only to the consignee named in the bill of lading, or to some one authorized by the consignee to receive them. It then states that it is the duty of a carrier not to deliver freight without the production of the bill of lading. This is true as a general rule. This charge, after stating the above general principles, instructs the jury that, if they find from the evidence that the defendant delivered the cement to Mack, Duke & Co. without the production of the bill of lading, and without plaintiff's consent or direction, and that the defendant did not, subsequent to the delivery of the cement to Mack, Duke & Co., ratify said delivery to said firm, and they further find that the plaintiff was the owner of the cement at the time it was so delivered to said firm, then they should find for the plaintiff for the reasonable value thereof. This states the law correctly as applied to the facts of this case. The plaintiff was entitled to a verdict if it had not sold the cement to Mack, Duke & Co., before the cement was delivered to said firm, unless it had consented to said delivery, or had directed it to be made to said firm, or had ratified such delivery after it had knowledge thereof.

[11] If the plaintiff consented to or authorized said delivery, or ratified it after having knowledge that it had been made, it could not maintain an action against the defendant for making such delivery. Its previous consent to such delivery or its subsequent ratification thereof would constitute a complete bar to such an action. What we have said applies also to the second and third charges set out *supra*.

[12] The fourth charge set out *supra* instructs the jury that the plaintiff had a right to have the cement consigned to itself at Union, and that the defendant had no right to deliver the cement to Mack, Duke & Co.,

unless such delivery was authorized by the plaintiff. This charge omitted to state that, if the plaintiff ratified such delivery after knowing that it had been made, such ratification would relate back to such delivery and validate it.

[13] But the instructions are to be construed as a whole, and not disconnectedly, and an instruction, faulty by reason of the omission of some essential matters, may be cured by other instructions given which set forth the omitted matters. See Brickwood's Sacket on Instructions, vol. 1, § 173.

This charge does not directly contradict the other instructions. It merely omits to mention ratification, but ratification is explicitly stated in three other charges that were given. The jury were not misled by this fourth charge, as is conclusively shown by their verdict for the defendant. The jury must have believed that the plaintiff either authorized the delivery to Mack, Duke & Co., or ratified it after it was made; otherwise, they would not have found for the defendant under the instructions.

The charge of the court covered all the questions at issue and it was fair to each party and we find no error in it.

5. We find, also, that the court did not err in refusing to give the charges requested by the plaintiff, or in overruling the plaintiff's motion for a new trial, or for judgment notwithstanding the verdict.

The judgment of the court below is affirmed.

WESTLAKE v. KEATING GOLD MINING CO. et al.

(Supreme Court of Montana. Oct. 18, 1913.)

1. NEGLIGENCE (§ 119*)—PLEADING AND PROOF.

Negligence in all particulars alleged in the complaint need not be proved, but proof that negligence in any of such particulars caused plaintiff's injuries is enough.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

2. MASTER AND SERVANT (§ 129*)—VIOLATION OF STATUTE—CAUSAL CONNECTION WITH INJURY.

Causal connection between the negligence per se in storing in a mine more than 3,000 pounds of explosives, in violation of Rev. Codes, § 8546, and injury of an employé therein, is shown by the presence and explosion of such quantity, and the injury from the explosion; whether the same thing would have occurred had there been less than 3,000 pounds not being open to inquiry.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

3. MASTER AND SERVANT (§ 129*)—VIOLATION OF STATUTE—CAUSAL CONNECTION WITH INJURY.

There is no causal connection between the negligence per se of violating Rev. Codes § 8546, prohibiting the storing of explosives in a mine where its accidental explosion would cut off the escape of miners working in a mine, and injury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to a miner therein from explosion of dynamite near the shaft, where he was so located that his means of egress were not affected by the explosion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

4. MASTER AND SERVANT (§ 258*)—SAFE PLACE TO WORK—VIOLATION OF DUTY—COMPLAINT.

The allegation of the complaint, in an action for injury to a miner from explosion of dynamite, that defendant negligently stored it at such a place in the mine that, should an explosion occur, the lives of persons working in the shaft, of whom plaintiff was one, would be imperiled sufficiently charges violation of duty as to safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

5. MASTER AND SERVANT (§ 286*)—SAFE PLACE TO WORK—VIOLATION OF DUTY—EVIDENCE.

Evidence, in an action for injury to a miner working in the shaft of the mine from explosion of dynamite stored about 50 feet below him, near the shaft and near the thawer for heating dynamite for use, held sufficient to go to the jury on the question of negligent failure in respect to the duty of furnishing a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

6. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENT METHOD—EVIDENCE.

Evidence, in a servant's action for injury from explosion of dynamite in the mine in which he was working, held sufficient to show negligence in selecting a method not reasonably safe of thawing the dynamite for use, whereby it was overheated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

7. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—COMPLAINT—CAUSE OF EXPLOSION.

The complaint, in a servant's action for injury from explosion of dynamite by charging the explosion occurred by reason of the dynamite being overheated, does not limit plaintiff to showing a spontaneous explosion from heat alone, but posits a *conditio sine qua non*.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

8. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—EVIDENCE—CAUSE OF EXPLOSION.

Evidence, in a servant's action from explosion of dynamite in a mine, held sufficient to show the overheating of dynamite in the thawer caused the explosion, either directly or as an indispensable condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

9. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—PLEADING AND PROOF—CAUSE OF EXPLOSION.

While, in a servant's action for injury from explosion of dynamite by reason of its being overheated through an improper method of thawing, it is enough to give evidence from which the explosion should be ascribed to but one source, the thawer, and to but one cause, the overheated condition of the dynamite thereon, without showing whether, thus overheated, the dynamite exploded spontaneously or because susceptible, through its overheating, to some impulse otherwise inadequate, plaintiff may show that the collapse of an electric light bulb in the thawer

would suffice to explode dynamite when heated to a degree possible in the thawer, and that a bulb might be expected to collapse under the conditions existing in the thawer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

10. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—CAUSE OF EXPLOSION—EVIDENCE.

Were it in issue whether a master was negligent in the mere fact that he used electricity for his dynamite thawer in a mine, the fact that electricity was not used in other mines as a thawing agency would be proper evidence, though not conclusive, of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

11. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—NEGLIGENCE—PLEADING AND PROOF.

The complaint of a servant for injury from explosion of dynamite in a mine not charging that it was negligence to thaw dynamite by electricity in any event, but merely that it was negligence to use electricity for thawing in the manner and to the extent employed by defendant, evidence that electricity was not employed as a thawing agent in other mines is inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

12. EVIDENCE (§ 512*)—EXPERT TESTIMONY—METHOD OF THAWING DYNAMITE.

Opinions of qualified persons as to whether, in view of the overheating of dynamite in a thawer on previous occasions, the method employed for thawing dynamite was a safe one are admissible; it being impossible to say that the jurors are necessarily as competent to pronounce on the subject as are the witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. § 512.*]

13. TRIAL (§ 96*)—STRIKING EVIDENCE—MOTION.

The motion being to strike out certain testimony, refusal thereof is not error, part of it being admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

14. WITNESSES (§ 393*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

One's testimony at an inquest being admissible, under Rev. Codes, § 8025, only to impeach him by showing he had there made statements at variance with his testimony at the trial, not all of it, but only such part of it as tends to contradict his testimony at the trial, is admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1252-1257; Dec. Dig. § 393.*]

15. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The case not having reached the jury, error in admission of impeaching evidence was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

16. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

Though an employé assumed the risk of dangers incident to the presence of dynamite as he saw them, he did not assume the risk from negligent method of thawing dynamite of which he did not know.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

Action by Alexander Westlake against the Keating Gold Mining Company and another. Judgment for defendants. Plaintiff appeals. Reversed and remanded for retrial.

Walsh & Nolan, of Helena, for appellant. Jesse B. Roote, of Butte, for respondents.

SANNER, J. Action by appellant to recover damages for personal injuries caused by an explosion of dynamite in a mine of the respondent company on January 18, 1911. Nonsuited upon the trial, he appeals from the judgment. The allegations of the complaint touching the cause and manner of the accident are as follows: "That on the 18th day of January, 1911, and for some time prior thereto, the defendants negligently stored and kept and thawed in said mine, where said mining operations were carried on, large quantities of dynamite and other highly explosive substances, and, as plaintiff is informed and believes, largely in excess of 3,000 pounds, and at a point in said mine about 75 feet from said incline shaft, and at said shaft where, in its downward course, it reached the 200-foot level, and where, should an explosion of same occur, escape by those working in said mine, in the employ of the defendant company using said incline shaft as a means of egress, would be cut off, and where, should an explosion of said dynamite occur, the lives of the said employees of said defendant company, working in said mine and near said incline shaft, would be imperiled; * * * that the said defendants so storing and keeping said dynamite and other highly explosive substances, as aforesaid, and at the place designated negligently placed a portion of same in a tight compartment for storage preparatory to use, and, for the purpose of thawing the same and the said dynamite and other explosive substances so placed in said compartment for the purpose of being thawed, the defendants negligently used and caused to be used electricity to such an extent that said dynamite and other highly explosive substances so being thawed, as aforesaid, were heated to excess; and plaintiff further avers that the use of electricity for the purpose named, as a thawing agency and in the manner stated and at the place named and to the extent used, was highly dangerous—all of which facts the defendants knew, or, in the exercise of reasonable diligence, could have known; and plaintiff avers that the use of electricity in the manner in which the same was used there by defendants for the thawing of said dynamite was gross and wanton negligence on their part; * * * that on the 18th day of January, 1911, said dynamite and other explosives so being thawed, as aforesaid, and through and by reason of electricity being used for thawing the same, and by reason of said dynamite so being thawed being heated to excess through

the use of said electricity in the manner in which it was, exploded, and through the explosion of same all of the dynamite so stored in said mine, as aforesaid, exploded, and through the explosion of said dynamite and other explosives, as aforesaid, and by reason of the force of such explosion, said plaintiff so working in said incline shaft received injuries," etc.

[1] No special difficulty is presented in the dissection of these allegations; and, for the purpose of determining what proof was admissible under them, and whether a sufficient case was made to go to the jury, we say they fairly and sufficiently allege that the appellant's injuries, occasioned by the explosion, were due to the negligence of respondents in the following particulars: In having more than 3,000 pounds of explosives in the mine; in having explosives stored at a place in the mine where, should they explode, escape by those in the mine would be cut off; in having explosives stored at and near the shaft where, should they explode, the lives of the persons working in the shaft would be imperiled; and in the method used for "thawing," to wit, the use of electricity in such a manner and to such a degree that the portion of the explosives being thawed became heated to excess. So construing the complaint, we proceed to ascertain the value of the case made, having in mind the rule that the appellant was not required to prove negligence in all the particulars alleged (*Beeler v. Butte & London Dev. Co.*, 41 Mont. 465, 477, 110 Pac. 528), but that it was sufficient to take the case to the jury if the evidence presented in this behalf tended to establish that negligence in any of these particulars caused his injuries (*Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988).

[2] The allegation of negligence in storing more than 3,000 pounds of explosives in the mine charges the violation of a specific duty imposed by section 8546, Revised Codes, and such a violation is negligence per se. *Conway v. Monidah Trust*, 132 Pac. 26; *Melville v. Butte-Balaklava C. Co.*, 47 Mont. 1, 130 P. 441; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549. The respondents, insisting that the presence of negligence per se is of no importance unless it was a proximate cause of the injury, call our special attention to the case of *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. Ed. 1179, and assert that "there is no showing in pleading or in evidence that the excessive quantity of powder had anything to do with the explosion." It is a rule so fundamental as to be axiomatic, to which the *McWhirter* Case adds nothing, that before negligence, however established, can become a basis of recovery, causal connection must be shown between it and the injury complained of.

This court has so held on several occasions, including that of *Monson v. La France Copper Co.*, supra, which we are assured is decisive against the appellant. The *Monson* Case aptly expresses the rule, and as aptly indicates the limit of its application. That action was for the death of a miner who, it was alleged, had fallen from a cage in the defendant's mine because of the operation of the cage without the gates required by statute—a clear charge of negligence per se. In the course of the decision this court, speaking through the Chief Justice said: "We find the neglect of duty on the part of the defendant and the death of the deceased established beyond question, * * * but no fact or circumstance appears from which any reasonable conclusion may be drawn that this neglect of duty bears a direct, proximate, causal relation to the death of deceased. There is no direct evidence that the deceased got into the cage at the 1,400-foot level, but, assuming that this fact is established, * * * there is no evidence as to how the deceased got out of the cage; * * * there is nothing to show whether he died from natural causes, or from the violence of a fall, or from being squeezed by the cage as it passed the timbers." How wide the divergence is between the situation thus disclosed and that at bar is manifest. Here it is established that the dynamite which was being kept in the Keating mine—whether more or less than the law allows—exploded and produced appellant's injuries. When a quantity of dynamite by exploding produces injury, there is a causal connection between the dynamite and the injury; and if the existence of that quantity in that place is negligence, a causal connection is made by the explosion between that negligence and the injury. It does not answer to say that a quantity of dynamite less than 3,000 pounds may or would have exploded under the same circumstances, or that the explosion of a quantity less than 3,000 pounds, under the same circumstances, may or would have produced the same injury. To suppose that a specific causal connection must be shown between the injury and the existence or explosion of that portion of the dynamite which exceeded 3,000 pounds would entirely defeat the statute, considered as a foundation of civil liability. The appellant's injuries were caused by the explosion of a quantity of dynamite kept in respondents' mine, which it is claimed was greater than that allowed by law; this, if true, was sufficient; for "where the cause of an injury is specifically ascertained, the law will not stop to speculate upon what might have occurred had such cause been absent." *Thompson on Negligence*, §§ 45, 49. Whether at the time the explosion occurred there were to exceed 3,000 pounds in the mine is a matter about which men may differ upon reading the record; but, having in view the rule that upon a motion

for nonsuit the evidence must be taken in its most favorable light, and to establish whatever it fairly tends to prove, it is deducible from the testimony that such was the fact. Hence, upon this aspect of the case, a sufficient showing was made to take it to the jury.

[3] The allegation of negligence in storing the dynamite at a place in the mine where, should it accidentally explode, escape by those working in the mine would be cut off, also charges the violation of a specific duty imposed by section 8548, Revised Codes. Such a violation is negligence per se; but it is obviously of such a character that no causal relation can exist between it and any injuries save those suffered by persons whose escape had in fact been cut off by the explosion. The appellant was not one of these; he was above the place of storage, above the point of explosion, and his means of egress were in no wise affected by it. The lack of causal connection between his injuries and the place of storage—considered as a potential danger, by stopping egress in case of explosion—is perfectly clear.

[4, 5] But the place of storage presents another aspect under the allegation of negligence in storing the dynamite at a place where, should an explosion occur, the lives of persons working in the shaft, among whom was the appellant, would be imperiled. As to this he invokes the doctrine that the master is obliged to use reasonable care to furnish his employé with a reasonably safe place in which to work, the respondents insisting that the complaint does not charge a violation of that duty, and that "the doctrine of a safe place is not in the case." While it is true that the words customarily used in formulating this charge do not appear in the complaint, the language actually employed is their equivalent. In *O'Brien v. Corra Rock-Island Min. Co.*, 40 Mont. 212, 105 Pac. 724, the only plea of negligence was that, at a point about 40 feet from where the plaintiff was working, the defendants "had negligently and wrongfully stored and were keeping a large and dangerous quantity of dynamite," which exploded and killed Daniel O'Brien; but we held that under it the measure of the master's liability was to use reasonable care to provide the servant with a reasonably safe place in which to work. Turning, then, to the evidence, we observe: That the appellant was engaged in the shaft at a point about 50 feet above the 200-foot level; that a large quantity of dynamite was kept at the 200-foot level, near the shaft in which appellant was working; that it was stored at a point about 75 feet from the "thawer," in which dynamite was being heated so as to be rendered more readily explosive; that the dynamite both in the thawer and at the shaft, exploded; that by the explosion appellant was injured, his life imperiled, and the life of one of his compan-

ions destroyed. It is said that in point of fact there is no analogy here with the O'Brien Case, because caps were stored with the dynamite in that case. The difference is one of detail, not of principle. So far as we can tell, there was no exigency or custom that required the storing of the dynamite so close to the shaft that the effect of its explosion could be felt therein, or so near to the thawer as to increase the danger of explosion; and if, as may be inferred from the facts shown, the danger of explosion was increased by storing the large quantity of dynamite at a point so near the thawer, then, for the reasons stated in the O'Brien Case, enough was shown to take this case to the jury on the question whether the respondents had negligently failed to furnish appellant with a reasonably safe place in which to work.

[8-8] The appellant also insists that, independently of the foregoing contentions, a sufficient showing was made as to the negligent cause of the explosion, under the allegations of the complaint touching the methods of thawing. According to the testimony, the purpose of using a thawer is to heat cold dynamite which is not sufficiently sensitive for mining purposes, so as to make it more readily explosive. The more it is heated the more it will respond to the instrumentalities capable of inducing explosion. The thawer was a cabinet within a cabinet, situated along a drift about 25 or 30 yards from the shaft; the outer cabinet consisted of an excavation in the drift inclosed by a front made of scrap lumber set into the walls and floor of the drift, "put up to make a fairly close covering," and covered with gunny sacks and rags; the entrance to this outer cabinet was through a door large enough for a person to pass through conveniently. The inner cabinet was a box 2x3 feet in size; the whole front side of it being removable. It was constructed of new lumber. Within it were four shelves made of boards, some of which were perforated, and two 32 candle power, and three 16 candle power, incandescent electric lights. In thawing the dynamite was laid upon the shelves in the inner cabinet, where the heat generated by the electric lamps brought it to or beyond the desired stage. Thawed dynamite was also kept in boxes in the outer cabinet, preparatory to distribution among the miners as needed. How much heat was generated by the means employed is not shown, and there was no thermometer or other device in the cabinet by which it could be ascertained; nor is there any testimony showing the exact degree to which dynamite should be thawed in order to be available for mining purposes and at the same time be reasonably safe, considering the nature of the substance. The record, however, is replete with testimony that it was often too hot. Some of the witnesses testified that it was sometimes so hot as to be sweaty and mushy; when in that condition it was especially sensitive and dangerous to handle.

On two occasions it was so hot when delivered to the miners that they felt impelled to cool it before using, for fear of a premature explosion. Surely it was a question for the jury whether a method capable of producing such results was a reasonably safe one, or whether, as employed, it was unsafe in the respect alleged; and, as the master is obliged to use ordinary care to select such methods or appliances as are reasonably safe, having in mind the nature of the business in hand, it is clear that ample proof was made of negligence in this regard.

The respondents argue, however, that since the appellant charges the explosion to have occurred through the overheating of the dynamite, his case has failed, because there is no evidence that heat will explode dynamite, or that the thawer was generating a degree of heat sufficient to effect that result. The witness Boulware distinctly testified that dynamite could be exploded by heat alone; "getting hot in the sun might explode it," he said. But we do not understand the appellant to have been so limited by his complaint that he was obliged to show a spontaneous explosion from heat alone; his allegation touching the overheating of the dynamite posits a *conditio sine qua non* which, if established by the proof and shown to be negligent, is sufficient. *Lundeen v. Livingston E. L. Co.*, 17 Mont. 32, 41 Pac. 995; *Meisner v. City of Dillon*, 29 Mont. 118, 74 Pac. 130; *O'Brien v. Corra Rock-Island Min. Co.*, supra; *Stewart v. Stone & Webster E. Corp.*, 44 Mont. 160, 119 Pac. 568. The question, therefore, is whether there was sufficient evidence that overheating of dynamite caused the explosion, either directly or as an indispensable condition. When the explosion happened, there was in operation a thawer capable of heating dynamite to excess, and dynamite was being heated in it. On the very day of the explosion, dynamite had come from this thawer overheated to the stage called "mushy." Unthawed dynamite, such as the deposit near the shaft, does not readily explode, even with cap and fuse. Dynamite thawed to the degree proper for mining purposes does not commonly explode unless cap and fuse are applied, but dynamite heated to excess may explode from heat alone. No mining operations were carried on in the shaft where the thawer was. The appellant had nothing to do with its handling. No one went in or out at that level but the powderman, and he was in the level below when the explosion occurred. After the explosion there was nothing left of the thawer but scattered pieces of wood, and the rock was displaced where it had been. In the absence of a countervailing explanation, and upon the circumstances stated, it is proper to ascribe the explosion to but one source, the thawer, and to but one cause, the overheated condition of the dynamite therein.

[9] Whether, thus overheated, the dynamite

mite exploded spontaneously or because susceptible to some impulse otherwise inadequate, it was not necessary for the appellant to show; but it was his privilege to account for the explosion, if he could, in such a manner as to cut off all escape from liability. In his effort to accomplish this, he was met by many adverse rulings, of which he complains. There was testimony that the bulbs in the thawer were so situated, with reference to the holes in the shelves, that moisture, if generated in the cabinet, could get to them; that the dynamite was sometimes heated to such a degree as to have moisture upon the sticks; that an electric bulb, when inclosed, may get so hot as to burn wood or set clothing afire; that it can be heated by electricity so that the heat itself will break the glass, or that the glass would be broken by a drop of water striking it; that when a bulb breaks there is a report "sometimes like a 30.30 or a 32 revolver cartridge." One witness also testified that, heated to the degree it sometimes was by the thawer, dynamite will explode from a jar or concussion such as would be caused by the bursting of an electric light bulb of the same character as those used in the thawer. But other testimony to the same effect was excluded. It is true that the witnesses from whom this evidence was sought claimed no precise knowledge of the constituents of dynamite, or of the exact degree to which it must be heated to be thus responsive; but they were all practical miners who had observed and handled dynamite and knew its properties from the practical point of view. Speaking generally, and without reference to those instances in which the rulings may have been justified on strictly technical grounds, we think the testimony was competent and admissible. Whether the collapse of a bulb would suffice to explode dynamite when heated to a degree possible in the thawer, and whether a bulb might reasonably be expected to collapse under the conditions existing in the thawer, were not irrelevant inquiries; for if the collapse of a bulb was a matter to be reasonably anticipated, and if such a collapse would suffice to explode dynamite heated to a degree possible in the thawer, then it was negligence to employ a system in which these conditions might concur; and if they did concur, escape from liability would be impossible. The bursting-bulb theory may or may not be worthy of consideration under the facts as finally established; but to the extent that it might be warrantably credited by the jury, it tended to re-enforce the contention of appellant under the allegations in question.

[10, 11] Appellant also sought to show by several witnesses who were miners, and who had worked in several mines besides the Keating, that electricity was not elsewhere employed as a thawing agency. This evidence was rejected upon objections by re-

spondents, their theory as advanced in the trial court being that the master might select any method he saw fit for the conduct of his business. Needless to say, this was incorrect; the master may select any method which is reasonably safe; and, "while not conclusive on the question of negligence, evidence is generally admissible in an action for personal injuries, to show whether or not a master's machinery, appliances, ways, and methods are such as are in ordinary and common use by others in the same business." 26 Cyc. 1108; *Forquer v. Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Kinsel v. North Butte Min. Co.*, 44 Mont. 445, 120 Pac. 797. If, therefore, the complaint had tendered the issue that the use of electricity for thawing, without regard to the manner of use, was negligence, the evidence would have been admissible. But as we read the complaint, it does not charge that it was negligence to thaw by electricity in any event, but to use electricity for thawing in the manner and to the extent employed. Under this construction, the exclusion of the evidence was proper.

[12] In another series of questions the appellant sought to elicit the opinions of certain witnesses as to whether, having in view the overheating of the powder on previous occasions, the method employed for thawing was a safe one. In some instances the witness was not sufficiently qualified, but otherwise there is no force in any of the objections addressed to these questions in the court below. The method in question was the use of electricity in the manner and to the extent employed, and the inquiry was relevant and material; for, although it may be said that, given the facts, the jury could tell whether the method was a safe one, yet it cannot be said that the jury were necessarily as competent to pronounce upon this subject as were some of the witnesses whose opinions were rejected. *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Copenhaver v. Northern Pac. Ry. Co.*, 42 Mont. 453, 464, 113 Pac. 467.

Other rulings were made adverse to appellant in the course of the examination of witnesses which are assigned as error. As to them we find that whatever error was committed was cured by the subsequent admission of the testimony, and so they are of no avail on this appeal.

[13-15] Some space is given in the briefs to the discussion of the ruling admitting, over objection, the testimony of Boulware before the coroner's jury, and the refusal of the court to strike it out on motion. It could not be stricken in its entirety, for the very reason that it should not have been admitted in its entirety, viz., parts of it—and parts only—were admissible. The only purpose that any of it could serve was to show that at the inquest Boulware had made statements, touching the accident, at vari-

ance with those given on the trial, and such of these as it contained were admissible if denied or if recollection of them were disclaimed (Rev. Codes, § 8025); but the testimony of Boulware at the inquest contained much matter of opinion, and some of pure hearsay, which in no way tended to contradict the particular facts or opinions given by him upon the trial. The admission in toto of his testimony before the coroner's jury was wrong, but as the case did not reach the jury, we are unable to see how the appellant was prejudiced by it.

[16] The final question is whether the case as presented by the appellant discloses assumption of risk. We think not. The only risk which it is claimed he assumed is that of the explosion of the dynamite at the shaft. Whatever the condition of that dynamite may have been, and however likely the explosion from causes within his knowledge, the explosion was not so caused according to the record, and he had no knowledge of the conditions from which it *prima facie* did proceed. To make a case of assumption of risk it is not enough that the injured party knew of the thing from which harm might come; he must know and appreciate the danger from which he suffered. *O'Brien v. Corra Rock-Island Min. Co.*, *supra*; *Osterholm v. Boston & Mont., etc., Co.*, 40 Mont. 508, 529, 107 Pac. 499. Paraphrasing the language of this court in *Moyse v. Northern Pac. Ry. Co.*, 41 Mont. 272, 108 Pac. 1062, we may say: He assumed the risk of all dangers incident to the dynamite at the shaft as he saw them; but he had no cause to think, when he went to work at the point above, that the dynamite would be exploded by the negligent use of a thawer 75 feet away, out of his sight, and with which he had nothing to do.

The judgment is reversed, and the cause is remanded for retrial.

BRANTLY, C. J., and HOLLOWAY, J., concur.

WESTERN MINING SUPPLY CO. v. MELZNER et al.

(Supreme Court of Montana. Oct. 29, 1913.)

1. SALES (§ 181*)—DELIVERY—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that there was not a delivery of property claimed to have been sold to plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

2. NEW TRIAL (§ 70*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

A new trial should only be granted for insufficiency of the evidence to support the verdict where the alleged insufficiency is convincingly shown; questions of fact being primarily for the jury's determination.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

3. TRIAL (§ 48*)—RECEPTION OF EVIDENCE—OBJECTIONS—EVIDENCE INCOMPETENT IN PART.

If only part of the evidence embraced in an offer is admissible, all the evidence may be rejected.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.*]

4. APPEAL AND ERROR (§ 1078*)—BRIEFS—ARGUMENT OF EXCEPTIONS—SUFFICIENCY OF ARGUMENT.

A bare statement in appellant's brief as to alleged error in giving a particular instruction "and furthermore, as to this instruction, we think that this error is a breach of an elementary proposition of law," did not amount to argument within the rule that an assignment of error not argued will be deemed waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

5. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction not based upon the evidence should not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

6. FRAUDULENT CONVEYANCES (§ 135*)—TRANSFER OF PERSONALTY—DELIVERY.

As against creditors and bona fide purchasers, the necessity of a delivery of personalty sold could not be obviated by some open, visible, and notorious act of ownership by the purchaser, under Rev. Codes, § 6123, providing that every transfer of personalty is conclusively presumed to be fraudulent and void as to creditors and bona fide purchasers if not accompanied by an immediate delivery and followed by actual change of possession.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 427; Dec. Dig. § 135.*]

7. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS—MODIFICATION.

The trial court cannot be placed in error for refusing to modify an instruction, unless the instruction as modified correctly states the law and is applicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

Appeal from District Court, Silver Bow County; Geo. B. Winston, Judge.

Action by the Western Mining Supply Company against A. B. Melzner, as administrator of John J. Quinn, deceased, and others. From an order denying plaintiff's motion for a new trial after judgment for defendants, plaintiff appeals. Affirmed.

Charles R. Leonard and Maury, Templeman & Davies, all of Butte, for appellant. James E. Healy, of Butte, and C. M. Parr, of Hamilton, for respondents.

HOLLOWAY, J. Action in conversion. The defendants prevailed in the lower court, and plaintiff has appealed from an order denying it a new trial.

Plaintiff's claim of title to the property out of which this controversy arose rests upon alleged purchases of it from the Shackleton & Whiteway Construction Company on May 29 and June 26, 1905. Defendant Parr claims the same property by virtue of his purchase of it at sheriff's sale follow-

ing an attachment levied on July 8, 1905. A more detailed statement of the facts introduces the opinion on the former appeal. *Western Mining Supply Co. v. Quinn*, 40 Mont. 156, 105 Pac. 732, 28 L. R. A. (N. S.) 214, 135 Am. St. Rep. 612, 20 Ann. Cas. 173. Upon the last trial the result of the controversy was made to depend upon the answers to the inquiries: Was there a sale of the property by the Shackleton & Whiteway Construction Company to plaintiff? And, if so, was there such an immediate delivery and actual and continued change of possession as to satisfy the statute of frauds? Rev. Codes, § 6128. In our consideration of the matters we have not made any distinction between the plaintiff and its immediate predecessors.

While there are items of evidence and circumstances which might have raised a doubt in the minds of the jurors as to whether there was any sale at all by the construction company to plaintiff, we may assume that, as between the parties, there was a valid sale, and the determining question then is: Was there a delivery of possession of the property? The only persons who assumed to know what was done were Sultor, who acted for and on behalf of the construction company, and Farnham, who acted for the plaintiff. These two witnesses told the same story; and, if there was any delivery at all, it occurred on June 26, 1905, and resulted from the delivery by Sultor to Farnham of the key to the warehouse which contained the balance of the property. Upon the former appeal we held that if there was such a symbolical delivery, and the construction company thereafter ceased to exercise any ownership or control, it was sufficient as against the claim of the attaching creditor. *Western Mining & Supply Co. v. Quinn et al.*, above. Upon this trial Sultor and Farnham were required to go into details as to their transaction, and in doing so they testified that the warehouse was entered only through the office door and a basement door, the other doors fastening upon the inside, and that the basement was occupied by one Lawlor as a livery barn. Whether Farnham received a key to the basement is not made plain, but in any event, about the time of this supposed delivery, Lawlor caused a new lock to be placed upon the basement door and retained the keys to that lock. Practically all of the machinery, lumber, etc., was housed upon the floor above the livery barn and access to it had only through the office door. According to Sultor and Farnham, that office door was fastened by means of a Yale lock, and it was through the delivery of the key to that Yale lock by the construction company, acting through Sultor, to the plaintiff, acting through Farnham, that delivery was made, if made at all, on June 26, 1905. If this testimony had been accepted by the jury, a different result would have been reached; but it was not believed

by the jury, and it was not uncontradicted. Lawlor and Parr each testified that there was not any Yale lock on the office door at the time the attachment was levied, and they and other witnesses testified that there was not any evidence that a Yale lock had ever been on the door.

[1] Upon this contradictory evidence it was for the jury to determine whether there was in fact any delivery, and the verdict is conclusive against the plaintiff and fully justifies the trial court's ruling.

[2] A new trial should not be granted except for reasons cogent and convincing, for all questions of fact presented by the evidence are primarily to be solved by the jury. *Sutton v. Lowry*, 39 Mont. 462, 104 Pac. 545; *Welch v. Nichols*, 41 Mont. 485, 110 Pac. 89.

Complaint is made of a ruling by the trial court excluding plaintiff's offer in evidence of the minute entry of a meeting of the stockholders of the construction company authorizing Sultor to sell the property; but the record discloses also that plaintiff offered as an entirety six typewritten pages of minute entries which included, with the entry authorizing Sultor to make the sale, entries of other meetings with reference to subjects entirely foreign to the matter before the court.

[3] It is the rule in this state, and generally for that matter, that if a party makes an offer of evidence, some of which is admissible and some of which is not, the offer may be rejected as a whole. *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035. Counsel cannot impose upon the trial court the duty to segregate the admissible from that which should not be admitted.

[4] Exception is taken to instruction No. 5 given by the court. All that is said of this by counsel for appellant in that portion of their brief devoted to argument is: "And furthermore, as to this instruction, we think that this error is the breach of an elementary proposition of law." It is the rule in this jurisdiction that an assignment not argued will be deemed waived. *Mette & Kanne Distilling Co. v. Lowrey*, 39 Mont. 124, 101 Pac. 986; *Foster v. Winstanley*, 39 Mont. 314, 102 Pac. 574. The statement quoted above cannot be dignified with the title "argument," and hereafter assignments thus treated will be deemed within the rule above, for, if counsel for appellant cannot urge some specific reason for their objections, they ought not to expect the members of this court to do that work for them.

[5] It may be readily conceded that the instruction, as given, is erroneous, in the sense at least that it ought not to have been given. It is not founded upon the evidence. Either there was a delivery of the property by the delivery of the key to Farnham or there was not any delivery at all. There is not room for another inference from the evidence. The court submitted to the jury the question whether plaintiff "by some open, visible, and notorious acts of ownership" had

taken actual possession of the property. The jurors may have understood the instruction, but after the most careful consideration we are in doubt as to whether we do. If it was the purpose of the instruction to inform the jury that plaintiff must prove, not only an immediate delivery, but an actual and continued change of possession, the language employed would seem to come as nearly concealing that purpose as any that could be selected.

[6] If it was the intention to inform the jury that plaintiff might, by some open, visible, and notorious acts of ownership, obviate the necessity of a delivery, it is clearly erroneous as contradicting the statute. Section 6128, above.

[7] However, the suggested modification made by plaintiff at the settlement would not have aided the instruction or made it less objectionable; and it is elementary that a trial court cannot be put in error for refusing a suggested change of an instruction, unless the instruction, as changed, correctly states the law and is applicable to the facts of the given case.

The order of the district court is affirmed. Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

LIZOTT v. BIG BLACKFOOT MILLING CO.
(Supreme Court of Montana. Oct. 29, 1913.)

1. APPEAL AND ERROR (§ 1005*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

The jury's finding on substantially conflicting evidence will not be reviewed if sustained by the trial court upon a motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

2. EVIDENCE (§ 598*)—FINDINGS.

The fact that several witnesses contradicted plaintiff's unsupported statement, did not make his statement a mere scintilla of evidence so as to be insufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.*]

3. NEW TRIAL (§ 70*)—INSUFFICIENCY OF EVIDENCE.

The district court has a certain discretion in the granting or refusing a new trial on the ground that the verdict is not supported by the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Thady Lizott against the Big Blackfoot Milling Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Henry C. Stiff, of Missoula, for appellant. Harry H. Parsons and Albert Besancon, both of Missoula, for respondent.

BRANTLY, C. J. The plaintiff recovered a judgment for damages for a personal injury suffered during the course of his employment by the defendant. The defendant has appealed from the judgment and an order denying its motion for a new trial.

The plaintiff was employed by defendant at its logging camp near St. Regis, in Missoula county. The work assigned to him, and in which he was engaged at the time he was injured, was the moving of logs along a skidway to a point at which they could be piled or "decked," so that they could be conveniently loaded upon sleighs or wagons for transportation to defendant's mill. His office was, by the aid of an assistant, to control the movement of the logs by the use of a canthook down the decline of the skidway; he being on one side, and the assistant on the other. It is alleged that the defendant failed to exercise ordinary diligence to furnish the plaintiff a reasonably safe place in which to work, in that the pathway along which the plaintiff was required to walk while moving the logs was unsafe and dangerous by reason of the existence therein of a hole caused by the removal of a stump by the defendant in clearing the ground for the skidway; that the hole was covered by protruding roots, leaves, and other loose materials, so that it could not be seen; that while moving a log the plaintiff stepped into the hole, and fell; and that, being thus compelled to release the handle of the canthook which he had fastened upon the log, he was caught by it as it was forced over by the weight of the log, and sustained a fracture of his left leg below the knee, resulting in his permanent disability. The defendant denied negligence in the particular charged, and alleged the usual defenses of contributory negligence and assumption of risk. The plaintiff having adduced sufficient evidence to make a prima facie case, the defendant undertook to rebut and overcome it by showing (1) that there was no hole or other similar defect in the pathway, and (2) that, upon the assumption that there was, plaintiff contributed to his own injury by the course he pursued in handling the log by which he was caught. The plaintiff was the only witness who testified to the existence and condition of the hole. Several witnesses who were employed by the defendant at the time, including the boss who selected the ground and superintended the construction of the skidway, testified directly to the contrary. These and other witnesses—about an equal number on either side—testified concerning the propriety of the course pursued by the plaintiff in doing the work; the opinions expressed by them being directly in conflict.

[1-3] Counsel argue that the testimony of plaintiff as to the existence of the hole was completely rebutted by the testimony of defendant's witnesses, with the result that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there was no substantial evidence to sustain the finding of the jury on this issue, and hence the district court should have ordered a new trial. We have held in many cases that the effect and value of evidence is addressed exclusively to the jury, and that their finding thereon, when it presents a substantial conflict, and has been examined and adopted by the trial court upon a motion for a new trial, is not subject to review by this court. Counsel's argument implies the concession that the plaintiff's unsupported statement required a submission of the case to the jury; in other words, that there was substantial evidence to support his case. The fact that several witnesses contradicted him, did not render his statement so improbable as to reduce it to a mere semblance or scintilla of evidence insufficient to support a verdict. The court was not authorized to ignore it, for the testimony of a single witness who is entitled to full credit is sufficient for the proof of any fact, except perjury and treason. Rev. Codes, § 7861. The jury are not bound in any case to decide in conformity with the declaration of any number of witnesses as against a less number, or against a presumption or other evidence satisfying their minds. Section 8028. These rules apply as well to the evidence touching the existence of the hole as to the evidence touching the mode adopted by the plaintiff in doing the work. It is true that the evidence as a whole as it appears in type seems to preponderate against the verdict; but, since it presents a substantial conflict, we may not say that the district court abused the discretion lodged in it in such cases to grant or refuse a new trial. *Schatzlein Paint Co. v. Passmore*, 26 Mont. 500, 68 Pac. 1113; *Campbell v. City of Great Falls*, 27 Mont. 37, 69 Pac. 114; *Mullen v. City of Butte*, 37 Mont. 183, 95 Pac. 597; *Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038.

The judgment and order are affirmed.

HOLLOWAY and SANNER, JJ., concur.

Ex parte DE VORE.

(Supreme Court of New Mexico. Oct. 14, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 9*) — COMMON-LAW CRIMES.

Common-law crimes are recognized and punished in New Mexico, by virtue of section 3422, Comp. Laws 1897, which provides, "In criminal cases, the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8, 9; Dec. Dig. § 9.*]

2. CRIMINAL LAW (§ 9*) — COMMON-LAW CRIMES—"RECOGNIZED"—"KNOWN."

The word "recognize," used in the above section, is given various significations by the

lexicographers. Webster, among other definitions, defines its meaning to be, "to avow knowledge of"; Century Dictionary, "to know again." Webster defines the meaning of the verb "know" to be, among others given, "to recognize." In the above section the word "recognized" was used in the sense of "known," and as used was intended to adopt the common law of crimes, as known in the United States and the several states of the Union, which was the common law, or *lex non scripta* of England, as it existed at the time of the Independence of the United States, supplemented and modified by such British statutes as were of a general nature and not local to that kingdom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8, 9; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 7, p. 6006; vol. 5, p. 3943.]

3. STATUTES (§ 241*)—PENAL LAWS — CONSTRUCTION.

Penal statutes are to be strictly construed, but are not to be subjected to a strained or unnatural construction in order to work exemptions from their penalties. Such statutes are to be interpreted by the aid of the ordinary rules for the construction of statutes, and with the cardinal object of ascertaining the legislative intention.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

4. STATUTES (§ 161*)—REPEAL.

Where a statute does not specifically repeal or cover the whole ground occupied by the common law, it repeals it only when, and so far as, directly and irreconcilably opposed in terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

5. HABEAS CORPUS (§ 30*)—GROUNDS—ERROR IN MITTIMUS.

Where a party is confined in prison, the legality of the imprisonment does not rest upon the mittimus, but upon the judgment, and a prisoner who has been legally and properly sentenced to prison cannot obtain his discharge simply because there is an imperfection, or error, in the mittimus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

6. CRIMINAL LAW (§ 1206*) — COMMON-LAW CRIMES—PUNISHMENT.

While common-law crimes are recognized and punished in this state, common-law penalties are not inflicted, but the punishment therefor is prescribed by section 1054, Comp. Laws 1897.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.*]

7. HABEAS CORPUS (§ 92*)—BRIEF—WAIVER.

Where petitioner, in his application for the writ of habeas corpus, sets forth certain grounds for his discharge, which his counsel fail to discuss in their brief, or upon the argument of the case, the court assume that such points are waived, and will not consider the same.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87-96; Dec. Dig. § 92.*]

(Additional Syllabus by Editorial Staff.)

8. STATUTES (§ 183*)—CONSTRUCTION.

Where the language of a statute is doubtful, or an adherence to the strict letter would lead to injustice, absurdity, or contradiction, the statute will be construed according to its spirit or reason, even though this necessitates the rejection of words and substitution of others.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 261; Dec. Dig. § 183.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

9. STATUTES (§ 217*)—CONSTRUCTION—TRANSLATION.

In construing a statute which was translated into Spanish prior to its enactment, where the Legislature was composed in large part of members speaking Spanish almost exclusively, it is proper to consult the Spanish translation to ascertain the legislative intent.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 293; Dec. Dig. § 217.*]

10. ESCAPE (§ 4*) — NATURE OF OFFENSE — FELONY.

A prison breach by a person confined on a felony charge is a felony under the common law.

[Ed. Note.—For other cases, see *Escape*, Cent. Dig. § 5; Dec. Dig. § 4.*]

11. CRIMINAL LAW (§ 1206*)—PUNISHMENT — "PRESCRIBED BY LAW."

As used in Comp. Laws 1897, § 1054, providing the punishment for a criminal convicted of a felony for which no punishment is "prescribed by law," the phrase quoted means prescribed by statute law, not by common law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5520, 5521.]

Original application by H. C. De Vore for writ of habeas corpus. Writ issued, and hearing had on return thereto. Writ quashed, and prisoner remanded.

Renehan & Wright, of Santa Fé, for petitioner. Frank W. Clancy, Atty. Gen., for the State.

ROBERTS, C. J. This is an original application for the writ of habeas corpus by H. C. De Vore, who pleaded guilty to an indictment returned against him by the grand jury of Otero county, on the 29th day of October, 1912, charging him with the offense of "prison breach," upon which plea of guilty he was sentenced by the district court to serve a term in the state penitentiary of not less than 10, nor more than 12 years. He bases his right to the writ upon the following grounds: (1) Prison breach is not a statutory offense in New Mexico, and the common law of crimes is not in force in this state; (2) admitting the common law of crimes to be in force in New Mexico, the punishment inflicted was not authorized under such law; (3) the sentence imposed is violative of section 13, art. 2, of the state Constitution.

[1] 1. It is admitted by the Attorney General that there is no statute in New Mexico defining the crime of prison breach, and providing punishment therefor. Counsel for petitioner and the state agree that petitioner was indicted and sentenced for a common-law offense, and it necessarily follows that if the common law of crimes is not in force in this state, the petitioner is unlawfully restrained of his liberty, as the district court would have no jurisdiction of such an offense. The initial question, therefore, to be determined is whether or not the common law of crimes is in force in this state. It is conceded that if such law was in force prior

to the adoption of the Constitution, it was carried forward by the Constitution as the law of the state.

New Mexico was acquired by the United States from Mexico by the Treaty of Guadalupe Hidalgo, February 2, 1848. The common law was not recognized by Mexico, and had no place in the jurisprudence of New Mexico prior to its cession to the United States. Consequently it would require a specific enactment, by Congress, or the territorial Legislature, to adopt the common law. It is not claimed that Congress so legislated, but the Attorney General does contend that the territorial Legislature, in 1851, by section 18 of an act entitled "An act, regulating the practice in the district and Supreme Courts of the territory of New Mexico," made the common law of England the rule of practice and decision in criminal cases. The section, which is incorporated into C. L. 1897 as section 3422, reads as follows: "In criminal cases, the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision." On behalf of the petitioner it is urged that this statute was ineffectual to adopt the common law as a part of our criminal jurisprudence, because, in the United States courts common-law crimes are and were not punishable, and such law is in such courts merely a source of definition, and, further, that at the time of the enactment of the above section the common law of crimes was not universally recognized by the several states of the Union. As remarkable as it may appear, the effect of the statute has never before been presented squarely to the Supreme Court of the territory or state.

In the case of *Territory v. Weller*, 2 N. M. 470, the section was referred to by Chief Justice Axtell, but its scope was not discussed. In the case of *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349, the court quoted the section, and said: "By providing that the common law, as recognized by the United States and the several states of the Union, should be the rule of practice and decision in the territory, the Legislature has vested the Supreme Court with jurisdiction to review judgments in criminal cases by writ of error."

And later, in the case of *Territory v. Herrera*, 11 N. M. 129, 66 Pac. 523, the territorial Supreme Court again referred to this section, and held that under its provisions the common-law rule, which it evidently considered to have been adopted thereby, required the court, in a capital case, before pronouncing sentence upon the defendant, to ask him "if he had anything to say why sentence should not be pronounced," in the absence of a statute dispensing therewith.

In the case of *Territory v. Montoya*, decided by the state Supreme Court, and reported in 125 Pac. 622, Mr. Justice Hanna,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

speaking for the court, says: "The common law of crimes is in force in New Mexico except where it may have been repealed or modified by statute." But it will be noted that the question was not directly involved in the case, and therefore the language may be considered obiter dictum.

It is interesting to note that in each of the above cases the court seemingly treated the above statute as having adopted the common law of crimes in New Mexico, without question. The cases cannot be considered controlling authority, however, because the question was not directly involved, as in none of the cases was the defendant being prosecuted for a common-law crime. It is therefore the duty of this court to determine, as an original proposition, the question of the effect of the statute.

[2] Counsel for petitioner admits that it was the intention of the Legislature, by the adoption of the section in question, to incorporate into the territorial law common-law crimes, but insists that the language employed will not permit the court to give effect to such intention. If it be true that the Legislature so intended, and certainly no other purpose is apparent, then it is the duty of the court to give effect to such intention, if it can be done without unreasonably perverting the language employed. The difficulty is occasioned by the words used, viz., "recognized by," for the United States has never recognized the common law of England, if by that term is meant "adopted" or "applied" as a rule of decision. As stated, there is no common law of the United States; the common law is merely a source of definition. 8 Cyc. 386; U. S. v. Palmer, 3 Wheat. 610, 4 L. Ed. 471; U. S. v. Hudson, 7 Cranch, 32, 3 L. Ed. 259; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698.

[3] Prior to 1848 New Mexico, as heretofore observed, was a part of the republic of Mexico, and subject to the laws of that country, and such laws were of course retained in the territory, except in so far as modified by the laws of the United States or the territory. In Mexico the common law was unknown, and it is hardly to be presumed that the Legislature of New Mexico would intend to make the common law the source of definition for a system of laws in no wise related to the common law. Having become a part of an Anglo-Saxon nation, it is evident the lawmaking power was attempting to conform the criminal laws of the territory to the customs and institutions of that race of people, and so attempted to adopt the common law in so far as it applied to public wrongs. Penal statutes are of course to be strictly construed, but they are not to be subjected to any strained or unnatural construction in order to work exemptions from their penalties. Such statutes must be interpreted by the aid of the ordinary rules for

the construction of statutes, and with the cardinal object of ascertaining the intention of the Legislature. 36 Cyc. 1183.

In the case of U. S. v. Winn, Fed. Cas. No. 16,740, Mr. Justice Story says: "And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another simply because it is more restrained, if the objects of the statutes equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature."

And the rule relative to construction of criminal statutes is thus stated by the Supreme Court of Massachusetts, in the case of Commonwealth v. Loring, 8 Pick. 370: "But it is said that penal statutes admit of no latitude of construction; that they are to be taken strictly, word for word, let the consequences be what they may. It is true it is so laid down as a general rule, and the reason is that the court shall not be allowed to make that an offense which is not so made by the legislative enactment. But the rule does not exclude the application of common sense to the terms made use of in the act, in order to avoid an absurdity which the Legislature ought not to be presumed to have intended. There are cases which show this, although precedents would not be required to sustain so reasonable a doctrine."

[6] The fundamental rule in the construction of a statute is to ascertain and give effect to the intention of the Legislature. The intention, of course, must be the intention expressed in the statute, and where the meaning of the language employed is plain, it must be given effect. But where the language of a statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, absurdity, or contradictions, the duty devolves upon the court of ascertaining the true meaning. 36 Cyc. 1106. And it is a well-settled rule in the construction of a statute that the spirit or reason of a law will prevail over its letter, especially where the literal meaning is absurd (36 Cyc. 1108), and words may be rejected and others substituted. James v. United States Fidelity & Guarantee Co., 133 Ky. 313, 117 S. W. 411.

In dealing with this subject, Mr. Endlich, in his work on Interpretation of Statutes (page 400, § 295) says: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice presumably not intended, a construction may be put upon

it which modifies the meaning of the words and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, sometimes by altering their collocation, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language, and really give true intention."

The word "recognize" is given various significations by the lexicographers. Webster, among other definitions, defines its meaning to be, "to avow knowledge of." One definition, found in Century Dictionary, is "to know again"; a definition, given the verb "know," by Webster, is "to recognize." The word could not have been used in the sense of "adopted" or "practiced," for, as already shown, the United States did not adopt the common law. The United States courts "recognized" it only in the sense that it was "known" to such courts. The common law was known in the "United States and the various states of the Union," but was not adopted as the rule of practice and decision in the United States, nor all of the states. The common law of crimes, as known in the United States and the various states of the Union, was of course the *lex non scripta* of England, as it existed at the time of the Independence of the United States, supplemented and modified by such British statutes as were of a general nature and not local to that kingdom. And where adopted by any state, only such parts were carried into the body of the law as were applicable to the conditions of the adopting state, and not in conflict with its Constitution and laws. While the common law of crimes was not the rule of practice and decision in many of the states in 1851, when this statute was enacted, still it was recognized by the United States and all the states, if the term be used in the sense of "known"; for all the courts, both national and state, were necessarily familiar with the common law. If we ascribe to the word "recognized" the meaning of "known," the question of the proper construction of the statute and its effect is easy of solution. This, we think, may properly be done without going to the extreme sanctioned by many of the courts in the construction of statutes, in order to give effect to the legislative intent.

That this is the proper construction of the section we think is made more manifest by a resort to the history of the time when this law was enacted, and its passage through the Legislature. At the time of the acquisition of New Mexico, its people used the Spanish language exclusively, and very little English was spoken. Three years thereafter, when this section was enacted, the House of Representatives was composed of 19 native citi-

zens of the territory, and but 6 English-speaking representatives, while the council was made up of 10 native citizens, and 2 Anglo-Americans. Every act introduced was necessarily translated into either English or Spanish, according to the language in which it was originally drawn. The act, of which this section was a part, was originally introduced in the English language, in its present form. It was translated into the Spanish prior to its enactment as follows: "En causas criminales la ley comun conocida en los Estados, y los varios Estados de la Union, sera la regla para la practica y la decision."

[8] The word used in the Spanish translation, to express the meaning of the word "recognized" in the original English bill, it will be noted was "conocida" which means "known." The correct word, which should have been employed to express the same meaning in Spanish, would more properly have been "reconocida," nevertheless the word used, "conocida," meaning "known," shows clearly the legislative intent to adopt the common law as known in the United States and the various states of the Union, and would warrant the construction which we have placed upon the act.

In the case of *Douglass v. Lewis*, 3 N. M. (Gild.) 596, 9 Pac. 377, Justice Henderson, speaking for the territorial Supreme Court, says: "This statute was enacted in 1852. We are warranted in looking back to that period to ascertain the surroundings of the Legislature, the language in which the act was passed, the difficulty and improbability of a verbally correct translation into English, and determine by these and other considerations what was meant by the use of the words and somewhat obscure phrases employed in the section as it now appears in the statutes of the territory." See, also, 38 Cyc. 1117.

If the above statement of the rule is correct, we may properly consult the Spanish translation of the act, and profit by such light as it may shed upon the meaning of the language used, where ambiguous and uncertain words have been employed to express the legislative intent, where it appears that such translation was made before the enactment of the statute, and was before the Legislature during the consideration of the measure. Of course the court must necessarily be governed by the language of the original act, and is not authorized to look to the language employed in the translated bill or act and base its decision thereon (section 3800, C. L. 1897), but certainly it is warranted in resorting to all legitimate facts and circumstances which will aid it in arriving at the true meaning of words of doubtful import found therein.

If we have correctly interpreted the section, it necessarily follows that the territorial Legislature adopted the common law,

as the rule of practice and decision in criminal cases, thereby incorporating into the body of our law the common law, *lex non scripta* of England, and such British statutes of a general nature not local to that kingdom, nor in conflict with the Constitution or laws of the United States, nor of this territory, which were applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country. That this was the effect of the statute is settled by repeated decisions of the territorial Supreme Court and the state court, in construing section 2871, C. L. 1897, which provides: "In all the courts in this territory the common law as recognized in the United States of America, shall be the rule of practice and decision."

It was urged in this case by the Attorney General that, even admitting that section 3422 was invalid and ineffectual, the common law of crimes was adopted by the section just quoted, as the language therein employed was sufficiently broad and comprehensive to effectuate such result. The point is seemingly well taken (*State v. Pulte et al.*, 12 Minn. 164 [Gil. 99]), but we need not discuss it, in view of our conclusion that the prior section did so.

[4] It was suggested, by counsel for petitioner, upon the argument of this case, that as the Legislature of 1854 enacted a somewhat comprehensive code of criminal laws, it must be presumed that it intended to abrogate common-law crimes. It is not contended that the Code, so enacted specifically repealed section 3422, *supra*, or that it covered the whole ground occupied by the common law, and it is well settled that where a statute does not specifically repeal or cover the whole ground occupied by the common law, it repeals it only when, and so far as, directly and irreconcilably opposed in terms. *State v. Pulte et al.*, *supra*.

[5] 2. Petitioner contends that he is imprisoned for "escape," and not for "prison breach"; that "escape" at common law was a misdemeanor, and that the court must look to the common law and be guided by it in determining the sentence to be imposed. It is true the mittimus delivered to the warden of the penitentiary recited that petitioner was convicted of the crime of "escape from jail," but the legality of the imprisonment does not rest upon the mittimus, but upon the judgment (*Sennott's Case*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. Rep. 344), and a prisoner who has been legally and properly sentenced to prison cannot obtain his discharge simply because there is an imperfection, or error, in the mittimus. *People ex rel. Trainor v. Baker*, 89 N. Y. 461. Upon an examination of the indictment in this case we find the charging part (omitting unimportant portions of the indictment) as follows: "Did then and there the time and place aforesaid, willfully and feloniously, from and out of

said common jail, as aforesaid, of Otero county, N. M., aforesaid, located at Alamo-gordo, Otero county, N. M., as aforesaid, break out, escape, and go at large," etc. It will thus be seen that the attempt was made to charge petitioner with prison breach, rather than escape, for, an essential element of prison breach lacking in escape is that there must be a breaking, and petitioner is charged with the breaking. The judgment recites that the defendant entered a plea of guilty to the charge contained in the indictment, which is followed by the sentence of the court, all showing clearly and unmistakably that petitioner was sentenced for the offense charged against him in the indictment.

[10] At the time of the breach, petitioner was in jail under a charge of burglary, as shown in the indictment. Burglary, under our statute, is a felony. Bishop's New Criminal Law (8th Ed.) § 1076, in discussing the common-law crime of prison breach, quotes with approval the following excerpt from Cabbett's Criminal Law: "Breach of prison, or even the conspiracy to break it, was felony at the common law for whatever cause, criminal or civil, the party was lawfully imprisoned; but the severity of the common law was mitigated by the statute *de fren-gentibus prisonam*, 1 Edw. II, St. 2. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony at common law; and to break prison when lawfully confined on any inferior charge was, by this statute, punishable only as a high misdemeanor, by fine and imprisonment."

From the known eminence and ability of the author, we conclude, without further research, that the above statement of the law is correct. When petitioner broke and escaped from jail he was confined therein on a felony charge, and the breach was therefore a felony, and punishable as such. The common-law punishment for the crime need not be looked to further than to determine the grade of the offense, for by section 1042, C. L. 1897: "Crimes and public offenses are divided into: First, felonies; and second, misdemeanors"—and the next succeeding section defines a felony to be: "A felony is a public offense punishable with death, or which is, or, in the discretion of the court, may be punishable by imprisonment in the penitentiary or territorial prison; or any other public offense which is, or may be, expressly declared by law to be a felony."

[8] This statute was enacted in 1854, and under its terms the crime for which petitioner was convicted would be a felony, because at the time of the breach he was lawfully imprisoned on a felony charge, punishable by imprisonment in the state penitentiary. But it is contended that the court had no power or authority to impose a sentence of from 10 to 12 years upon petitioner, be-

cause at common law all felonies were punishable by death. It is not necessary to review or determine the question suggested, because in this state the common-law penalties are not recognized or imposed. Section 1054, C. L. 1897, reads as follows: "When a criminal is found guilty in the district courts of this territory of any felony for which no punishment has been prescribed by law, the said criminal shall be punished by a fine of not less than fifty dollars, or by imprisonment in the territorial prison for not less than three months, or both at the discretion of the court."

[11] Petitioner contends: First, that this statute does not apply to common-law offenses, but only to statutory crimes, for which no punishment has been prescribed; and, second, that the section is of doubtful validity. Relative to the first proposition, it may be stated that counsel for petitioner has failed to point out any statute of the territory or state which denominates an act a crime and fails to fix the punishment therefor. After a careful search, we have failed to find such a statute. It is to be presumed that the Legislature had some object in view when it enacted the section, and, as we view it, the manifest purpose was to provide for the punishment of common-law crimes. That the punishment imposed by the common law for crimes and misdemeanors, in many instances, was excessive and not suited to our conditions and circumstances cannot be doubted. Felonies under the common law of England occasioned the forfeiture of lands and goods, but not so in the United States. The statute used the term "for which no punishment has been prescribed by law," and, as employed in the section, refers to statutory law. Thus, where no statute of the state fixes the punishment for any crime, the court is directed to impose the penalties provided by the act in question. As used in this statute, the term "prescribed by law" must be construed to mean prescribed by the statute law. The validity of the section is so well settled by the adjudication of the courts that the question need not be discussed. See *Frese v. State*, 23 Fla. 267, 2 South. 1; *In re Yell*, 107 Mich. 228, 65 N. W. 97; *Martin v. Johnson*, 11 Tex. Civ. App. 628, 33 S. W. 306; *State v. Williams*, 77 Mo. 310.

[7] 3. The third ground stated in the application for the writ is not discussed in the brief filed on behalf of the petitioner, nor was it upon the argument of the case, and it will not therefore be considered by the court.

For the reasons stated, the petitioner will be remanded to the custody of the warden of the state penitentiary, to be dealt with according to law, the writ of habeas corpus will be discharged; and it is so ordered.

HANNA and PARKER, JJ., concur.

MANNIX v. R. L. RADKE CO. et al.
(S. F. 5,908.)

(Supreme Court of California. Oct. 16, 1913.
Rehearing Denied Nov. 14, 1913.)

1. CONTRACTS (§ 44*)—BUILDING CONTRACT—FILING—VALIDITY—ENFORCEMENT BETWEEN PARTIES.

Code Civ. Proc. § 1183, requiring building contracts to be in writing when the amount exceeds \$1,000, and a memorandum filed in the office of the county recorder, or they shall be wholly void, and no recovery shall be had thereon by either party, prohibits a recovery on such a contract which is unfilled, even as between the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 128; Dec. Dig. § 44.*]

2. WORK AND LABOR (§ 10*)—INVALID CONTRACT—REMEDY.

Where an express contract for the lathing and plastering of certain buildings, involving an amount in excess of \$1,000, was void for want of record of a memorandum thereof, as required by Code Civ. Proc. § 1183, the contractor's sole remedy was an action for the reasonable value of the labor and materials furnished, provided he could show a substantial compliance with the terms of the attempted contract; his recovery being limited to the price fixed therein.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 25; Dec. Dig. § 10.*]

3. CONTRACTS (§ 346*)—BUILDING CONTRACT—INVALIDITY—QUASI CONTRACT—PLEADING.

Where plaintiff sued on a void contract for the lathing and plastering of certain buildings for a specified price, and it appeared that the only reason plaintiff could not recover on the contract was because it was not in writing and filed in the recorder's office, as required by Code Civ. Proc. § 1183, and there was evidence that the contract price was the reasonable value of the labor and materials furnished, plaintiff was properly permitted to recover such reasonable value, though the complaint attempted to state a cause of action on the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 346.*]

4. APPEAL AND ERROR (§ 1002*)—VERDICT—REVIEW.

A verdict based on conflicting evidence is conclusive on the appellate courts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Thomas Mannix against the R. L. Radke Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Robert H. Countryman, of San Francisco, for appellants. Naylor & Riggins, of San Francisco, and Clarence N. Riggins, of Napa, for respondent.

PER CURIAM. This is an appeal by defendants from a judgment against them, and from an order denying their motion for a new trial in an action brought by plaintiff for a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

balance of \$5,075, alleged to be due him for doing the lathing and plastering work in the construction of two certain wooden office and store buildings in San Francisco, known respectively as the Delbert and Countryman buildings, which were erected during the summer and fall of the year 1906, almost immediately after the great conflagration of April of that year. The case was tried by a jury, which rendered a verdict in plaintiff's favor against the corporation defendant for \$4,000, and also against each of the defendants, R. L. Radke and R. H. Countryman, for \$1,333.33, being his one-third share as a stockholder of said corporation of said \$4,000. Judgment was entered accordingly.

Plaintiff alleged in his complaint that "within two years last past" he "performed work and labor for and furnished materials to, said R. L. Radke Company in lathing and plastering two certain buildings, * * * for a portion of which the said corporation agreed to pay plaintiff the sum of \$11,500; that for the balance of said work no price was agreed on between them, but the reasonable value thereof is and was the sum of \$1,150." The complaint acknowledged credits in the sum of \$6,350 in money, and \$1,224.80 in laths sold and delivered to plaintiff by said corporation, and alleged a balance due plaintiff of \$5,075.20. There was no other allegation of the ultimate fact of reasonable value of any of the work or materials than such as is contained in the foregoing. The verdict awarded plaintiff only \$74.80 in excess of the amount that would have been due for the work and materials for which defendants "agreed to pay" \$11,500, according to plaintiff's claim, if there had been no claim for extra or additional work.

The only denial of the allegations of the complaint in regard to the work and materials contained in the answer is as follows: "And deny that plaintiff at any time ever made any agreement with the defendant corporation to do or perform for said defendant corporation any work or labor for, or to furnish any materials to, or did perform any work or labor or furnish any material to the defendant corporation, or agreed to pay for any work or labor or material of any kind, nature, character, or description, and deny that any of said defendants is indebted to said plaintiff in any sum of money, or at all." As a separate answer and defense, defendants substantially admitted the allegations of the complaint as to the agreement to pay \$11,500 for certain work and materials, going further into the details thereof as to the work agreed to be performed by plaintiff, and also alleged certain particulars wherein plaintiff had failed to comply with his contract, and a failure on plaintiff's part to diligently prosecute the work, all to its damage in the sum of \$50,000. It denied the allegations as to extra work, and also denied that plaintiff had ever performed his contract.

By way of cross-complaint, defendants alleged the contract between plaintiff and the corporation by which plaintiff agreed to do the work of lathing and plastering said buildings for \$11,500, and his failure to properly or promptly perform his contract, to its damage in the sum of \$101,500, for which sum judgment was asked.

The evidence showed without conflict that a portion of the work was undertaken on an express promise for the payment of said sum of \$11,500. The additional claim of \$1,150 was for extra work not embraced in the original agreement. It was conceded by all parties on the trial that the contract for the work to be done for \$11,500 was not wholly reduced to writing, or recorded as required by section 1183 of the Code of Civil Procedure; such section providing that: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars and shall be subscribed by the parties thereto; and the said contract or a memorandum thereof * * * shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, * * * otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto." In fact, the only writing signed by anybody was a bid written on a card and signed by plaintiff, as follows:

\$11,500.

Two coats of hair mortar

30c. per yard sand finish

27c. per yard two coats of brown mortar.

Thomas Mannix.

There was some dispute in the trial court on the argument on motion for a nonsuit as to the effect of this section where the controversy is one between the owner and contractor only, no right of any third party being involved, and the matter is very fully discussed in the briefs of the parties in this court.

[1, 2] The decisions of this court in *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391, and *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113, the latter of which was decided since the trial of this case, clearly enough declare the effect of the provisions of section 1183, Code of Civil Procedure, that we have quoted, as to the rights of the parties to a contract which has not been executed and filed in the manner prescribed thereby. It is unnecessary to discuss these decisions further than to say that in such event neither party may maintain any action based on such contract against the other; that the sole remedy of the contractor is an action for the reasonable value of the labor and materials furnished, which in no event must exceed the price fixed by the invalid contract, which must be taken as the utmost limit of his recovery; and that the contractor cannot recover at all without showing a substantial

compliance with the terms of such attempted contract. The reasons for these conclusions are fully stated in the opinions in the cases last cited, and need not be repeated here.

It thus appears that the sole remedy of the plaintiff in this case, in so far as the labor and materials to be done and furnished for \$11,500 are concerned, was an action for the reasonable value of the labor and materials furnished, in no event to exceed the price fixed, \$11,500, which must be taken as the utmost limit of his recovery, and that he could not recover at all without showing a substantial compliance with the terms of the attempted contract.

[3] It is earnestly contended by appellants that, in so far as the labor and materials furnished under the invalid contract are concerned, this is not an action for reasonable value at all, but one solely upon an express contract; that there is nothing in the complaint and no issue made by the pleadings as to reasonable value; and that plaintiff failing to show a valid express contract must fail altogether in this action, because he has failed to allege in his complaint the reasonable value of such labor and materials. These views were urged by them in the trial court; the question being presented both on motion for nonsuit and by several requested instructions. The learned judge of the trial court decided against appellants upon this proposition, apparently upon the theory that as between the parties, no right of any third person being involved, there was a valid contract. As we have seen, this theory of the learned judge cannot be maintained in view of our decisions.

While the District Court of Appeal of the Third District in deciding this case expressed views similar to those we have just stated, it answered certain claims of appellants based thereon, as follows:

"The conclusion follows that respondent tried the case upon a wrong theory; but the inquiry still remains whether any prejudice resulted to appellants. This question involves a consideration of the pleadings, evidence, and instructions.

"The complaint, as we have seen, outside of the extra work, is based upon the express contract; but, under such allegation, evidence was admissible of the reasonable value of the services. *Bringham v. Knox*, 127 Cal. 40, 59 Pac. 198; *Donegan v. Houston*, 5 Cal. App. 628, 90 Pac. 1073. In the former it was held that: 'The complaint for foreclosure of the claim of lien sufficiently alleges the value of the materials by alleging the contract price at which they are furnished in the absence of a demurrer for uncertainty.' In the latter the allegation in the complaint was: 'Now comes the plaintiff and says that within the last two years past he did grading and excavating for the defendants, for which they agreed to pay him the sum of six thousand one hundred seventy-three dollars.'

The court held that the complaint was good in *indebitatus assumpsit*, and that recovery could be had thereunder on either an express or implied contract or both, and that a quantum meruit or quantum valebat count was unnecessary.

"The erroneous theory as to the effect of the performance of the void contract was harmless as far as the evidence was concerned, since it appears without conflict that the contract price was the reasonable value of the work. If there had been substantial evidence that the value was less than claimed, then it is apparent that the theory apparently adopted by the lower court might have misled the jury, and the following instruction would probably have been prejudicially erroneous: 'If you find from the evidence that plaintiff performed work and labor and furnished material to the R. L. Radke Company, at their request, in lathing and plastering certain buildings in San Francisco, for which said corporation agreed to pay plaintiff \$11,500, and that it has not paid him this amount in full, you are instructed that the plaintiff is entitled to recover any unpaid balance thereof from said R. L. Radke Company.' No effort was made, however, to show that the value was less than the contract price; the vital controversy between the parties being as to whether the contractor had performed the work for which he was employed."

We think that by what is said in the foregoing quotation from the opinion of the District Court of Appeal that court properly disposed of the claims of defendants in the respects mentioned. See, also, *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369; *Coghlan v. Quattararo*, 15 Cal. App. 662, 667, 115 Pac. 664. The record fully shows that there was not the slightest misunderstanding on the part of anybody at any time as to such facts in relation to this attempted contract as were material to the question of its validity and binding force. On all hands it was conceded that such contract had not been executed in the manner required by the statute, or filed in the recorder's office, as was required by the statute. The only question in the lower court in this regard was as to the effect of such failure. If, by reason of the fact that the contract was not in writing, and was not filed in the recorder's office, plaintiff was not entitled to recover on the contract, he was nevertheless entitled, unless his complaint was so drawn as to prevent it, to recover the reasonable value of his labor and materials, not exceeding the contract price, in the event, of course, that he had substantially complied with the terms of the attempted contract, a thing essential to recovery under either theory. We think the District Court of Appeal was warranted in holding that he was not so precluded. As a matter of fact, there was evidence showing that the contract price was the reasonable value, and, according to the

opinion of the District Court of Appeal, this was in no way attempted to be controverted.

[4] As to the claim that plaintiff did not substantially perform his part of the contract, the best that can be said for defendants' case is that the evidence is substantially conflicting, with the result that the conclusion of the jury and the trial court is binding upon all appellate courts.

As substantially stated by the District Court of Appeal, while there was much evidence to show that the workmanship was of a somewhat inferior grade, there was evidence to sustain a conclusion that the contract between these parties did not contemplate that first-class work ordinarily desired in permanent buildings. These buildings were commenced in the summer following the great conflagration of 1906. Office quarters sufficient to afford accommodations for those who had been burned out "down town," and who could not find adequate accommodations there until permanent structures were restored or reconstructed, were then in immediate demand, and the answer itself shows that these wooden buildings outside of the fire limits were erected to meet this demand. There was sufficient evidence to support the conclusion that it was expressly stipulated that in so far as the plastering was concerned it was to be done as cheaply as possible, or, as plaintiff put it, it was to be "as cheap a job as could be done in the plastering line." In view of these circumstances, we think that the District Court of Appeal properly concluded that there was sufficient evidence to sustain the conclusion of the jury and the trial court that the terms of the contract were as plaintiff testified, and that he did substantially live up to his contract in the doing of the stipulated work.

The foregoing, as we look at the record, disposes of the important questions presented by this appeal. There are a great many points made for a reversal in addition to those we have discussed. As we have somewhat hastily calculated, there are in the brief of counsel for appellants 41 specifications of error in the rulings of the trial court in the matter of evidence, and 67 in the matter of instructions, and errors are also alleged in regard to rulings on the demurrer and on the motion for new trial. We have considered the points there made, and find nothing therein warranting a reversal. It is manifestly impracticable to discuss all these points in detail in this opinion. The instructions given by the court to the jury were, taken as a whole, fair and complete, and we find no prejudicial error therein. We find no error in the matter of rulings on evidence that we can fairly conclude was prejudicial. The same is to be said of the ruling on demurrer. The trial court was fully warranted, in the light of the evidence presented to it on that question, in denying the motion for new trial

in so far as the same was based on the ground of misconduct of jurors.

The judgment and order appealed from are affirmed.

BEATTY, C. J., does not participate in the foregoing.

POWELL v. PETCH. (S. F. 6,507.)

(Supreme Court of California. Oct. 15, 1913.)

1. LIMITATION OF ACTIONS (§ 148*) — ACKNOWLEDGMENT OR NEW PROMISE—SUFFICIENCY.

Under Code Civ. Proc. § 360, providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of that title, relative to the limitation of actions, unless contained in a writing and signed by the party to be charged thereby, the acknowledgment of a debt must be a distinct, unqualified, unconditional recognition of an obligation for which the person making the admission is liable.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 597-603; Dec. Dig. § 148.*]

2. LIMITATION OF ACTIONS (§ 148*) — ACKNOWLEDGMENT OR NEW PROMISE—SUFFICIENCY—"INDEBTEDNESS."

Under Code Civ. Proc. § 360, requiring acknowledgments or new promises to take a debt out of the operation of the statutes of limitation to be in writing, a letter written by a debtor after the bar of the statute had attached asking the status of "my indebtedness" and stating that the money advanced by him to the creditor's daughter was intended to offset it, but asking the creditor to "let me know the condition," was not a sufficient admission taking the indebtedness out of the statute of limitations; the use of the words "my indebtedness" not acknowledging the present existence of a debt or raising an implied promise to pay, since the obligation was an "indebtedness" whether barred by the statute or not.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 597-603; Dec. Dig. § 148.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3528-3536.]

3. LIMITATION OF ACTIONS (§ 165*)—NATURE OF STATUTORY LIMITATION.

Statutes of limitation are statutes of repose and do not extinguish the debt but only bar the remedy.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 649; Dec. Dig. § 165.*]

In Bank. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by I. W. Powell against Thomas R. Petch, as administrator with the will annexed of Robert B. Powell, also known as Robert Baldwin Powell and as R. B. Powell. From a judgment for plaintiff, defendant appeals. Reversed.

Servage & Cutten, of Eureka, and Charles P. Cutten, of San Francisco, for appellant. Coonan & Kehoe, of Eureka, for respondent.

MELVIN, J. The plaintiff, I. W. Powell, was a brother of defendant's decedent. In

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1890 the former entered into negotiations to purchase certain real property in the state of Washington and sold to his brother a half interest in said property, taking as part payment of the consideration therefor Robert B. Powell's note for \$1,500. On December 10, 1892, this note was replaced by another for the principal sum of \$1,560; the \$60 representing interest due on the note of earlier date. Thereafter R. B. Powell paid but one installment of taxes. After that his brother paid all of the taxes for five or six years and then ceased to make such payments. The property was sold for taxes in 1901 or 1902. In April, 1908, Robert B. Powell, who resided in Eureka, Cal., wrote to plaintiff, who lived in Victoria, British Columbia. The letter, which was duly received, contained, among other things, the following passage: "What is the status of my indebtedness to you regarding the lot you bought? The money that I advanced Nonie was intended to offset it, but let me know the condition." The "Nonie" mentioned was a daughter of plaintiff, to whom admittedly her uncle had given certain sums of money. After the death of Robert B. Powell, plaintiff brought this action to recover the principal and interest alleged to be due on the note, and also the sum of \$44 claimed as advances made in behalf of Robert B. Powell by plaintiff for the payment of taxes on the property. Defendant demurred, setting up the bar of the statute of limitations (subdivision 1, § 337, subdivision 1, § 339, and section 1499 of the Code of Civil Procedure). The demurrer was overruled, and the same statutes were pleaded in the answer. The judgment was in favor of plaintiff. From it the defendant appeals.

[1] The sole question presented by this appeal relates to the passage from Robert B. Powell's letter which we have quoted above. Did the words there used amount to such a promise as gave a new cause of action on the outlawed promissory note? Section 360 of the Code of Civil Procedure is as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." The acknowledgment of a debt in contemplation of this statute must be a distinct, unqualified, unconditional recognition of an obligation for which the person making such admission is liable. *McCormick v. Brown*, 36 Cal. 185, 95 Am. Dec. 170; *Bid-del v. Brizzolara*, 56 Cal. 382; *Pierce v. Merrill*, 128 Cal. 476, 61 Pac. 67, 79 Am. St. Rep. 63.

[2] The letter written by Robert B. Powell to his brother falls far short of containing an admission or a new contract which would take the indebtedness out of the statute of limitations. It was written after the bar of the statute had attached and must be viewed in the light of that fact, for there is a great

difference to be put upon the construction of a letter written before and one prepared after the running of the statute. *S. P. Co. v. Prosser*, 122 Cal. 415, 52 Pac. 836, 55 Pac. 145. Respondent thinks that the use of the words "my indebtedness" is a sufficient acknowledgment of the then present existence of the debt to raise an implied new promise to pay. But calling the obligation an "indebtedness" was not sufficient to amount to a waiver of any limitation given by statute as a bar to recovery. If an obligation has not been paid, it is still an *indebtedness* whether barred by the statute or not.

[3] Statutes of this sort are statutes of repose. They do not extinguish the debt but only bar the remedy. *McCormick v. Brown*, supra. Consequently one who has the right to avail himself of the benefit of such a law makes no new contract nor any acknowledgment from which the law implies a new contract when he writes of his "indebtedness."

In *Bullion & Exchange Bank v. Hegler* (C. C.) 93 Fed. 890, section 360 of our Code of Civil Procedure was under review. Two letters were relied upon to take a note out of the statute of limitations. The first of these letters, addressed to the cashier of the plaintiff, contained the following language: "Have neglected answering your letter calling my attention to note and interest due for the reason that I expected to see Mr. Williams and talk with him about it. But have not seen him. Beg to say that I cannot pay the note or interest time, nor until I can turn some realty or other property into cash, which seems impossible to do at present." In the other letter, written to the attorney for the banking corporation, was this passage: "Referring to the notes, I don't see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this, I can pay you at least a part." Judge Morrow, in commenting upon these letters and their force, said: "There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff; but in neither case is it an acknowledgment from which a promise to pay the debt can be inferred. In other words, it is not an unqualified acknowledgment, since it is accompanied with the condition that he cannot pay, or he does not see any chance to pay, unless he can turn some realty or other property into cash; and there is no evidence that this condition has been reached."

Held by its four corners, the paragraph quoted from the letter of Robert B. Powell to his brother may be and should be construed as a mere inquiry whether the latter claimed any balance due. The writer evidently believed that he had paid the debt in part at least, and the words "let me know the condition" by no means imply a promise to pay if it should transpire that his advances to his niece had been less than the

amount of the note and interest. The whole tenor of this part of the letter was that the writer wanted information. An answer to his question might have revealed a balance against him or a fully liquidated account. To be effectual an agreement to pay a stale claim must recognize a specific debt and there must be a distinct promise to settle it. *Burrage v. Crump*, 48 N. C. 331. Surely no promise to pay a definite debt may be implied from the language of the letter.

The court should have sustained the plea of the statute of limitations.

The judgment is reversed.

We concur: LORIGAN, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.

SAUSALITO BAY LAND CO. v. SAUSALITO IMPROVEMENT CO. (S. F. 5,812.)

(Supreme Court of California. Oct. 7, 1913.
On Petition for Rehearing,
Nov. 6, 1913.)

1. TRIAL (§ 396*)—FINDINGS—FACTS TO BE FOUND.

Defendant could not complain of the failure of the trial court to make a finding as to an allegation of its cross-complaint, in support of which it introduced no evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

2. CORPORATIONS (§ 401*)—INTERLOCKING DIRECTORATE—VALIDITY OF TRANSACTIONS.

Where the same persons constitute a majority of the directors of two corporations, transactions between them controlled by such directors, in the absence of actual or intended fraud, are voidable only, and not void, and may be ratified by either party, and when ratified are binding upon the party ratifying them.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1363, 1364, 1595; Dec. Dig. § 401.*]

3. CORPORATIONS (§ 426*)—INTERLOCKING DIRECTORATE—VALIDITY OF TRANSACTIONS—RATIFICATION.

Where a contract for the sale of land between two corporations having the same majority directors, officers, and stockholders was made in 1890, and the minority stockholders who were familiar with the facts did nothing toward repudiating the contract, and seven stock assessments to raise money to pay on the contract were levied by the purchasing corporation and paid by such minority stockholders, such payment and acquiescence was a ratification of the agreement and a waiver by the minority stockholders and by the corporation of the right to claim that the agreement was invalid because executed by the same persons as directors of both companies, and hence the purchasing corporation could not rescind on that ground in 1903.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.*]

4. VENDOR AND PURCHASER (§ 97*)—FORFEITURE—TENDER—WAIVER.

Where a contract between two corporations for the sale of land was treated by the managing directors and stockholders, who were the same in each company, as abandoned by mutual consent, and the purchaser's minority

stockholders failed to do anything concerning the matter, declared to the vendor that they could raise no more money to pay on the contract, and upon gaining control of the purchaser's affairs attempted to rescind, and refused to accept the vendor's offer to convey on payment of the price, the previous tender of a deed as a condition to a forfeiture by the vendor was waived by the purchaser, especially where the court, in a suit to quiet title, by its judgment provided that upon payment of the balance due the vendor should convey to the purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 161, 162, 168; Dec. Dig. § 97.*]

5. VENDOR AND PURCHASER (§ 76*)—FORFEITURE—TENDER—WAIVER.

Where a vendor allows all payments to become past due, and thereafter accepts partial payments, the forfeiture is waived, and the payment of the balance and the execution of a deed become dependent and concurrent conditions, and the vendor must tender a deed as a condition to demanding payment, and without such tender cannot declare a forfeiture.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 117, 119; Dec. Dig. § 76.*]

6. QUIETING TITLE (§ 50*)—SCOPE AND EXTENT OF RELIEF.

In a vendor's action against the purchaser to quiet title on the theory that the contract had been abandoned by the purchaser, the court rendered judgment against the purchaser for the sum remaining unpaid on the contract, and that the vendor's title be quieted as against the purchaser, provided that upon payment of the sum specified within six months the vendor should execute to the purchaser a deed to the property. *Held*, that plaintiff in the action to quiet title was not entitled to recover the balance due on the purchase price, and the judgment should be so modified as to merely determine the amount due without rendering a judgment for the vendor therefor.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 100; Dec. Dig. § 50.*]

In Bank. Appeal from Superior Court, Marin County; T. J. Lennon, Judge.

Action by the Sausalito Bay Land Company against the Sausalito Improvement Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Bishop, Hoefler, Cook & Harwood, of San Francisco, for appellant. Andrew G. Maguire and Archibald J. Treat, both of San Francisco, for respondent.

SHAW, J. The plaintiff sued the defendant to quiet title to two parcels of land. The complaint is in the usual form, alleging title and possession in plaintiff, and that defendant claims an interest in the land without right.

The defendant, by cross-complaint sets up a claim for damages against the plaintiff under an executory agreement for the sale of the land made by the plaintiff and defendant on October 24, 1890. The plaintiff at that time was the owner of the land. It desired to dispose of the same and for that purpose the officers and stockholders of plaintiff formed and organized the defendant corporation and subscribed for the ma-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jority of its capital stock, intending that the defendant should buy the land, erect a wharf thereon, it being on the water front of Sausalito, and there carry on the business of selling fresh water to be obtained from the plaintiff to ocean steamers. The agreement of sale was then executed. The plaintiff agreed to sell to the defendant, and the defendant agreed to buy, the land for the sum of \$15,000. \$2,000 was paid in cash, \$3,000 was to be paid on or before October 24, 1891, and the remainder in installments of \$2,500 each year thereafter; the last payment being due on October 24, 1895. A failure to pay was declared to operate as a forfeiture of the defendant's rights, and the money already paid was thereupon to be retained as liquidated damages. At that time the majority of the directors of the two companies was composed of the same persons, as was also the majority of the other officers and stockholders. In course of time \$6,081.58 was paid on the principal of the price, and \$4,298.22 on the interest. The defendant never at any time had any property other than this land, nor any means of buying or paying for it except by assessments on its capital stock. \$5,400 was expended by defendant in improvements on the land. The money to make the payments and for the improvements was all raised by stock assessments. This action was begun on January 8, 1903. From and after the year 1898 no payments whatever were made on the price of the land, and no business was carried on by the defendant. During all this time the majority of the directors, officers, and stockholders continued to be composed of the same persons, and they continued to manage and control both companies. Nothing was done to raise money to perform the contract on the part of the defendant. So far as it was concerned, the enterprise was abandoned. So far as the evidence shows, the last assessment was made in 1898, and no further effort was made by the defendant, or its managing officers or majority stockholders, to complete the purchase, or to do business of any kind. The cross-complaint alleges a rescission of the contract in April, 1903, after the action was begun, and prays for damages in the sum of \$25,000. The only foundation shown for damages is the money paid on the price and on the improvements.

The defendant alleges that this contract was procured by false representations made by the majority directors to the minority stockholders, whereby they were induced to take the stock and consent as stockholders to the making of the agreement, and that the entire scheme was fraudulently designed and contrived by the majority directors, officers, and stockholders to defraud the defendant and the minority stockholders, and that for that purpose, and being in control, they intentionally remained inactive and refrained from levying assessments or doing anything

whatever to pay the money or carry on the business of the defendant. These matters are also alleged as a defense in the answer. The court found that all the allegations of false representations, fraud, and fraudulent intent were untrue. It is not contended that these findings are contrary to the evidence, and therefore the elements of actual fraud and of false representations must be eliminated from our consideration of the case. It is admitted by the pleadings that in April, 1903, the defendant made an attempt to and did rescind the contract, so far as it could do so without the consent of the plaintiff.

Judgment was given, declaring that the plaintiff is the owner in fee of the land, that it "have judgment against the defendant" in the sum of \$13,316.94, being the sum remaining unpaid on the principal and interest of the purchase price of the land, and that its title to the land be quieted as against all claims of the defendant; provided, that upon payment of the sum aforesaid, with interest, within six months from the date of the entry of the judgment the plaintiff should execute to the defendant a good and sufficient deed for the property. The defendant appeals from this judgment, and from an order denying its motion for a new trial.

[1] The cross-complaint alleges that the value of the parcels of land does not and never did exceed \$5,000. This is denied by the plaintiff in its answer thereto. There is no finding as to the value of the land. There was, however, no evidence on that subject. The defendant having made the allegation, and having introduced no evidence to prove its truth, the failure of the court to make any finding regarding it is an omission of which the defendant cannot complain. *Winslow v. Gohransen*, 88 Cal. 453, 26 Pac. 504; *Macomber v. Bigelow*, 126 Cal. 13, 58 Pac. 312.

The main contention of the defendant is that, by reason of the fact that the majority of the directors, officers, and stockholders of the two companies, those who controlled and managed the affairs of the defendant, were the same during all the period in question, and the fact that they, having and exercising control, did nothing toward completing the performance of the agreement of sale, but allowed it to lapse, the plaintiff cannot recover, or assert any right to forfeit the contract, or any right under it. It is insisted that, regardless of the absence of actual fraud or bad intent, and even if they were at all times acting in good faith, as must be presumed in view of the unassailed findings, their conduct constituted constructive fraud upon the defendant, sufficient to justify a rescission at the defendant's demand, and to excuse the delay in making such demand for rescission, and hence that the defendant is entitled to recover the money paid on the land and improvements. In this connection it must be noted that a short time before this demand for rescission was

made the minority stockholders of defendant, those having no stock in the plaintiff company, for the first time obtained control of the actions of the defendant.

[2] The rule established in this state is that, where one corporation deals with another, and the same persons, constituting the majority of the directorate of each company, control the deal, there being no actual or intended fraud, the transaction is not void, but only voidable, and may be ratified by either party by conduct having that legal effect, and that it is binding upon the party so ratifying it. *San Diego v. Pacific Beach Co.*, 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788; *Pauly v. Pauly*, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98; *Reclamation Dist. v. Birks*, 159 Cal. 237, 113 Pac. 170. The correct doctrine is well stated in *O'Conner, etc., v. Coosa F. Co.*, 95 Ala. 617, 10 South. 291, 36 Am. St. Rep. 251, as follows: "If the same persons as directors of two different companies represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair or open it may be shown to be. * * * The general rule is that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding if acquiesced in by the corporations and their stockholders." The following authorities are to the same effect: *Ashhurst's Appeal*, 60 Pa. 315; *Buell v. Buckingham*, 16 Iowa, 293, 85 Am. Dec. 516; *Manufacturers' Co. v. Big Muddy Co.*, 97 Mo. 45, 10 S. W. 865; *Booth v. Robinson*, 55 Md. 440; *U. S., etc., Co. v. Atlantic, etc., Co.*, 34 Ohio St. 464, 32 Am. Rep. 380; 2 *Beach, Corp.* § 944; 2 *Cook, Corp.* § 658.

[3] The conduct of the minority stockholders of the defendant, who are here seeking in its name to avoid the transaction, and of the other stockholders as well, was equivalent to a ratification of the original sale, and for this reason the agreement became binding upon the corporation and upon them. The general rule, as stated in the authorities above cited, is that, if a person entitled to avoid a contract on such ground is informed of the facts upon which his right rests, and thereafter delays taking any steps to avoid or repudiate the transaction until a period equal to the statute of limitations has expired, the presumption is that he has ratified it. Under some circumstances a much shorter time will justify the presumption. Here the contract was made in 1890, and no stockholder did anything toward a repudiation until 1903, a period many times exceeding that of the statute of limitations. It is not claimed that any of them were ignorant of the facts. The evidence shows that they

were all familiar with all the facts from the beginning. There is also further evidence of ratification. At least seven stock assessments were levied by the defendant upon its stockholders, after the execution of the agreement, to raise the money which was paid thereon and for the improvements. These assessments began immediately after the agreement was made, and continued at intervals until 1898. They were paid by all the stockholders, including those now representing the defendant, with full knowledge of all the facts and without objection. Such payment and acquiescence was clearly a ratification of the agreement and a waiver by these stockholders and by the corporation of the right to claim that the agreement is invalidated by the fact that it was executed by the same persons as directors of both companies.

It follows, also, as a result of this conclusion, that no cause of rescission existed in 1903 at the time the defendant, according to its allegations, rescinded the contract, and that no rights accrue to the defendant from that attempt to rescind.

[4, 5] It is further claimed that, in order to put the defendant in default, and authorize the plaintiff to treat the contract as terminated, and sue to quiet title, the plaintiff should have tendered a deed to the defendant and demanded payment of the price, and that, as it has not done so, the contract still subsists, the defendant may still perform it, and the plaintiff cannot have his title quieted. Where the vendor allows all the payments to become past due, and thereafter accepts partial payments, the forfeiture is waived; the payment of the balance and the execution of a deed thereupon become dependent and concurrent conditions. "Non-payment alone does not put the vendee in default; the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture." *Boone v. Templeman*, 158 Cal. 297, 110 Pac. 947, 139 Am. St. Rep. 126; *McCroskey v. Ladd*, 96 Cal. 459, 31 Pac. 558. So far as plaintiff is concerned, in the absence of such tender and refusal, it having accepted part of the price after maturity of the whole, the contract would still stand, and it could not have a decree declaring that it is the owner in fee, and that defendant has not interest, unless the conduct of the defendant in the matter has waived a tender, or amounts to a refusal to perform in any event, or an abandonment of the contract. Prior to the beginning of the action there were no negotiations between the plaintiff and the defendant corporation or its officers looking to a tender of a deed. The common managing directors and stockholders of the two companies had seen that the defendant's enterprise was a failure, and had practically abandoned it by mutual consent. The stockholders of the defendant who had none of the plaintiff's stock, and who now control the

action of the defendant, had failed to do anything concerning the matter, and had declared to plaintiff that they could raise no more money to pay the debt. They also had practically abandoned the contract. When they first gained control of defendant's affairs, after the action had begun, instead of endeavoring to pay the money and obtain a deed, they proceeded to give notice of rescission; that is, they repudiated the obligation of the contract, and upon that action they still stand. During the trial the plaintiff offered to convey the land to the defendant on payment of the price, with an abatement of part of the interest, and the defendant refused. The court, however, in its judgment, continued this offer, and gave the defendant the benefit of the contract as if it were still in existence, by the provision that upon payment of the balance due within six months the plaintiff should convey to the defendant. Under all these circumstances we think that the plaintiff has done all that equity requires, and that a previous tender of a deed must be deemed to have been waived. *Gray v. Dougherty*, 25 Cal. 280; *Warvelle on Vend.* § 756; *Am. & Eng. Ency. of Law*, 5; *Lawrence v. Miller*, 86 N. Y. 131.

[8] It appears that a technical error was made in the form of the judgment. The plaintiff is not entitled, in this form of action, to recover of the defendant the balance due upon the purchase price. The judgment appears to include such a provision. We think, however, that it was not so intended. Nevertheless, a modification should be made by striking out the objectionable language. The appellant does not raise this objection, and we do not think it justifies the imposition of costs because of the modification.

The order denying a new trial is affirmed.

The judgment is modified by striking out the following part thereof: "That plaintiff have judgment against the defendant and cross-complainant in the sum of \$13,316.94, and costs of suit, which are hereby taxed at \$——," and inserting instead thereof the following: "That the balance of the purchase price of said property, and interest, under the agreement mentioned in the findings, is the sum of \$13,316.94."

As thus modified the judgment is affirmed, without costs.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

On Petition for Rehearing.

PER CURIAM. The appellant, in a petition for rehearing, takes a statement in the opinion herein to the effect that the persons controlling both companies had "practically abandoned the *enterprise* of the defendant company by mutual consent," and another statement that the defendant company had "practically abandoned the *contract*," and

from these statements assumes that the opinion declares that the *contract* was abandoned by both parties thereto by mutual consent. Upon this basis, counsel argue that, under the doctrine stated in *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320, when both parties to a contract abandon it, either party may recover the money paid on it. The remarks in the opinion do not have the effect assumed. Counsel fail to note the significance of the words used. The remarks were made in the course of the discussion of a different question. Lest others may also misunderstand it, we take this occasion to explain that the "enterprise" of the defendant, that is, its business of selling water to ocean steamers, was the thing which was referred to as "practically abandoned" by mutual consent. It had proven a failure, and wisdom dictated its abandonment. But the opinion says only that the defendant company "had practically abandoned the *contract*," not that the plaintiff had done so, or that both companies had abandoned it. In the connection in which it occurs this means only that defendant had abandoned all effort to perform it. The plaintiff company had never evinced any intention to do otherwise than stand upon the contract and enforce it. There was no abandonment of the contract by both parties such as is necessary for the application of the rule referred to in *Joyce v. Shafer*.

The petition for a rehearing is denied.

BEATTY, C. J., dissenting.

BRADLEY CO. v. MULCREVY, County Clerk, et al. (S. F. 6,611.)

(Supreme Court of California. Oct. 14, 1913.)

1. APPEAL AND ERROR (§ 391*)—STAY OF EXECUTION — UNDERTAKING — INVALIDITY — SECOND BOND.

Since the Code of Civil Procedure fixes no time within which an undertaking to stay execution pending appeal must be filed, but the undertaking may be given at any time before execution of the judgment, where appellant has given a void undertaking, such act does not terminate his right to file a second sufficient bond which will operate as a stay.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077-2084, 2087-2088; Dec. Dig. § 391.*]

2. APPEAL AND ERROR (§ 458*)—STAY OF PROCEEDINGS—NECESSITY OF UNDERTAKING.

Where plaintiff recovered judgment from which the defendant appealed, plaintiff was entitled to enforce execution on the judgment at once, nor was his right impaired by the fact that he had instituted proceedings for the justification of sureties on a bond to stay execution pending appeal, where such bond is void for failure to comply with the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Dec. Dig. § 458.*]

In Bank. Application by the Bradley Company against Harry I. Mulcrevy, as County Clerk of San Francisco County, and J. M. Seawell, one of the judges of the Superior

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Court of such county, and the Superior Court for a writ of mandate requiring the issuance of a writ of possession on a judgment recovered by petitioner in ejectment against Emma R. Bradley. An alternative writ of mandate was issued by the Supreme Court, to which a return was made by demurrer and answer. Writ discharged, and proceeding dismissed.

Stoney, Rouleau & Stoney and Orville C. Pratt, Jr., all of San Francisco, for petitioner. Brown & Baer, of San Francisco, for respondents.

SLOSS, J. The material facts are not in controversy, and may be briefly stated as follows: Judgment for the recovery of the possession of a parcel of land in the city and county of San Francisco was entered in the superior court of said city and county in favor of Bradley Company, the petitioner herein, and against Emma R. Bradley, on February 15, 1913. On March 26, 1913, the judge of said court made an order fixing the amount of a bond to stay execution of the judgment, so far as it directed delivery of possession, at \$4,300, whereof \$300 was for waste and \$1,000 for use and occupation. Code Civ. Proc. § 945. On March 29, 1913, Emma R. Bradley filed a notice of appeal to this court from the judgment and on the same day filed an undertaking from which we quote this language material to the present case: "And whereas the appellant is desirous of staying the execution of said judgment so appealed from and to also stay the execution of said judgment for the delivery of possession of the said lands and premises, we do therefore further, in consideration thereof, and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of three hundred (\$300) dollars, being the amount for that purpose fixed by the judge of the court, that during the possession of such property by the appellant she will not commit, or suffer to be committed, any waste thereon, and that if said judgment appealed from be affirmed, or the appeal dismissed, she will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of four thousand (\$4,000) dollars, being the amount for that purpose fixed by the judge of said court."

The petitioner, claiming that said bond was insufficient in form to stay execution, demanded of the county clerk the issuance of a writ of possession. Its demand being refused, it applied to the judge of the superior court for an order directing the clerk to issue such writ. This application, made *ex parte*, was denied and, when renewed upon notice, was taken under submission. On April 1, 1913, before the renewed motion had been made, the petitioner had served upon

Emma R. Bradley notice of exception to the sufficiency of the sureties. On April 14, 1913, she served and filed her notice that the sureties would justify, and on April 18, 1913, they did justify before a judge of the superior court. Meanwhile, on April 17, 1913, after the notice of motion to direct the issuance of a writ had been given, the appellant filed a second bond, which, as is conceded, was sufficient in form to effect a stay of execution. Thereupon the respondent judge denied the pending motion for the issuance of a writ of possession.

The petitioner makes the claim that the bond first filed was entirely nugatory and ineffectual for want of compliance with the terms of the order fixing the amount of an undertaking to stay execution. It contends that by the said bond the sureties bound themselves in the sum of \$300 only, while the amount required by the judge's order was \$4,300. So contending, it advances the further claim that the appellant, having once filed a stay bond, was not authorized, except under an order of the appellate court, to file a second bond, even though the first was ineffectual for any purpose.

We do not find it necessary to pass upon the validity of the first undertaking. We recognize the force of the elementary rule that sureties "are entitled to stand upon the express terms of their agreement and are never implicated beyond those terms." *Ogden v. Davis*, 116 Cal. 32, 47 Pac. 772. On the other hand, the language of a bond, as of other contracts, is to receive a fair and reasonable interpretation for the purpose of effecting the objects of the instrument. *L. & S. F. Bank v. Parrott*, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; *Swain v. Graves*, 8 Cal. 549; *Austin v. Union P. Co.*, 4 Cal. App. 610, 88 Pac. 731. Whether, under a proper application of these rules, the first undertaking should be held to be one for \$300 only, or whether, in view of the qualifying words "being the amount for that purpose fixed by the court," the sum named should not be disregarded as an obvious clerical error, is a nice question which, as we have already said, need not be here decided. Of course, if the first bond was effectual to stay execution, the petitioner is not entitled to the relief sought. We shall assume, for the purposes of the discussion, that the undertaking was for \$300 only, and that it was therefore entirely nugatory and ineffectual for the purpose of staying execution. On this assumption it must, we think, be held that the appellant was within her rights in filing a second undertaking, sufficient in form, and that such second undertaking was binding and effective to stay execution.

[1] The Code of Civil Procedure fixes no time within which an undertaking to stay execution must be filed. The undertaking may be given at any time before execution of

the judgment. *Hill v. Finnigan*, 54 Cal. 493. The right to stay execution by the filing of a stay bond had not therefore expired by limitation of time when the second bond was filed. The petitioner contends, however, that the fact that a prior attempt to stay execution by means of a bond had been made (though ineffectually) prevented any further steps in the lower court to stay execution. Reliance is had upon *Hill v. Finnigan*, supra, where the court said that the sections of the Code "contemplate but one proceeding to stay the execution below." This declaration, like all expressions in judicial opinions, must be read in the light of the facts under consideration. In the *Finnigan* Case the appellant had filed a stay bond sufficient in form. The respondent excepted to the sufficiency of the sureties, and neither they nor other sureties justified. It was with reference to this situation that the court said that no further proceedings could be taken in the court below to effect a stay. Where a bond sufficient in form is filed, but the sureties are in fact insufficient, the undertaking does, until the sureties, after exception, have failed to justify, operate as a stay. During the intervening time, which may extend to 50 days (Code Civ. Proc. § 948), the respondent has been prevented from enforcing his judgment, although he may not have had adequate security, or perhaps any substantial security. If, upon the failure of the sureties to justify, the appellant could file a new stay bond, the same condition might again arise, and it would be possible, by a series of successive bonds executed by insufficient sureties who would fail to qualify, to obtain all the benefits of a stay without furnishing to the respondent the security contemplated by the Code. These are the considerations which led the court in *Hill v. Finnigan*, supra, to the conclusion that the appellant was not authorized, except upon order of the appellate court, to file a second stay bond where the sureties upon a first had failed to justify. But the situation is entirely different where the original bond fails, in substantial respects, to comply with the form required by statute. Such bond is not effective to stay the execution at all.

[2] The respondent has the right to enforce execution at once, and his right is of course not impaired by the fact that he may have instituted proceedings for the justification of sureties. We have, then, the case of an appellant who has filed a paper which is entirely void as an undertaking to stay execution. The position of both parties is just the same as it would be if no bond had been filed. The fair conclusion is that a second bond, sufficient in form, may be filed at any time before the judgment has been enforced, as it unquestionably could be if no steps had theretofore been taken to obtain a stay.

Without passing upon the validity of the

first bond filed in this case, our holding is that, if said bond be void, the second is binding upon the sureties and is effectual to stay execution.

The alternative writ is discharged, and the proceeding dismissed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

BRANDON et al. v. UMPQUA LUMBER & TIMBER CO. (S. F. 6,529.)

(Supreme Court of California. Oct. 14, 1913.)

1. CORPORATIONS (§ 630*) — DISSOLUTION — EFFECT.

The dissolution of a corporation terminates its existence as a legal entity and renders it incapable of suing or being sued as a corporate body.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482-2486; Dec. Dig. § 630.*]

2. CORPORATIONS (§ 617*)—DISSOLUTION—EFFECT.

The dissolution of a corporation resulting from a statute declaring the forfeiture of the corporate franchise for nonpayment of a license tax has the same effect as if it were declared by judicial decree.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2448-2456; Dec. Dig. § 617.*]

3. CORPORATIONS (§ 630*)—APPEAL—RIGHT TO APPEAL.

Under the Corporation License Tax Act (St. 1906 [Ex. Sess.] p. 25) § 10a, as amended by St. 1907, p. 745, which added the proviso that no action pending against any corporation shall abate because of the forfeiture of the franchise for nonpayment of the tax but may be prosecuted to final judgment and enforced by execution with the same effect as though no forfeiture had occurred, the corporation, and not the directors who were made trustees with power to settle its affairs after the forfeiture of its franchise, may appeal from an adverse judgment rendered in an action begun against it before the forfeiture.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482-2486; Dec. Dig. § 630.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by David Brandon and another against the Umpqua Lumber & Timber Company. From a judgment for plaintiffs, defendant appeals. On motion to dismiss. Motion denied.

Mannon & Mannon, of Ukiah, for appellant. Preston & Preston, of Preston, for respondents.

SLOSS, J. Motion to dismiss appeal. The action was brought in December, 1911, against the Umpqua Lumber & Timber Company, a corporation organized under the laws of this state, to quiet title to certain parcels of land in the county of Mendocino. The corporation answered, setting up a claim to an easement for a railroad right of way over

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the lands described in the complaint. Judgment in favor of the plaintiffs was entered on January 2, 1913. On January 11, 1913, the attorneys who had appeared for the corporation gave notice that it appealed from said judgment. The respondents, presenting a certificate of the Secretary of State showing that on November 30, 1912, prior to the entry of judgment, the defendant corporation had forfeited its corporate charter for failure to pay its license tax, moved to dismiss the appeal on the ground that the forfeiture took away the right of the corporation to give notice of, perfect or prosecute an appeal.

[1, 2] It is no doubt the rule that, unless the statute otherwise provides, "the effect of the dissolution of a corporation is to terminate its existence as a legal entity and render it incapable of suing or being sued as a corporate body or in its corporate name." *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 580, 89 Pac. 335. And this effect follows whether the dissolution has been declared by judicial decree, as in the case of the *Vivienda Water Company*, or results from the statute declaring the forfeiture of the corporate franchise for nonpayment of license tax. *Newhall v. Western Zinc M. Co.*, 164 Cal. 380, 128 Pac. 1040. It may, too, be conceded that section 10a, added to the corporation license act in 1906 (Stats. Ex. Sess. 1906, p. 22), providing that the directors of a corporation forfeiting its charter are trustees of the corporation and its stockholders, with power to settle the affairs of the corporation and to maintain or defend actions pending in favor of or against the corporation, did not, in its original form, give the trustees authority to maintain or defend actions in the corporate name. This provision is substantially similar to section 400 of the Civil Code, which was held, in *Crossman v. Vivienda Water Co.*, *supra*, to give no such authority.

[3] But section 10a was amended in 1907 (Stats. 1907, p. 745) by the addition of the following proviso: "Provided always that no action pending against any corporation shall abate thereby, but may be prosecuted to final judgment the same may be enforced by execution with the same force and effect and in like manner as though no forfeiture had occurred. * * *" This enactment has been construed by us in the very recent case of *Lowe v. Superior Court*, 134 Pac. 190, where the court used this language: "We are of the opinion that section 10a of the act, as amended by the addition of the proviso, should be construed as providing that any action included within the meaning of the proviso shall not abate by reason of the forfeiture but may be continued and prosecuted in its corporate name to final judgment,

the control and management of the action so far as the corporate interests are concerned being in the directors or managers in office at the time of the forfeiture; they being the trustees of the corporation and stockholders or members. While doubtless they may be properly substituted as parties defendant, such substitution is not essential to a continuance of the action, as we read the statute." In the case just referred to this court had been asked to issue a writ of prohibition restraining the superior court from enforcing a judgment entered against a corporation after the forfeiture of its charter. The relief sought was denied. The views expressed in the foregoing quotation are decisive of the present motion, unless the respondents can successfully distinguish the *Lowe* Case from the one before us. This they seek to do by pointing out that in the *Lowe* Case the parties suing the corporation were seeking to continue the prosecution against it in its corporate name, while here the defendant corporation is seeking to exercise the right of appeal. But we think the proviso is not to be construed as conferring a right upon the adverse party alone. It declares that the action shall not abate "but may be prosecuted to final judgment [and] * * * enforced * * * in like manner as though no forfeiture had occurred." It is true that actions *by* the corporation are not saved. But in actions *against* the corporation the intent seems to be to permit the litigation to go on to final judgment and execution as if there had been no forfeiture. If the plaintiff may prosecute his action regardless of the forfeiture, using the corporate name as that of the party to be served with notices of all kinds, and otherwise treating the corporation as the party defendant, there must be the correlative right of defending in the corporate name against such prosecution. The contrary view would lead to the anomalous result that those interested in resisting the action would be bound by proceedings taken against the corporation in its corporate name, while they could not defend in the only name and capacity by which it was sought to bind them. Our conclusion is that the proviso gives the right to continue the defense, as well as the prosecution, in the corporate name, notwithstanding a forfeiture of charter pending the action, and that the right of defense includes the right to prosecute an appeal in the name of the corporation. It becomes unnecessary to consider other points urged in opposition to the motion.

The motion to dismiss the appeal is denied.

We concur: ANGELLOTTI, J.; LORIGAN J.; MELVIN, J.; SHAW, J.; HENSHAW, J.

NORDLOH et al., County Com'rs, v. DISTRICT COURT OF FIRST JUDICIAL DIST. et al.

(Supreme Court of Colorado. Nov. 8, 1913.)
COUNTIES (§ 197*)—CLAIMS—AUDIT AND ALLOWANCE.

Under Rev. St. 1908, § 1337, authorizing the judge of the district court of any county to appoint a committee to examine the official accounts of the county treasurer but not expressly authorizing him to fix the compensation of the members of the committee or to order their compensation paid by the county, the members should present their claims against the county to the board of county commissioners in the usual way and take an appeal to the district court, if dissatisfied with the action of the board, and the district court had no power to allow such claims in an ex parte manner without giving the county an opportunity to be heard and to order the county commissioners to pay them.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 309-311; Dec. Dig. § 197.*]

Error to District Court, Adams County; Charles McCall, Judge.

Henry Nordloh and others, County Commissioners of Adams County, were adjudged guilty of contempt by the District Court of the First Judicial District, and they bring error. Reversed and remanded, with directions.

George Allan Smith and John T. Barnett, both of Denver, and George A. Garard, Co. Atty., of Brighton, for plaintiffs in error.

MUSSER, C. J. Pursuant to section 1337, Rev. Stat. 1908, the judge of the district court of the First Judicial district, in and for Adams county, of his own motion appointed a committee of three persons to examine the official accounts of the treasurer of that county. This committee proceeded with its work. Before completion, each of the members of the committee presented to the district judge a bill for the services rendered. These bills were allowed by the judge, and the county commissioners, who are plaintiffs in error, were ordered to pay them. Later the judge issued a citation to the county commissioners, wherein it was stated that it had been represented to the court that the county commissioners had failed and refused to allow the claims which had been ordered paid by the court, and the commissioners were commanded to appear before the court on a certain day and hour to show cause why they had failed to comply with the said orders and why they should not forthwith convene and allow the claims. In response to this citation, the commissioners, in person and by their attorney, appeared in court and filed a motion to quash and suppress the citation. The court refused to hear this motion and struck it from the files. Thereupon the commissioners tendered a written answer to the court in response to the citation, which the court would not permit to be filed. Then, after some conversa-

tion with the court, it was ascertained that the committee had not presented the bills for their entire services. An adjournment was taken, during which the committee presented additional bills to the county commissioners, who allowed the sum of \$1,068 and refused to allow a further sum of \$845. When court reconvened, it was informed of the action of the county commissioners. Thereupon the court made an order allowing the further amount of \$845 and ordered the commissioners to allow the same and to issue a warrant for the payment thereof. When questioned by the court, the county commissioners stated that they would not allow and pay this further amount because they regarded it excessive. An adjournment was taken, and, on the reconvening of the court, the commissioners, by their attorney, informed the court that they still adhered to their former statement, whereupon the court adjudged each of them guilty of contempt and ordered them confined in the county jail until they would comply with the order of the court to allow and pay the bills. To review this judgment, this writ of error is prosecuted.

While the statutes direct district courts to appoint such committees for the examination of the accounts of county treasurers, they nowhere fix or mention the compensation which the members of the committees shall receive for their work, nor do they expressly give to the district judge the power to fix or allow any compensation or to order their compensation paid by the county. There is no reason why a claim against the county for such services should not take the usual course. If the district court has any power to fix the amount of compensation that the committee shall receive, it is only by implication. In other cases of claims against the county, they are presented to the board of county commissioners and by that body allowed or disallowed in whole or in part, and, if the claimant is dissatisfied with the action of the board, he has his appeal to the district court, where the matter may be adjudicated as in any other case of a claim of one person against another.

In the present case the district court, upon presentation to it of the bills of the claimants, allowed them. The county was given no opportunity to be heard. Without such opportunity, in an ex parte manner, the claims were allowed by the district court, and the county commissioners were ordered to pay them. To imply that the discretion which the statutes, in other cases of claims against a county, vest in the county commissioners was in this case vested in the district court or district judge, and that he could determine the matter without a hearing or without opportunity to the county to be heard, is contrary to all principles of law. The judge was without any authority in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

premises and wholly exceeded his jurisdiction. The judgment is therefore reversed, the cause remanded, and it is ordered that the citation be quashed and the proceedings dismissed.

Reversed and remanded, with directions.

WHITE and BAILEY, JJ., concur.

SYMES INVESTING CO. v. WHEELLOCK.
(Supreme Court of Colorado. Nov. 3, 1913.)

1. LANDLORD AND TENANT (§ 171*)—EVICTION—TENANT'S SURRENDER OF POSSESSION.

A tenant, cannot by voluntarily surrendering possession of the premises, evict himself.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 691-694, 709; Dec. Dig. § 171.*]

2. LANDLORD AND TENANT (§ 172*)—ACTS OF LANDLORD—CONSTRUCTIVE EVICTION.

It is essential even to a constructive eviction that the conduct of the landlord be more than a mere trespass, and such as to effectually deprive the tenant of the use and benefit of all or some part of the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. § 172.*]

3. LANDLORD AND TENANT (§ 172*)—EVICTION—VACATION BY TENANT.

Where a tenant under a lease expiring December 31st notified the landlord that he expected to vacate his offices on November 15th, and actually vacated November 11th, and said that if occupation by other tenants from that time was desired, satisfactory arrangements might be made, and the landlord accepted the proposal and asked to be advised when the offices could be had, to which the tenant made no reply, and then cleaned and repaired the offices and received rent therefor during the term, there was an abandonment by the tenant, and hence no eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. § 172.*]

4. LANDLORD AND TENANT (§ 194*)—RENT—AMOUNT.

Where the tenant, after notice to the landlord, vacated the premises and the landlord entered and allowed new tenants free rent during the term, such loss was chargeable to the landlord in his action against the former tenant for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. § 194.*]

Hill and Gabbert, JJ., dissenting.

En Banc. Error to County Court, City and County of Denver; George W. Dunn, Judge.

Action by the Symes Investing Company against Jesse M. Wheelock. Judgment for plaintiff for an insufficient amount, and plaintiff brings error. Reversed.

J. Foster Symes, of Denver, for plaintiff in error. Fred W. Parks, of Denver, for defendant in error.

BAILEY, J. The action was begun in a justice's court, to recover from the defendant the sum of \$268.50, a balance due on rent for

the month of November and December, 1911, under a written lease of offices numbered 613 to 619 in the Symes Building, Denver, occupied by the Northwestern Mutual Life Insurance Company, of which defendant was general agent. The justice of the peace gave judgment for \$182.50 in favor of plaintiff. Defendant tendered \$91.25, being the amount due under the lease to the 15th of November, and upon refusal of plaintiff to accept it appealed the case to the county court.

There were no pleadings, but a stipulation, filed before trial in the county court, shows that plaintiff is a corporation of the state and owner of the Symes Building; that defendant had a lease from plaintiff of rooms 613 to 619 inclusive in that building, which expired December 31, 1911, at a monthly rental of \$182.50; that defendant voluntarily vacated the premises on November 11th, 1911, and paid no rent for November and December of that year, but made tender of \$91.25 and kept the same good, which plaintiff refused; that plaintiff received from other tenants for a part of the premises, as rental during November and December, the sum of \$98.50; that certain letters, hereinafter set forth, passed between plaintiff and defendant; and that plaintiff, between November 15th and December 31st, 1911, made repairs and alterations on the premises at an approximate cost of \$510.00 after defendant had vacated.

On September 28th, 1911, the defendant wrote plaintiff as follows:

"I shall vacate offices in the Symes Building at termination of lease. I expect to vacate offices on November 15th, and if you should desire to have same occupied by tenants from that time, satisfactory arrangements could probably be made."

On October 19th following, the plaintiff answered:

"Referring to your letter of September 28th, beg to say that we will be glad to take over any part of your space as fast as we rent it, on the understanding that we allow you the same price that we rent it for—provided we can have possession a few days ahead of time to make necessary changes.

"If this is satisfactory, please let us know the earliest date that we could have Rooms 618 and 619."

The defendant did not answer that letter. At various times after the exchange of the foregoing correspondence, and while defendant was still occupying the rooms, Mr. Symes, agent of plaintiff company, showed them to numerous prospective tenants in the presence of the defendant, who on such occasions said nothing, because, as he testified, he did not wish to embarrass Mr. Symes. The two had personally transacted no business for about two years. The business incident to the tenancy had been transacted with the cashier of defendant, who signed

and delivered the rent checks. The first week in November Mr. Symes called to collect the rent for that month, and was requested by the cashier to wait until plaintiff had re-rented the rooms and adjust the rent later on, to which he acceded. The Monday following the Saturday on which the defendant vacated the premises, plaintiff put workmen to cleaning and altering the rooms to suit new tenants. When defendant learned of this he wrote the following letter:

"I am inclosing you herewith my check for \$91.25, being rent from November 1st to November 15th, and am sending you under separate cover, keys to the offices which I heretofore held under lease from you, in the Symes Building, as I notice you have taken possession of the premises and consequently terminated my lease."

To which plaintiff immediately replied:

"We beg to acknowledge receipt of your letter of November 15th, inclosing check for \$91.25, which we return.

"We would be very glad to receive the same on account of November rent, per terms of your lease, or as rent to November 15th, but on the understanding that we have in no wise released you from the terms of your lease, which we expect you to carry out.

"You very well know that our understanding was that we are to allow you on your lease, credit for any rent we receive on your space, in accordance with our letter of October 19th, and our verbal conversations with your office. It was on this understanding that we put workmen in part of your rooms to make the necessary alterations for other tenants.

"If you desire the keys for any purpose we will be glad to send them back to you."

The foregoing are the material and undisputed facts of the case.

The plaintiff sued to recover the balance due under the lease, being \$365.00 for the months November and December, less \$98.50, the amount received from other tenants during that period, or \$266.50. At the conclusion of the testimony defendant moved a nonsuit, plaintiff moved for a directed verdict, and defendant, in turn, moved for a directed verdict in favor of plaintiff for \$91.25, the amount tendered, all of which motions the court overruled. The jury were instructed, retired and returned a verdict for plaintiff for \$91.25. Plaintiff's motion for a new trial was overruled, and it prosecutes this writ of error.

Plaintiff in error contends that under the facts the question of eviction is not involved, and that the court erred in submitting it to the jury. If the facts raise the question, it was properly submitted, and the judgment may not be disturbed; if not, the court should have directed a verdict for plaintiff for \$266.50 less free rent.

[1-3] It is fundamental that a tenant cannot, by voluntarily surrendering possession of the premises, evict himself. *Lettick v. Hon-*

nold, 63 Ill. 335. The renting of other quarters by defendant, notice of vacation on a certain date and vacation of the premises accordingly, constituted an abandonment, and entry thereafter by the landlord was not an eviction. *Humiston, et al. v. Wheeler*, 175 Ill. 516, 51 N. E. 893. It is essential to even constructive eviction that the conduct of the landlord be more than a mere trespass and such as to effectually deprive the tenant of the use and benefit of all or some part of the premises. 2 *Underhill on Landlord and Tenant*, §§ 670, 671. In the case at bar the plaintiff entered upon the premises at the invitation of the defendant. If defendant had not written the letter of September 28th, showing a desire to have the premises occupied and inviting plaintiff to act to that end, no controversy could have arisen. The plaintiff acted upon the suggestion of the defendant and accepted the proposal, with the request that, if the terms of acceptance were satisfactory, it be advised when certain of the rooms could be had. The defendant made no answer to that letter, but for over three weeks kept silent, during which time the plaintiff showed the premises to numerous prospective tenants in his presence and in the presence of his cashier. It is not apparent why embarrassment would have resulted to the plaintiff's agent from anything which defendant might have said on such occasions respecting their relations under the lease. It was not until after he had vacated the rooms, when he learned that plaintiff was altering and cleaning them, that he denied his liability under the lease, because, as he claims, "satisfactory arrangements" had not been made for a new tenant. Considering his letter of September 28th, the plaintiff's reply thereto, together with what followed as a consequence of those letters, the defendant should have been as solicitous to ascertain the true conditions, regardless of the fact that he was about to vacate, as he evidently was to escape a valid obligation through circumstances which he apparently thought favorable to the accomplishment of that result. It is a fair conclusion from the undisputed facts that defendant knew, or should have known, the entire situation. To declare that the acts of plaintiff, invited as they were by the defendant and by his silence approved, amount to an eviction, would be not only contrary to law, but against good conscience, and would lend encouragement to others to attempt by like methods to escape just obligations. There is a total absence of facts even tending to show an eviction. The motion of plaintiff for a directed verdict should have been sustained.

This case is clearly distinguishable from those cited by defendant in error to support the contention that there was evidence of an eviction. Neither of those cases are upon the facts even analogous to this one. We do not question the law as stated in *Hyman v. Jockey Club Co.*, 9 Colo. App. 300, 48 Pac.

671. In that case there was a forcible entry and detainer, the sheriff holding the premises for some days under orders from the landlord before turning over the keys to the latter. Such acts were there held to amount to an eviction in law. The principles upon which that decision was based are, quoting from the opinion, as follows:

"The rule of law is well settled, that, if the lessor himself wrongfully deprives the tenant of the whole or any part of the premises, the tenant is discharged from the payment of the whole rent until the possession is restored. *Tayl. Landl. & Ten.*, secs. 378-380. In 2 *Wood, Landl. & Ten.* 1096, the rule is stated that: 'An actual expulsion of the tenant, or intentional disturbance by the landlord, or by any other person acting by his authority, or by virtue of a legal right vested in them in any manner, which so seriously disturbs the tenant's possession as to compel an abandonment of the premises by him, or which deprives him of their beneficial enjoyment, amounts to an eviction, and the rent is suspended from the time of such disturbance.'"

The court there held that the acts shown amounted to a wrongful deprivation of possession of the premises and an actual expulsion or intentional disturbance of the tenancy, committed by or through the landlord. And in the case of *MacKellar v. Sigler*, 47 *How. Prac. (N. Y.)* 20, the tenant abandoned because the premises had become unfit for occupancy because of an overflow of water from an adjoining house, and thereafter the landlord entered to make repairs, and relet the house to another, of his own motion. The gist of that decision is based upon the rule contained in the following quotation from the opinion therein:

"In the absence of a stipulation to that effect, in the agreement creating the tenancy, the landlord has no right, except, perhaps, where it may be requisite to prevent waste, to enter the demised premises during the term, without the consent of his tenant, to make repairs; and if he does, he will be deemed a trespasser, and become liable as such."

In one of the foregoing cases the landlord forcibly evicted the tenant, and in the other he took possession of the premises after the tenant had been driven from the house by an overflow of water from adjoining property. In the case at bar there was no wrongful deprivation, actual expulsion or intentional disturbance, nor was the entry without the consent of the tenant. On the contrary, the landlord went into possession not only with the consent, but by the invitation of his tenant. So that it is manifest these decisions have no application here.

[4] The plaintiff allowed each of the new tenants free rent from the date of taking possession to the 1st of December, 1911. In one instance the time was three days on a basis of \$35.00 a month, or \$3.50, and in the

other, seven days on a basis of \$720.00 a year, or \$13.80, a total of \$17.30. This loss properly belongs to plaintiff. The judgment is reversed and the cause remanded, with directions to the court below to enter judgment for plaintiff, as of date March 28th, 1912, in the sum of \$249.20, the amount claimed less free rent.

Judgment reversed.

HILL, J. (dissenting). I cannot agree with the conclusion that the question of eviction is not involved. As I read the evidence it fails to disclose conclusively that the plaintiff entered upon the premises for the purpose of making the repairs at the invitation of the defendant, or that there ever was a meeting of the minds of the parties upon any agreed line to be followed. Neither is the evidence conclusive of the fact that the defendant had abandoned the premises at the time plaintiff took possession. To the contrary, the evidence of Mr. Wheelock discloses that at the time the plaintiff took possession he had not surrendered the keys; that his first knowledge of the plaintiff's possession was when he sent there for something which he wanted in the offices. This evidence could be properly construed to mean that he still had some things left there. He testified that his sign had been removed from the door; that all of these acts were without his knowledge or consent. Under this state of facts I think the question of eviction was properly submitted to the jury. This position is sustained by the authorities. *Hyman v. Jockey Club Co.*, 9 *Colo. App.* 299, 48 *Pac.* 671; *MacKellar v. Sigler*, 47 *How. Prac. (N. Y.)* 20; *Jones on Landlord and Tenant* (1906 Ed.), § 548.

Mr. Wheelock's first letter states if plaintiff should desire to have the offices occupied by tenants, satisfactory arrangements could probably be made. To my mind the evidence is not conclusive that satisfactory or any arrangements were ever made with the defendant concerning this subject, or the right to make permanent changes during the period of his lease. The fact that the defendant did not reply to the plaintiff's letter of October the 19th would not avoid the rule that surrender was effected by the actions of the landlord. *Gray v. Kaufman Dairy & I. C. Co.*, 162 *N. Y.* 388, 56 *Pac.* 903, 49 *L. R. A.* 580, 76 *Am. St. Rep.* 327. By the terms of the defendant's first letter, if the plaintiff desired possession prior to the termination of the defendant's lease or prior to his surrender of the property in turning over the keys, etc., it was incumbent upon its manager to have seen the defendant and secured an understanding concerning it, as well as the privilege to have made repairs during the remainder of the term. The plaintiff entered into possession about six weeks prior to the expiration of the defendant's term. During a part of this period it made permanent changes, improvements, and repairs at

a cost in excess of \$500. This was not for the purpose of securing tenants for the unexpired portion of the defendant's term, but was for the benefit of the plaintiff in order to secure new tenants, which it did, whose leases run for a term of years. During the time that these changes and improvements were being made the premises were unfit for occupancy. To my mind all of these facts were properly submitted to the jury as evidence pertaining to the termination of the tenancy by the plaintiff. *Carson v. Arvantes*, 10 Colo. App. 382, 50 Pac. 1080.

GABBERT, J., concurs in the views herein expressed.

RIO GRANDE SOUTHERN R. CO. v. CAMPBELL.

(Supreme Court of Colorado. Nov. 3, 1913.)

1. EVIDENCE (§ 575*)—EVIDENCE AT FORMER TRIAL—AVAILABILITY OF WITNESS.

Ordinarily the former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the subsequent trial, since that would deprive the adverse party of his right to cross-examine in the presence of the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2407-2409; Dec. Dig. § 575.*]

2. EVIDENCE (§ 575*)—EVIDENCE AT FORMER TRIAL—GROUNDS FOR ADMISSION.

The testimony of a witness at a former trial cannot be read to the jury in the form of a deposition, where he was present at the second trial and no physical infirmity kept him from testifying; it appearing merely that between the trials he had forgotten the facts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2407-2409; Dec. Dig. § 575.*]

En Banc. Appeal from District Court, La Plata County; Charles A. Pike, Judge.

Action by Samuel M. Campbell against the Rio Grande Southern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

E. N. Clark, of Denver, for appellant. Thomas B. Stuart and Charles A. Murray, both of Denver, and Charles A. Johnson, of Durango, for appellee.

GARRIGUES, J. 1. June 8, 1901, plaintiff, Samuel M. Campbell, was injured while coupling cars in a train upon which he was braking, and brought this suit against the railroad company to recover damages, upon the ground that its negligence caused the accident. The trial of the case in March, 1904, resulted in a verdict for plaintiff, which on appeal was reversed, and the cause remanded for a new trial. See *R. G. S. R. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986. A trial in April, 1909, resulted in another verdict against the company, and it brings the case here on appeal.

[1, 2] The testimony of one Fred Weller, a material witness for the plaintiff on the first trial, was taken by the official reporter, ex-

tended and preserved by bill of exceptions. He was called as a witness by the plaintiff on the second trial, at which time he was a young man apparently of sound mind and in good bodily health. In his examination in chief plaintiff offered in evidence all his testimony given on the former trial, preserved by the bill of exceptions, on the ground that the witness said he did not remember the facts to which he had formerly testified. The court permitted this evidence, preserved by the bill of exceptions, to be read to the jury over the objections of the defendant, and the question presented is whether this was reversible error.

2. In 2 Wigmore on Evidence, § 1415, it is said: "No one has ever doubted that the former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the present trial." What Weller said on the first trial was hearsay on the second trial, and could not be introduced as substantive testimony by the party calling him, unless it came within some well-established exception to the rule regarding hearsay evidence. Merely because it was given at a former trial of the same case involving the same issues and between the same parties, where the witness was cross-examined, did not make it admissible as his evidence on this trial. Instead of plaintiff making his case by evidence given on this trial, he was permitted to do so by evidence given at another trial. Weller's testimony for the party calling him was what he said on this trial of the case, and not what he said on the former trial, unless for some good reason his evidence on the former trial was allowed to become his evidence on this trial, which by analogy would be similar to his deposition. This could only be done under some established exception to the rule regarding hearsay testimony. We, therefore, turn to the exceptions to the rule for the authority to admit this evidence. Authority may be found for holding that testimony, properly preserved and authenticated, given at a former trial, where there has been ample opportunity to cross-examine the witness, may be used at the subsequent trial of the same case between the same parties in cases where the witness is dead, when the witness is absent from the jurisdiction or out of reach of the court's process, when the party has been unable, after diligent search, to find the witness, or where his absence is on account of the procurement of the opponent, where the witness is so sick he cannot attend, where the witness is insane, where the witness has suffered loss of memory by disease or old age, where the witness is disqualified from testifying by reason of interest, infamy, or the like, and, for certain kinds of testimony, where the witness is blind. 1 Greenleaf on Ev. (16th Ed.) § 163g; 2 Wigmore on Ev., §§ 1401 to 1418, inclusive.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Some, though not all, of these exceptions have been recognized by us. *Young v. People*, 54 Colo. 293, 130 Pac. 1011. Without committing this court to all the exceptions mentioned, it is sufficient in this case to say that it comes within none of them. Weller was not dead. He was within the jurisdiction of the court, and subject to its process, and was in fact present in court, called and sworn by the party desiring and offering his evidence. So far as the evidence discloses he was a young man about 26 or 28 years of age, in good health, and sane. His loss or pretended loss of memory was not due to disease or old age, he had no apparent interest in the litigation or its result, and nothing was disclosed that disqualified him from testifying. It is well established that a party to a litigation has a right to be confronted in court with and to cross-examine his opponent's witnesses in the presence of the jury. Evidence in the nature of a deposition read to the jury might leave an entirely different impression upon their minds than an oral examination in their presence. It would establish a dangerous precedent to allow the testimony of a witness given on a former trial to be introduced as his evidence at a subsequent trial merely because he said he had forgotten the transaction and his former testimony. It is possible the testimony on the first trial might be false, and that there was then no known way of breaking it down on cross-examination; but before the second trial its falsity might be discovered, and the witness not dare to testify as he had on the first trial, and to escape embarrassment, he could conveniently say he had forgotten the transaction, which would make his former evidence admissible. Because the witness said he had no recollection was not sufficient to create a new exception to the established rule regarding hearsay evidence. While it might in some cases work a hardship and be a great disappointment to a party calling a witness for him not to testify as expected, or as he had theretofore done, it is not a sufficient reason for the admission of his former evidence. To create such a precedent we think would work far greater harm to the public than the inconvenience to a litigant in some particular case.

The court in *Velott v. Lewis*, 102 Pa. 326, correctly stated the rule when it said in that case: "The witness but failed to recollect what he had previously sworn to, but if this were enough to admit the notes of a former trial, we might as well abandon original testimony altogether, and supply it with previous notes and depositions. It would certainly be an excellent way to avoid the contradiction of a doubtful witness, for he could always be thus led to the exact words of his former evidence."

In *Stein v. Swensen*, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234, it is said: "When

failure of memory amounts to mental imbecility, the witness is as one dead or insane, and, as his testimony cannot then be taken, his testimony upon a former trial of the same issues, between the same parties, may be resorted to. To admit it in any less case would continually present the question, What degree of forgetfulness shall be required?" See, also, *Wells v. Drayton*, 1 Nott & Mc. (S. C.) 409, 9 Am. Dec. 718, and *Robinson v. Gilman*, 43 N. H. 295.

The judgment will be reversed, and the cause remanded.

Reversed.

HILL, J., not participating.

GABBERT, J. In my opinion there are additional reasons why the judgment of the district court should be reversed. The testimony of plaintiff at the former trial was reviewed in 44 Colo. It was there stated, after quoting his testimony, that according to his own statements it stood admitted that the impact of the cars was not of sufficient force to cause the drawheads to turn down. This was an important feature of the case in view of the fact that one of the claims on the part of plaintiff was that the defective condition of the locomotive made it impossible for the engineer to properly control its movements, and that these defects caused the locomotive to suddenly increase the speed of the cars which caused them to come together with such force as to turn down the drawheads and drawbars. At the second trial his testimony was so changed as to create the impression that the injury to these appliances was caused by the severity of the impact when the cars came together. A party to an action should not be permitted to change his testimony at a second trial so as to avoid rulings of a court of review of a former, when by so doing the theory of his case is so changed that the conclusion is inevitable that one or the other of his statements is untrue. Such a change, unless in some way satisfactorily explained, should not be permitted, when thereby a recovery may be based upon a state of facts which, according to his testimony previously given, did not exist. No such explanation was given.

It is contended, however, that the testimony of plaintiff on the subject was substantially the same at both trials. If this be true, then it must appear from his testimony that the alleged defects in the locomotive did not in any manner contribute to his injury. Conceding, then, that there is no material change in his testimony on the subject under consideration, it was error to submit to the jury, as stated in our former opinion, an issue of fact which was not in the case, by advising them to the effect that if the evidence disclosed negligence on the part of the defendant by operating the train upon which plaintiff was employed with a defective loco-

motive, which caused his injury without fault on his part, he would be entitled to recover.

The trial court also committed prejudicial error in admitting testimony on the part of plaintiff to establish the alleged defective condition of the locomotive, when that question was not involved, if, as claimed by counsel for plaintiff, his testimony at the second trial with respect to the cause of his injury was substantially the same as at the first.

Instruction No. 3 was to the effect that it was the duty of defendant to provide reasonably safe and suitable cars, drawheads, drawbars, and coupling appliances. This language is condemned by many authorities upon the ground that thereby the duty of the employer as thus defined is absolute, when the correct rule is he is only required to exercise due and reasonable care to provide reasonably safe and suitable appliances for the use of his employees.

LENDHOLM et al. v. PEOPLE.

(Supreme Court of Colorado. Oct. 6, 1913.

Rehearing Denied Nov. 3, 1913.)

1. INTOXICATING LIQUORS (§ 145*)—WRONGFUL SALE—CHARACTER OF PLACE—"SALOON"—"RESTAURANT."

Rev. St. 1908, § 1805, provides that every "saloon, bar or other place" where liquors are sold or kept for sale, etc., shall be closed at midnight and on Sunday, and prohibits during such time the sale of liquor therein. *Held*, that while the word "restaurant," used to describe a place used solely to dispense food, is not within the act, yet the term "saloon" includes a restaurant or eating house where intoxicating liquors are sold for consumption by guests with their meals, and hence the act prohibits such sale in regular restaurants on Sunday and after midnight.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent.Dig. §§ 156-158; Dec.Dig. § 145.*

For other definitions, see Words and Phrases, vol. 7, pp. 6310, 6311; vol. 8, p. 7794; vol. 7, pp. 6180, 6181; vol. 8, p. 7789.]

2. INTOXICATING LIQUORS (§ 145*)—REGULATION—SALE—NATURE OF PLACE.

The name by which a place where intoxicating liquors are sold is called does not, in law, fix its status for the purpose of regulating such sales; the character of the place being determined by that which habitually takes place therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent.Dig. §§ 156-158; Dec.Dig. § 145.*]

Gabbert, J., dissenting.

En Banc. Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

S. S. Lendholm and another were convicted of keeping open on Sunday a place in which intoxicating liquors were sold, and therein selling intoxicating liquors on that day, and they bring error. Affirmed.

John T. Bottom, of Denver (Milnor E. Gleeves, of Denver, of counsel), for plaintiffs in error. Fred Farrar, Atty. Gen., and Frank C. West, Asst. Atty. Gen., for the People.

WHITE, J. Plaintiffs in error, defendants in the court below, were convicted of keeping open on Sunday a place in which spirituous, vinous, malt, and other liquors were kept, sold, bartered, exchanged or given away, and of therein selling intoxicating liquors on said day, contrary to the provisions of section 1805, R. S. 1908. They were sentenced to pay a fine, and bring the cause here for review.

The case was tried upon an agreed statement of facts. Defendants were the officers and directors and had actual charge and management of the Café Mozart, a "regular restaurant" conducted in the city and county of Denver, serving meals to its patrons day and night, and furnishing with such meals, for an additional price, intoxicating liquors in quantities less than a quart to patrons desiring the same. The defendants admit the sales of liquor in small quantities after midnight and upon Sunday in the restaurant, and the drinking of the same therein; but claim that because such sales were made in connection with meals, the law was not violated.

[1] The statute requires, *inter alia*, that "every saloon, bar or other place where" liquors are sold or kept be closed at midnight and on Sunday, and prohibits, during such time, the sale of liquor therein. The defendants claim that as the word "restaurant" is not specifically mentioned in the statute, it is necessarily excluded from its operation under the rule of construction known as "*eiusdem generis*." The contention is not sound for the simple reason that in its generic sense the word "saloon" includes restaurant or eating room, as well as a bar-room or grogshop. Indeed, in such sense the word does not necessarily indicate a place where intoxicating liquors or even liquid refreshments are sold. It may mean a spacious and elegant apartment for the reception of company or for works of art, a hall of reception, a large room or parlor, a hall for public entertainment or amusement, also, a public room for specific uses, as the saloon of a steamer (i. e., the main cabin), or it may mean an eating saloon. Webster's New International Dictionary; *Cardillo v. People*, 26 Colo. 355, 58 Pac. 678. The word is not so used, however, in this statute. This was determined in *Cardillo v. People*, *supra*, where we held that it is here used "in the sense of a barroom or grogshop or drinking saloon kept for supplying intoxicating liquors." We ascribed that meaning to the word because the title of the act necessarily so limited its sense, and for the further reason that a statute in *pari materia* defines a saloon as "any place where spirituous or vinous liquors are sold in quantities less than one quart." A restaurant that is used solely as an eating saloon, therefore, does not come within the terms of the statute. City of Den-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ver v. Domedian, 15 Colo. App. 36, 60 Pac. 1107. It is equally certain, however, that a restaurant where intoxicating liquors are kept and habitually sold to the public in small quantities does come within its terms, for it is then a "saloon or other drinking place" within the meaning of the law.

In Scanlon v. City of Denver, 38 Colo. 401, 88 Pac. 156, a conviction had under an ordinance entitled, "An ordinance concerning the licensing and regulating of dramshops and tippling-houses" was under review. We there said: "It is defendant's contention that this section of the ordinance was not intended to include bona fide keepers of restaurants, as evidenced by the title, which relates solely to dramshops and tippling-houses. He says that a restaurant is not a dramshop or tippling-house. This, however, depends upon the character of the business that is carried on therein. That business may be so conducted in a restaurant as to constitute it a tippling-house under the meaning of that term as defined in the authorities is beyond doubt."

Harris v. People, 21 Colo. 95, 98, 39 Pac. 1084, 1085, involved a conviction under this statute. The facts were: The defendant kept a grocery store, in which he likewise kept and sold bottled goods and beer in small quantities to any person who called for it. We there said: "The sale of liquor was made in small quantities, and the invitation and the opportunity for drinking the same were furnished by the defendant to purchasers; and these facts, together with the fact that the house was kept open on the Sabbath Day, were sufficient to convict. It is undoubtedly true that if one keeps open on the Sabbath Day a public house where intoxicating liquors are sold in small quantities and drunk on the premises, he violates the statute. * * * The evil intended to be prohibited by this statute consists in keeping open a public house where liquor is sold in small quantities, and the opportunity is given to purchasers to drink it on the premises."

[2] The name by which a place is called does not, in law, fix its status. The character of a place, what it really is, is fixed and determined by that which habitually takes place therein. If the place be open to the public to whom meals are regularly served, it is an eating saloon; but if intoxicating liquors are likewise so habitually served therein, it is also a drinking saloon. Nor can this be affected by the comparative number of sales of food and sales of liquor, or the comparative revenue derived from one or the other. The test of the character of the place cannot be: What is its principal business, but what business is there habitually carried on? If it consists, in whole or in part, of habitually selling intoxicating liquors in quantities less than one quart, to the public generally, it is a saloon or other drinking place within the meaning of the law.

As said in Hussey v. State, 69 Ga. 54, 58: "It makes no difference in law whether the place be called a barroom, or a glee-club resort, or a parlor, or a restaurant, if it be a place where liquor is retailed and tipped on the Sabbath Day, with a door to get into it, so kept that anybody can push it open and go in and drink, the proprietor of it is guilty of keeping open a tippling-house on Sunday. It makes no difference if the drinking be done standing or sitting—at a bar or around a table—it is tippling, and the place where it is done is a tippling-house. And if anybody wishing to drink can have access thereto—if ingress and egress be free to all comers—it is a tippling-house kept open on Sunday."

The several legislative acts requiring licenses for the sale of intoxicating liquors in less than a designated quantity, the places where, and the time when the same may be sold, are parts of one system, governed by one spirit and policy, and must be construed so as to be consistent and harmonious, one with the other and in their several parts. People v. Gibson, 53 Colo., 231, 237, 125 Pac. 531. When so construed it is certain that the place described in the stipulation herein constitutes a saloon or other drinking place within the meaning of the law. To sell, exchange, or dispose of intoxicating liquors for gain, or knowingly permit the same to be done on his premises, in less quantities than one gallon, it is provided that every person (except those enumerated in sections 5521, 5522, R. S. 1908, to which class defendants do not belong) must have a legal license therefor. Sections 1798, 1799, 4005, R. S. 1908. And a license granted for such purpose shall not authorize the person obtaining the same to sell such liquors in more than one place or house, and every license shall describe the house and place intended to be occupied. Section 3995, R. S. 1908. It is then declared that all places where spirituous or vinous liquors are sold in quantities less than one quart shall be deemed to be a saloon (section 3996, R. S. 1908), and by section 1805, R. S. 1908, that every saloon or other place where intoxicating liquors are kept or sold shall be closed on Sunday and after midnight, etc. It is admitted that defendants had a license to sell liquors in less quantities than one quart in the Mozart Café, and habitually made such sales therein. The legislative pronouncement is that such places are saloons, and that they be closed during certain hours. Moreover, the evil of permitting people to congregate in places of public resort and indulge in drinking of intoxicating liquors upon Sunday or after midnight is not lessened by the fact that in restaurants patrons are able to obtain food as well as liquor and may be seated while they drink. No reason is apparent for stopping the sales of liquors over bars at midnight and on Sunday that is not equally applicable to such

sales at such times in restaurants or other public drinking places. However, as to the wisdom of such laws we have no concern. The law, being clearly an exercise of the police power of the state, must be upheld, whatever may be our individual views as to its wisdom. Whether patrons of such restaurants could be supplied therein with intoxicating liquors from adjoining or nearby saloons during the time such places are authorized to keep open and sell liquors, and such transactions not make of such restaurants saloons, within the meaning of the law, should not be determined herein. That question is not involved under the stipulation of facts upon which this case is determined.

The judgment is affirmed.

Judgment affirmed.

GABBERT, J., dissenting.

SCOTT, J. (specially concurring). I concur in the conclusion reached in this case, but cannot agree to much that has been said in the opinion. It is true that our statutes upon this subject, when considered together, are incongruous and even absurd. But the sole purpose of the statute under consideration, and all others bearing relation to it, was to prohibit the sale of intoxicating liquors on the Sabbath Day and between the hours of midnight and 6 o'clock a. m. on week days, and this regardless as to where the liquor might be sold, or what article, food or otherwise, might be sold at the same time with it. The agreed statement shows that the liquors are sold entirely independent of the meal, and by the drink or bottle, and for a price separate and distinct from the meal. This to my mind constitutes a clear violation of the law.

But I cannot agree that it was the purpose or intent of the Legislature to declare that a legitimate hotel or restaurant, the chief business of which is to furnish lodging or food, or both, should close its dining room on Sunday simply because it served liquors with its meals on week days. Such places are not saloons, grogshops, nor tippling-houses, and cannot be made so by statutory definition or judicial construction, but they are places where intoxicating liquors may not be sold on Sunday or during the prohibited hours on week days. The provision for the closing of places where saloons or grogshops are conducted on Sunday, and the prevention of loitering in such places on Sunday, is for the secondary purpose alone of securing the enforcement of the prohibition of liquor sales in such places at the times mentioned.

It is a very natural conclusion that the Legislature intended to prohibit the sale of intoxicating liquors in every place on Sunday, and after midnight, but it is a reflection on the intelligence and common sense of its membership to say that they intended to prevent hotels and restaurants from serving food to the public on Sunday simply because

such places serve liquors with meals on week days, which they have a perfect right to do when provided with proper license.

GABBERT, J. (dissenting). The majority opinion is based upon the assumption that the statute embraces every place where liquors are sold in less quantities than one quart. The cases cited from this jurisdiction do not, in my opinion, sustain this conclusion, for the simple reason that in the case at bar the question is whether a keeper of a bona fide restaurant, who sells liquors in connection with meals, is embraced within the statute—a proposition which was in no sense involved in any of our previous decisions—and hence is one of first impression, which must be determined from a construction of the statute under the facts stipulated.

The word "saloon," standing alone, has several definitions, but as employed in the statute under consideration should be given that meaning which the word usually conveys, namely, a place to which the general public has access where liquors are sold by the drink, over a bar, to be drunk upon the premises. No one would think of designating a dining room of a hotel or regular restaurant, where liquors are furnished in connection with meals, a saloon, but would employ the word only in designating a public place where liquors are sold over a bar, or by the glass. This is the popular understanding of what constitutes a saloon, and this restricted meaning should always be given where the context or circumstances require it. The statute says, "Every saloon, bar or other place," where liquors are kept, sold, or given away, shall remain closed during designated hours. A bar as thus used is synonymous with saloon, and this clearly indicates what the Legislature meant by the word "saloon"; in other words it means, as previously stated, a place to which the general public has access, where liquors are sold by the drink over a bar. The rule of *ejusdem generis* is therefore applicable, which is to the effect that when general words follow the enumeration of particular things, the general words will be construed as applicable only to things of the same general nature as those enumerated. The particular words are presumed to describe or designate certain species, and the general words following such description are used for the purpose of including other species of the same genus. This rule is based on the obvious reason that if the Legislature had intended the general words to be understood in their restricted sense, the particular classes would not have been enumerated. From this rule it follows that the word "other" following an enumeration of particular classes must be read as "other such like," and to include only others of like kind or character. And so here, had it been the intention of the General Assembly to embrace all places where liquors were kept or sold, there was no occasion to make any enumeration of the

places which it was the intention to include, but such intention would have been expressed by stating that all places where liquors are kept or sold shall be closed during the designated hours and time.

The intent of the Legislature is the law, and where it may be said that from the words employed the intent is doubtful, they should be so construed by the application of any of the recognized rules of construction as will avoid anomalous or absurd results. In *Birmingham v. People*, 40 Colo. 362, 90 Pac. 1121, it was decided that the statute under consideration forbids the places thereby included from being kept open during certain hours; that during that time liquor shall not be sold therein, nor shall persons not connected with the business be permitted to be or remain in or around them during the time prohibited. From the language of the statute a violation of either of these inhibitions subjects the offender to a fine and imprisonment. Certainly the statute does not mean that the wholesale liquor dealer, who might keep his place open after midnight or on Sunday, could be subjected to the penalties prescribed, or that the dining room of a hotel, wherein liquors were sold with meals, or a restaurant where the same business is carried on, must be closed during the prescribed time, even though liquors were not sold during that period, or the proprietor would be subject to fine and imprisonment, and yet by the construction given the statute in the majority opinion the inevitable conclusion is that such places must remain closed during the hours mentioned in the statute. There is no escape from this conclusion, for the statute states in unmistakable terms that all the places which it includes must close and remain closed during the times mentioned. The result which must follow the construction given the statute by the majority opinion indicates beyond question that such was not the intent of the Legislature in enacting it, but that such intent is ascertained by applying the rule of *ejusdem generis*, which would exempt the proprietors of the Mozart Café from its operation.

The judgment of the district court should be reversed, and the cause remanded, with instructions to dismiss the proceeding.

DOYLE v. NAUGHTON et al.

(Supreme Court of Colorado. Nov. 3, 1913.)
DESCENT AND DISTRIBUTION (§ 71*)—ESTABLISHMENT OF HEIRSHIP.

Rev. St. 1908, § 7050, provides that any person claiming to be an heir at law and entitled to an estate, may file in the court where such estate is in settlement a petition setting forth his relationship and the claims of all other persons who claim to be heirs and asking for a judicial ascertainment of the heirs of the deceased. Section 7051 provides that the court shall hear proofs concerning the heirs of the deceased and shall enter a decree determining

who they are. The husband of a decedent, who had entered into a postnuptial agreement denying both spouses a share in the estate of the other, filed a petition setting forth his relationship, the death of his wife, and that it had been stated he was not an heir, and prayed the court to declare him entitled to one-half of the property of his deceased wife. *Held* that, as he did not even set forth the names of other persons claiming to be heirs of the deceased and did not pray a determination of the question of heirship, his petition must be dismissed but without prejudice to the rights of any person to have the validity of the postnuptial agreement adjudicated, as the relief asked by the petitioner which was the setting aside of the postnuptial agreement was not such relief as is contemplated by the statute.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 229-236; Dec. Dig. § 71.*]

Error to County Court, City and County of Denver; H. C. Class, Judge.

Proceeding to establish heirship by Patrick W. Doyle against Mary C. Naughton and others. The petition was dismissed, and petitioner brings error. Modified and affirmed.

W. H. C. Taylor, of Denver, for plaintiff in error. Lafayette F. Crawford, of Denver, for defendants in error.

MUSSER, C. J. On July 11, 1911, Sarah Doyle died intestate in Denver. On July 21st an administrator of her estate was appointed by the county court. On October 31st Patrick W. Doyle filed a petition in the county court entitled "In the matter of the estate of Sarah Doyle, deceased," wherein it was alleged that Patrick was the husband of Sarah; that she died seised of certain real property, household goods, and insurance and left no last will; that in the petition for letters of administration it was set forth that her heirs were Patrick W. Doyle, husband, who had relinquished all claim to the estate, and six others, sons and daughters of the deceased. Doyle's petition further alleged that the statement in the petition for letters of administration that he had relinquished all claim to the estate was based upon a certain postnuptial agreement entered into between him and Sarah, his wife, which postnuptial agreement was set out in his petition. He then alleged that neither party to the agreement agreed to surrender or relinquish any rights in the estate of the other upon decease and that such was not the purpose. He further stated that he is entitled to a share in the estate of Sarah Doyle, as widower; that he had never relinquished his right to inherit as her heir; and that an attempt was being made by the other heirs at law to deprive him of his just right in the estate of Sarah Doyle. He prayed that the court would consider his claim to a share in the estate and enter an order of record decreeing and adjudging that he was entitled to one-half of the estate in accordance with statute, and further prayed for his costs and such other relief as to the court seemed just and equi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

table. To this petition a demurrer was filed on two grounds: First, that it did not state facts sufficient to entitle the petitioner to the relief prayed for; second, that the court had not jurisdiction at that time to grant the prayer of the petition. The court sustained this demurrer and dismissed the petition. It is this order of the court that it is sought to review by this writ of error.

We are unable to find any authority in the laws of this state for any such proceedings as were attempted in the county court. It is claimed by the plaintiff in error and denied by the defendants in error that it was a proceeding under section 7050, Rev. Stat. 1908. That section provides that "any person claiming to be an heir at law and as such entitled to an estate of inheritance in any intestate lands, tenements or hereditaments constituting all or a part of the estate of any deceased person, may file in the court in which such estate is in process of settlement or at any time before the order of published notice of final settlement, a petition duly verified, setting forth the relationship of the petitioner to the deceased and the names and addresses of all other persons who are or who claim to be heirs so far as known to the petitioner, and asking for a judicial ascertainment and determination of the heirs of such deceased." The section further provides that, in case such petition is filed, the order for the notice of final settlement and the notice itself shall include a notice of the application for the determination of heirship, and then goes on and specifies the notice which shall otherwise be given to all persons named as heirs.

Section 7051 provides that upon the day named in the notice for the hearing the court shall receive and hear proofs concerning the heirs of the deceased and shall upon proofs submitted enter a decree determining who the heirs are. If a petition is filed seeking a determination of heirship, the statute does not provide that it shall be answered or otherwise met by plea, nor can any action be taken thereon until the day fixed for final settlement and after the publication and serving of notice as provided in the statute. The decree to be entered is simply a determination of who the heirs are. In the first place, Doyle's petition did not in any manner indicate that he desired a determination of who the heirs of Sarah Doyle were. It does show that what he desired was a determination that he was not excluded from the inheritance by the postnuptial agreement set up in his petition. He did not allege who the heirs were, nor who claimed to be the heirs, if any. All he alleged was that the petition for administration stated that certain persons were heirs of the deceased, among whom was himself, coupled with the statement that he had relinquished all rights to the estate. His petition seems to have been called forth by that statement. That statement did not bind him. It was not even evidence that he had

relinquished any claim to the estate, nor did it call for any denial or motion on his part. The fact was that he was the surviving husband of the deceased, and it would take more than a statement or conspiracy to oust him from an inheritance that the law allowed by virtue of that relationship. It was incumbent on some one else to move to exclude and not for Doyle to move to prevent exclusion. He did not pray, as the statute requires, for a judicial ascertainment and determination of the heirs of the deceased. All that he asked for was an order adjudging that he was entitled to one-half of the estate. What he really sought also was a construction of the postnuptial agreement to the effect that it did not exclude him from the inheritance. Such a proceeding is plainly not what is provided for by sections 7050, 7051, of our statute.

It would be improper for this court to determine at this time whether or not the county court has jurisdiction in any proceeding, as a court of probate, to determine whether the postnuptial agreement excluded Doyle from the inheritance, because the proceeding initiated by him, and which culminated in the judgment sought to be reviewed, was wholly irregular and unknown. In such proceeding it is safe to say that the court could not determine what was presented for determination. Nor ought we to determine whether or not the county court, as a court of probate, would have the power in a proceeding prosecuted by virtue of section 7050 to determine the effect of the postnuptial agreement, because no such proceeding was attempted in the county court. Whether the reason entertained by the county court for dismissing the petition was right or wrong, the dismissal of it was right.

The judgment of dismissal, however, is modified so that it shall not be taken as an adjudication, in any way, of the effect of the postnuptial agreement and shall be without prejudice to the right of Doyle or any of the other heirs or persons in interest to have the effect of that agreement upon the inheritance adjudicated in an appropriate action or proceeding in a proper court, and as so modified the judgment is affirmed.

Modified and affirmed.

WHITE and BAILEY, JJ., concur.

RICE v. PEOPLE.

(Supreme Court of Colorado. Nov. 3, 1913.)

1. INDICTMENT AND INFORMATION (§ 132*) — JOINDER OF OFFENSES—ELECTION.

Under an information charging an assault, an assault with a deadly weapon with intent to commit bodily injury, and an assault with intent to murder, where it appeared that the different counts were not distinct offenses, but related to a single assault charged to have been committed in different ways to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

meet the evidence, the state was not required to elect upon which count it would proceed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-447, 449-453; Dec. Dig. § 132.*]

2. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—INTENT.

While, in a trial for one offense, evidence of another independent offense or act is generally inadmissible, yet, in a prosecution for assault and battery, evidence that previous to the assault defendant had told the witness to assault the person assaulted, and had tried to hire the witness to assault him, was admissible as tending to prove that defendant had intended to have such person assaulted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

3. CRIMINAL LAW (§ 384*)—EVIDENCE—RE-MOTENESS.

Where it appeared, in a prosecution for assault and battery, that trouble had continued between defendant and the person assaulted for about 7 years, evidence that defendant about 17 months before the assault had had it in his mind to have the assault made was not objectionable for remoteness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.*]

4. ASSAULT AND BATTERY (§ 91*)—EVIDENCE—PRESUMPTION.

On proof that while a fight was in progress defendant came up and encouraged its continuance by saying, "Kill him; stomp him to death," and made some demonstration with a gun, there was a presumption that he intended at least to encourage an assault or assault and battery upon the person referred to.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. § 91.*]

5. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTION.

Where defendant, by the words and gestures attributed to him, was presumed to have intended an assault and battery, any error in an instruction that every person is presumed to intend the natural and ordinary consequences of his acts, and that the presumption applies likewise to words and gestures, was not prejudicial in view of a conviction of assault and battery only, as it had not brought about a liability greater than his words and gestures implied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for assault and battery arising out of a fight, evidence that during the afternoon, some time after the fight, defendant told a third person to assault the witness was so entirely irrelevant that the court could not say that it was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

7. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT.

Where the evidence in a prosecution for assault and battery was such that, according to the view taken, the jury might have either acquitted or convicted defendant, the court could not say that the evidence did not warrant a conviction, since that would be to invade the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

8. CRIMINAL LAW (§ 1129*)—APPEAL—ASSIGNMENT OF ERROR—STATUTE.

The statute, as well as the rules of the Supreme Court, require that an appellant shall file an assignment of errors relied on for reversal, and errors not assigned will not be reviewed where the state objects.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

En Banc. Error to District Court, Logan County; H. P. Burke, Judge.

Sam B. Rice was convicted of assault and battery, and he brings writ of error. Affirmed.

Munson & Munson and McConley & Hinkley, all of Sterling, for plaintiff in error. Fred Farrar, Atty. Gen., and Clement F. Crowley, Asst. Atty. Gen., for the State.

MUSSER, C. J. [1] The defendant in error was convicted of assault and battery in the district court. The information charged, in four counts, mayhem, an assault, an assault with a deadly weapon with intent to commit bodily injury, and an assault with intent to commit murder, on one Shaeffer. The charge of mayhem was withdrawn by the court from the jury, and will not be considered in the case. The defendant filed a motion to require the people to elect upon which count of the information they would proceed. This motion was overruled, and the action of the court in that behalf is assigned as error.

These different counts related to the same transaction as appears from the evidence. They related to one fight that took place, and were not several and distinct offenses, but arose from the same transaction or offense charged to have been committed in different ways for the purpose of meeting the evidence. The defendant could not have been guilty of more than one. No error was committed in overruling the motion to elect. Bergdahl v. People, 27 Colo. 302, 61 Pac. 228; Kelly v. People, 17 Colo. 130, 29 Pac. 805; White v. People, 8 Colo. App. 289, 45 Pac. 539.

The evidence showed that a son of the defendant and one Shaeffer began to quarrel, and thereupon one Walker, who was with the son, took the matter up and became engaged in a fist fight with Shaeffer. While the fight was going on, the defendant came up. He did not touch Shaeffer, and very soon after he arrived he stopped the fight. Thus far there is no conflict in the evidence. Evidence for the people was to the effect that Walker, without provocation, struck Shaeffer and began the fight; that when the defendant came up he said, applying a vulgar epithet to Shaeffer, "Kill him; stomp him to death," and came towards the combatants with a gun; that he then stopped the fight, because he saw two other men approaching; and that very shortly after the fight the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

fendant said, "This has been running for 7 years; we finished it in 15 minutes; Shaeffer is whipped, and owned up to it." The evidence for the defendant was to the effect that the defendant came up and immediately stopped the fight, and that he said nothing and did nothing to encourage it. Over the objection of the defendant, a witness was permitted to testify that about 17 months before the fight the witness was herding cattle for the defendant, and that the latter told the witness to kick Shaeffer's head off, and tried to hire him to commit an assault on Shaeffer. The witness also related later conversations that he had with the defendant.

[2, 3] It is a general rule, applied with considerable strictness, that in a trial for one offense evidence of another independent offense or act is inadmissible. To this rule, however, there are some well-defined exceptions, among which may be mentioned an instance when the former offense or act tends to prove a design or purpose on the part of the defendant which he likely carried out by committing the offense charged. *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325, 16 Ann. Cas. 787; 1 Wigmore on Evidence, § 304.

The evidence objected to tended to prove that the defendant had it in his mind to have Shaeffer assaulted, and for that purpose had attempted to influence the witness. Now, if that was the defendant's purpose, it was probably true that he encouraged and aided the assault by saying and doing what the people's witnesses said he did when he came to where the fight was in progress. This view is strengthened somewhat by the other evidence which tended to prove that the fight had settled in 15 minutes what had been going on between Shaeffer and the defendant for 7 years. This last-mentioned evidence also removes the objection that the matter detailed by the witness, relative to his assaulting Shaeffer, was too remote in time from the offense charged, for, if it is true that the strife between Shaeffer and the defendant had been going on for 7 years, 17 months was well within that time. From the foregoing considerations, it seems plain that the evidence objected to was admissible.

There is no instruction set out in the abstract relative to the law of principal and accessory, and hence we are unable to say that any error was committed in the instruction, if any was given.

[4, 5] Objection is made to an instruction to the effect that every person is presumed to intend the natural and ordinary consequences of his acts, and "this presumption applies likewise to words and gestures." The contention is that the presumption does not apply to words and gestures, for, as said, men may use words that literally may mean one thing, and which were intended and understood to mean another. However this may be, if there was any error in this instruction, it was not prejudicial to the de-

fendant. There was evidence that he came up during the fight and encouraged its continuance by saying, "Kill him; stomp him to death," and that he made some demonstration with a gun. Now, the jury were bound to presume from this conduct, if they believed the testimony, that the defendant intended at least to encourage an assault or assault and battery upon Shaeffer. He could not have meant thereby that the fight should cease. He was acquitted of an assault with a deadly weapon with intent to commit bodily injury and of an assault to commit murder. He was convicted of assault and battery only. He certainly intended that much by the words and gestures attributed to him by the witnesses, and, as the instruction did not bring about a result greater than his words and gestures, if used, must at least have implied, he was not prejudiced.

The objection to a remark made by the prosecuting attorney while addressing the jury is not deemed of sufficient merit to warrant a serious consideration.

[6] Over the objection of the defendant, a witness was permitted to testify, in rebuttal, that during the afternoon, some time after the fight, the defendant told Walker to assault the witness. Why this evidence was offered and admitted cannot be imagined. It had no probative value. It rebutted nothing offered by defendant. It added nothing to the testimony of the people. On the other hand, it detracted nothing from the testimony for the defendant. It seems so useless in purpose and effect that it would be ill advised for a court to say that it might have prejudiced the defendant.

[7] The final assignment of error is that the evidence did not warrant the verdict. To uphold this assignment would be to invade the province of the jury. It is true that under a certain view of the evidence they could have well acquitted the defendant; under another they could have convicted him. The jury saw fit to render the verdict they did. This court cannot inquire into their action in the state of the evidence.

[8] In the reply brief the defendant, for the first time, raises the point that the judgment provides for a fine of \$100 and imprisonment for 30 days, while section 1659, Rev. Stat. 1908, says that the punishment for assault and battery shall be imprisonment in the county jail not exceeding 6 months, or a fine not exceeding \$100. In the oral argument the Attorney General insisted that the defendant could not object to the judgment on this account, because it was not assigned as error, and an examination of the assignment of errors reveals nothing that would include this objection. The statute, as well as the rules of this court, contemplate that a plaintiff in error shall make and file an assignment of errors relied on for the reversal of a judgment, and, as the defendant in error insists that this be observed in the present instance, this court cannot ignore the

statute and the rules. Defendant says that the judgment is void, and on that account this court should set it aside of its own motion. If it is void, he has nothing to fear from it, so that affords no reason for this court to voluntarily interfere when the other party to the judgment insists that it shall stand as it is. If the judgment is not void, certain it is that the defendant cannot be made to suffer two punishments for an offense when the law prescribes but one, so that, if the defendant shall pay the fine imposed, and the law is that he shall be punished by fine or imprisonment for the offense of which he has been convicted, he cannot be made to suffer imprisonment also. Thus the defendant would be benefited by the judgment as rendered, for, had but one punishment been inflicted, it is likely that the additional burden intended by the maximum fine would have been shifted so as to increase the term of imprisonment. So that, from his own viewpoint, the defendant has no reason to complain of the judgment as rendered whether void or not, and, as the defendant in error wants it as it is, and the state of the record will not permit this court to interfere, it must so remain.

As no prejudicial error appears in any of the errors assigned for reversal, the judgment is affirmed; but its affirmance shall in no wise be taken to give it validity, if it is invalid, nor in any manner change its force and effect, as rendered.

Judgment affirmed.

CITY OF DELTA v. LAMB.

(Supreme Court of Colorado. Nov. 3, 1913.)

1. MUNICIPAL CORPORATIONS (§ 408*)—IMPROVEMENTS—TAXATION—STATUTES—AMENDMENT.

Gen. Laws 1877, § 2655, provided in paragraph 71 that all cities and incorporated towns constructing water or gas works may assess each tenement and vacant lot abutting on the mains. This statute was subsequently amended by Laws 1893, p. 464, providing that all cities and incorporated towns constructing gas, water, or electric light works may assess upon each tenement or other place supplied such rent as may be deemed proper. *Held*, that the amendment repealed the earlier power to tax each tenement or lot abutting on the water mains.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1005, 1006, 1183; Dec. Dig. § 408.*]

2. MUNICIPAL CORPORATIONS (§ 408*)—IMPROVEMENTS—ASSESSMENTS—STATUTES—REPEAL.

While Laws 1879, p. 195, authorized municipalities to levy frontage taxes on all lots abutting on water mains, yet as Act 1893, p. 464, which amended Gen. Laws 1877, § 2655, giving municipalities such power, did not authorize any such tax, the act of 1879 must be construed as repealed by implication; being inconsistent with the latest expression of legislative will.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1005, 1006, 1183; Dec. Dig. § 408.*]

3. MUNICIPAL CORPORATIONS (§ 408*)—ASSESSMENTS—POWER OF LEGISLATURE.

The power of a municipality to levy assessments depends upon the express provisions of the charter or general statute, and hence a municipality cannot, without an express grant of power, levy assessments on property which merely abuts on streets carrying water or gas mains.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 406.*]

En Banc. Error to District Court, Delta County; Sprigg Schackelford, Judge.

Action by the City of Delta against T. E. Lamb. There was a judgment dismissing the complaint, and plaintiff brings error. Affirmed.

Fred N. Dickerson, of Delta, for plaintiff in error. Millard Fairlamb, of Delta, for defendant in error.

SCOTT, J. In this case the trial court sustained a demurrer to the complaint. The city electing to stand on its complaint, the case was dismissed, and is now before us for review.

The complaint alleges that the city of Delta is a city of the second class, and owns and controls a city waterworks plant; that the city adopted an ordinance on the 2d day of December, 1909, levying a frontage tax of \$2 each on all lots, or parts of lots, in the city abutting on the water mains of the city plant, for the purpose of maintaining such water system. The ordinance was set out in full. The complaint further alleges that the defendant is the owner of 11 lots within the city, fully set out, and upon which there has been, under the terms of the ordinance, levied a tax of \$22. For a second cause of action it is alleged that a similar ordinance of the city was enacted for the year 1910, providing for a like levy upon the same lots and in like amount. The prayer was for judgment for the total of these sums. The grounds of the demurrer are: (1) The facts stated are not sufficient to constitute a cause of action; (2) want of jurisdiction, in that the city is not authorized to bring suit for recovery of a tax assessed and levied in such case.

The first contention of the defendant below, defendant in error here, is that there is no authority for the levy of a frontage tax on lots abutting on water mains for the purpose of maintaining a city water system.

[1] It was provided by the seventy-first paragraph of section 2655, c. 100, General Laws 1877, in so far as it is necessary now to consider, as follows: "Seventy-First.—All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon each vacant lot in front of which the pipes commonly called 'street mains' are laid, but such vacant lots as do not take water from such 'street mains' shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one-story building; and gas should be charged for by the foot, and then only to such as use it; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works."

Later the Legislature provided for other additional and miscellaneous powers of councils in cities and towns, Laws of 1879, p. 195, as follows: "Fifth. To levy annually, by ordinance, and collect a frontage tax on all lots fronting on water mains in towns or cities having waterworks owned by such towns or cities." This was the only provision contained in this act relating to waterworks.

By an act of 1893, c. 160, Laws 1893, the seventy-first paragraph above quoted, and in so far as it relates to municipal water plants, was amended so as to read as follows: "Sec. 4. The seventy-first (71) paragraph of section fourteen of said act, is amended to read as follows: Seventy-First. All cities and incorporated towns constructing such water, gas or electric light works are authorized to assess from time to time, in such manner as they shall deem equitable upon each tenement or other place supplied with water, gas or electric light, such water, gas or electric light rent, as may be agreed upon by the council or trustees; and gas should be charged for by the foot and electric lights by the light and then, only to such as use them and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected in addition to the other taxes authorized to be levied a special tax on taxable property in said city or town; which tax, with the water or gas or electric light rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works."

The question to be determined is whether or not by the act of 1893 that part of the act of 1879 providing for the levy of the frontage tax was repealed by implication, though not in stated terms.

It will be noticed that by the said seventy-first paragraph before its amendment, city councils were authorized to assess, from time to time, each tenement or other place supplied with water, or each vacant lot in front of which the pipes commonly called street mains are laid, but with the restriction that

such vacant lots as do not take water from the mains shall not be assessed at more than one-half as much as the same amount of frontage on lots occupied by one-story buildings. The act of 1879 would seem to have authorized the collection of a tax upon all lots fronting on the water mains of a municipally owned plant, without specified restriction or limitation upon the city council.

[2] By the act of 1893, amending the seventy-first paragraph of section 2655, Laws of 1877, the power to assess is limited to a charge or rental for the use of water, and a general tax on all the taxable property within the city or town, not to exceed three mills. Thus the right to tax lot frontage abutting on water mains, contained in the original section, was clearly taken away by the amendment of 1893. This is so inconsistent with the provision of the act of 1879 as to be without question in conflict therewith, and, being a later act upon the same subject and covering the whole of the subject of the right of such cities to tax for the maintenance of a municipally owned waterworks system, must be held to have repealed the provision of the act of 1879, in relation thereto. *Lace v. People*, 43 Colo. 199, 95 Pac. 302. If this be true, then there was at the time of the passage of the ordinances in question no statutory authority therefor.

[3] It is generally held that the power of a municipality to levy assessments depends on express provision of charter or statute, and that the extent to which this power may be exercised is to be determined by the proper construction of such provision. 28 Cyc. 1102, and authorities cited. This rule should apply with special emphasis in this state, where the statutory power once existed and was later taken away.

The ordinances and the levies under them were without authority, and are void. Having adopted this view, it is not necessary to determine the question as to whether or not a valid special tax for local improvements may be collected in the manner attempted in this case.

The judgment is affirmed.

Judgment affirmed.

POMROY et al. v. BOARD OF PUBLIC WATERWORKS, DIST. NO. 2, OF CITY OF PUEBLO et al.

(Supreme Court of Colorado. Nov. 8, 1913.)

1. MUNICIPAL CORPORATIONS (§ 439*)—"SPECIAL ASSESSMENTS"—NECESSITY FOR BENEFITS.

A special or local assessment, which is a burden imposed upon real property for a local public improvement, the extent of which is determined by the benefits which inure thereby to the property, in order to be valid must be levied for an improvement local in its nature which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

enhances the value of the property assessed in an amount at least equal to the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1053; Dec. Dig. § 439.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6567-6579.]

2. WATERS AND WATER COURSES (§ 182*)—PUBLIC WATER SUPPLY—WATERWORKS DISTRICTS—SPECIAL ASSESSMENT.

An assessment to pay the maintenance and purchase price of a waterworks system purchased by a waterworks district from a private corporation, which is levied only against the lots in front of which the mains were laid at the time of the purchase, although the bonds are liens upon the real estate of the entire district, is for a general and not a local improvement, since the only special benefits accrued from the laying of the mains, and not from the purchase by the district, and therefore Sess. Laws 1905, p. 366, § 9, permitting such an assessment, is unconstitutional.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 267; Dec. Dig. § 182.*]

3. MUNICIPAL CORPORATIONS (§ 437*)—SPECIAL ASSESSMENTS—PURPOSE.

The test of the validity of a special assessment is not whether any purpose to which tax may be applied is valid, but whether the property against which it is levied is especially benefited by the purposes to which the tax may be applied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1051; Dec. Dig. § 437.*]

4. WATERS AND WATER COURSES (§ 183½*)—PUBLIC WATER SUPPLY—WATERWORKS DISTRICTS—SPECIAL ASSESSMENT.

So much of the purchase price of a waterworks system as is used to pay for the parts of the system which furnish water, not only where the mains are already laid, but where they may be laid in the future, such as a pumping plant, water rights, and similar items, are for the general benefit of the property and inhabitants of the district, and a special assessment cannot be levied against the lots in front of which mains are laid to pay therefor.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 183½.*]

5. MUNICIPAL CORPORATIONS (§ 439*)—SPECIAL ASSESSMENTS—NATURE OF BENEFITS.

Special benefits which will sustain a special assessment must be immediate, and of such a character that they can be seen and traced, and not remote or contingent benefits enjoyed by the general public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1053; Dec. Dig. § 439.*]

6. CONSTITUTIONAL LAW (§ 290*)—EMINENT DOMAIN (§ 2*)—COMPENSATION—DUE PROCESS OF LAW—SPECIAL ASSESSMENT.

To enforce a special assessment for a purpose which does not confer a special benefit upon the property would result in taking private property without compensation, and without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 871-875; Dec. Dig. § 290.* Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

Hill, J., dissenting..

En Banc. Error to District Court, Pueblo County; J. E. Rizer, Judge.

Action by Henry K. Pomroy and others against the Board of Public Waterworks,

District No. 2, of the City of Pueblo, and others. Judgment for the defendants, and plaintiffs bring error. Reversed and remanded.

Hartman & Ballreich, of Pueblo, Chas. L. Avery, of Denver, and Chas. W. O'Donnell, of Pueblo, for plaintiffs in error. M. J. Galligan, M. G. Saunders, and E. F. Chambers, all of Pueblo, for defendants in error.

GABBERT, J. Under the provisions of an act found in the Session Laws of 1905, at page 361 et seq., Waterworks District No. 2, of the city of Pueblo, was created. The territory embraced in that district included all that portion of the city lying south of the Arkansas river. The purpose of creating the district was to enable the city to purchase a waterworks system for the use and benefit of the inhabitants of the territory included in the water district. After it was created, the city, for the object indicated, purchased the waterworks plant, priorities, and all appliances of the Pueblo Water Company by the issuance and delivery of interest-bearing bonds which were made a lien upon all the taxable real property of the district, and in effect an obligation of the district only. The company from which the purchase was made had been in existence about 25 years, and had laid water mains in certain of the streets, alleys, and other public places of the territory embraced in the water district. There are a great many lots and tracts in the district fronting on streets in which water mains are not laid. After the purchase the constituted authorities levied a frontage tax on certain lots fronting upon streets where the water mains were laid. These mains had been laid and maintained and water distributed through them by the company from which the purchase was made. Plaintiffs, as owners of these lots, brought suit to restrain the collection of this tax. The authority to levy the tax is based upon section 9 of the act, which provides, in substance, that it shall be lawful to levy, annually, an assessment upon each lot or parcel of ground which shall abut on any street in the water district through which the distributing pipes of the waterworks are or may be laid so as to conveniently supply such lots with water, whether water be used upon such lots or not, which assessment shall be levied at a uniform rate, according to frontage. The proceeds of this tax can be applied in payment of the operating expense and maintenance of the system and the discharge of the bonded indebtedness. The trial resulted in a judgment in favor of the defendants. Plaintiffs have brought the case here for review on error.

Counsel for plaintiffs contend the tax is invalid for several reasons, all of which, however, go to the constitutionality of the act. Their first point is that section 9, in so far as it authorizes a frontage tax to be levied upon lots on streets where the mains

had been laid and maintained and water distributed through such mains by the company, is invalid for the reason that it authorizes the levy of a special assessment for the purchase of or to pay for an already existing water plant. In other words, they contend the tax is invalid for the reason that any special benefit which accrued to the lots in question by reason of the water mains being in the streets upon which the lots involved abut had attached prior to the time the system was purchased by the city, and that it affirmatively appears none of the objects to which the frontage tax may be applied confers any special benefits upon these lots. The section of the act referred to provides that the frontage tax may be applied to defray the operating expense and maintenance of the system, to the payment of interest upon bonds issued to purchase it, and to provide a fund to discharge such bonds at maturity.

[1] A special or local assessment is a burden imposed upon real property for a local public improvement; the extent of the burden being determined by the special benefits which inure to the assessed property as the result of the improvement. 25 Ency. 1168. Assessments of this character are upheld upon the theory that the special benefits inuring to the property assessed are equal to the burden thereby imposed; that is to say, that an improvement to defray the expense of which the proceeds of the special assessments are applied must benefit the property on which the special assessment is levied in a manner local in its nature, and which does not attach to other property of a like character, and in order to be valid must specially enhance the value of the property against which such assessment is levied at least equal to the amount so assessed. *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 467.

[2] One test, then, to apply in order to ascertain the validity of a special assessment is whether or not the property upon which it is levied is specially enhanced in value by the improvement or purpose for which the assessment is made. The mains were laid and water maintained therein in the streets upon which the lots of plaintiffs abut by the company from which the system was purchased. The service afforded since the purchase is no different or better than it was before. Has any special benefit been conferred upon the lots of plaintiffs by the transfer of the waterworks system, or for any of the purposes for which such tax may be applied? We think this question must be answered in the negative. All the benefits which resulted to the lots involved had attached before the system was purchased. The testimony disclosed, without dispute, that the mere change in ownership has not caused any value to attach to the lots by virtue of the mains being in the streets and the service afforded which did not exist prior to the purchase, and that in no respect has their value been specially en-

hanced by the purchase of the system, nor will the expenditure of the funds to be realized from the frontage tax for the purposes to which it may be applied confer upon the lots in the least degree, any special benefits whatever. Counsel for defendants contend that it is the presence of the water mains containing water which imparts a definite value to the lots in front of which such mains are laid, and that a lot has selling value on account of this condition which it would otherwise not have. Conceding this to be true, it cannot avail the defendants. In the respects mentioned the conditions are no different now from what they were before the purchase; neither has the purchase of the system conferred any special benefit on the lots in question. Whatever benefit has or will result to the property embraced in the water district from this source inures to all proportionately, including that located on streets where mains have not been placed, and is not limited to that fronting on streets where mains were laid when the purchase was made. In other words, it affirmatively appears that no new or special benefit has accrued to property abutting streets in which mains were laid when the purchase was made which has not accrued proportionately to all the real property in the district. True, the latter property can enjoy the use of water from such mains more readily and at less expense than lots located more remote from mains; but that was the condition when the purchase was made, so that the purchase by the city, which is the only change in the system that in any manner could affect the property of plaintiffs, has added nothing to the value of their lots. *Aldridge v. Essex Public Road Board*, 48 N. J. Law, 366, 5 Atl. 784; *Speer v. Essex Road Board*, 47 N. J. Law, 101.

[3] On behalf of defendants it is contended that, if any of the purposes to which the frontage tax may be applied is valid, the tax is valid. This is not the test. Authority to levy a special frontage tax can only be upheld on the theory that the property upon which it is levied is specially benefited by the purposes to which such tax may be applied.

[4] It will be borne in mind that the question of levying upon lots a tax to defray the expense of extending water mains in the future is not involved; but whether so much of the system which is utilized or may be utilized in the future necessary to supply the inhabitants of a municipality with water through distributing mains constitutes a general or local improvement. The purchase was not merely the distributing mains. It included pumping machinery, boilers, appliances of various kinds, reservoirs, standpipes, a pumping station, lands, charts, registers, and priorities in the Arkansas river from which the water to distribute through the system is obtained. These various items go to make up a system which is utilized to furnish water to those in front of whose lots mains are now

laid, and will be so utilized as mains are extended in the future. It is not for the benefit of any particular locality within the district, but for the general benefit of all the property within its limits and all the inhabitants therein. So much of an improvement as is designed and utilized for the general benefit of the inhabitants and property within the limits of a municipality is in no sense local, and special assessments to raise funds to construct, purchase, pay for, or maintain that portion of it cannot be lawfully levied. *Hughes v. City of Momence*, 164 Ill. 16, 45 N. E. 302; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; 28 Cyc. 1115.

The necessity for applying this rule to the case at bar is obvious. The special frontage tax can be applied to the payment of interest and the principal of the bonded indebtedness. This indebtedness, by the terms of the bonds, is made a lien upon all the taxable real property in the district, and is the debt of the district, and not of the abutting property. Owners of lots fronting on streets in which mains are not laid escape this tax. When the bonded indebtedness is discharged, a frontage tax to meet it will no longer be required, and lots fronting on streets in which mains may thereafter be extended will not be burdened with such tax to pay for the system, and yet they will enjoy all the benefits resulting from the system having been paid for, in whole or in part, by frontage tax upon other lots without having contributed anything for that purpose in the way of a frontage tax. This result demonstrates beyond question that so much of the system as is now or will be utilized in the future for furnishing water for the benefit of the inhabitants and property of the district is not a local improvement, and that all taxable real property in the district must bear its proportionate share of the amount necessary to liquidate the indebtedness incurred for such part of the system. Otherwise, if the frontage tax should be held valid, a tax would be imposed upon part of the property of the district to pay for an improvement which is for the benefit of all of the property and inhabitants in the district.

[§] Special benefits which will sustain a special assessment must be immediate, and of such a character that they can be seen and traced. Remote or contingent benefits enjoyed by the general public will not sustain a special assessment. 25 Ency. 1195.

[§] To enforce a special assessment for a purpose which does not confer a special benefit upon the property upon which it is levied would result in taking private property without compensation, and without due process of law.

Having reached the conclusion that the frontage tax is invalid, for the reasons given, it is unnecessary to consider the other ques-

tions urged against the constitutionality of the act.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed and remanded.

HILL, J., dissents; WHITE, J., not participating.

JACKSON v. LARSON et al.

(Court of Appeals of Colorado. Oct. 14, 1913.)

1. ADVERSE POSSESSION (§ 79*)—REQUISITES—"COLOR OF TITLE"—VOID TAX DEED.

A "color of title" on which title by adverse possession may be based is a mere pretense of title, but not a valid title, one which purports to be a good title, but is not so in fact; and that a tax deed is void on its face and notice of application therefor was not given does not prevent its constituting color of title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 459-462; Dec. Dig. § 79.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1264-1273; vol. 8, p. 7606.]

2. TAXATION (§ 789*)—TAX TITLES—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Where a tax deed is offered to establish paramount title to real estate, the parties claiming thereunder must prove, either that the statutory notice of application therefor was given, or that the assessed valuation rendered it unnecessary, before the deed can be admitted in evidence.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.*]

3. ADVERSE POSSESSION (§ 84*)—HOSTILE CHARACTER OF POSSESSION—GOOD FAITH.

The failure of the grantee in a tax deed to give notice of his application therefor, rendering the deed ineffectual to establish paramount title, is not sufficient to show want of good faith in claiming title thereunder by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 488-500; Dec. Dig. § 84.*]

4. ADVERSE POSSESSION (§ 115*)—COLOR OF TITLE—GOOD FAITH—EVIDENCE.

The question what constitutes color of title as a basis for title by adverse possession is to be decided by the court on inspection of the paper title presented, while the good faith of the party claiming thereunder is a question of fact to be decided on sufficient evidence.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.*]

5. ADVERSE POSSESSION (§ 79*)—HOSTILE CHARACTER OF POSSESSION—GOOD FAITH.

The failure of the grantee in a tax deed to give notice of the application therefor, if sufficient to prevent the original grantee from claiming title by adverse possession thereunder because of bad faith, does not affect such a claim by a purchaser from the grantee.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 459-462; Dec. Dig. § 79.*]

6. APPEAL AND ERROR (§ 854*)—REVIEW—SCOPE AND EXTENT—REASONS FOR DECISION.

Where the court in its oral announcement found that plaintiffs acquired title by adverse

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—6

possession under a quitclaim deed, the fact that it failed to refer to a tax deed of plaintiffs' grantor under which they also claimed is not material, where the decree found all the issues in their favor, since the oral announcement merely gave the court's reasons for the decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

7. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF COURT—EQUITABLE ACTIONS—CONFLICTING EVIDENCE.

The findings of the court on conflicting evidence in an equitable action are conclusive upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Cunningham, P. J., dissenting in part.

Appeal from District Court, Weld County; Neil F. Graham, Judge.

Action to quiet title by Eric Larson and another against Jerome F. Culp, to which James B. Jackson was, by stipulation, made a party defendant. From a judgment for plaintiffs, the defendant Jackson appeals. Affirmed.

John T. Jacobs, of Greeley, for appellant. Delph E. Carpenter, Herbert M. Baker, and R. E. Winbourn, all of Greeley, for appellees.

BELL, J. This is an action to quiet title under section 255, Mills' Annotated Code, brought by Eric Larson and Edwin T. Larson, appellees, in the district court of Weld county, against Jerome F. Culp, a former owner of the title to the west half of section 19, township 11 N. of range 61 W. of the sixth P. M., in said county, which is here in controversy.

It seems that the Union Pacific Railroad Company, the patentee from the government, transferred said property to Jerome F. Culp, above named, who neglected to pay the taxes thereon, and the treasurer of said county sold the same for the taxes so due, and the county bought it in, assigned the certificate of purchase to John Sedgwick, who, on December 17, 1901, received a treasurer's deed to all of section 19 aforesaid, and by a quitclaim deed, bearing date January 27, 1902, and acknowledged in 1904, purported to convey the west half of said section 19 to the appellees herein. The evidence shows that, in the early spring of 1902, the appellees took possession of the last-named property, and fenced the same thereafter, and, beginning July 1, 1902, paid all taxes legally assessed thereagainst for seven consecutive years, then brought this suit against Jerome F. Culp, the grantee of said railroad company. The said Culp defaulted, and made no defense to the action, and, on the 20th day of November, 1909, executed and delivered to James B. Jackson, appellant, for an expressed consideration of \$100, a quitclaim deed

for said west half of section 19, and, on the 16th day of December, 1909, by stipulation of the parties hereto, the said Jackson was made a party defendant, and, afterward, filed an answer, and, later, an amended answer and cross-complaint, setting up the invalidity of the treasurer's deed, and averring that said treasurer's deed was void upon its face, and the sole foundation of any claim or right the appellees had in the premises. By cross-complaint said Jackson set up his title to the premises, and asked that it be quieted in him. The appellees, in their replication, among other things, set up the two seven-year statutes of limitation.

It is admitted by counsel that the treasurer's deed is void upon its face, and, if offered in evidence to establish the paramount title to the property, that it would be inadmissible. However, in this case, it was offered merely as evidence of color of title. It was also objected to because the appellees did not show nor offer to show that the assessed value of the land was under \$500, nor that notice was given to the owner of the intended demand on the treasurer for a deed. There is no evidence on these subjects from either side, and the court held that, for the purpose of proving color of title, for which the deed was offered, it was admissible; and it is our opinion that the ruling of the trial court in this respect was proper.

[1] A color of title is a mere pretense of title, but not a valid title. It purports to be a good title, but is not so in fact.

In Lebanon Mining Co. v. Rogers, 8 Colo. 34-37, 5 Pac. 661, 662, the court said: "In Wright v. Mattison, 18 How. (U. S.) 56 [15 L. Ed. 280], it is said that 'the courts have concurred, it is believed, without an exception, in defining color of title to be that which has the appearance of title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title under which an entry or a claim has been made in good faith.'" It will be noticed from this decision of the United States Court, approved by our own Supreme Court, that "no importance is attached to the ground of invalidity of an apparent or colorable title."

[2] Counsel for appellant vigorously contends that a treasurer's deed, similar to the one before us, was held incompetent evidence in Richards v. Beggs, 31 Colo. 186, 72 Pac. 1077. There is no intimation in that case that the treasurer's deed was offered merely as a colorable title to support the possession and payment of taxes under the statutes of limitation. The court held, however, that it was incumbent upon the parties claiming

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

real estate under a tax deed to prove, either that the statutory notice was given, or that the assessed valuation rendered it unnecessary to give such notice before the deed would be admissible in evidence. This is the undoubted rule where the treasurer's deed is offered to establish the paramount title. However, the rule is to the contrary where the deed is offered as a mere color of title. A tax deed, invalid upon its face, has been repeatedly held to be a color of title in this jurisdiction. *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244; *Hogue v. Magnes*, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 357; *Bennett v. N. C. S. L. & I. Co.*, 23 Colo. 470, 48 Pac. 812, 56 Am. St. Rep. 281; *Brinker v. U. P. D. & G. R. Co.*, 11 Colo. App. 166, 55 Pac. 207; *Williams v. Conroy*, 35 Colo. 117, 83 Pac. 959. If it were a rule that a tax deed, void upon its face, was inadmissible in evidence to prove color of title, then such a deed could not be held good as a color of title, as there would be no way to use it beneficially.

In *De Foresta v. Gast*, supra, the Supreme Court said that a tax deed gives color of title, even though a person of legal learning and experience may, by a critical examination, discover defects in the instrument fatal to its validity. Counsel for appellant contends that our seven-year statutes of limitation were taken literally from those of the state of Illinois, and, when we adopted the statutes, we adopted the construction placed upon them by the courts of that state, and cites the cases of *Bowman v. Wettig*, 39 Ill. 416, and *Dalton v. Lucas*, 63 Ill. 337, as cases directly in point and decisive of the case before us.

[3] The Illinois cases cited were unfortunately based upon the erroneous doctrine that a person who buys property at a tax sale will be presumed to be familiar with the provisions of the Constitution and statute pertaining to securing titles thereunder, and if such a purchaser secures a deed void upon its face, he is presumed to know the law, and he cannot be said to be holding the premises under color of title in good faith. Both of these holdings by the Illinois court have been repudiated by the subsequent decisions of the courts of the state of Colorado, and likewise by the courts of the state of Illinois. It was said in the case of *De Foresta v. Gast*, supra, that a tax deed regularly executed gives color of title, though an expert or lawyer might, by inspection, see that it was void upon its face, and, in *Brinker v. U. P. D. & G. R. Co.*, 11 Colo. App. 166, 55 Pac. 207, it was held, in direct conflict with the case of *Bowman v. Wettig*, that a tax deed which issues before the period of limitation expires is a valid color of title. The Supreme Court of Illinois, in speaking of the doctrines announced in the *Bowman-Dalton Cases*, supra, said: "It is claimed that the cases of *Bowman v. Wettig*, 39 Ill. 416, and *Dalton v. Lucas*, 63 Ill. 337, establish the doctrine that

defendant was bound to know the law, and to know that the verbal contract for the land could not be enforced, and that the decree for its enforcement was erroneous, and therefore he was guilty of bad faith in so acquiring the deed. Such a doctrine would abrogate the statute (of limitation), and require the party claiming its benefit to establish a valid title, and in the case of *Davis v. Hall*, 92 Ill. 85, it was said that the apparent teachings of the opinion in *Bowman v. Wettig*, supra, had not been adhered to in the later cases. The decision in *Dalton v. Lucas* was based on the prior case of *Bowman v. Wettig*; but, if given full effect, it could not influence the decision in this case." *Sexson v. Barker*, 172 Ill. 361-366, 50 N. E. 109. It would seem that the above and other later Illinois decisions have limited the *Bowman-Dalton Cases* as authority to such cases as involve a knowing and intentional omission by a purchaser at a tax sale to give the notice required by statute, and thereby keep the owner in ignorance of his rights. *Sexson v. Barker*, supra, 367.

In *Miller v. Pence*, 132 Ill. 149, 23 N. E. 1030, the court had under consideration the requisites of a notice prior to introducing the deed as evidence of color of title, and the Supreme Court of Illinois said: "The statute requires notice to be served on the person in whose name the land was taxed, * * * as a condition to obtaining a deed, * * * and as this requirement of the statute was not observed, the tax title cannot be held to be paramount title. But * * * those deeds constituted color of title, and it appears from the evidence that appellee entered into possession of the premises in 1879, under color of title, and remained in possession for more than seven successive years, and during that period paid all taxes assessed on the premises. The color of title thus established, with proof of possession and payment of taxes, clearly brought appellee within section 2 of the act of 1839." See, also, *Morrison v. Norman*, 47 Ill. 477-479.

The court in the *Bowman-Dalton Cases*, as a presumption of law, held that possession under color of title under the tax deeds was not held in good faith. That doctrine has been repudiated by the subsequent decisions of the courts of Colorado and Illinois. Our Supreme Court, in speaking to this question, said: "As has been said by the Supreme Court of Illinois construing this statute: 'The law presumes that all men act in good faith until there is some evidence to the contrary',—and, again: 'Color of title made in good faith is shown by any deed or instrument which purports on its face to convey title which a party is willing to and does pay his money for, apart from any fraud. The deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it had no faith or confidence in it.'" *Knight v. Lawrence*, 19 Colo. 425-433, 36 Pac. 242, 245;

Sexson v. Barker, *supra*, 172 Ill. 365, 50 N. E. 109.

[4] A color of title, or what it is rather, is a question of law to be decided by the court on an inspection of the paper title presented. The good faith of the party claiming under the color of title is a question of fact to be decided on sufficient evidence. *Latta v. Clifford* (C. C.) 47 Fed. 614; 2 Ency. L. & P. 409-411. The appellant offered no evidence whatever as to the bad faith of the appellees or their grantor in securing or holding the premises. The appellees and the grantee in the tax deed went upon the stand at the trial, and each testified to the good faith of these transactions.

[5] If we should admit, for argument's sake, that the Bowman-Dalton Cases are authority for the purposes cited, even then they would not apply to this case, as they limit their application to the grantee in the tax deed, as is said in the syllabus of *Bowman v. Wettig*, *supra*, 39 Ill. 418: But "a purchaser * * * from the grantee in a tax deed, executed before the expiration of two years from the sale, would not be held to notice of the illegality appearing on its face"; and in *Dalton v. Lucas*, *supra*, 63 Ill. 339, it is said that "a subsequent grantee would not be affected by the laches of a purchaser at a tax sale, but the party himself, having omitted a plain duty enjoined upon him by law, will be considered as having done so for a sinister purpose, and will not be permitted to avail of a deed procured by such neglect." This seems to be a complete answer to the contention of appellant that appellees could not tack their possession under the quitclaim deed to the possession of Sedgwick under the treasurer's deed.

As we understand, appellant's contentions are: First. That the treasurer's deed was void upon its face, hence not a valid color of title, and that appellees failed to show the amount of the assessment or notice of demand for the deed. Secondly. That, while the quitclaim deed bears date January 27, 1902, it was not signed nor delivered until 1904. Thirdly. That, assuming said deed was delivered in 1904, and that the possession thereunder could not be tacked to the possession under the treasurer's deed, there was not a holding under color of title for seven years; hence the seven-year statute, providing for a holding under a claim and color of title, did not operate.

[6] The trial court, upon conflicting evidence, found that the quitclaim deed was signed and delivered about the 27th day of January, 1902, and that the appellees early in the spring of that year took possession of the property, fenced it, and in the month of July following commenced the payment of taxes, and completed their title by holding under said quitclaim deed in good faith and by paying all taxes legally assessed thereagainst for seven years, but said nothing about the holding under the tax deed in its

oral announcement. However, in its ultimate written findings and decree filed in court, it said: "(The court) doth find the issues herein joined generally in favor of said plaintiffs on their complaint, answer, and replication, and against the defendant, Jackson, on his amended answer and counterclaim and replication." This was a finding and decree upon all issues where there was conflicting evidence, and the oral announcements of the court, upon which appellant's counsel bases his argument, are but the reasons given for its decision. *County Commissioners of Montezuma County v. Frederick*, 50 Colo. 465, 115 Pac. 514; *Stough v. Reeves et al.*, 42 Colo. 432-436, 95 Pac. 958.

In the latter case the Supreme Court said: "Counsel for appellant has included in the bill of exceptions and in the abstract of the record the oral remarks made by the court at the time of the rendition of the judgment, instead of the findings formulated and signed by the court and entered of record as its ultimate findings of fact and conclusions of law, and counsel predicates much of his argument upon some expressions found in the oral disposition of the judge as to the specific objection that the description was subject to. We can consider only the ultimate conclusions of the court as expressed by the record, and we are not concerned with the reasoning by which the court below arrived at such conclusion."

In the *Stough* Case, *supra*, in the oral announcement of the trial judge, he found on a minor objection that the tax deed was invalid, and did not mention many other more substantial objections. However, in his recorded conclusions and decree, the finding was general. The Supreme Court held that his conclusion on the minor objection was erroneous, but sustained the decree on the more substantial objections to the deed, which were not mentioned by the trial judge in his oral announcement.

[7] We have examined the evidence as to the time when the quitclaim deed was signed, and all the circumstances attending the transaction; and we think that there is sufficient evidence to sustain the findings and decree of the court, and also to support the finding that the quitclaim deed was signed and delivered early in the year 1902. The mere fact that the appellee Eric Larson was uncertain as to when the deed was signed and delivered did not prevent the court from considering the evidence of the grantor and the attending circumstances as sufficient to justify its conclusion, and we are concluded by these findings made upon conflicting evidence. *Railroad Company v. McDonough*, 54 Colo. 515-517, 131 Pac. 402.

The findings and decree of the trial court are affirmed, with costs.

CUNNINGHAM, P. J. (specially concurring). I concur in the result reached in the majority opinion in this case, but base my

concurrence entirely upon the rule laid down in *Bowman v. Wettig*, 39 Ill. 416, and in *Dalton v. Lucas*, 63 Ill. 337, wherein it is held that: "A purchaser, however, from the grantee in a tax deed," which was "executed before the expiration of two years from the sale, would not be held to notice of the illegality appearing on its face." *Bowman v. Wettig*, supra. And: "A subsequent grantee would not be affected by the laches of a purchaser at a tax sale, but the party himself, having omitted a plain duty enjoined upon him by law, will be considered as having done so for some sinister purpose, and will not be permitted to avail of a deed procured by such neglect." *Dalton v. Lucas*, supra.

On all other points the majority opinion, as I view it, is diametrically opposed to the rule announced by our Supreme Court in *Richards v. Beggs*, 31 Colo. 186, 72 Pac. 1077. It is true, as is said in the majority opinion, that in the *Richards* Case, "there is no intimation in that case that the treasurer's deed was offered merely as colorable title to support the possession and payment of taxes under the statutes of limitation," but it is equally true that there is nothing in the *Richards* opinion which indicates any limitation whatever upon the rule therein announced, which is unequivocal, that a tax deed is not admissible in evidence to establish title to real estate unless it first be proven, either that the statutory notice was given of when the time for redemption would expire before the deed was issued, or that the assessed valuation was less than \$500. The two closing sentences of the opinion in the *Richards* Case are too plain to require construction or to warrant cavil, and they read as follows: "No presumptions obtain that the preliminaries which authorize the issuance of a tax deed have been observed, or that the conditions necessary for its issuance existed, except as suggested by statute; hence, so far as the authority of the treasurer to issue a tax deed is dependent upon the conditions contemplated by the section under consideration, that must be shown to exist by evidence allunde, for the deed itself would not prove them. *It is therefore incumbent upon the parties claiming real estate under a tax deed to prove either that the statutory notice was given, or that the assessed valuation rendered it unnecessary to give such notice before the deed would be admissible in evidence.*" (The italics are mine.)

If the seven-year statute of limitations were satisfied by the mere proof of color of title, there would be much force in the position taken in the majority opinion that a tax deed void on its face, when offered as color of title only, ought to be admitted, without requiring of the holder of such deed preliminary proof that he had complied with the statutes pertaining to notice; but the seven-year statute requires more than color

of title; it requires good faith, and while many authorities hold that good faith will be presumed, it ought not to be presumed in favor of one who relies for his title on a deed clearly void on its face, and where the invalidity of his deed is due to his own failure or omission to comply with a statutory requirement. As was well said by the Supreme Court of Illinois in *Dalton v. Lucas*, supra: "But the party himself, having omitted a plain duty enjoined upon him by law, will be considered as having done so for some sinister purpose, and will not be permitted to avail of a deed procured by such neglect."

The neglect of a grantee in a tax deed to comply with a statute is a fraud in law, if not a fraud in fact, and certainly sufficient to overcome all presumptions of good faith on his part. To hold that a tax deed like the one here before us cannot be admitted in evidence when offered as paramount title, but must be admitted when offered as color of title held in good faith, is, to my mind, illogical. Whether the tax deed holder rests his title upon the tax deed alone, or upon that instrument, plus the statute of limitations, in either case he must, before he can prevail, have his deed admitted. If his failure to give the statutory notice of his intention to take a deed bars the admission of the deed when offered for one purpose, it seems logical to hold that it bars it for any purpose. At any rate, this is the rule of evidence announced by our Supreme Court in *Richards v. Beggs*, supra, and with that ruling I am in complete accord. To permit the holder of a tax deed who has ignored, presumptively from some sinister purpose, the provisions of the statute pertaining to the giving of preliminary notice to avail himself of the statute of limitations is to encourage a disregard of the statutes by offering a premium therefor. Where one, without any explanation whatever, disregards a duty imposed upon him by statute, it ought to be presumed that he did it willfully and intentionally, and for a sinister purpose, and, in the absence of all proof, he ought not to be permitted to reap a benefit from his own wrongdoing. Under the rule announced in the majority opinion, a confessed violator of the law may present his self-tainted tax title to a court of equity and have it purified by the chancellor. The oscillations of the judicial pendulum between the rule of strict and the rule of liberal construction, as applied to tax deeds, is regrettable.

It is stated in the majority opinion that, "a tax deed, invalid upon its face, has been repeatedly held to be color of title in this jurisdiction." While, literally, this statement is supported by the opinions cited, I undertake to say that there is no opinion in this state which has held that a tax deed void on its face, and whose invalidity was due entirely to omissions on the part of the

grantee himself, which omissions are presumptively due to a sinister purpose, can constitute color of title under our seven-year statute to the advantage of such grantee. None of the cases cited from this state meet the conditions that I have here outlined, and therefore they are not in point. The deed in *De Foresta v. Gast*, 20 Colo. 308, 38 Pac. 244, was claimed to be void on its face because it showed a sale and conveyance of several distinct parcels of land en masse, whereas the statute in force at that time required a separate sale and conveyance of each parcel. The court in the *De Foresta* Case, 20 Colo. 309, 38 Pac. 245, held that: "There is nothing in our statute which requires separate deeds for each piece of property sold, where the purchaser of the several tracts is the same person" (citing *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177, where the point had been so held). The opinion in the *De Foresta* Case, 20 Colo. 310, 38 Pac. 246, further held that where the deed by its recitations showed that the tax proceedings were "in substantial conformity with the requisitions of the statutes in such case made and provided," it practically supplied any defects in the accompanying recitals. But even this doctrine has been repudiated by our Supreme Court time and time again, and it has been frequently ruled, since the *De Foresta* opinion was handed down, that such deeds are absolutely void.

In the case of *Williams v. Conroy*, 35 Colo. 117, at page 120, 83 Pac. 959, at page 960, cited in the majority opinion, it is specifically said that: "Plaintiff's tax deeds were regular and valid on their face, though because of informalities in the sale they are, as a matter of law, void." Here is the plain distinction between the *Williams* Case and the case at bar. Again, on the same page, it is said: "These tax deeds, though valid on their face, are void for the same irregularity which affects the plaintiff's earlier ones." This is sufficient to demonstrate clearly, I think, that the *Williams* Case cannot properly be cited to support the conclusions reached in the majority opinion.

In *Whitehead v. Callahan*, 44 Colo. 399, 99 Pac. 59, Chief Justice Campbell, speaking for the court, said: "If this tax deed was void, especially if it was void upon its face, as the court found it was, which holding we have elsewhere herein affirmed, defendant's occupancy of the land in controversy under it was a trespass."

The query naturally arises, just how long one must persist in a trespass in order that a spurious title under which he trespasses shall ripen into an unassailable title? The majority opinion says seven years.

In *Emerson v. Shannon*, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232, Chief Justice Hayt ruled that a tax deed showing on its face that noncontiguous tracts of land were sold together for a gross sum was, under uni-

form holdings of the authorities, "absolutely void." In that case it should be borne in mind that the irregularity appearing on the face of the deed was not due to culpable wrong on the part of the grantee, but error on the part of the county treasurer. This ruling was upheld in *Webber v. Wannemaker*, 39 Colo. 428, 89 Pac. 780. It is true that in the *Webber* Case, and also in the *Emerson* Case, it is said that such deeds are "not admissible to support a title," and the majority of the court in the instant case seems to discover in this limitation a port of refuge, but if the deed in the present case was not sufficient to support a title, then it was utterly immaterial. It is not ruled in the *Williams* and *Emerson* Cases that the deed becomes inadmissible only when it is offered as full and complete proof of title, but, on the contrary, it is held inadmissible when it is offered to support title.

In *Eaches v. Johnston*, 46 Colo. 457-459, 104 Pac. 940, 941, it is said: "The tax deed was not executed as required by section 3902, *Mills' Ann. Stats.*, and was therefore not prima facie evidence of anything." The statutes were violated in the instant case in the issuance of the deed here under consideration, and the statutes were violated by *appellee*, the grantee in the deed named.

In *Sayre v. Sage*, 47 Colo. 559-568, 108 Pac. 160, 164, it is said that: "The bar of the statute does not begin to run until the deed is recorded, for the reason that it is only after it has been filed for record that any title of the owner is conveyed," and, because the grantee in the tax deed in the *Sayre* Case had withheld the same from record, the court in that case ruled that the deed, until recorded, did not even constitute color of title. In other words, it was the duty of the grantee in the deed to record the same, and until he complied with the statute in this behalf, he could not claim color of title. But it is no more the duty of a grantee of a tax deed to record the same than it is his duty to serve the notice of his intention to take the tax deed, and until he does serve such notice, the title and interest of the owner is not divested.

Section 3904, *Mills' Ann. Stats.*, reads: "No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of deed therefor by the treasurer, any law to the contrary, notwithstanding. * * *." In *Sayre v. Sage*, supra, our Supreme Court ruled that section 3904 supra (commonly known as the short statute) does not bar an action to set aside a tax deed, upon the ground that it is void upon its face, citing many Colorado authorities. It is difficult to perceive any reason why a tax deed void on its face cannot set the five-year statute of limitations in motion, but may set the seven-year statute in motion. Again, in the *Sayre* Case, 47 Colo., page 565, 108 Pac. 160,

it is held that a treasurer's deed to land sold for taxes is void unless attested by the official or private seal of the treasurer. This, because the statute so requires; but the statute pertaining to attestation is no more imperative than the statute which requires the grantee in a tax deed to serve notice of his intention to take the deed. If he may not disregard one statute, he may not disregard another.

As early as the sixth Colorado, our Supreme Court ruled that a tax deed which bore on its face the evidence of noncompliance with a substantial requisition of the law was a nullity. See *Gomer v. Chaffee*, 6 Colo. 317. It is true that in that case the court had the short statute under consideration, but this ought to make no difference. In the course of the *Gomer* opinion the Supreme Court said: "It is difficult to see how the statute of limitations can avail a defendant holding a void tax deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor right of actual possession. The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of law" (citing many cases).

In *Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 121, 117 Pac. 1007, our Supreme Court uses this language: "The clerk had no authority to assign the certificate after the lapse of three years, and the assignment was void. An assignment was essential to the issuance of deed. A deed executed upon a void assignment is in itself void, and conveys no title. The tax deed is therefore upon its face a nullity." This reasoning is applicable to the facts before us. The treasurer had no authority to issue the deed we are here considering, unless and until the holder of the tax certificate, who was demanding a deed, had served notice upon the original owner, or had made a showing that the land was worth less than \$500. Such notice was essential to the issuance of deed. A deed executed without such notice is itself void, and conveys no title. Hence the tax deed before us is therefore upon its face a nullity. It will therefore be seen that whatever may have been the holdings of the earlier Colorado cases, the later decisions are all to the effect that a deed void on its face is a nullity, and that one who holds possession under it is a trespasser. But, as I have tried to point out already, there is no early Colorado case holding that a tax deed void on its face is sufficient to support color of title, where the invalidity is due to the wrongful acts of the grantee in such deed named. The great weight of modern authority everywhere is against the rule that a tax deed void on its face can set in motion a statute of limitations like our own, which requires the concurrence of three things, viz.: Color of title;

claim under it; and that claim made in good faith.

In *Evans v. Welch*, 29 Colo. 364, 68 Pac. 779, it is said that: "All presumptions are in favor of the legal holder, and the burden of overcoming them rests with him who assails the legal title." Therefore, in my judgment, there can be, in an action brought by one who claims title under a tax deed, no presumption of good faith. But, certainly, if such presumptions may be indulged, under certain circumstances, it is overthrown by positive record evidence of bad faith. I am in entire accord with the views of the Supreme Court of Oklahoma as expressed in *Keller v. Hawk*, 19 Okl. 407, 413, 91 Pac. 778, 780, wherein it is said: "The Legislature did not intend that time should breathe life and force into an instrument upon the face of which it could be seen that it was absolutely void. The law [of limitations] was intended to protect purchasers at tax sales and their grantees from hidden defects in the proceedings, and not from those which the tax deed shows upon its face, and which under the law persons dealing with the title are bound to know."

The Supreme Court of Wyoming is to the same effect. See *Matthews v. Blake*, 16 Wyo. 116, 92 Pac. 242, 27 L. R. A. (N. S.) 339. The majority opinion in the instant case breathes life and force into an instrument upon the face of which it can be seen that it is absolutely void, *because of the oupable acts of the grantee therein named*. It should not be forgotten that this is an equity case, and that equity maxims are applicable. Equity regards that as done which ought to be done, and, I suppose, it will regard that as not having been done which can only be done in flagrant violation of law. In *Richards v. Beggs*, supra, Justice Gabbert says: "A tax deed cannot issue upon a tax sale certificate without previous notice of the time when the right to redeem would expire, unless the assessed valuation upon which the sale was based was less than \$500." But the effect of the majority opinion in this case is that while a tax deed cannot, or ought not to, so issue, nevertheless, it has, and has issued at the instigation of the appellee in this case, and to his benefit. By his own wrong he becomes the owner of the land in question, if the majority opinion shall stand as the law of this state.

There is another reason, which, to my mind, is sufficient, why the preliminary notice must be proven as a condition precedent to the admission of the tax deed: This notice is necessary to cut off the right of the fee holder to redeem from the tax sale, and until he is so served, the owner of the fee may unsuccessfully assert his right of redemption, and therefore, if the tax deed has been admitted in evidence by the court, it could have availed appellee nothing.

The ruling of the trial court in admitting the tax deed was, in my opinion, erroneous.

SEDGWICK v. CULP et al.

(Court of Appeals of Colorado. Oct. 14, 1913.)

ADVERSE POSSESSION (§ 79*)—COLOR OF TITLE—VOID TAX DEED.

A treasurer's tax deed, void on its face, offered as color of title, on which to base title by possession and payment of taxes for seven years under claim and color of title made in good faith, is admissible without a showing that notice of intention of the grantee to apply for such a deed had been given as required by law, or that the assessed value of the property was such as to make the giving of such notice unnecessary.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.*]

Cunningham, P. J., dissenting.

Appeal from District Court, Weld County; Neil F. Graham, Judge.

Action by John Sedgwick against Jerome F. Culp and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Delph E. Carpenter, Herbert M. Baker, and R. E. Winbourn, all of Greeley, for appellant. John T. Jacobs, of Greeley, for appellee Jackson.

BELL, J. This action was brought by John Sedgwick, as plaintiff, against Jerome F. Culp and James B. Jackson, defendants, for the purpose of quieting the title in said Sedgwick to one-half of section 19, township 11 N., of range 61 W. of 6 P. M., in Weld county, Colo.

At the trial plaintiff offered in evidence, as color of title, a treasurer's tax deed to the land in question, without showing that notice of the intention of said Sedgwick to apply for a treasurer's deed had been given as required by law, or that the assessed value of the property was such as to make the giving of notice unnecessary. The tax deed was admitted to be void upon its face. The deed offered was excluded by the court, and thereupon the plaintiff was denied the benefit of his plea of the statute of limitation, based upon his possession and payment of taxes for seven successive years under claim and color of title, made in good faith.

At this term of court, in the case of James B. Jackson v. Eric Larson et al. (No. 3,789) 136 Pac. 81, the identical treasurer's deed here involved was under consideration, and was held to be admissible in evidence as color of title, and the decision in that case on that point is decisive of this case also, and for the reasons there given we hold that the court erred in excluding said deed as evidence of color of title, and the judgment must be reversed.

Reversed and remanded.

CUNNINGHAM, P. J., dissenting. KING, J., specially concurring.

CUNNINGHAM, P. J. (dissenting). I have expressed my views concerning the conclusions reached in this case in my specially concurring opinion in Jackson v. Larson (No. 3,789) 136 Pac. 81.

KING, J. (specially concurring). For the reason that the opinion of the court reversing the judgment herein is a memorandum opinion, based upon the finding of the majority of the court upon one point considered and determined in Jackson v. Larson, et al. (No. 3,789), handed down at this term of the court, and wherein the presiding judge submitted a specially concurring opinion, which, in fact, is a dissenting opinion as to the only question in issue in this case; and because in that case the conclusion reached affirming the judgment of the trial court is right under all the authorities, without reference to the question that is decisive of the instant case; and, further, because, in my judgment, the views announced by the presiding judge in his dissenting opinion as to the question here necessary to decide are at variance with the decisions of our own Supreme Court, and, if accepted, so fraught with danger to established property rights—I feel justified in presenting this supplemental opinion.

August 2, 1909, the plaintiff, Sedgwick, in possession of the premises, brought a suit against Culp in usual form to quiet title. Culp made no defense, but long after suit was begun, defendant Jackson took his title to the premises by quitclaim deed, and with it his lawsuit. On December 16, 1909, Jackson made his appearance, and in March, 1910, his answer, claiming title under his quitclaim deed from Culp, the patentee. The plaintiff for his title relied upon a treasurer's tax deed issued to him, duly recorded, and under which he alleges that he went into actual possession under claim and color of title made in good faith, and that thereafter during more than seven years prior to the beginning of suit he remained in possession and paid all taxes assessed against said land under claim and color of title made in good faith. Defendant alleged that the tax deed was void on its face, and for reasons aliunde, particularly that the land was assessed at a valuation in excess of \$500 during the years for the taxes of which the land was sold, and that, notwithstanding such assessed valuation, Sedgwick, the purchaser and assignee of the certificates of purchase, failed to give the statutory notice of his intention to apply for a treasurer's deed prior to its execution and delivery. This latter allegation was put in issue by the pleadings, and there was no evidence offered by the plaintiff of the giving of said notice, nor proof by the defendant that such notice was not given. Upon trial the plaintiff offered the treasurer's deed in evidence as color of title only; it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

being admitted that it was void on its face. Upon defendant's objection, the deed was excluded. The deed offered describes the land by legal subdivisions; recites the sale of the land to the county for delinquent taxes, the assignment of the certificates of purchase by the county to Sedgwick, the payment of all subsequent taxes, giving the amount thereof, and by apt words in statutory form purports to convey the title to Sedgwick. The plaintiff offered to prove that at the time he accepted the deed, he made inquiry of the county treasurer, and was told that the deed was a valid deed; that he entered into possession of the land in good faith, believing that his deed was valid, and paid the taxes assessed against the land for seven full years after the first payment of taxes, and had ever since been in possession; that all of said acts had been done by him under claim and color of title made in good faith; that during said time no other person had paid any taxes on the land, or made any demands against the plaintiff for possession or claimed any right, title, or interest therein; and that at all such times he was ignorant of the law requiring notice. Upon objection the court refused to admit the proof offered.

The questions involved, and the only questions, are: (1) Whether the tax deed offered constituted color of title in plaintiff, and as such was admissible in evidence; and (2) whether such deed, together with the evidence offered by the plaintiff, constituted prima facie claim and color of title made in good faith.

It is asserted by the appellees, and by the presiding judge in his dissenting opinion in *Jackson v. Larson*, supra, that because the plaintiff herein (the deed being the same) failed to prove that he gave the statutory notice of his intention to apply for the treasurer's deed, the said deed was inadmissible as proof of anything, even color of title, but more particularly as proof of claim of title made in good faith; and it is also asserted that, assuming, as we may for the purposes of this discussion, that notice was not given, that fact alone is not only presumptive evidence of a sinister purpose in taking a tax deed, and overcomes the other legal presumptions (1) that all men are presumed to act in good faith until the contrary is shown, and (2) that the deed itself purports good faith, unless facts and circumstances attending its execution show that the party accepting it had no faith or confidence in it, but furthermore bars and precludes the claimant under such deed from offering any evidence which will show his good faith and explain his reasons for failing to give the statutory notice. In other words, that fact alone is conclusive proof of bad faith.

That a void deed, whether void upon its face or shown to be such by evidence allunde, does constitute color of title sufficient to set in motion the seven-year statute of limitation, and is of itself evidence of "claim

and color of title made in good faith," is announced by a continuous line of decisions of our Supreme Court, beginning with *Lebanon Mining Co. v. Rogers*, 8 Colo. 34, 5 Pac. 661, in an opinion written by Mr. Justice Helm in 1884, approved and amplified by Mr. Justice Elliott in *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242, and *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244; by Mr. Chief Justice Hayt in *Bennet v. N. C. L. & I. Co.*, 23 Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281; by the Court of Appeals in *Brinker v. U. P., D. & G. Ry. Co.*, 11 Colo. App. 166, 55 Pac. 207; by Mr. Justice Gabbert in *Walters v. Webster*, 52 Colo. 549, 553, 123 Pac. 952; and by Mr. Justice Bailey in *Silford v. Stratton*, 54 Colo. 248, 130 Pac. 327, that opinion having been delivered in January, 1913. In *Lebanon Mining Co. v. Rogers*, supra, quoting from and adopting the views announced in *Wright v. Mattison*, 18 How. (U. S.) 56, 15 L. Ed. 280, after saying that the courts have concurred without exception in defining color of title to be that which has the appearance of title, but which in reality is not such, it is said: "They have equally concurred in attaching no exclusive or peculiar character or importance to the *ground of invalidity* of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title under which an entry or a claim has been made in good faith." (Italics are mine.)

In *Knight v. Lawrence*, supra, 19 Colo. 432, 36 Pac. 244, the court says: "In our opinion, the phrase 'color of title,' [as applied to the statute of limitations] refers to a *paper writing* purporting to convey title, or to some writing whereby title is sought to be acquired"—and, further: "Possession and payment of taxes must, of course, be affirmatively shown by evidence in the first instance, and so also the acquisition of the paper title. But when such evidence does not disclose bad faith on the part of the party claiming under the statute, it would seem to be a work of supererogation to offer further evidence of good faith, unless in rebuttal of facts and circumstances shown by the opposite party. As has been said by the Supreme Court of Illinois construing this statute, 'The law presumes that all men act in good faith until there is some evidence to the contrary,' and, again, 'Color of title *made in good faith* is shown by any deed or instrument which purports on its face to convey title which a party is willing to and does pay his money for, apart from any fraud. *The deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it had no faith or confidence in it.*' We see no reason to doubt the wisdom of the Illinois decisions." (Italics are mine.)

In *De Foresta v. Gast*, supra, the court said: "The statute * * * is intended as a protection to a person holding in good faith under a mere colorable title—that is,

under a title which is really no title"—and quotes with approval the words of Mr. Justice Field in *Hall v. Law*, 102 U. S. 466, 26 L. Ed. 217, to wit: "Whenever an instrument by apt words of transfer from grantor to grantee—whether such grantor act under the authority of judicial proceedings or otherwise—in form passes what purports to be the title, it gives color of title." And again, and as applied to a tax deed: "Moreover, the deed in form and by apt words purports to convey the land to the grantee by virtue of legal authority vested in the grantor (the county treasurer). The deed, therefore, must be held to give color of title, even though a person of legal learning and experience may, by a critical examination, discover defects in the instrument fatal to its validity as a muniment of title."

In *Bennet v. N. C. S. L. & I. Co.*, supra, the court, having under consideration the same statute of limitation as applied to a tax deed void on its face, said: "Under the decision in *Crisman v. Johnson*, ante [23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224], such a tax deed is certainly void, but it does not follow that it is not sufficient to start the statute running. The phrase 'color of title' in the statute was before this court for consideration in the case of *De Foresta v. Gast*, 20 Colo. 307 [38 Pac. 244], and that case may be cited as authority for the proposition that a 'void deed, taken in good faith, may give sufficient color of title.' * * * Applying the rule announced in that case to the case at bar, and it is apparent that the tax deed gives color of title. It is executed by the proper officer; gives a correct description of the property conveyed; alleges that the same was subject to taxation for the year 1877; that the taxes were assessed and remained due and unpaid at the date of the sale; that the sale was held by virtue of the authority vested by law in the treasurer. It states that Joseph Sharratt bid \$121.55 for the property, this being the whole amount of taxes, interest, and costs then due and remaining unpaid; that said sum was paid to the treasurer, and the property was stricken off to Sharratt at that price. It recites, also, that three years had elapsed between the sale and the execution of the deed, and the payment of all taxes by Sharratt accruing during this period. That such a deed furnishes sufficient color of title is well established by the great weight of authority."

In the case of *Brinker v. U. P., D. & G. Ry. Co.*, supra, the court, by Bissell, J., said: "It is insisted, and of course we must concede that this position is supported by a good many authorities, that a deed void on its face cannot make color because its apparent invalidity necessarily destroys the good faith, which is as important to furnish a basis for the application of the statute as the possession of the deed purporting to transfer the title. It is insisted with much force and

learning that a void deed which will make color can only be applied to those cases where the deed is void for reasons dehors the instrument. We do not, however, feel at liberty to assume that the law is otherwise than as it has been declared by the Supreme Court. We, therefore, do not intend to either enter on the discussion of this question or express any opinion about it, other than to say it is the law of this jurisdiction as declared by the supreme authority that a deed, even though void on its face, will make color of title as fully and as effectually as though the deed was regular on its face and void for reasons aliunde the instrument."

In *Walters v. Webster*, supra, the court, by Mr. Justice Gabbert, said: "Defendant's title was based upon a tax deed. The plea of the statute of limitations which he sought to interpose related to this deed. On behalf of plaintiff it is urged that this deed is void on its face. It was issued and recorded more than seven years before plaintiff commenced his action. From this state of facts, it would constitute color of title under a proper plea of the statute of limitations and proof of the necessary facts. *Williams v. Conroy*, 35 Colo. 117 [83 Pac. 959]; *De Foresta v. Gast*, 20 Colo. 307 [38 Pac. 244]."

In *Silford v. Stratton*, supra, the last case to which our attention has been directed, the court had under consideration a treasurer's deed appearing on its face to be based on a sale to the county and an assignment of the certificate by the county clerk more than three years after its issuance, and therefore held to be void on its face. The court, by Mr. Justice Bailey, said: "While this court has held that a deed void on its face is sufficient color to set the seven-year statute of limitation in motion, it has never held that such a deed, coupled with the payment of taxes, is *conclusive* of good faith." (Italics mine.) "So that it was competent for the defendant in this case, as was done, to introduce affirmative proof to establish the fact that the plaintiffs did not act in good faith in the transaction."

Many other authorities from our own courts of last review might be cited, but are unnecessary. I have quoted somewhat at length the language of certain of the decisions, for the purpose of showing that a tax deed, void on its face or for reasons aliunde, if it contains apt words of transfer, constitutes color of title, and as such is admissible in evidence, without regard to the peculiar ground which makes it void, or to the question of good faith; and, further, that such deed is also evidence of claim of title in good faith. Its character as color of title cannot be overcome by extraneous evidence, and therefore, when offered as color of title only, it must be admitted. Its effect as evidence of claim of title asserted in good faith may be attacked by anything in evidence tending to show a lack of good faith; and, on the other hand, the presumption of good faith

may be supported and strengthened by any competent evidence. Mr. Justice Bailey, in *Silford v. Stratton*, supra, in saying that the defendant may introduce affirmative proof to overcome the presumption of good faith raised by the color of title, and to establish the fact that the plaintiff did not act in good faith in the transaction, placed the burden of showing bad faith where it belongs—on the one alleging it.

The ruling of the Supreme Court in *Knight v. Lawrence*, supra, is that the "deed itself purports good faith, unless facts and circumstances attending its execution show the party accepting it *had no faith or confidence in it*." Confidence in the title is there made the test of good faith in *claim of title*, and also in *Hardin v. Gouveneur*, 69 Ill. 140.

In the instant case it is contended that, upon the authority of *Dalton v. Lucas*, 63 Ill. 337, and *Bowman v. Wettig*, 38 Ill. 416, *Sedgwick*, having omitted to give the notice of his intention to apply for the treasurer's deed as required by law, will be presumed to have done so for some sinister purpose, and will not be permitted to avail himself of a deed procured without such notice, even under the plea of the statute of limitations. That rule, if conceded for the purpose of affecting the presumption of good faith, has no possible effect upon the admissibility of the deed as color of title. *Hardin v. Gouveneur*, supra. Moreover, upon the question of good faith, even the cases cited do not go so far as to hold that proof of such failure to give notice is conclusive evidence of the want of good faith, or conclusive proof of a sinister purpose, so that the presumption thus raised may not be overcome by other evidence. The holding of the court in those two cases rests upon its application of the maxim that every person is presumed to be familiar with the provisions of the Constitution and the statute—in other words, is presumed to know the law—and follows certain prior rulings of that court, which hold that when a deed on its face discloses the fact of its illegality, the law will presume bad faith, because the grantee therein, knowing the law, was apprized by the deed itself when he took it that there was no authority to execute it. This holding, it has been shown, is in direct antagonism and conflict with the uniform decisions of our own Supreme Court upon the question of color of title given and the presumption of good faith raised by a deed void on its face; and the cases of *Bowman v. Wettig* and *Dalton v. Lucas*, upon the point here involved, to wit, whether, upon the presumption that plaintiff knew the law, he must be held guilty of bad faith in accepting a deed issued without compliance therewith, have been flatly repudiated by later decisions of the Illinois Supreme Court. See *Miller v. Pence*, 132 Ill. 145, 23 N. E. 1030, and *Sexson v. Barker*, 172 Ill. 361, 50 N. E. 109. In the latter case, having under consideration the seven-year statute

of limitations, the court said: "There is no doubt that the deed to the defendant from the master in chancery constituted color of title, and the only controversy between the parties is whether it was acquired in good faith. The good faith of the defendant is a question of fact, and in the absence of evidence to the contrary it will be presumed. Bad faith will not be presumed, but must be established by proof. *McConnel v. Street*, 17 Ill. 253; *McCagg v. Heacock*, 34 Ill. 476 [85 Am. Dec. 327]; *Brooks v. Bruyn*, 35 Ill. 392; *Morrison v. Norman*, 47 Ill. 477; *Stumpf v. Osterhage*, 111 Ill. 82. In order to overcome this presumption the evidence must show a *design to defraud* the person having a better title, and in this case there is an absence of evidence tending to prove that fact. * * * It is claimed that the cases of *Bowman v. Wettig*, 38 Ill. 416, and *Dalton v. Lucas*, 63 Ill. 337, establish the doctrine that defendant was bound to know the law and to know that the verbal contract for the land could not be enforced, and that the decree for its enforcement was erroneous, and therefore he was guilty of bad faith in so acquiring the deed. Such a doctrine would abrogate the statute and require the party claiming its benefit to establish a valid title, and in the case of *Davis v. Hall*, 92 Ill. 85, it was said that the apparent teachings of the opinion in *Bowman v. Wettig*, supra, had not been adhered to in the later cases." And, construing the case of *Dalton v. Lucas*, the court further said: "That case involved a knowing and intentional omission by a purchaser at a tax sale to give a notice required by the statute, and thereby keep the owner in ignorance of his rights, and it has no application here."

To be logically consistent, if, upon the question of good faith, the presumption that every person knows the law is conclusive, the same rule would apply to a tax deed which is void on its face because showing that the assignment was made by the county clerk more than three years after the issuance of certificate, or that several noncontiguous tracts of land were sold en masse for a gross sum, and be conclusive evidence of the bad faith of the purchaser who took it, and destroy his claim under the color of title, as is sought to be applied in this case, upon the presumption that the purchaser knew the law, and, knowing it, failed to give the requisite notice; therefore his sinister purpose will be not only presumed, but conclusively established. To me, it is clear that in the last analysis the question of good faith or sinister purpose is one of fact, to be shown by all the evidence. If the purchaser in fact knew that he was required to give notice, and yet failed to give it, the sinister purpose might well be presumed; but if, as a matter of fact, he did not know of the existence of the statute, and, because of that ignorance, failed to give the notice, his good faith in the transaction is not even thrown

in doubt by such failure. The intent, or design to defraud the person having a better title, said in *Sexson v. Barker* to be necessary to overcome the presumption of good faith, is absent. If, as said by our own court, good faith will be presumed by the taking of the deed itself, unless the facts and circumstances attending its execution showed that the party accepting it had no faith or confidence in the deed, it is plain that confidence in the title and purpose in acquiring it constitute the test of claim of title in good faith; design to defraud, lack of confidence in the title of bad faith. I cannot give consent to the view that, as a basis for fixing the charge of mala fides upon a person who had not done some affirmative act enjoined by the law, the presumption that all men know the law is sufficient to overcome those other presumptions that all men act in good faith until the contrary is shown, and that a deed purports good faith, and also to overcome the further proof of good faith shown by a good and valuable consideration paid for the deed, placing the same upon record, taking actual possession of the premises conveyed and improving the same, occupancy thereof for a long period of years, and payment of taxes continuously, together with the oath of the party that when he took the deed he believed that it was valid; that as a matter of fact he was ignorant of the statutory requirement involved, and not aware of any failure upon his part to perform any duty enjoined on him by law or otherwise. If any doubt as to the good faith of such purchaser is raised by the mere failure on his part to give or cause to be given the statutory notice in question, he may rebut it by such proof as he offered and the court refused to admit.

The well-known maxims, "*Ignorantia facti excusat*," "*Ignorantia juris non excusat*," state fundamental principles which are general in their application; but, like all other general principles, have their exceptions. Ignorance of the invalidity of a deed is ignorance of a fact; but where such deed is void on its face, its invalidity is patent to every one who knows the law, and therefore, it is contended by some of the authorities, and asserted in the dissenting opinion, ignorance of its invalidity is equivalent to ignorance of law which excuses no one; but the statute of limitations under consideration in this case was enacted for the very purpose of creating and enforcing an exception to the general rule announced by that maxim, and in effect has been so declared by the courts of this state. The same may be said as to the effect of the statute of limitations upon that other maxim, "*Nullus commodum capere potest de injuria sua propria*"—no one can take advantage of his own wrong. In law the "wrong" which estops exists, or does not exist, according to whether there was an intent, purpose, or design to defraud, where mala fides in fact must be

shown to defeat a bona fide claim of title made through faith or confidence in the written instrument constituting color of title.

The case of *Richards v. Beggs*, 31 Colo. 186, 72 Pac. 1077, is quoted and relied on as conclusive against the admissibility of the deed in this case as color of title. As I read that case, it is not in point. There is no rule better known among lawyers, or more fully recognized by the courts, than that a decision in a given case is not authority beyond the facts of the case in which it is rendered. The deed was offered as paramount title. The opinion as reported in 31 Colo. 186, 72 Pac. 1077, states that the action was in ejectment; that plaintiff's only evidence of title was a tax deed which he offered without any preliminary proof as to the assessed valuation of the land, or that the required notice of the time of redemption had been given, and that "for these reasons the deed was refused, and plaintiff, offering no further evidence, a judgment of nonsuit was entered." I think it is obvious from this statement of facts that the deed was offered as evidence of paramount title only, and that the question of color of title was not raised. But if we concede that, as claimed in argument, the opinion itself, as reported, does not disclose or indicate any limitation upon the rule that the tax deed offered was inadmissible, a reference to the record of that case on file in the Supreme Court shows that the action was in ejectment, the defense, a general denial. Under these circumstances, the statute of limitations could not be in issue, nor color of title a question. But it is further shown that the tax deed relied on was executed in May, 1900, and the suit was begun June 18, 1901, a little more than one year after the execution of the deed, and for that reason no statute of limitations could have been involved, and no question of color of title in the case; and a further inspection shows that the question of color of title or claim of title in good faith was not even mentioned in the pleadings or in the printed briefs and arguments on file, so that decision has no bearing whatever upon the question here under discussion.

In the outset I stated that the position of the appellee, if accepted, is fraught with danger to established property rights. As hereinbefore shown, the Supreme Court has uniformly held for a period of 29 years that a void tax deed gives color of title, and is presumptive proof of claim of title in good faith. This has become an established rule of property, and, supported by the payment of taxes for the requisite period, has become the foundation for extensive and valuable property rights, and this rule should be regarded as having all the force and effect of a statute. If it is to be changed, it should be by legislative action, for the very obvious reason that such a repealing statute could

not be retrospective in its operation nor retroactive in effect; while, on the other hand, if repealed by a judicial act, it is both retrospective and retroactive, because it holds that the law as heretofore understood and declared has never been the law. It was well said in *Sexson v. Barker*, that such a decision would abrogate the statute of limitations itself. It would affect every title dependent for its validity upon the statute of limitations, if acquired within the prescriptive period of 20 years, unless, having been settled by some judicial proceeding, the title has become *res judicata*. Moreover, in the instant case we are met in the outset with a showing that the original patentee, who was made the defendant in this case, evaded the payment of taxes, with which governmental functions are carried on, for a period of 11 or more years; that when made a party defendant to this case he made no appearance; that Jackson, who did defend, secured a quitclaim deed from the patentee for what is alleged to be a nominal consideration only, and for speculative purposes, long after the suit was instituted; that he bought a lawsuit with full knowledge of its existence; and there is no equitable reason to justify the raising of doubtful presumptions against the plaintiff who has carried the burdens of taxation, and in favor of such a defendant.

The tax deed offered as color of title should have been admitted, as also the evidence offered as to possession and payment of taxes, together with other evidence offered on the question of good faith; and for error in refusing to admit the same, the judgment should be reversed.

HURLBUT and MORGAN, JJ., concur.

GIBSON v. WAGNER.

(Court of Appeals of Colorado. Oct. 14, 1913.)

1. PROCESS (§ 85*)—SERVICE BY PUBLICATION—NECESSITY OF STRICT COMPLIANCE.

To give a court jurisdiction by substituted service through publication of the summons, the statutory requirements must be strictly complied with, and nothing excuses omissions or insufficient statements.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 99; Dec. Dig. § 85.*]

2. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVITS—SUFFICIENCY.

Under the statutory requirement, in an affidavit for publication of a summons, that plaintiff shall give defendant's post office address, if known, or state that it is not known to the affiant, such statements must be made positively, and an affidavit that affiant was informed and believed that the post office addresses of the defendants were unknown to affiant would not support a judgment entered on service by publication.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

3. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVITS—SUFFICIENCY.

Under the statute requiring an affidavit for service of the summons by publication stating

that defendant resides out of the state, has departed from the state without intention of returning, or has concealed himself to avoid the service of process, an affidavit stating that defendants resided out of the state or had departed therefrom without intention of returning, or had concealed themselves to avoid service of process, as to a number of defendants, one of whom was a domestic corporation which could not reside without the state, depart therefrom, or conceal itself, and whose articles of incorporation would have disclosed its residence and post office address, and which stood in such relation to the defendant attacking the service that, had it received a copy of the summons, it would probably have notified him, in connection with the failure of the affidavit to state defendants' post office addresses or that such addresses were unknown, was insufficient.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

4. JUDGMENT (§ 490*)—COLLATERAL ATTACK—WANT OF JURISDICTION APPARENT ON THE RECORD.

A judgment entered on service by publication was void and could be attacked collaterally because of the insufficiency of the affidavit, where such insufficiency was affirmatively disclosed by the record.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 926-928; Dec. Dig. § 490.*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Charles E. Gibson against Daniel F. Wagner. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Isaac Pelton, of Akron, for appellant. Munson & Munson, of Sterling, for appellee.

KING, J. The judgment appealed from was rendered in an action brought by the appellant, Gibson, in the usual form under the Code, to quiet title to certain lands in Yuma county. Upon trial it was admitted, by stipulation of counsel, that the plaintiff was the owner of said lands, unless his title had been extinguished by a certain decree of the county court of said county, pleaded in the answer as an adjudication of the said title in favor of defendant and against the plaintiff herein. It was also admitted that the plaintiff herein was a defendant in said cause; that the decree recited that he had been duly served with summons; but that said service, if made at all, was by publication. Plaintiff contends that the affidavit for publication of summons was defective and wholly insufficient in that it neither gave the post office address of said defendant nor stated that his post office address was unknown to the affiant, and further that the affidavit contained no sufficient statement of the nonresidence of said defendant as required by law; that, by reason of the insufficiency of the affidavit, the judgment relied on was void.

[1] 1. The law is well settled that, in order to give the court jurisdiction by substituted service through publication of summons, the statutory requirements must be strictly complied with, and that nothing ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cuses omissions or insufficient statements. 1 Black on Judgments (2d Ed.) § 232; Sylph M. & M. Co. v. Williams, 4 Colo. App. 345, 36 Pac. 80; Beckett v. Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399; Trowbridge v. Allen, 48 Colo. 419, 110 Pac. 193; Empire R. & C. Co. v. Coldren, 51 Colo. 115, 117 Pac. 1005.

[2] The post office address of the defendant Gibson and of a number of the other defendants was not given. There was no direct or positive statement that the post office addresses of such defendants were unknown, but as to them the affidavit reads: "Affiant is informed and believes * * * that the post office addresses of the other of the herebefore named defendants are unknown to affiant." There is no provision of our Code permitting an affidavit for publication of summons to be made upon information and belief as to any of the matters required to be stated therein. There seems to be no direct holding upon that question by the courts of this state, except that in Sylph M. & M. Co. v. Williams, 4 Colo. 345, 36 Pac. 80, it is said that the affidavit for publication may not be made on information and belief by the attorney in the case, and we think that rule would apply with equal force to the plaintiff; but whatever may be the rule as to some of the statements required to be made in such affidavit, concerning which, in the nature of things, plaintiff cannot have positive knowledge, it is clear that, as to the requirement that the plaintiff shall give the post office address of the defendant, if known, or state that his post office address is not known to the affiant, such statement must be made positively and not on information and belief. There is nothing in the nature of things that would admit of that statement being made upon information and belief, and to so make it is a palpable evasion of the statute instead of a strict compliance therewith. The language used in the affidavit is not even a statement of the fact on information and belief. Such an allegation affords no foundation for an order for publication of summons and will not support a judgment, the validity of which depends upon service so made.

[3] 2. The statute makes requisite, as a condition precedent to an order for constructive service, an affidavit stating that defendant resides out of the state, or has departed from the state without intention of returning, or has concealed himself to avoid the service of process. The affidavit in this case states that the defendants Gibson, the Colorado Security Company, the American Mortgage Trust, Limited, John S. Gibbons, and Fannie Blackmore "either reside out of the state of Colorado or have departed therefrom without intention of returning, or conceal themselves to avoid the service of pro-

cess." The appellant contends that the averment of all these matters in the alternative or disjunctive is not a direct statement as to any of them and we think the contention is right. However, assuming, but not deciding, that under some conditions, as applied to an individual defendant, these several allegations may be stated together in the disjunctive or alternative form, we think the averment as here made, applied to many defendants, both individual and corporate, taken together with the failure to give the post office addresses of any of said defendants, or to state that they were unknown, strongly suggests an effort to conceal all, rather than to furnish any, information by which notice of the suit to divest the title of defendants and vest it in the plaintiff would possibly reach any of the defendants. As to the Colorado Securities Company, a domestic corporation, the omnibus affidavit cannot be true. Its place of residence is within the state and cannot be elsewhere; it cannot depart therefrom and, as a corporation, cannot conceal itself to avoid service of process; its articles of incorporation, on file in the office of the Secretary of State, must of necessity state the town and county in which its principal office is located, which, for the purpose of service of summons, is the town and county of its residence, unless by statute otherwise provided, and likewise its general post office address; and, if such fact and such address had been stated in the affidavit, a copy of the summons would have been mailed to this defendant. Inasmuch as it appears from the record that this corporation was the beneficiary in the deed of trust under foreclosure of which Gibson claimed title, it would not be unreasonable to presume that, if a copy of the summons had reached the company, notice of the proceeding might have been communicated to Gibson, its assignee. The affidavit, as a whole, is circumstantial and positive as to matters which the statute does not require to be stated, but, as to matters which are material, its averments are indirect and ambiguous or on information and belief.

[4] 3. Counsel for appellee insist that, even though the affidavit for publication of summons be insufficient, the decree cannot be held void or set aside in this proceeding, which they denominate a collateral attack. Where, as in this case, the insufficiency of the affidavit is affirmatively disclosed by the record, the judgment based upon substituted service is a nullity and may be attacked collaterally by any one whose rights are affected thereby. Trowbridge v. Allen, supra.

The judgment will be reversed, and the cause remanded, with direction to the trial court to enter judgment in favor of the plaintiff, quieting his title.

Reversed and remanded.

ROLLINS v. FEARNLEY INVESTMENT & REAL ESTATE CO. et al.

(Court of Appeals of Colorado. Sept. 15, 1913.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF FACT.

A finding of fact having been on sharply conflicting evidence cannot, on appeal, be said to be wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. WATERS AND WATER COURSES (§ 247*)—SUIT TO ESTABLISH RIGHTS—DECREE.

The decree limiting use of water by defendants in a suit to settle rights to specified lands, allowing them to use it only when necessary, and providing that all surplus over and above that used by them for irrigating said lands shall go to plaintiff, sufficiently guards plaintiff's rights against a prodigal use of water by defendants.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. § 247.*]

3. APPEAL AND ERROR (§ 1054*)—HARMLESS EVIDENCE—TRIAL OF COURT.

The trial having been by the court without a jury, it cannot be said prejudice resulted from admission of incompetent evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

Appeal from District Court, Arapahoe County; Charles McCall, Judge.

Suit by Robert P. Rollins against the Fearnley Investment & Real Estate Company and another. Decree for defendants. Plaintiff appeals. Affirmed.

William Young and James H. Brown, both of Denver, for appellant. George F. Dunklee, Edward V. Dunklee, and O. E. Jackson, all of Denver, for appellees.

CUNNINGHAM, P. J. Appellant, Rollins, as plaintiff below, in April 1909, filed his complaint to quiet title to a certain ditch and to a water right incident thereto, averring complete ownership and absolute title of both to be in himself. In 1903 Rollins instituted an injunction proceeding against the appellee investment company and another, in which the same question, viz., the title to the ditch and water here involved, was litigated. In the first action Rollins obtained, ex parte, a preliminary injunction restraining the investment company and its tenants from diverting and using water from the ditch. On final hearing the trial court dissolved this injunction, and found that the equities of the case, instead of being with plaintiff, were with defendant the investment company, defendant below and appellee here. The injunction case, which was appealed, was affirmed—see *Rollins v. Fearnley*, 45 Colo. 319, 101 Pac. 345, where the facts are more fully stated. On appeal in the former case the Supreme Court not only found that there was ample evidence introduced on the former trial to support the findings of the lower

court that the equities were with the investment company, but expressed the belief that said findings were undoubtedly correct, and added that they were unqualifiedly approved by it.

The sole question in both cases brought by appellant turned upon the title to the ditch, and the water right incident thereto. The testimony in both cases was similar. On the first trial, after finding the equities against Rollins and for the investment company, the trial court dissolved the preliminary injunction theretofore granted by it, and dismissed the case, assigning as its reason for such action the absence of proper and necessary parties to a complete determination of the controversy. The Supreme Court, in its opinion already cited, expressly ruled that: "All matters affecting appellant Rollins' rights, as alleged and set forth in his complaint, were correctly determined by the trial court." Among the matters set forth in Rollins' original complaint, indeed the principal matter, was his claim of title to the ditch and water right which in this action he seeks to have quieted in himself. The evidence in this case (as we read the records in both cases) preponderates in appellee's favor quite as clearly as in the former case.

[1, 2] It is urged in behalf of appellant in his brief in the instant case that the trial court committed error in decreeing to appellees a greater amount of water than is reasonably required to properly irrigate their land. It would perhaps be sufficient on this point to say that we find no error assigned which requires us to consider this question; but, inasmuch as the evidence introduced on this point was sharply conflicting, we are unable to say that the finding and decree of the trial court in this behalf were wrong. Moreover, the judgment specifically limits the use of the water decreed to appellees to their lands, which are accurately described in the decree, and allows the appellees to use the same only whenever it is necessary, and provides: "That all surplus water over and above the amount of water used by defendant and the intervenor [appellees] for the purpose of irrigating their said lands, shall go to the plaintiff, his heirs, executors, administrators and assigns, for the purpose of irrigating his said lands"—providing the appellant shall carry out the terms of the contract on which his rights are based, which contract it is not necessary for us to set forth. These provisions of the decree clearly limit the rights of the appellees to the use of the water on the lands now owned by them, and sufficiently guard the rights of appellant against a prodigal use of the water by appellees.

[3] Serious complaint is made by appellant to the rulings of the trial court on the introduction of testimony, and we think that the record discloses that both parties were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

permitted, over objection, to introduce much incompetent evidence, but, as the trial was to the court without a jury, we cannot say that prejudicial error resulted therefrom. Judgment affirmed.

WILSON et al. v. AGNEW.

(Court of Appeals of Colorado. Oct. 14, 1913.)

1. LANDLORD AND TENANT (§ 184*) — DISCHARGE OF LEASE—RE-ENTRY.

A landlord by re-entering and assuming absolute control of the property because of a default by the lessee in paying rent or otherwise, or upon abandonment by the lessee and acceptance by the lessor, thereby cancels the lease so as to release both parties from subsequent liability under the lease, except damages accruing up to the cancellation, so that a landlord, by re-entering upon the lessee's default in rent and taking control of the property, canceled the lease so as to entitle the lessee to a deposit made to secure performance of the lease, whether the deposit was intended as liquidated damages or a penalty; the landlord not being entitled to retake possession and at the same time resort to the deposit made to insure performance of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 743-750; Dec. Dig. § 184.*]

2. EVIDENCE (§ 441*) — PAROL EVIDENCE — VARYING CONTRACT—LEASE.

In an action by the assignee of a lessee to recover a deposit by lessee to insure performance of the obligations of the lease, brought after the landlord had retaken possession, evidence was not admissible to show damage because of alterations made in the building after forfeiture and re-entry by the lessor, where the lease did not provide that the deposit should cover such damage but provided that the note given by the lessor for the amount of the deposit, which was to be treated as a loan if lessee performed his obligations, should be canceled upon forfeiture.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

3. EVIDENCE (§ 384*)—PAROL EVIDENCE.

The parol evidence rule will be enforced in all cases not brought within its exceptions.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 384.*]

4. EVIDENCE (§ 441*) — PAROL EVIDENCE — VARYING CONTRACT.

A party cannot add to the terms of a written agreement by parol evidence, as by adding an obligation not contained therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

5. DAMAGES (§ 79*)—DAMAGE OR PENALTY.

Consonant with the policy of the courts disapproving forfeitures, if there is a doubt as to whether a forfeiture is intended as liquidated damages or a penalty, and the damage is easily computed or readily reduced to a certain amount, the courts will construe the provision as a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164-169; Dec. Dig. § 79.*]

Cunningham, P. J., dissenting.

Appeal from District Court, City and County of Denver; George W. Allen, Judge.

Action by Rosa A. Agnew against Nathani-

el P. Wilson and another in which defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal. Affirmed.

Mel Emerson Peters, Halsted L. Ritter, and Hamlet J. Barry, all of Denver (John T. Barnett, of Denver, of counsel), for appellants. E. I. Thayer, of Denver, for appellee.

MORGAN, J. Defendants appeal from a judgment against them in an action begun March 23, 1910, by the plaintiff, Agnew, assignee of the Psychic Science Company, a corporation that leased from the defendant Wilson a certain piece of real property in Denver, Colo., for a period of ten years. The suit was brought by the assignee of the lease to recover the amount of a deposit of \$5,000 and to cancel a bond for \$3,000 made by the lessee to the lessor.

The entire transaction was reduced to writing and consisted of a lease for ten years, Wilson, lessor, and the Psychic Science Company, lessee; a bond for \$3,000 given to the lessor by the lessee, as principal, and the Empire State Surety Company, as surety, to guarantee the keeping of the obligations in the lease; a written agreement was also entered into between the lessor and lessee whereby \$5,000 was turned over to the lessor, to be considered, so long as the lessee kept the obligations of the lease, as a loan for ten years at 6 per cent., evidenced by a note and deed of trust on the leased property, but with the further provision that if the lessee should fail to keep the obligations of the lease, or any of them, or forfeit the lease, then the said note and deed of trust to be canceled and released; a written option was also given by the lessor to the lessee to purchase the property within one year.

The Rome Realty & Investment Company and F. L. Peters were made defendants because the property was conveyed to the investment company by Wilson after the lease and prior to the suit, and Peters was the agent of the defendant Wilson. The Empire State Surety Company was made a defendant because the plaintiff had conveyed to it certain property to indemnify it against loss on account of its suretyship on the bond, and the complaint prayed for a reconveyance of this property to her.

The complaint demands that Wilson pay the \$5,000 left with him as a deposit and that the \$3,000 bond given to him be canceled. The defense is that the \$5,000 deposit and the \$3,000 bond were made and agreed upon between the lessor and the lessee as liquidated damages, and that the defendant is entitled to retain the \$5,000 and entitled to the \$3,000 guaranteed by the bond because the lessee forfeited the lease. The defendants filed a cross-complaint, demanding the \$3,000 due upon the bond, and the Empire State Surety Company filed its answer, denying liability.

The lower court gave the plaintiff judgment for the \$5,000 except the balance of the rent owing on the last month that the lessee occupied the building, ordered the cancellation of the bond for \$3,000, released the surety thereupon, and ordered the surety to reconvey to the plaintiff the real property she had conveyed to it as indemnity, also declared a lien upon the leased property for the amount of the judgment in favor of the plaintiff.

An examination of the various written instruments introduced in evidence and entered into in conjunction with the lease discloses a very careful attempt on the part of the lessor to protect himself against loss in case of a forfeiture of the lease. First, the lease provides for a re-entry by the lessor in case of a failure to pay the rent. Second, the agreement whereby the \$5,000 was deposited with the lessor as a loan provided that the note and deed of trust should be canceled and delivered up in case the lease was forfeited. Third, the bond for \$3,000 provided that if the rent was not paid in accordance with the lease, or if any of the obligations of the lease were broken, the amount of the bond should be forfeited to the lessor, and that the amount should be considered as liquidated damages and not as a penalty.

After these instruments were executed, the lessee took possession, paid the rent as agreed for five or six months, and defaulted by paying only a part of the February, 1910, rent. The lease was made May 1, 1909, but payment of rent, by agreement, did not begin until the building was finished that the lessor was to erect upon the leased premises. The lessee was notified when this default occurred, in writing; that, unless the rent was paid as required by the lease, the property must be vacated, and in which notice the lessor declared a forfeiture of the lease and stated that he would take possession of the property unless the rent was paid. The lessor and Mrs. Agnew, as assignee, aforesaid, had some conversation after this notice was given in which it was tacitly understood between the two that the lessee would surrender the property and the lessor would accept the same. Thereafter the lessor took entire and complete control of the property; the lessee abandoned it and the lease; the lessor altered the second story of the building, took over the tenants that were occupying portions of it, collected rents from them himself, made leases with subsequent tenants, and in all other respects took entire control of the property as of his first and former's estate, as the lease provided he could do.

[1] Could he do this and at the same time claim the deposit and the benefit of the bond? The answer, on first impression, would be in the affirmative, but the law is plain between landlord and tenant that, when the lessor re-enters and resumes absolute control

of the property, on account of a default of the lessee, in the payment of the rent, or as to any other obligation of the lease, or by reason of an abandonment or surrender of property by the lessee and acceptance thereof by the lessor, the lease is thereby canceled, and by reason thereof both parties are released from any subsequent obligation or liability under the lease.

"The surrender of the leased premises by the tenant extinguishes the relation of landlord and tenant and releases him from liability for rent accruing thereafter. * * * Surrender may be had by express agreement of the parties or by operation of law, and in the latter case whether or not a surrender has been effected ordinarily depends upon the intention of the parties." 24 Cyc. 1162.

"A landlord is not, on the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter but may at his election suffer the premises to remain vacant and recover his rent for the remainder of the term, or he may on the other hand elect to enter and determine the contract, and in the event of such re-entry he is entitled to recover only for the rent then due." 24 Cyc. 1164, 1165.

"Where a tenant deposits money as security for the payment of rent and the performance of the covenants of the lease and is dispossessed during the term for failing to pay rent, the deposit is not forfeited; the tenant is entitled to recover the balance remaining after deducting therefrom the amount of damages suffered by the landlord from the breaches of covenants on his part prior to the dispossession. Even in some cases where the lease recites that the deposit is made as liquidated damages, the tenant has been held to be entitled to the surplus." 24 Cyc. 1143, 1144.

In the case of *Carson v. Arvantes*, 10 Colo. App. 382, 387, 50 Pac. 1080, 1082, the court said: "An agreement by the tenant to abandon possession of the demised premises and one by the landlord to resume his occupancy and the execution of this agreement in law amounts to a surrender of the term. Whenever this happens, the lease is terminated and the obligation of the tenant to occupy or to pay rent is thereupon determined. This is familiar law with reference to leasehold rights and is thoroughly well settled. *Talbot et al. v. Whipple*, 96 Mass. [14 Allen] 177; *Kneeland v. Schmidt*, 78 Wis. 345 [47 N. W. 438, 11 L. R. A. 498]; *Hegeman v. McArthur*, 1 E. D. Smith [N. Y.] 147; *Rice v. Dudley*, 65 Ala. 68; *Buffalo County National Bank v. Hanson*, 34 Neb. 455 [51 N. W. 1035]. Under this rule the landlord of course has his election between one of two remedies. He may leave the premises vacant, sue for the rent for the balance of the term, and enforce any security which the lessee gave to insure performance. If he chooses he may likewise

terminate the contracts and enter a claim for rent up to the date of the abandonment and the acceptance of possession. He is not at liberty to take possession of the premises and at the same time insist that the contract is in force and recover rent for the balance of the term." Our Supreme Court, in the same case appealed to it (*Carson v. Arvantes*, 27 Colo. 77, 83, 59 Pac. 737, 739), said: "Any agreement between landlord and tenant manifesting the intention of both to terminate a lease, which is unequivocally acted upon by each, effects its cancellation; and, Hallett being released from all liability under the lease, it follows that the security pledged for the performance of his contract was discharged; and therefore appellants could no longer insist upon holding a deposit for the performance of a contract which by their own act they had canceled. *Buffalo County Bank v. Hanson*, 34 Neb. 455 [51 N. W. 1035]; *Taylor on Landlord and Tenant*, § 507; *Talbot v. Whipple*, 98 Mass. [14 Allen] 177." See, also, *Rauer's Law & Collection Co. v. Third Street Improvement Co. et al.* (Cal. App.) 131 Pac. 77; *D'Appuzzo v. Albright* (Sup.) 78 N. Y. Supp. 654; *Cunningham v. Stockon*, 81 Kan. 780, 106 Pac. 1057, 19 Ann. Cas. 212; *Chande v. Shepard*, 122 N. Y. 397, 25 N. E. 358; *Baxter v. Helmann*, 134 Mo. App. 260, 118 S. W. 1152; *Brigham Young Trust Co. v. Wagener*, 13 Utah, 236, 44 Pac. 1030.

It makes but little difference in what way the lease was terminated, whether by re-entry and a resumption of possession by the lessor or whether by a surrender on the part of the lessee and an acceptance thereof by the lessor, because in either case the relation of landlord and tenant would be terminated. *Rockwell v. Eller's Music House*, 67 Wash. 478, 122 Pac. 12, 14, 39 L. R. A. (N. S.) 894.

In view of the decision of the Supreme Court in the case of *Carson v. Arvantes*, 27 Colo. 81, 59 Pac. 738, it is unnecessary for us to determine whether the deposit made in this case by the contract, or the indemnity of the bond, should be considered as liquidated damages or as a penalty. The Court of Appeals held in that case, where the lessee deposited with the lessor \$250 and took a receipt which thereafter formed the security contract, that said contract provided for a penalty and not for liquidated damages. The contract, so the court said, "in general terms recited the receipt of \$250 as security that the lessee would remain in the store until the end of the lease, paying rent in advance, and provided that, if they moved out and did not pay the rent according to the agreement, the deposit should be forfeited and become the property of the lessor." But the Supreme Court in the same case said: "The only question presented is: Did the Court of Appeals determine the cause on correct principles of law applicable to the facts? In determining this question, however, we do not deem it necessary to decide whether the

agreement with respect to the deposit was one of liquidated damages, in case of a breach of the contract of lease, or whether it was security for damages which appellants might sustain in case the terms of that agreement were not complied with, for it could make no difference how it should be treated in this respect, if, as a matter of fact, the lease was terminated by the acts of the parties, and the rent paid up to the date when it was so canceled."

There is no conflict in the testimony as to the lessor's declaration of a forfeiture and that he demanded and resumed absolute and adverse possession and control of the property and accepted the surrender thereof; and having done this, under the ruling of the Supreme Court above cited, it is unnecessary to determine whether the deposit is liquidated damages or penalty, because resumption of possession which canceled the lease canceled every claim for damages accruing subsequent to such cancellation, except such damages, however, as may have accrued up to and prior to such cancellation. And, whether the deposit was understood to be as liquidated damages or a penalty in the beginning, such acts of the lessor, by operation of law, left the deposit in his hands free from the grasp of the contract of deposit, and the money of the lessee; and, even if it were contended that the lower court erred in allowing the balance of the February rent to be deducted from the deposit, there is no contention here and no cross-error assigned thereupon.

An examination of the lease and the other instruments accompanying it authorizes the conclusive presumption that the parties never contemplated any damages that would accrue upon any breach except that of a forfeiture of the lease and the consequent vacation and abandonment of the premises. The lessor was amply secured for such breach and would have been fully protected if he had not resumed possession and thus elected to save himself in this way rather than rest upon the right he had to refuse to accept the surrender of the property and to rely upon the deposits for his security or damages. He had two means provided: One by the terms of the lease under which he could declare a forfeiture and resume possession; the other by refusing to accept the surrender and resorting to the deposits. He chose the former, and this debarred him from any claim under the latter. *Carson v. Arvantes*, supra.

[2] The appellant, however, offered to prove that there was another damage accrued prior to the forfeiture, on account of alterations of the second story of the building, made after the forfeiture, that cost between \$3,500 and \$4,000; but the lower court excluded this testimony on the ground that it was extraneous evidence and tended to change the terms of the written agreements.

[3] The enforcement of the parol testimony rule may sometimes inflict great hardship, and the rule is oftentimes more honored in the

breach than in the observance, but nevertheless it is a wholesome general rule, not to be broken except by the exceptions, which are numerous, that usually accompany the rule itself. This proof, however, does not come within any exception, and the admission of this parol proof that the lessee agreed that the deposit should cover the necessary cost of alterations in the building would be adding another penalty for the breach of the lease, not contained in it or in any of the contemporaneous agreements, and a damage not common or natural to the forfeiture of the lease nor included in its general terms. If the lessor intended this damage to be provided for, it would have been easy to have inserted it in one or more of the agreements. The lessor had the assistance of counsel, and no doubt it was deliberately concluded that such damage was taken care of by the strict terms of the instruments providing for a breach of the lease on failure to pay the rents; and such was the case if the lessor had refused to accept the surrender of the property and rested upon his rights under the lease and the other contracts of security. He could have given notice to, or agreed with, the lessee that he would take charge of the property as agent, and that he would hold it (the lessee) for the difference between the rent actually received and what the lease called for, less expenses, during the remainder of the term, and in such case could have held all of the deposit as liquidated damages, or enough thereof as a penalty, to cover the difference, as damages for the breach, or he could have done what he did, declare a forfeiture, take possession and control, and save himself from damage in that way. He could not do both. Therefore it was not error for the lower court to exclude parol testimony as to the alteration of the building, because its admission would introduce another element or item of damage that the deposit should cover, not in any way named in, referred to, or within the meaning of the terms of the written agreements but duly taken care of and provided for in the strict provisions concerning forfeiture for nonpayment of rent. Citation of authority would not aid us on this point, as is said by Prof. Wigmore: "Such is the complexity of circumstance and the variety of documentary phraseology, and so minute the indicia of intent, that one ruling can seldom be of controlling authority or even of utility for a subsequent one. The opinions of judges are cumbered with citations of cases which serve no purpose there except to prove what is not disputed—the general principle. Other than in relation to some of the foregoing topics which have broad and uniform bearings, individual rulings can have little value as precedents unless the entire detail of the documents and circumstances is set forth; and an abbreviation of them is therefore more likely to mislead than to profit. The application of the rule should in almost all instances be

left to the trial judge's determination." 4 Wigmore on Evidence, § 2442, p. 3443.

A careful examination of these instruments discloses that the lessor, through his counsel, deliberately concluded and believed that the provision, in the lease and in the other instruments, for a forfeiture on account of nonpayment of rents for the term would fully protect the lessor in all respects, including damages by reason of alterations of the building, if such damages were contemplated. This conclusion of the lessor and his counsel was a correct one, because it was no doubt so concluded with the understanding and intention that the lessor should stand upon the terms thus provided for in case of a forfeiture and not resume possession of the property and cut himself out of any right to rely upon the deposits.

[4] If this testimony were admitted to prove that the alteration of the building was one of the items of damage provided against, then the parol testimony rule would be wholly abrogated, because, if there is any one of its restrictions more inviolate than another, it is the one that a party may not add to the terms of a written agreement by parol evidence, and especially to add another obligation to those already in the writing as an addition to the burden upon the opposing party. Furthermore, this rejected testimony would prove nothing more than that the lessor intended to provide for a forfeiture of a sufficient sum to pay him for remodeling the building; but, when the contracts were drawn, all mention of the remodeling was omitted, and purposely so omitted, no doubt, because it was intended that the forfeiture itself would cover all damages incurred in remodeling. Mr. Mel E. Peters, who drew these instruments, and who testified for the lessor, stated in his testimony, in answer to the question, "But you never incorporated in the contract, which you prepared, that language, did you?" (meaning the language as to remodeling): "A. The intention in drawing the contract was to draw it so in case of a forfeiture of the lease that this should be paid as liquidated damages, whenever the covenants of the lease or a fracture of the covenants of the lease should end in a forfeiture of the lease—would result in a forfeiture of the lease—then the money should be paid." All of Mr. Peters' testimony goes to show that he believed, when the contracts were drawn, that a forfeiture for nonpayment of rent would entitle the lessor to claim the deposits as liquidated damages, or at least as security for the damages incurred; but as the lessor took possession of the property, and thereby elected to protect himself in a different way, oral testimony concerning the element of damage concerning the remodeling was inadmissible.

[5] Furthermore, the moment this evidence is considered, so easily and readily reducing the damages to an exact sum, the contention of appellants as to liquidated damages is de-

stroyed, because the courts, ever astute to discover a reason for disallowing a forfeiture, have held that if there is a doubt, and the damage is easily computed or readily reduced to an exact amount, the parties never intended anything more than a penalty. *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344, 38 L. R. A. (N. S.) 847.

Both parties in this case rely upon the harsh effect of two recognized rules that have been frequently enforced, one forfeiting as liquidated damages a certain sum of money agreed upon regardless of what the damages may be in fact, the other a rule peculiar to the law of landlord and tenant whereby the landlord may forfeit his right to claim a forfeiture against his tenant; and while these rules are neither absolute nor of immaculate or miraculous conception, but merely applied in many adjudicated cases as a means to arrive at justice between the parties, it is not found necessary to disturb them in the conclusion reached.

The judgment of the lower court is therefore affirmed, except in so far as it affects the bond for \$3,000; the lower court having denied an appeal as to that part of its judgment.

CUNNINGHAM, P. J. (dissenting). Enough appears in the majority opinion to make it plain that in the judgment of the writer of the majority opinion it is based upon authority rather than upon reason, for he says in effect that on first impression, the conclusions therein arrived at do not comport with reason. One's first impressions are not infrequently his best impressions. It must be conceded that our courts have gone a long way in matters pertaining to the law of landlord and tenant and in matters pertaining to penalties and liquidated damages in overthrowing the intention of parties to agreements of this sort, and making, and then enforcing, contracts which the parties themselves had not, as a matter of fact, entered into. But I know of no well-considered case wherein the rule is announced that the interpretation which the parties to a contract have placed upon it, when clearly established, will not be enforced, where the same is reasonable and does not offend against public policy. There was evidence offered in this case, not alluded to in the majority opinion, which tended strongly to show. (Indeed, to my mind conclusively shows) that both parties to the contract of lease in this case fully understood that the \$5,000 referred to in the majority opinion was to be treated as liquidated damages and was to be retained by Wilson, and by him used in the remodeling of the building, if it became necessary, because of the violation of the terms of the lease by the Psychic Society to remodel the same. The trial court admitted this evidence when it was offered but la-

ter struck it out and refused to consider it for any purpose. Therein the trial court, in my judgment, clearly committed reversible error, and for that reason I cannot yield assent to the conclusions reached in the majority opinion.

STATE ex rel. ABEL, Deputy Superintendent of Public Instruction, v. EGGERS, State Controller. (No. 2,077.)

(Supreme Court of Nevada. Nov. 4, 1913.)

1. STATUTES (§ 119*)—SUBJECT AND TITLE.

Any provision for the repeal or enactment of a statute authorizing payment of the traveling expenses of a state official, would not be germane to an act entitled "An act making appropriations for the support of the civil government of the state of Nevada for" certain years.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 164-167; Dec. Dig. § 119.*]

2. STATUTES (§ 109*)—TITLES AND SUBJECTS—AMENDATORY ACTS.

An amending statute would not be effective to amend any act to which the title of the amendatory act was not germane.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. § 109.*]

3. STATUTES (§ 225*)—CONSTRUCTION—RELATED STATUTES.

Sections of the general appropriation act are in pari materia with the general acts relating to the purposes of the appropriation, and hence should be considered in connection therewith, so as to carry out the provisions of the general act, unless manifestly repugnant thereto.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

4. STATES (§ 62*)—OFFICERS—COMPENSATION—EXPENSES—LEGISLATIVE REGULATIONS.

The Legislature has power to abolish or restrict the payment of traveling expenses of state officers.

[Ed. Note.—For other cases, see States, Dec. Dig. § 62.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 47*)—SALARIES—TRAVELING EXPENSES—CONSTRUCTION OF STATUTE—"ACTUAL TRAVELING EXPENSES."

The General Appropriation Act for 1913-14 (Laws 1913, c. 136) §§ 66 to 70, inclusive, made appropriations for "actual traveling expenses" for each of the five Deputy Superintendents of Public Instruction. An act approved March 20, 1911 (Laws 1911, c. 133) § 13 (Rev. Laws, § 3251), provides that all claims for traveling expenses, including the cost of living and transportation of each Deputy Superintendent, shall be paid from the general state fund. The amount appropriated for the years 1913 and 1914 for the "actual traveling expenses" of the deputies was the same as that appropriated by the previous Legislature for the traveling expenses of such officers. *Held*, that the appropriation for traveling expenses by the appropriation act for 1913 and 1914, included the cost of living of the deputies actually incurred while away from home performing official duties.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 121; Dec. Dig. § 47.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6. STATUTES (§ 158*)—REPEAL—IMPLICATION. Repeals by implication are not favored, and are only permitted where the two acts cannot stand together.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.*]

7. STATUTES (§ 161*)—RELATED STATUTES.

Statutes relating to the same subject, which can stand together, should be construed so as to make each effective.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

8. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE PURPOSE.

Statutes should be construed so as to effectuate the manifest legislative purpose, and this is sometimes done contrary to the words of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

9. STATUTES (§ 206*)—CONSTRUCTION—UPHOLDING STATUTES.

If a statute may be differently construed, that construction should be given which will make it effective.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

10. MANDAMUS (§ 3*)—ADEQUATE LEGAL REMEDY.

Since the statute expressly provides that mandamus shall be issued where there is not a plain, speedy, and adequate remedy in the ordinary course of law, the writ will not be issued if such an adequate remedy exists.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. § 3.*]

11. MANDAMUS (§ 3*)—DEFENSES—ADEQUATE LEGAL REMEDY.

Rev. Laws, § 4459, provides that all claims against the state for services or advances, for payment of which legal appropriation has been made, and which have been authorized by law, but of which the amount has not been fixed, may be presented to the Board of Examiners for allowance. Section 5653 provides that when such a claim is rejected by the State Controller, the claimant may sue in any court in Ormsby county to recover the rejected part of the claim. Section 5655 provides that upon presentation of a certified copy of a final judgment in favor of the claimant in such an action, the Controller shall draw his warrant in claimant's favor for the amount of the judgment. *Held*, that since the relator had an adequate legal remedy, mandamus would not issue against the State Controller to compel him to issue a warrant in relator's favor for the amount to which he was entitled, under the statutes, as "traveling expenses" incurred while acting as Deputy Superintendent of Public Instruction.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. § 3.*]

Mandamus by the State, on the relation of J. F. Abel, Deputy Superintendent of Public Instruction of the State of Nevada, against Jacob Eggers, as State Controller. Petition for writ denied.

Brown & Belford, of Reno, for petitioner. George B. Thatcher, Atty. Gen., for the State.

TALBOT, C. J. This is an original proceeding in mandamus to compel the respondent, the State Controller, to draw his warrant for a claim approved by the State Board of Examiners for hotel and kindred expenses incurred by the relator in the dis-

charge of his official functions as Deputy Superintendent of Public Instruction when absent from the place of his residence. The facts stated in the petition are admitted by written stipulation, and a demurrer has been interposed.

It is the duty of the State Controller to refuse to draw warrants in cases where payment is not authorized by law, and naturally if there is great doubt he takes the course which will protect him and the state treasury. On his behalf it is contended that there is no appropriation for the payment of these expenses in the general appropriation act for the years 1815 and 1914. Laws 1913, c. 136. Sections 66 to 70, inclusive, make appropriations "for actual traveling expenses" for each of the five Deputy Superintendents of Public Instruction, in amounts varying from \$1,000 to \$1,500.

Differently from prior appropriation bills, the word "actual" has been inserted in this general appropriation bill ahead of each of the provisions for "traveling expenses" for the Governor and Attorney General, for the State Superintendent of Public Instruction, for the Deputy Superintendents of Public Instruction in different districts, for District Judges, and for the Mine Inspector and his deputy. It is the contention of respondent that the items for hotel charges are not "actual" traveling expenses under the provisions of the appropriation act, and to support this contention reliance is had on the case of State v. La Grave, 28 Nev. 88, 42 Pac. 797.

Section 13 of "An act concerning public schools, and repealing certain acts relating thereto," approved March 20, 1911 (Laws 1911, c. 133), which was passed long after the decision in that case, and which we have to consider here, provides that: "All claims for the traveling expenses, including the cost of transportation and cost of living, of each Deputy Superintendent of Public Instruction while absent from their places of residence, together with the necessary office expenses, shall be paid from the general fund of the state." Revised Laws, § 3251.

These appropriation bills, as indicated by the titles, are passed for the support of the state government, and are not legislative acts changing the substantive or general laws of the state. The civil government of the state is established by the Constitution and general statutory provisions, and it is for the support of such government that general appropriation bills are enacted. It is not expected that changes and amendments in the general laws of the state will be made in general appropriation bills, and the life of such acts is only two years.

Although failure to appropriate will prevent recovery from the state for traveling expenses, if the Legislature in the most explicit terms had designated in the general appropriation bill that the statute providing for

the payment of traveling expenses for different officers should be repealed, or should be suspended for two years, such provisions or enactments would be void under section 17, article 4, of the Constitution, which provides: "Each law enacted by the Legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but, in such case, the act, as revised, or section as amended, shall be re-enacted and published at length."

[1] Any provision for the repeal or enactment of a law authorizing payment of the traveling expenses of an officer would not be germane to this act, which is entitled "An act making appropriations for the support of the civil government of the state of Nevada for the years 1913 and 1914," for the title does not indicate a purpose to repeal or amend any such existing law. *State v. Gibson*, 30 Nev. 356, 96 Pac. 1057; *State v. Board of County Comm'rs of Storey County*, 22 Nev. 399, 41 Pac. 145; *State v. Silver*, 9 Nev. 231; *Chase v. Rogers*, 10 Nev. 253, 21 Am. Rep. 738.

[2] Any act to suspend or amend one or more acts would not be effective unless the title of the amendatory act were pertinent; and if it were sought to amend two or more acts by one amendatory act, it would not be valid or amend any act to which the title of the amendatory act was not pertinent. *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454; *Ex parte Hewlett*, 22 Nev. 333, 40 Pac. 96; *State v. Commissioners*, 22 Nev. 399, 41 Pac. 145; *State v. Hoadley*, 20 Nev. 318, 22 Pac. 99.

It must be conceded that the use of the word "actual" in relation to traveling expenses, used in the several sections of the general appropriation bill, if considered alone, affords room for argument that the Legislature thus manifested an intent to restrict the purposes for which the appropriation was made. While the words "actual traveling expenses," considered alone, may give the inference that hotel bills are not to be allowed or paid, the fact that the Legislature appropriated the same amount for "actual traveling expenses" as designated in the general appropriation bill at the previous session for "traveling expenses," raises a doubt or contrary inference that the Legislature may have intended to appropriate enough to cover the payment of the hotel bills. If, unlimited or not considered in connection with existing laws, the literal language in appropriation bills were given effect, amounts larger than earned or provided by law might often be paid. But the language used in the appropriation bill is not the only language that is controlling in determining the legislative intent. In general appropriation bills appropriations are made in concise language, usually intended to be supplemented by more definite, existing statutes, and

for the purpose of meeting the expenses of the state government in accordance therewith.

[3] Sections of the general appropriation act are in pari materia with the general acts controlling the purposes for which the appropriation is made. They are therefore to be considered in connection with the general provisions of law to which they relate, and unless there is such a manifest repugnance as to leave no room for reasonable construction otherwise, they will be construed so as to carry out the provisions of the general law. This is the view taken by this court in former decisions where the provisions of the general appropriation act had been called in question. *State v. La Grave*, supra; *State ex rel. Fowler v. Eggers*, 33 Nev. 535, 112 Pac. 699; *State v. Westerfield*, 23 Nev. 468, 49 Pac. 119.

In the *Fowler Case* an act of the Legislature approved March 23, 1909 (Laws 1909, c. 159), provided that the salary of the Deputy Attorney General should be \$2,400 a year, payable in the same manner as salaries of other state officers, which under an earlier statute was monthly. The general appropriation bill appropriated \$4,800 for the salary of the Deputy Attorney General for that and the succeeding year. It was held that the statute should be considered in connection with the appropriation bill, that it was not in the nature of a relief bill, and did not become effective until the date of the approval, and that instead of being entitled to the full \$4,800, as appropriated, by the language of the general appropriation bill the salary of the Deputy Attorney General was limited by the statute, and was payable only at the rate of \$200 per month after the special act providing for such salary came into force.

If, as provided regarding district judges before the amendment of 1907, allowing their necessary expenses at the place of holding court when away from home, the statute limited the payment of traveling expenses for Deputy Superintendents of Public Instruction to traveling expenses by public conveyance, or to "actual traveling expenses," we might well hold that living expenses could not be paid by the state for lack of any provision for such payment, either in the statute relating to expenses or the general appropriation bill. Although there is room for difference of opinion as to whether the mere words "traveling expenses," when considered alone, include more than fares or cost of transportation, or whether they would embrace the expense of berths and meals on the train, or hotel bills while on the trip, we see no reason for disapproving the close construction heretofore given by this court in *State v. La Grave*, 23 Nev. 88, 42 Pac. 797, deciding that hotel bills of the Superintendent of Public Instruction were not payable under the statute providing for "actual traveling expenses." We would not disagree with this contention of respondent in this regard if these words

alone controlled and were to be construed in the appropriation bill or an act of the Legislature, without reference to other statutory language. Notwithstanding this decision, the Legislature by enactment of a later statute could provide for the payment of the living expenses of these officials when away from home.

[4] Unquestionably the Legislature has the power to abolish or restrict the payment of traveling expenses or otherwise change the law, but the proper way for manifesting such an intent is by an amendment or repeal of the existing statute. Clearly the words inserted in the appropriation act do not and could not accomplish this purpose. Whether an appropriation was or was not made, the law still remains that Deputy Superintendents are entitled to be paid their expense for "cost of living" while absent from their place of residence in the discharge of their duties. The question then is, Did the Legislature fail to make an appropriation to cover certain expenses which Deputy Superintendents are entitled to claim from the state as a matter of law? The amount appropriated for the "actual traveling expenses" of the Deputy Superintendent was the same as appropriated at the previous session for the "traveling expenses" of these officials. It was the amount recommended by the State Controller in his report to the Legislature, made pursuant to law, in estimating the expenses for the maintenance of the state government which the Legislature would be expected to provide. If there had been a reduction in the appropriation, it might be argued therefrom that the Legislature did not at this time intend to provide for any expenses other than traveling expenses in the restricted sense. If this construction is to be placed upon provisions of the appropriation act, then we must attribute to the Legislature a purpose to cause the Deputy Superintendents to perform a greater extent of traveling than they had been accustomed to do in years past, and to contribute from their private resources a very much larger amount than they would be called upon to contribute if they did no more traveling than in the years past, when all of their expenses were paid by the state. It does not seem probable that such a purpose or result was contemplated by the Legislature. The same would be true regarding other officers for whose "actual traveling expenses" appropriations are made.

[5] As, beyond question, the Legislature had made the cost of living of the Deputy Superintendents of Public Instruction, while absent from their places of residence, a part of the traveling expenses which they are entitled to be allowed by the state, we conclude that the provision in the general appropriation bill for "actual traveling expenses" means the actual traveling expenses as now allowed by the general law, including the cost of living actually incurred while away from home performing official duties,

not exceeding the amount of the appropriation, and that the payment of such expenses is not limited by the decision of this court construing an earlier act which did not provide for the cost of living. Under such a construction the state may properly pay the cost of living of the Deputy Superintendents while away from home, in compliance with the later statute as enacted by the Legislature, which was not repealed nor suspended by this general appropriation bill.

In the La Grave Case the court was construing in connection with the appropriation bill a statute providing for the payment of the actual traveling expenses of the State Superintendent of Public Instruction which did not provide for hotel bills or living expenses, and which has been superseded by a different law, and here we are construing in connection with an appropriation bill, and giving effect to an act of the Legislature which has not been repealed, and which definitely provides that the cost of living of the Deputy Superintendents of Public Instruction while absent from their places of residence shall be paid from the general fund of the state. In order to arrive at a different conclusion, it would be necessary to disregard the general provisions of the law, which should be mainly considered in construing doubtful sections of the appropriation bill. If upon consideration of the language in the general appropriation bill in connection with the statute a doubt arises, naturally we conclude that the Legislature intended to comply, instead of to fail to comply, with the statute. A failure to make any appropriation for or payment of the traveling expenses for two years would, in effect, amount to a repeal or suspension of the law for at least that period.

[6] To hold that under these circumstances the Legislature did not intend to make an appropriation for the payment of the living expenses would be equivalent to saying that, contrary to the good faith so generally kept or practiced by the state in complying with the laws, the Legislature, at least for two years, intended not to meet the obligation imposed by statute to pay the hotel bills of the District Deputy Superintendents. Repeals by implication are not favored, and occur only if there is an irreconcilable repugnancy, where the two acts cannot stand together. *State v. Donnelly*, 20 Nev. 214, 19 Pac. 680; *Walley's Estate*, 11 Nev. 260. The same liberal rule of construction ought to apply in favor of a statute which might otherwise have its clear provisions made inoperative or be suspended.

[7] It is also a well-recognized principle that statutes relating to the same matter which can stand together should be construed so as to make each effective. *State v. Donnelly*, 20 Nev. 214, 19 Pac. 680; *State v. Rogers*, 10 Nev. 319; *State v. Hoover*, 5 Nev. 141.

[8] In the interpretation of statutes the courts so construe them as to carry out the

manifest purpose of the Legislature, and sometimes this has been done in opposition to the words of the act. *Gibson v. Mason*, 5 Nev. 283.

[9] If different meanings may be given to a statute, the one should be applied which will make it effective. *State v. Martin*, 32 Nev. 198, 106 Pac. 318; *Hettel v. District Court*, 30 Nev. 382, 96 Pac. 1062, 133 Am. St. Rep. 731.

[10] Notwithstanding relator may be entitled to recover his living expenses from the state, he cannot prevail in this proceeding, because he has a remedy by an ordinary civil action. Section 5695 of the Revised Laws provides that the writ of mandamus may be issued by the Supreme Court, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station; the following section directs that "this writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law," and it has often been held that the writ will not issue if such remedy exists. *State ex rel. Gleeson v. Jumbo Ex. M. Co.*, 30 Nev. 192, 94 Pac. 74, 133 Am. St. Rep. 715, 16 Ann. Cas. 896; *Mayberry v. Bowker*, 14 Nev. 340; *State v. Boerlin*, 30 Nev. 473, 98 Pac. 402; *State v. Langan*, 29 Nev. 459, 91 Pac. 737; *Van Riper v. Botsford*, 29 Nev. 465, 91 Pac. 738. In *State v. Storey County*, 22 Nev. 263, 38 Pac. 668, it was said that the writ of mandamus should be resorted to only when the ordinary remedies do not afford adequate relief and without it there would be a failure of justice.

Section 21 of article 5 of the Constitution provides that the Governor, the Secretary of State, and the Attorney General shall constitute a board of examiners to allow claims against the state, except salaries and compensation of officers fixed by law.

Section 4459, Revised Laws, provides: "All claims against the state for services or advances, for payment of which an appropriation has been made by law, and which have been by law authorized, but of which the amount has not been liquidated and fixed, may be presented to the Board of Examiners in the form of an account or petition, and in such manner as said board shall prescribe by their rules, the claimant may present his evidence to sustain said demand, which evidence, if oral, shall be reduced to writing, and they shall either reject or allow the claim, in whole or in part, within thirty days from its presentation, and shall indorse upon the same, if allowed in whole or in part, over their signatures: 'Approved for the sum of ——— dollars,' and shall immediately transmit the same so indorsed, together with all the evidence received by them relating thereto, to the Controller of State. The Controller shall not allow or draw his warrant for

any claim of the class described in this section, which shall not have been approved by said board, or a greater amount than allowed by said board, except when said claim shall not have been acted upon by said board within thirty days prior to its presentation."

Section 5653 provides: "An officer or person who has presented a claim against the state for services or advances authorized by law, and for which an appropriation has been made, but of which the amount has not been fixed by law, to the Board of Examiners, which claim said board or the State Controller has refused to audit and allow, in whole or in part, may commence an action in any court in Ormsby county having jurisdiction of the amount, for the recovery of such portion of the claim as shall have been rejected."

Section 5655 provides: "Upon the presentation of a certified copy of a final judgment in favor of the claimant in any such action, the Controller shall draw his warrant in favor of the claimant for the amount awarded by the judgment."

[11] Under these statutes the relator has an adequate remedy by ordinary action at law in Ormsby county.

The petition for writ of mandamus is denied.

NORCROSS and McCARRAN, JJ., concur.

STATE ex rel. MIGHELS v. EGGERS, State Controller. (No. 1,986.)

(Supreme Court of Nevada. Nov. 4, 1913.)

1. MANDAMUS (§ 71*) — PURPOSE OF WRIT — ENFORCEMENT OF OFFICIAL DUTY.

Performance of a duty, enjoined upon an officer by law without leaving him any discretion in its performance, may be compelled by mandamus, if there is no other adequate remedy.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 133; Dec. Dig. § 71.*]

2. MANDAMUS (§ 105*) — PURPOSE OF WRIT.

If a claim against the state for services authorized by law is presented, the amount of which has been fixed by law and an appropriation made therefor, the claim may be enforced by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 223; Dec. Dig. § 105.*]

3. MANDAMUS (§ 3*) — DEFENSES — ADEQUATE LEGAL REMEDY.

Mandamus will not issue when the ordinary legal remedies will give adequate relief.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. § 3.*]

4. STATES (§ 61*) — OFFICERS — COMPENSATION — SECRETARY INDUSTRIAL AND PUBLICITY COMMISSION.

Act March 29, 1907 (Laws 1907, c. 185) § 3, provides that the chairman of the State Industrial and Publicity Commission shall receive, as compensation for his services, to be paid out of the state treasury, the sum stated, and the other two members shall serve without compensation. Section 4 provides that the commission may appoint a secretary "at a salary of not more than \$1,800 per annum, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may employ such other experts as may be necessary to perform any service that may be required of them, and shall fix their compensation payable out of such contributions" as may be made by the various counties and private individuals. Section 6 permits the commission to solicit private contributions, but prohibits them from receiving money in payment of specific services. Section 8 permits the various counties to allow a certain sum to the commission. Section 9 requires the expenditures for necessary office supplies, etc., to be audited and paid for as other state expenses are paid for, and section 10 requires the commission to report every six months a detailed statement of all sums received, showing from what source received, and for what purpose expended. *Held*, that the salary of a secretary of the commission, appointed at a fixed salary, was payable only out of the contributions received, and not from the state treasury, so that the State Controller could not be compelled to draw warrants for such salary.

[Ed. Note.—For other cases, see *States*, Cent. Dig. §§ 43, 64; Dec. Dig. § 61.*]

5. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENT.

The legislative intent in enacting a statute must govern if ascertainable.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

6. STATUTES (§ 205*)—CONSTRUCTION—CONSTRUING AS WHOLE.

The whole act should be construed together to remove or explain any ambiguity in a particular statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 282; Dec. Dig. § 205.*]

7. STATES (§ 180*)—FISCAL MANAGEMENT.

Before the State Controller is bound to draw a warrant for official salaries, it must appear by statute that an appropriation has been made, and that the state has obligated itself to pay such salaries from the state treasury.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 128; Dec. Dig. § 130.*]

8. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL FUNCTIONS—CONSTRUCTION OF STATUTE.

The court has no legislative power, and cannot put into a statute a provision omitted by the Legislature.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

9. MANDAMUS (§ 10*)—PROOF OF RIGHT.

Mandamus will issue only where the right to be protected is clear.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 37; Dec. Dig. § 10.*]

Application for writ of mandate by the State, on the relation of H. R. Mighels, against J. Eggers, State Controller. Demurrer to application sustained, and application denied.

James A. Finch and George Springmeyer, both of Reno, for petitioner. Cleveland H. Baker, Atty. Gen., for respondent.

TALBOT, C. J. The relator asks for a peremptory writ of mandate, requiring the State Controller to draw his warrants for \$6,900, alleged to be due and unpaid as salary of the relator as secretary of the State Industrial and Publicity Commission from August 1, 1907, to the 1st day of June,

1911, when the act of March 29, 1907 (Laws 1907, c. 185), creating that commission, became repealed by an act of the Legislature of March 17, 1911 (Laws 1911, c. 74). It is not shown that during this period of nearly four years he took any action to enforce the payment of his salary.

Section 4, under which the relator seeks to recover such salary from the state, is as follows: "Said commission may appoint a secretary at a salary of not more than \$1,800 per annum, and may employ such other experts as may be necessary to perform any services it may require of them, and shall fix their compensation, payable out of such contributions as may be made by the various counties and by private individuals."

Under the amended demurrer it is contended on behalf of respondent, by brief and argument, that this court has no jurisdiction of the subject-matter, that the petitioner has not alleged that there is any appropriation for the payment of the salary, nor that the claim was ever presented to the Board of Examiners, that the petitioner's salary was not fixed by law, and consequently that mandamus is not the proper remedy. It is not alleged or claimed that the respondent has in his possession any contributions from counties or private individuals, and the questions arise whether relator's salary is fixed by law, and whether it is made payable as an appropriation out of the state treasury.

Section 21 of article 5 of the Constitution provides that the Governor, the Secretary of State, and the Attorney General shall constitute a board of examiners to allow claims against the state, except salaries and compensation of officers fixed by law.

Section 5653, Revised Laws, provides: "An officer or person who has presented a claim against the state for services or advances authorized by law, and for which an appropriation has been made, but of which the amount has not been fixed by law, to the Board of Examiners, which claim said board or the State Controller has refused to audit and allow, in whole or in part, may commence an action in any court in Ormsby county having jurisdiction of the amount, for the recovery of such portion of the claim as shall have been rejected."

Section 5655 provides: "Upon the presentation of a certified copy of a final judgment in favor of the claimant in any such action, the Controller shall draw his warrant in favor of the claimant for the amount awarded by the judgment."

[1, 2] Where the law especially enjoins a duty upon an officer, and leaves him no discretion, and there is no other adequate remedy, performance may be enforced by mandamus. *Mau v. Liddle*, 15 Nev. 271. In cases where an officer or person has presented his claim against the state for services authorized by law, the amount of which has been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fixed by law, and for which an appropriation has been made, the remedy by mandamus may be available. If the Legislature fixed the salary of relator, and made it payable out of the state treasury, such salary became a settled demand against the state, which could not be changed by the Board of Examiners, and which did not require their action prior to payment.

[3] If relator's claim be regarded as one not fixed by law, he has a remedy after rejection by the board, or by the State Controller after action by the board, by civil suit in the district court in Ormsby county, under the foregoing sections 5653 and 5655 of the Revised Laws, and therefore would not be entitled to the writ of mandate, because he would have another adequate remedy, as determined by this court to-day in *State ex rel. Abel v. Eggers*, 136 Pac. 100, and in other cases. *State ex rel. Gleeson v. Jumbo Ex. M. Co.*, 30 Nev. 192, 94 Pac. 74, 133 Am. St. Rep. 715, 16 Ann. Cas. 896; *Mayberry v. Bowker*, 14 Nev. 340; *State v. Langan*, 29 Nev. 459, 91 Pac. 737. As held in *State v. James*, 22 Nev. 263, 38 Pac. 668: "The writ of mandamus will not issue when ordinary remedies afford adequate relief." *State v. Guerrero*, 12 Nev. 105; *State v. Boerlin*, 30 Nev. 473, 98 Pac. 402.

[4] We understand that this principle of law is conceded by the relator, and that he is proceeding on the theory that his salary was fixed by law, and that an appropriation has been made for its payment from the state treasury, which authorizes the drawing of a warrant by the State Controller, and that otherwise he would not ask for a writ of mandate.

It will be observed that the language of section 4 of the act, under which relator alleges he was appointed secretary, and under which he seeks to recover salary, stating that "said commission may appoint a secretary at a salary of not more than \$1,800 per annum," although naming the maximum, does not fix the amount of the salary. If the Legislature had specified \$1,800 per annum as the salary, and had directed its payment out of the state treasury, under the Constitution and statutes the claim would not have to be presented to the Board of Examiners. The act having left it optional with the commission to appoint a secretary at not more than \$1,800 per annum, the commission could have fixed the salary at \$1,200 per annum, or any other amount not exceeding \$1,800 per annum; and consequently it may be argued that the salary was not fixed by law, and that approval or action by the Board of Examiners is required, and therefore that mandamus will not lie to compel the State Controller to draw his warrant when the claim has not been acted upon by the board, nor if acted upon by the board, because as indicated the statute provides a different remedy by action in the court in Ormsby county. For the

relator it is contended that as the Legislature authorized the commission to appoint a secretary at a salary of not more than \$1,800 per annum, and thereby named the maximum and authorized the commission to fix the salary, the Legislature could delegate this power to the commission, and that the salary became fixed by law when it was fixed by the commission. It may be conceded that the Legislature could authorize the commission to fix the salary, and still be claimed that, although it was fixed by a commission authorized by law to fix it, nevertheless it was not fixed by law or act of the Legislature, but only by a commission whose act in fixing it did not amount to a law. It is unnecessary for us to determine this phase of the case, owing to the conclusion we reach regarding the other contention—that the salary is made payable out of the state treasury. If the last two commas in section 4 as quoted had been omitted, possibly the payment out of the contributions would have been limited to the compensation of experts employed by the commission. If we ignore the rule sometimes applied, which under that section as punctuated with commas would carry the payment out of contributions back to any payments previously contemplated by the sentence, instead of holding that the language and punctuation make the salary payable out of contributions, there would still be no provision for the payment of the salary of the secretary out of the state treasury. Consequently, if the language used directs the payment of his salary from any fund or source, it is from the contributions, for the section nowhere provides that his salary shall be paid from the state treasury.

[5, 6] The intention of the Legislature in passing this law, as in the construction of statutes generally, must govern if ascertainable. If one clause of a statute is obscure, the whole act or different parts are to be examined together in order to remove or explain the ambiguity. *Ex parte Prosole*, 32 Nev. 378, 108 Pac. 630; *Maynard v. Johnson*, 2 Nev. 25.

The preceding section 3 of the act provided that: "The chairman of such commission shall receive, as compensation for his services, to be paid out of the treasury of the state of Nevada, the sum of twenty-five hundred dollars per annum, payable in equal monthly installments, upon the first day of each and every month, and the other two members shall serve without compensation." We held that this language constituted an appropriation which authorized the payment of the salary of the chairman out of the general fund of the state treasury. *State ex rel. Davis v. Eggers*, 29 Nev. 469, 91 Pac. 819, 16 L. R. A. (N. S.) 630.

Section 6 of the act provided that "the commission shall have the right to solicit and receive private contributions, but shall accept no money or other considerations from

any firm or individual in payment of specific services or favors to be rendered."

Section 8 of the act was as follows: "There may be allowed to such commission by the commissioners of the several counties, if in their judgment they deem it advisable, a sum not exceeding the amount of two hundred and fifty dollars per year, from each and every county in the state of Nevada; and the boards of county commissioners of the various counties of this state are hereby authorized and empowered to provide by appropriate methods of taxation sufficient funds to defray the amounts contributed by their respective counties, and the county auditors of the various counties of this state are directed to and shall, within thirty days after being directed thereto by the board of county commissioners of their respective counties, draw and transmit to such commission the proper warrant or warrants to pay the sum contributed by their respective counties, such sums to be used by the said commission for the purpose for which the commission is established and for the best interests of the various counties and the state of Nevada, under the direction of the chairman and at least one other member of the commission."

Section 9 provided that expenses for "necessary office furniture, supplies, stationery, books, periodicals, maps, * * * shall be audited and paid as other state expenses are audited and paid."

Section 10 provided that "such commission shall, at least once in every six months, fully report to the advisory committee a full and detailed statement of all sums received and disbursed by the commission during the preceding six months, showing in detail from what source received, and for what purposes disbursements were made."

As the act makes direct provision that the salary of the chairman and the cost of furniture and office supplies shall be paid out of the state treasury, and nowhere provides that the salary of the secretary of the commission should be paid by the state, and does not provide for the use of these contributions otherwise than in paying the salary of the secretary and the compensation of other experts, or the compensation of the experts alone, we cannot say that it was not the intention of the Legislature that the salary of the secretary and the compensation of "other experts" should be paid from contributions authorized to be received from individuals and the several counties.

At the time that the general appropriation bill, approved March 22, 1907, was passed by the Legislature the act of March 29, 1907, creating the State Industrial and Publicity Commission, had not been approved, and consequently it could not be inferred that the failure of the Legislature to make any pro-

vision in the general appropriation bill that year regarding this commission indicated any intention that the salary of the secretary or chairman should or should not be paid out of the state treasury. Both bills were passed during the closing hours of the session. Although the law could not be amended by reference or omission in any appropriation bill, the fact that at the next regular session the general appropriation bill provided for the payment of the salary of the chairman of the commission, and omitted to make any provision for the secretary of the commission, indicates that the Legislature construed the act as providing for the payment of the salary of the commission out of the state treasury, and not for such payment of the salary of the secretary. The Constitution provides that "no money shall be drawn from the treasury but in consequence of an appropriation made by law." Revised Laws, § 277; State ex rel. Davis v. Eggers, 29 Nev. 469, 91 Pac. 819, 16 L. R. A. (N. S.) 630.

[7] In order to recover upon an obligation against the state or an individual, it is incumbent upon the party seeking relief to show that an obligation exists. Certainly more than the creation of a doubt as to whether the salary of the relator was payable out of the state treasury or out of contributions is necessary, and it must appear by some provision of law that an appropriation has been made, and that the state has obligated herself to pay this salary from the state treasury before it becomes the duty of the Controller to draw a warrant.

[8] As the act nowhere provides that this salary shall be paid by the state, we are unable to see how any recovery may be had against the treasury. If any moral obligation rests upon the state, when it is not shown that any legal liability was created by statute, relief can be obtained only through the Legislature. The function of the court is to determine the intention of the lawmaking branch of the government from the language used, in accordance with the rules of construction. The court has no legislative power, and cannot read into the statute a provision that the salary of the relator shall be paid out of the state treasury, as the salaries of state officers are generally paid. Ex parte Pittman, 31 Nev. 43, 99 Pac. 700, 22 L. R. A. (N. S.) 266, 20 Ann. Cas. 1319.

[9] As heretofore held, the court will grant the writ of mandate only when the right sought to be protected is clear and undoubted. State v. Stoddard, 25 Nev. 452, 62 Pac. 237, 51 L. R. A. 229.

The demurrer is sustained, and the application for the writ is denied.

NORCROSS and McCARRAN, JJ., concur.

STATE *ex rel. BEEBE v. McMILLAN*, State Treasurer. (No. 2,085.)

(Supreme Court of Nevada. Nov. 15, 1913.)

STATES (§ 169*) — **PAYMENT FROM PUBLIC FUNDS—STATE INSURANCE FUND—"STATE TREASURY."**

Const. art. 5, § 21, constitutes the Governor, Secretary of State, and Attorney General a Board of Examiners to examine claims against the state, except the compensation of officers fixed by law. Article 4, § 19, provides that no money shall be drawn from the state treasury except to meet appropriations made by law. Article 5, § 22, provides that the State Treasurer and State Controller shall perform duties prescribed by law. Rev. Laws, § 4459, requires all claims against the state, provided for by appropriation, but not liquidated, to be presented to the Board of Examiners for approval, and that the Controller shall not allow them unless so approved. Section 4157 defines the general duties of the State Controller, section 4158 requires him to audit all claims against the state for which appropriation has been made, of which the amount has not been definitely fixed by law, and which have been examined and approved by the board, and to allow claims as provided by law, and section 4159 requires him to draw all warrants upon the treasury and to account therefor. The act relating to the compensation of workmen (Laws 1913, c. 111), receiving injuries in the course of their employment resulting in death, creates an Industrial Insurance Commission, composed of the Governor, State Mining Inspector, Attorney General and two others named by them, and a state insurance fund derived from premiums paid by such employers as accept the terms of the act, and by section 24 provides that all premiums shall be paid to the State Treasurer, and by section 40 that the state shall not be liable for any compensation under the act except from such funds. *Held*, that the "state treasury" did not include the state insurance fund, which was a special fund given to the Treasurer in trust, as distinguished from the general taxes and revenues of the state, and that the requirement for presentation of claims to the Board of Examiners and the issuance of warrants by the Controller did not apply.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 161; Dec. Dig. § 169.*]

Original proceeding for writ of mandate by the State of Nevada, on the relation of G. H. Beebe, against William McMillan, as Treasurer of the State of Nevada. Demurrer overruled, with leave to answer.

William Forman, of Tonopah, for petitioner. George B. Thatcher, Atty. Gen., for respondent.

TALBOT, C. J. Relator applies for a writ of mandate commanding the State Treasurer to pay out of the "state insurance fund" a claim which has not been approved by the Board of Examiners. It is agreed that the case be considered as standing upon demurrer to the petition, and the question argued, and which the court is requested to determine, is whether the State Treasurer may properly pay claims against this fund without the approval of the Board of Examiners and the warrant of the State Controller. The respondent has taken the safer course by

refusing to pay before an adjudication of the statute is obtained.

The Legislature at its last session passed an act entitled: "An act relating to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries result in death, creating an industrial insurance commission, providing for the creation and disbursement of funds for the compensation and care of workmen injured in the course of employment, and defining and regulating the liability of employers to their employes; and repealing all acts and parts of acts in conflict with this act." Laws 1913, c. 111. It provides for the "Nevada Industrial Commission," to be composed of the Governor, State Mining Inspector, Attorney General, and two others to be selected by the three named, that a majority of these shall constitute a quorum for the transaction of the business of the commission, and for a state insurance fund, to be derived from premiums to be paid by employers, based on percentages of monthly pay rolls, in cases where notice of rejection of the terms of the act is not served by the employer or employe.

Section 24 provides that all premiums designated in the act shall be paid to the State Treasurer, and shall constitute the state insurance fund for the benefit of employes and their dependents.

Section 40 provides that the state shall not be liable for the payment of any compensation under the act except from the state insurance fund, to be derived from the payment of these premiums, and section 41 that the expenses of administration shall not exceed 10 per cent. of the amount of the premiums paid into this fund.

Differently from the provisions generally existing in other states, our Constitution provides that the Governor, Secretary of State and Attorney General shall "constitute a Board of Examiners with power to examine all claims against the state, except salaries or compensation of officers fixed by law." Article 5, § 21. The organic act also provides, at section 19, art. 4, that no money shall be drawn from the state treasury but in consequence of appropriations made by law, and at section 22, article 5, that the Secretary of State, State Treasurer, and State Controller shall perform such other duties as may be prescribed by law.

Section 4459 of the Revised Laws provides that: "All claims against the state for services or advances, for payment of which an appropriation has been made by law, and which have been by law authorized, but of which the amount has not been liquidated and fixed, must be presented to the Board of Examiners in the form of an account or petition, and in such manner as said board shall prescribe by their rules. * * * The Controller shall not allow or draw his war-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rant for any claim of the class described in this section, which shall not have been approved by said board, or a greater amount than allowed by said board, except when said claim shall not have been acted upon by said board within thirty days prior to its presentation."

Section 4157 provides: "He shall keep and state all accounts between the state of Nevada and the United States, or any state or territory, or any individual, corporation, or public officer of this state, indebted to the state, or intrusted with the collection, disbursement, or management of any moneys, funds or interests, arising therefrom, belonging to the state, of every character and description whatsoever, where the same are derivable from or payable into the state treasury. He shall examine and settle the accounts of all county treasurers, and other collectors and receivers of all state revenue, taxes, tolls, and incomes, levied or collected by any act of the Legislature and payable into the state treasury, and certify the amount or balance to the State Treasurer. He shall keep fair, clear, distinct, and separate accounts of all the revenues and incomes of the state, and also, all the expenditures, disbursements, and investments thereof, showing the particulars of every expenditure, disbursement, and investment."

Section 4158 enacts: "He shall audit all claims against the state, for the payment of which an appropriation has been made, but of which the amount has not been definitely fixed by law, and which shall have been examined and passed upon by the Board of Examiners, or which shall have been presented to said board, and not examined and passed upon by them within thirty days from their presentation; and he shall allow of said last-mentioned claims (not passed upon by the Board of Examiners within said thirty days after presentation), the whole, or such portion thereof as he shall deem just and legal, and of claims examined and passed upon by the Board of Examiners, such an amount as he shall decree just and legal, not exceeding the amount allowed by said board. And no claim for services rendered or advances made to the state or any officer thereof, shall be audited or allowed unless such services or advancement shall have been specially authorized by law, and an appropriation made for its payment. For the purpose of satisfying himself of the justness and legality of any claim, he shall be allowed to examine witnesses under oath and to receive and consider documentary evidence in addition to that furnished him by the Board of Examiners. He shall draw warrants on the treasurer for such amounts as he shall allow of claims of the character above described, and also for all claims of which the amount has been definitely fixed by law, and for the payment of which an appropriation shall have been made."

Section 4159 is as follows: "He shall draw

all warrants upon the treasury for money, and each warrant shall express, in the body thereof, the particular fund out of which the same is to be paid, and no warrant shall be drawn upon the treasury except there be an unexhausted specific appropriation, by law, to meet the same. The Controller shall keep an account of all warrants by him drawn on the treasury, and a separate account under the head of each specific appropriation, in such form and manner as at all times to show the unexpended balance of each appropriation."

Is the state insurance fund, as so derived from premiums, identical with the state treasury, and are demands against it claims against the state within the meaning of the constitutional and statutory provisions regarding approval by the Board of Examiners and the drawing of warrants by the State Controller? If action by this board and official were required, much of the detail work performed by the special officers and clerical force of the Industrial Commission would have to be delayed until it could be considered by the board, which meets bimonthly, and has many other duties to perform, and the further question would arise whether the payment of such claims would have to be deferred until an appropriation, the amount of which would be easy to determine, could be made by the Legislature. Under the law as indicated it is evident that all claims against the state treasury must be presented to the Board of Examiners and to the State Controller before they can be paid out of that exchequer. But if the fund be regarded as a special one, placed in the hands of the State Treasurer for safe-keeping, in trust for employees injured and the dependents of employees who are killed, and as separate from the state treasury, presentation of claims to, or action by, the Board of Examiners or the Controller is not required by these general laws relating to claims against the state treasury, or otherwise, for the Nevada industrial commission act does not provide that claims against the state insurance fund shall be presented to the Board of Examiners or to the State Controller.

The fact that the State Treasurer is made the custodian of the fund does not necessarily make it a part of the state treasury. The provision in the act that \$2,000 should be paid to the Nevada Industrial Insurance Commission out of any moneys in the state treasury not otherwise appropriated, and that within six months after the receipt of that sum the commission should, out of the premiums received by it from employers, repay that amount to the state treasury, may be considered as indicating that the Legislature intended that the commission should draw that sum as a loan from the state treasury, and thereafter disburse it without approval by the Board of Examiners or the

State Controller, and inferentially that there should be a fund separate from the state treasury, and that the commission should likewise disburse any moneys in that fund without action by the Board of Examiners or the State Controller.

Any act of the Legislature requiring employers to contribute to the state treasury for the support of the State government a percentage on the monthly pay rolls, on the basis on which premiums are paid into the state insurance fund, would be unconstitutional because not uniform taxation. Article 4, § 20. These premiums are not paid for the purposes for which taxes and revenues are usually paid into the state treasury, and could not be used or made available for the payment of warrants for the ordinary expenses of the state government which are payable out of the state treasury. The state insurance fund being derived only from the payment of premiums by employers who do not object to coming under the terms of the compensation act, and being provided for the special and humane purpose of compensating employes who are maimed or injured, and the widows and orphans of those who are killed, may be distinguished from the state treasury, which is provided for the payment of the general expenses of the state government, and which is supplied under compulsory laws and provisions of the Constitution requiring a uniform system of taxation.

The state insurance fund should be regarded as separate from the state treasury, as are county and city funds, which are derived under general or special acts of the Legislature. The "state treasury" has a well-understood meaning, which does not include such a special fund as this one, providing for injured employes and their dependents, and we conclude that the requirements for presentation of claims against the state treasury to the Board of Examiners and the Controller do not apply to the state insurance fund.

The demurrer, upon the ground that the approval of the Board of Examiners and the warrant of the Controller are required before claims may be paid from that fund, is overruled. Respondent may answer within 10 days if he desires.

NORCROSS and McCARRAN, JJ., concur.

STATE ex rel. DAVIES v. WHITE et al.
(No. 2,088.)

(Supreme Court of Nevada. Nov. 5, 1913.)

1. MANDAMUS (§ 10*)—PURPOSE OF WRIT—COMPELLING ILLEGAL ACT.

A writ of mandate will not issue to compel members of a city council to submit to the electors a proposed ordinance which would be

void even if approved by a majority of the electors.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

2. MUNICIPAL CORPORATIONS (§ 111*)—ORDINANCES—VALIDITY—VIOLATION OF CHARTER.

An ordinance which violated city charter provisions would be void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245-256; Dec. Dig. § 111.*]

3. CONSTITUTIONAL LAW (§ 205*)—LICENSES (§ 7*)—SPECIAL PRIVILEGES—CITY ORDINANCES.

A city ordinance granting the individual named therein a license to conduct a restaurant with the privilege of selling intoxicants would be void as granting a special privilege to an individual to conduct a private business of such a character as to be subject to general police regulations and in which the public had no interest.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.* Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

4. MUNICIPAL CORPORATIONS (§ 111*)—VALIDITY OF ORDINANCES.

If an ordinance would be void if adopted by the city council, it would also be void if adopted by a vote of the electors of the city, under the initiative and referendum provisions of the city charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245-256; Dec. Dig. § 111.*]

Proceeding for mandamus by the State, on the relation of C. O. Davies, against Fred L. White and others, as the City Council of the City of Reno, County of Washoe, State of Nevada. Writ denied.

Dixon & Miller, of Reno, for relator. E. F. Lunsford, City Atty., of Reno, for respondents.

NORCROSS, J. This is an original proceeding, upon notice, for a peremptory writ of mandamus commanding respondents, as the city council of the city of Reno, to submit a certain proposed ordinance, designated ordinance No. 184, to a vote of the electors of the said city of Reno at a special election to be called for that purpose, in accordance with the initiative and referendum provisions of the act incorporating the city of Reno. The character and purpose of the proposed ordinance sought to be submitted to the electorate of the city of Reno is sufficiently indicated by its title which reads: "An ordinance directing the issue of a license or licenses to C. O. Davies for the keeping or conducting of a restaurant on the island in the Truckee river known as 'Belle Isle,' with the privilege, in connection therewith, of selling, furnishing, serving or otherwise disposing of wine, malt and spirituous liquors in sealed packages."

It is conceded that the petition for the submission of the ordinance is in due form and contains the requisite number of signatures of qualified electors to meet the requirements of the initiative and referendum provisions of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the city charter, but it is the contention of respondents that nevertheless the writ ought not to issue for the reason that the subject-matter of the proposed ordinance is not such a subject-matter as could be enacted into a valid ordinance and for the further reason that the provisions of the city charter providing for the initiative and referendum of city ordinances are unconstitutional for the reason that they were enacted prior to the adoption of the amendment of the state Constitution relative to the initiative and the referendum. As it is unnecessary to consider the constitutional question raised, the same will not be determined.

[1] The proposition that a writ of mandate will not issue to compel respondents to submit to the electors of the city a proposed ordinance that would be void even if approved by a majority of the electors is too clear for discussion or the citation of authorities. It remains only to consider whether the proposed ordinance would be valid if enacted. The proposed ordinance is special in character, designed to grant to a single individual a privilege in which the public at large has no interest or benefit.

By the provision of section 10 of article 12 of the city charter, the city council is invested with power "to fix, impose and collect a license tax on, regulate, prescribe the location of or suppress, * * * any and all places where intoxicating drinks are sold or given away." Stats. 1905, p. 121, c. 71.

It is admitted in this proceeding that general ordinances are in force in the city of Reno under the provisions of which the relator could have applied for a license such as is sought to be obtained through the enactment of the special ordinance under consideration, and that such application could be granted or refused by the city council. It is a serious question whether the proposed ordinance is not directly violative of the city charter which invests a certain discretion in the city council in the matter of granting or refusing liquor licenses.

[2] If violative of the provisions of the charter, it would for that reason be void.

[3] It is sufficient to hold the ordinance void upon the broad ground that it grants a special privilege to a single individual to conduct a private business of a character subject to general police regulations and in which no public interest can be said to be subserved.

"A by-law will be held bad when it appears to have been passed not to subserve the interests of the corporation (that is, the public) but those of some private person or class of persons." McQuillin on Municipal Ordinances, § 39. The same author says: "The general requisites of a valid municipal ordinance, one legally binding upon all whom it is designated to operate, may be thus briefly summarized: * * * (3) It must relate to a subject within the scope of the corporation. (4) It must be in harmony with the Constitution of the United States and the state, the

laws of the United States and the state, the municipal charter and general principles of the common law in force in the state. * * *

(10) It must be enacted in good faith, in the public interest alone, and designed to enable the corporation to perform its true functions as a local governmental organ." Section 14. Numerous authorities are cited by the author to support the text. See, also, *Lewis v. Webb*, 3 Me. (3 Greenl.) 326; *City of Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180.

The authorities cited by counsel for relator all go to the question of the right to the writ of mandamus, assuming that the proposed ordinance would be a valid municipal law if enacted. Neither in the brief nor the oral argument of counsel for relator has there been an authority cited that would support the validity of the proposed ordinance. In view of the fact that the city attorney had advised the city council in effect that the proposed ordinance would be void if enacted because it granted a special privilege, and that the city council had refused to submit the proposed ordinance to popular vote because of this reason, and that no serious attempt appears to have been made to controvert this contention, we are justified in assuming that counsel for relator were unable to find authority to the contrary.

[4] Counsel for relator dwell upon the fact that the provisions of the charter relative to the initiative and referendum of city ordinances have been complied with, and, if we understand their position correctly, it is their contention that that is decisive of the case. But a so-called proposed ordinance in proper form that could never be an ordinance in substance is not a proposed ordinance any more than an act of a Legislature in violation of the Constitution would be a statute.

The initiative and referendum provisions of the city charter provide an additional method for the adoption of ordinances, but the fact that such method is pursued adds no additional validity to the ordinance. If the ordinance would be void if adopted by the city council, the infirmity would not be cured by its adoption by the vote of the electors of the city. *Long v. City of Portland*, 53 Or. 92, 98 Pac. 1111; *Brazell v. Zeigler*, 26 Okl. 826, 110 Pac. 1052; *Giddings v. Trustees* (Cal.) 133 Pac. 479.

The writ prayed for is denied.

McCARRAN, J., concurs.

TALBOT, C. J. (concurring). I concur. The so-called proposed ordinance, the passage of which by the voters of the city is sought to be obtained by compelling the council to call a special election, would, if carried at such an election, be a license, which is distinguishable and ordinarily understood to mean something different from an ordinance. Any general regulation regarding city licenses

may be regarded as an ordinance, but an ordinance such as may be submitted for passage at a referendum vote at a special election under the city charter is a municipal law, rule, or regulation of a more public and permanent nature than a mere license to an individual to sell liquor. Such a license is defined by the Standard Dictionary, "In municipal law, an official permit to carry on a business not otherwise allowed;" and by Webster: "A formal permission from the proper authorities to perform certain acts or to carry on a certain business which without such permission would be illegal; also the document embodying such permission, as a license to preach, to practice medicine, to sell gunpowder or intoxicating liquors."

Among the references in Words and Phrases Judicially Defined, the following appear in volume 6, p. 5024: "In Dill. Mun. Corp. (4th Ed.) § 307, it is said that in this country the word 'ordinance' is limited in its application to the acts or regulations in the nature of local laws, passed by the proper assembly or governing body of the corporation. An 'ordinance' means a local law prescribing a general and permanent rule. Citizens' Gas & Mining Co. v. Town of Elwood, 114 Ind. 332, 16 N. E. 624, 626; Shuttuck v. Smith, 6 N. D. 156, 69 N. W. 5, 11. An ordinance is in the nature of a local statute. * * * Evison v. Chicago, St. P., M. & O. R. Co., 45 Minn. 370, 375, 48 N. W. 6, 11 L. R. A. 434. The word 'ordinance,' as applicable to the action of a municipal corporation, should be deemed to mean local laws passed by the governing body. The Legislature of the state passes laws and makes rules for the government of its procedure. So a municipal corporation passes laws, called 'ordinances,' and enacts rules. The same distinction that exists between laws and rules made by the Legislature should be held to exist between rules and ordinances enacted by a municipal corporation. Armatage v. Fisher, 74 Hun, 167, 26 N. Y. Supp. 364, 367."

In the note, Dillon's Municipal Corporations, vol. 1, p. 384, it is stated that: "A resolution is an order of the council of a special and temporary character; an ordinance prescribes a permanent rule of conduct or government. Blanchard v. Bissell, 11 Ohio St. 96, 103."

In my opinion the power of the city council is absolute under the special provision of section 10, art. 12, of the charter, which authorizes the council "to fix, impose and collect a license tax on, regulate, prescribe the location of or suppress any and all places where intoxicating drinks are sold or given away." It is apparent that by so specifically giving the control of such licenses to the council, and providing that elections may be called for the submission to the voters of proposed ordinances, without stating either in the section relating to ordinances or as a pro-

viso to the one relating to licenses that an election may be called to determine whether licenses shall be issued, the Legislature, under the usual definitions and distinctions, treated "ordinances" as distinct from "licenses" and made no provision for an election regarding them.

In McQuillin on Municipal Corporations, vol. 1, p. 825, it is said that: "Where the grant conferring the power is a complete enactment within itself, the provision, whether charter or statutory, becomes self-enforcing, and therefore legislation by ordinance is not required."

If, contrary to the will of the city council, the relator may force the calling of a special election, every other applicant who is denied such a license may also demand or require the calling of a special election. If a city liquor license were held to be a city ordinance or municipal law, in order to be consistent it would be necessary to hold that a county or state liquor license is a state law, and any person who is refused a state liquor license under the statute providing for the issuance of such licenses could by referendum demand submission at a state election of the question whether he should be granted a license.

Under our statute and decisions it is well settled that a license may be revoked. Wallace v. City of Reno, 27 Nev. 71, 73 Pac. 528, 63 L. R. A. 337, 103 Am. St. Rep. 747. If a license were considered as an ordinance or law which could be passed and enforced by referendum vote, the further question might arise whether any person whose license had been revoked by proper authority, or had expired at the end of the quarter if a city or county license, or at the expiration of a year if a state license, would have the right by referendum to ask the voters at an election, city, county, or state, to determine whether his license should be restored or a new one granted to him, and we might soon have a long list of ordinances and municipal and state laws carried or rejected at numerous expensive elections, which when passed would be nothing more than licenses as commonly understood, and the issuance of which to any individual is within the detail and routine work of the city council, under the ordinances and laws of a general nature relating to such licenses.

BOARD OF COM'RS OF CROOK COUNTY v. MULHOLLAND.

(Supreme Court of Wyoming. Nov. 10, 1913.)

1. COUNTIES (§ 16*)—DIVISION—EFFECT.

Where Campbell county was carved out of Crook and Weston counties under Act Feb. 13, 1911 (Laws 1911, c. 14), section 2 of which provided that, until it shall have organized and elected county officers, all portions of Campbell county shall belong to and be a part of Crook and Weston counties for all revenue and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other purposes, that portion of Campbell county lying within Crook county must, until the board of supervisors is duly elected and qualified, be considered as a part of Crook county in determining the status of that county, according to the assessed valuation of the property therein; this conclusion being strengthened in view of Comp. St. 1910, § 1058, declaring that a new county shall be deemed organized when a majority of the board of commissioners have been elected and qualified.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 12-15; Dec. Dig. § 16.*]

2. COUNTIES (§ 46*) — OFFICERS — COMPENSATION.

Where plaintiff in error was elected as assessor of Crook county in November, 1912, and qualified in the following January, and the assessed valuation of the property therein for the preceding year was over \$5,000,000, his compensation must be computed on the basis that Crook county was a county of the first class, notwithstanding a large part of the territory of the county went into Campbell county upon the qualification of the board of supervisors of that county elected at the same election; for a change in the assessed valuation of a county, occurring after the election of a county officer, does not affect his compensation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 54; Dec. Dig. § 46.*]

Error to District Court, Crook County; Carroll H. Parmelee, Judge.

Action by R. L. Mulholland against the Board of County Commissioners of Crook County. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Harry P. Isley, of Sundance, for plaintiff in error. B. C. Raymond, of Sundance, for defendant in error.

BEARD, J. This action was brought by Mulholland against the Board of County Commissioners of Crook county to recover \$25, which he claimed as a balance due him as salary as county assessor of said county for the month of April, 1913. The cause was tried to the district court of Crook county and judgment rendered in favor of plaintiff, and defendant appeals.

[1] The only question to be determined in the case is whether Crook county was, on November 5, 1912, the date of the general election in that year at which Mulholland was elected assessor of that county, a county of the first or of the second class. If it was then a county of the first class the judgment was right. The case was submitted upon the following agreed statement of facts: "First. That the Legislature of Wyoming, by an act approved February 13, 1911, formed the county of Campbell out of Crook and Weston counties, and fixed its boundaries. Second. That the people living within that part of Crook county now known as Campbell county voted at a special election held in July, 1911, to become a separate county, to be known as Campbell county. Third. That at the general election held on the 5th day of November, 1912, said county of Campbell elected county officers, including the Board of County Commissioners. Fourth. That the

majority of said Board of County Commissioners of Campbell county so elected qualified on the first Monday in January, 1913. Fifth. That the plaintiff herein, R. L. Mulholland, was duly elected county assessor of Crook county, Wyo., on the 5th day of November, 1912, and qualified as such assessor on the 7th day of January, 1913. Sixth. That the assessed valuation of Crook county for the year 1912 was \$7,096,119, and that the part belonging to the old county of Crook, as near as can be ascertained, was \$4,356,126, and the part belonging to that part of Crook county now known as Campbell county, as near as can be ascertained, was \$3,749,993. Seventh. That all the expenses incurred by that part of Crook county now known as Campbell county prior to the first Monday in January, 1913, except the expenses of the special election held in July, 1911, were charged to and paid by Crook county."

It is conceded by counsel for the respective parties in their briefs that the law in force at the time of Mulholland's election provided that counties having an assessed valuation of more than \$5,000,000 were counties of the first class. But counsel for plaintiff in error contends that as Crook county was divided and a part of its territory taken to form Campbell county, the assessed valuation of the part so taken should be deducted from the assessed valuation of Crook county, for the year 1912, which would leave it a county of the second class. We do not agree with that contention. Section 2 of the act of February 13, 1911, provided: "Until such time as said county of Campbell shall have organized and elected county officers, as provided by law, and the said officers shall have duly qualified, all such portions of said county as at the time of the passage of this act, belong to and are a part of Crook and Weston counties, respectively, shall remain a part of said counties respectively, for judicial, revenue and election purposes, including representation in the Legislature." Certainly the term "revenue purposes" as there used includes the assessment of property for taxation; and no method is provided for such assessment, prior to the complete organization of the new county by the election and qualification of its officers, other than as a part of the parent county. Again, by section 1058, Comp. Stat. 1910, it is provided, when a majority of the county commissioners of the new county have been elected, and have qualified and entered upon their duties, such county shall be deemed and held to be organized. We think it quite clear that, for the purpose of assessment, Crook county was not affected by the act creating Campbell county until the latter completed its organization, and that the assessed valuation of Crook county for 1912 included all property located and situated within its boundaries as such boundaries

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—8

were established prior to the act of February 13, 1911.

[2] By section 1150, Comp. Stat. 1910, it is provided: "The assessed valuation of a county for purposes of classification for compensation of its officers shall be ascertained by a reference to the assessment last made before the election or appointment of the county officer affected thereby." In this case that was the assessment for 1912; and it is the rule in this state that a change in the assessed valuation of a county occurring after the election of a county officer does not affect his compensation. Board of Commissioners v. Burns, 3 Wyo. 691, 29 Pac. 894, 30 Pac. 415; Guthrie v. Com'rs of Converse Co., 7 Wyo. 95, 50 Pac. 229. It being shown by the agreed statement of facts in this case that the assessed valuation of Crook county on November 5, 1912, the date of Mulholland's election as assessor for said county, was more than \$5,000,000, Crook county was then a county of the first class, and he was and is entitled to the salary fixed by law for assessors of counties of the first class. Being of the opinion that the case was correctly decided by the district court, the judgment is affirmed.

Affirmed.

SCOTT, C. J., concur. POTTER, J., being ill, did not sit.

STATE v. BYLES.

(Supreme Court of Wyoming. Nov. 10, 1913.)

1. COMMERCE (§ 40*)—INTERSTATE COMMERCE—WHAT CONSTITUTES.

A nonresident who solicits orders among residents of the state for vehicles manufactured in another state, which are to be delivered after the orders are procured, subject to the approval of the foreign seller, is engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*]

2. COMMERCE (§ 66*)—INTERSTATE COMMERCE—BURDENS.

Itinerant Vendor's Act (Comp. St. 1910, §§ 2844-2850), defining an itinerant vendor as any person who engages in itinerant or transient business in the state, traveling about from place to place selling manufactured goods, and providing that it shall not apply to commercial agents and travelers selling to merchants, or to book agents, or to sales of produce grown by the seller, and that every itinerant vendor before doing business shall obtain a license under penalty of fine, is unconstitutional, being in violation of Const. U. S. art. 1, § 8, giving Congress the power to regulate commerce among the several states, because applying to sales made in the business of interstate commerce by foreign agents who solicit orders from individuals.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 111; Dec. Dig. § 66.*]

3. COMMERCE (§ 77*)—INTERSTATE COMMERCE—INSPECTION LAW.

The Itinerant Vendor's Act (Comp. St. 1910, §§ 2844-2850), requiring "itinerant vendors," which term includes any person engaging in itinerant or transient business in selling

manufactured goods, wares, or merchandise, to obtain a license before exposing his goods for sale, is in violation of Const. U. S. art. 1, § 10, declaring that no state shall, without the consent of Congress, lay any imposts or duties upon exports or imports, except as may be absolutely necessary for executing its inspection laws, in so far as it applies to sales by agents of goods manufactured in a foreign state; there being no provision in the act for any inspection whatever.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 61-70; Dec. Dig. § 77.*]

Reserved Questions from District Court, Sheridan County; Carroll H. Parmelee, Judge.

C. A. Byles was indicted for a violation of the Itinerant Vendor's Act. On reserved questions. Act held unconstitutional.

D. A. Preston, Atty. Gen., for the State. A. C. Lyon, of Grinnell, Iowa, and H. W. Nichols, of Sheridan, for defendant.

SCOTT, C. J. On October 12, 1912, an information was filed in the district court of Sheridan county which, omitting the caption, signature, and verification, is as follows: "Comes now D. L. Gogerty, county and prosecuting attorney of the county of Sheridan and state of Wyoming, and in the name and by the authority of the state of Wyoming, informs the court and gives the court to understand that C. A. Byles, late of the county aforesaid, on or about the 5th day of October A. D. 1912, at the county of Sheridan in the state of Wyoming, did expose and offer for sale unlawfully manufactured goods, to wit, buggies and vehicles as an itinerant vendor, without having first procured a license from Sheridan county, Wyo., where said goods were exposed and offered for sale, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Wyoming."

The case was submitted to the trial court upon an agreed statement of facts and motion by the defendant for judgment and dismissal of the case upon such agreed statement, upon the ground of the alleged unconstitutionality of the statute under which the prosecution was instituted, and the trial court, finding that important and difficult constitutional questions were involved, reserved those questions to this court. The agreed statement of facts is as follows, viz.:

"It is hereby mutually stipulated and agreed that the following are and may be considered by the court as the facts in this case, which facts may be taken to have been proven by competent evidence: The defendant, C. A. Byles, is a citizen and resident of the state of Texas, and is employed on a salary and not on commission, by the Spaulding Manufacturing Company, whose factory and principal place of business is situated at Grinnell, Poweshiek county, Iowa, where they are engaged in the manufacture and sale of buggies, carriages, and automobiles, the said Spaulding Manufacturing Company be-

ing a copartnership, all the members of which are citizens and residents of the state of Iowa. The defendant, Byles, was, at the time of his arrest, employed as a foreman or superintendent of a force consisting of four salesmen or canvassers employed by said Spaulding Manufacturing Company, said salesmen or canvassers being engaged in traveling about throughout Sheridan county, Wyo., and adjoining counties, canvassing and taking orders for the future delivery of vehicles. Each salesman or canvasser carried with him one or more sample vehicles, as well as a catalogue, illustrating many other styles, which samples and catalogues were exhibited to prospective customers. Upon finding a purchaser the salesman or canvasser took the written order of the customer for a vehicle like the sample exhibited, or the style shown in the catalogue, said order providing that the vehicle purchased would be delivered at the residence of the purchaser within 30 days, or as soon as transportation would permit; the salesman at the same time taking either money or notes in payment of the purchase price. No vehicle was delivered by any salesman or canvasser at the time that the order was taken therefor. The orders thus taken by the various salesmen or canvassers were turned over to their superintendent or foreman, C. A. Byles, the defendant in this case, who looked up the reputation and financial responsibility of the purchaser, and, if found to be satisfactory, directed that the order be filled and the vehicle delivered in pursuance thereof. The Spaulding Manufacturing Company had a few vehicles manufactured by them in Grinnell, Iowa, which were under the charge of the defendant, Byles, in a storage warehouse in Sheridan, Wyo., temporarily occupied for that purpose, the number of said vehicles so stored being not to exceed 15 or 20, outside of those used exclusively as samples. If the defendant, Byles, had no vehicle on hand in said storage warehouse corresponding to the styles named in said orders, as was frequently the case, the order was sent directly to the factory of the Spaulding Manufacturing Company at Grinnell, Iowa, and the order was filled by sending a vehicle from said factory in Grinnell, Iowa, consigned to themselves, at Sheridan, Wyo., to be delivered by the defendant, Byles, or under his direction, to the respective purchasers, in pursuance of such orders. If the defendant, Byles, had on hand in the storage warehouse in Sheridan, Wyo., a vehicle corresponding to the one ordered, he directed that the order be filled, and the vehicle be subsequently delivered to the purchaser from the said storage warehouse. All sales were made subject to the approval of the Spaulding Manufacturing Company at Grinnell, Iowa, and, even after delivery, if disapproved by them, the vehicle was 'pulled' or taken back, and the order and notes or cash were returned to the

customer. No orders were taken or sales made by any of the salesmen or canvassers, under defendant Byles' supervision, to merchants or dealers in vehicles, but all sales were made to individual users or consumers. The defendant, Byles, personally did not sell or offer to sell any vehicles, but merely had charge of the force of salesmen or canvassers, as above described. Neither the Spaulding Manufacturing Company nor the defendant, C. A. Byles, had a store or permanent place of business in Sheridan county, Wyo., or at any other place within the state of Wyoming. The defendant, C. A. Byles, was arrested, charged with a violation of the law of Wyoming known as the 'Itinerant Vendor Act,' being sections 2844 to 2850, inclusive, of the Compiled Statutes of Wyoming of 1910, being chapter 158 of the Session Laws of Wyoming of 1909. Said statute was Senate Bill No. 76 of the Laws of 1909, and was introduced and originated in the Senate and not in the House of Representatives. If the defendant, Byles, or his employers, the Spaulding Manufacturing Company, of Grinnell, Iowa, be required to pay an annual license for transacting the above-described business within the state of Wyoming, as provided for in said statute, the payment of such license fees would render their business unprofitable, and entirely prevent them from engaging in it in this state. Neither the defendant, C. A. Byles, nor any of the salesmen or canvassers under his direction, nor his employers, the said Spaulding Manufacturing Company, had a license to transact the above-described business in Sheridan county, Wyo., as required by said Itinerant Vendor Statute. We hereby agree that the above and foregoing is a correct statement of the facts in the above-entitled cause. [Signed] A. C. Lyon, H. W. Nichols, Attorneys for Defendant. D. L. Gogerty, Prosecuting Attorney of Sheridan County."

The first two reserved questions are as follows:

"I. Upon the agreed statement of facts filed herein, is the statute known as the 'Itinerant Vendor's Law,' as found in sections 2844 to 2850, inclusive, of the Compiled Statutes of 1910, unconstitutional and void as an interference with and an attempt to regulate commerce between the state of Wyoming and the several other states in violation and contravention of the provisions of section 8 of article 1, of the Constitution of the United States, wherein it is provided that: 'The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states and with the Indian tribes'?

"II. Upon said agreed statement of facts, is said statute unconstitutional and void as in violation and contravention of the provisions of section 10, article 1, of the Constitution of the United States, wherein it is provided that: 'No state shall, without the

consent of Congress, lay any imposts or duties upon imports or exports, excepting what may be absolutely necessary for executing its inspection laws'?"

The law, the constitutionality of which is assailed, is known and commonly called the "Itinerant Vendor's Act," and was enacted as chapter 158, S. L. 1909, at page 219, and incorporated in the Compiled Statutes of 1910, sections 2844 to 2850, inclusive.

Section 2844 defines the term "itinerant vendor" for the purposes of the act in the following language; viz.: "The term, 'itinerant vendor' for the purpose of this act shall mean and include any person, either principal or agent who engages in either an itinerant or transient business in this state, either in one locality or in traveling about the state from place to place selling manufactured goods, wares or merchandise, and it shall include peddlers and hawkers, and also those who for the purpose of carrying on their temporary or transient business, hire, lease or occupy a building, structure, tent, car, boat, vehicle of any kind for the exhibition or sale of any manufactured goods, wares, or merchandise."

Section 2845 is as follows: "The provisions of this act shall not apply to commercial agents or travelers selling to merchants in this state in the usual course of business or to persons selling books, papers or school supplies: Provided, this act shall not apply to the selling of fruits, vegetables, dressed meats or farm products when sold by the grower or producer. Except that as in this section permitted, it shall not be lawful for any persons to be engaged in the business of itinerant vendor as defined by section 2844, unless such person shall be duly licensed so to do in accordance with the provisions of this act."

Section 2846 provides that every itinerant vendor, before making sale of manufactured goods, wares, or merchandise, shall first pay for and obtain a license from the county clerk of the county wherein he proposes to sell such manufactured goods, wares, or merchandise.

Section 2847 is as follows: "Every person licensed as aforesaid as an 'itinerant vendor' shall post his name, residence and the number of his license in a conspicuous manner upon his pack, parcel, or vehicle, or in a prominent place in his place of business, and when his license is demanded of him by any county officer, magistrate, sheriff, deputy sheriff, constable or police officer, he shall forthwith exhibit it, and if he neglects or refuses to do so, he shall be subject to the same penalties as if he had no license."

Section 2848 provides a penalty for every "itinerant vendor" who violates the foregoing sections, and is as follows: "Every 'itinerant vendor' who sells or exposes for sale either at public or private sale, in any county in this state, any manufactured goods, merchandise,

fruits, vegetables, dressed meats or farm products without first having procured a license from the county in which he sells or exposes for sale, such manufactured goods, wares or merchandise, fruits, vegetables, dressed meats or farm products, as provided for in this act, shall be punished by a fine of not less than fifty dollars, and not more than one hundred and fifty dollars, or by imprisonment in the county jail for a period of not less than ten, nor more than ninety days, or by both such fine and imprisonment."

[1, 2] It is contended that the act is in violation of the interstate commerce clause of the Constitution of the United States. The agreed statement of facts shows that the defendant was in fact engaged in interstate commerce. He was a resident and citizen of the state of Texas, and all of his business involved the sale by residents of other states to citizens of this state of goods manufactured in other states, the delivery of which required the shipment and transportation of vehicles from the state of Iowa to this state in pursuance of the conduct of such business. The defendant and canvassers under his direction solicited orders for future delivery of vehicles like the sample exhibited, and which orders were filled in most instances by shipment direct from the factory in Grinnell, Iowa, to be delivered to and at the home of the purchaser in this state. The statute has to do with interstate commerce business, and in requiring a license to be paid, not for the purposes of inspection, which would be in the nature of a police regulation, lays a burden upon such business. It was so held in principle by this court in *State v. Willingham*, 9 Wyo. 290, 62 Pac. 797, 52 L. R. A. 198, 87 Am. St. Rep. 948, in which Willingham, the defendant, was prosecuted, convicted, and fined within the provisions and for the violation of an ordinance of the city of Cheyenne, which made it unlawful for any person to keep a store or sell, vend, or retail any goods, wares, or merchandise without being first duly authorized by a license, as provided in the ordinance, and excepting from the requirements of the ordinance all persons engaged in the sale of goods, wares, and merchandise who pay an annual tax upon such goods, wares, or merchandise, assessed according to the revenue laws of the city, and also excepting from such ordinance all traveling agents who sell exclusively, by sample or otherwise, to regular merchants doing business in that city. The ordinance was held void because in violation of the interstate commerce clause of the Constitution of the United States, following *Clements v. Town of Casper*, an earlier decision of this court reported in 4 Wyo. 495, 35 Pac. 472. These cases establish the rule of decision in this court that a municipal ordinance which lays a burden upon interstate commerce must be held unconstitutional and void, and it follows that a statute which does the same thing must likewise be

held unconstitutional. Upon the agreed statement of facts we are of the opinion that the first interrogatory, as to whether the statute under which the prosecution is sought to be maintained is unconstitutional and void, must be answered in the affirmative. We, therefore, answer said first question, "Yes."

[3] Is the statute under consideration within the inhibition of section 10 of article 1 of the Constitution of the United States, where in it is provided that: "No state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, excepting what may be absolutely necessary for executing its inspection laws"? There is no provision in the law for inspection. There is no pretense that the manufactured goods here shipped into the state should be inspected. They do not fall within the class covered by any statute or police or health regulation of the state. The right to levy tax to enforce inspection laws is expressly excepted from the inhibition of the Constitution but the act does not measure up to the requirement of that provision. The sole and only effect and operation of the law is to lay a burden or duty upon goods manufactured in and imported from a sister state into this state, and for that reason we are of the opinion that the law is also unconstitutional under section 10, article 1 of the Constitution of the United States. We therefore answer the second question, "Yes."

Having upon the grounds and for the reasons stated found the statute unconstitutional, it would make no difference, in so far as this attempted prosecution is concerned, whether the statute is violative of other constitutional provisions or not, and for that reason we deem it unnecessary to set out and discuss or answer any or either of the other reserved questions, and we therefore return them unanswered to the district court of Sheridan county.

BEARD, J., concurs. POTTER, J., being ill, did not participate in this opinion.

PUGET SOUND ELECTRIC RY. v. CARSTENS PACKING CO.

(Supreme Court of Washington. Nov. 5, 1913.)

1. APPEAL AND ERROR (§ 1002*)—JUDGMENT (§ 199*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

A verdict based on conflicting evidence will not ordinarily be disturbed on appeal, nor will the judgment be ordered non obstante veredicto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002; * Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. CONTRACTS (§ 349*)—RELEVANCY.

Where, in an action for the cost of repairing certain cars belonging to defendant which were damaged in a wreck on plaintiff's railroad, it was undisputed that plaintiff's traffic manager had complained that the cars handled

for defendant were not being properly loaded, and that plaintiff would decline further shipments unless the fault was corrected, and the cars were loaded and sealed by defendant without plaintiff's intervention, the court properly excluded an offer of proof that the plans of the cars were approved by plaintiff through its officers at the time they were constructed, which was prior to the time they were wrecked.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1806, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

3. EVIDENCE (§ 131*)—SIMILAR OCCURRENCES.

Where certain private cars belonging to defendant were wrecked while being transported on plaintiff's road, and plaintiff claimed that the transportation of the cars was dangerous because they were not properly loaded, evidence that another railroad company had handled the cars, similarly loaded, over another track on an average of once a month for two years was properly excluded; there being no attempt to show that the conditions on the two roads were similar.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 399-402; Dec. Dig. § 131.*]

Department 1. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by the Puget Sound Electric Railway against the Carstens Packing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fletcher & Evans, of Tacoma, for appellant. J. A. Shackelford and F. D. Oakley, both of Tacoma, for appellee.

CHADWICK, J. Plaintiff brought this action to recover the sum of \$565.70 for repairing certain cars belonging to the defendant and which were damaged in a wreck on plaintiff's road. Defendant counterclaimed, setting up that the cars were, when damaged, in the exclusive control of the plaintiff and that the wreck was caused through the fault of the plaintiff, and asked damages for the meat products, with which the cars were loaded, in the sum of \$1,034.88. Upon issue fairly joined, and under instructions that were not excepted to, a jury found in favor of plaintiff, upon which judgment was entered, and defendant has appealed.

[1] Contending that there is no evidence to sustain the verdict, counsel invites us to review the testimony. This we have done and find a substantial conflict. Under the settled practice in this court, the verdict of a jury in such cases will not ordinarily be disturbed, nor will a judgment be ordered non obstante veredicto.

[2] Appellant sought to show that the plans of the cars were approved by the plaintiff through its officers at the time they were constructed. The offer was excluded by the court for the reason that the approval, if given, was given long before the cars were wrecked. This ruling was correct when considered in the light of the undisputed fact that respondent's traffic manager had complained that the cars handled by the company

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for appellant were not being loaded properly in that the loads were insufficiently braced and that respondent would decline further shipments unless the fault was corrected. The traffic manager testified that appellant promised to thereafter load the cars with sufficient braces to prevent any side motion of the loads, which consisted of halves of beef suspended from the roof of the car. Appellant's agent denied that he had so promised, but the jury has settled the dispute in favor of respondent. When the further fact that the cars were loaded and sealed without the intervention of the respondent is considered, it is certain that the court was without fault in rejecting the offer.

[3] It is also assigned as error that the court refused to permit a witness to testify that the Great Northern Railway Company had handled the cars in controversy over another track on an average of once a month for at least two years; the manner of loading being the same. No attempt was made to show that conditions were at all similar. Any inference which the jury might draw from the fact, if proven, would not have had the sustaining grace of indicating a probability. On the other hand, the record affirmatively shows that very few roads "have the conditions that we (respondent) have in the operation of cars. The curves are greater here and their conditions of side wash are not so great as on this road."

Other errors are assigned on the admission of testimony. The matters complained of were competent. The objections, in our judgment, go to the weight rather than to the materiality of the testimony, and it was properly admitted. We find the remaining assignments without merit in the light of the verdict.

The judgment is affirmed.

CROW, C. J., and GOSE, MAIN, and ELLIS, JJ., concur.

OLSON LAND CO. v. CITY OF SEATTLE et al.

(Supreme Court of Washington. Oct. 25, 1913.)

1. EVIDENCE (§ 387*)—PAROL EVIDENCE—OFFICIAL SURVEY OR PLAT.

An official survey, map, or plat of a city addition, recorded in the proper office, and showing the boundaries of a city, cannot be contradicted, impeached, or invalidated by parol or other extrinsic evidence; evidence aliunde being admissible only where there is a doubt as to the true location of the survey, or a question as to the application of the grant to its proper subject-matter, or where the survey is not made according to law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1698-1713; Dec. Dig. § 387.*]

2. EVIDENCE (§ 461*)—PAROL EVIDENCE—PLAT—INTENTION OF PARTIES.

The official plat of a city addition is the best evidence of the intention of the dedicators.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

3. DEDICATION (§ 51*)—LAND FOR STREET—PLAT—CONSTRUCTION.

Where a map of a city addition showed a street, bounded by heavy lines, 80 feet wide, and extending to a wavy line indicating the line of ordinary high tide of a bay into which the street extended as shown by dotted lines, it should be considered as evidencing an intention to include within the street a triangular piece of land between the tide line and the boundary of a turn in the street, though such land was partially set off on the plat by dotted lines.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 95; Dec. Dig. § 51.*]

4. DEDICATION (§ 63*)—LAND FOR STREET—ACCEPTANCE—USE.

Where a plat of a city addition showed the extension of a street to the high-tide line of a bay, including a triangular strip above such line beyond which there was a declivity of 10 to 15 feet, the fact that such triangular strip had never been improved or used by the public with the rest of the street, was included within dotted lines on the plat, and had never been named, there being nothing to show the meaning of such lines, was insufficient to show the automatic vacation of such strip under Rem. & Bal. Code, § 3803, providing that any county road or part thereof which remains unopened for public use for five years shall be deemed vacated.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

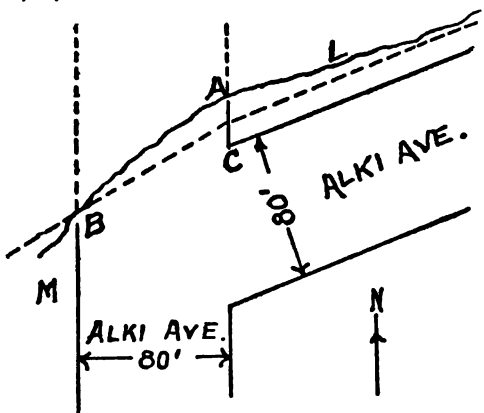
Gose and Chadwick, JJ., dissenting.

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Olson Land Company against the City of Seattle and others. Judgment for plaintiff, and defendants appeal. Reversed and dismissed.

Jas. E. Bradford and Melvin S. Good, both of Seattle, for appellants. Douglas, Lane & Douglas, of Seattle, for respondent.

MOUNT, J. This action was brought by the plaintiff to quiet alleged title to a tract of land and to enjoin the city of Seattle and its officers from exercising or attempting to exercise dominion over the same. The tract of land in question is a triangular tract designated on the following plat by the letters A, B, and C:



The wavy line at the top of the plat indicates the line of ordinary high tide of Elli-

ott Bay. The straight black lines represent the boundaries of Alki avenue. This avenue is 80 feet wide. It is not clear what the dotted lines at the top of the plat represent. The facts are substantially undisputed. It appears that in 1891 H. M. Hanson and wife and Knud Olson were the owners of a tract of land situated in King county, Wash. They platted this tract into lots, blocks, and streets and on October 18th of that year filed the plat with proper dedication in the office of the county auditor of King county. The lots and blocks and the streets and highways with the width and sizes thereof were designated on the plat. Shortly after the plat was filed, the owners conveyed certain of the lots to the plaintiff herein. At the time the plat was filed, this tract of land was not within any incorporated city or town; but in the year 1907 it became a part of the city of Seattle. About the time the plat was filed, or soon thereafter, Alki avenue was opened and has been continuously since used as a street or avenue. But the triangular tract in question has never been graded or improved or in any way used as a highway. The plaintiff has at times used it for storing wood thereon and for several years last past has rented it for camp sites and has constructed two or three small cottages thereon for summer use. The city claims that the tract is a part of Alki avenue and were threatening to eject the plaintiff therefrom when this action was brought by the plaintiff claiming title thereto and that the tract had not been dedicated as a street. The court below heard evidence of the original owners to the effect that they had not intended to dedicate this three-cornered tract as a street. After hearing the evidence the court concluded that such was not the intention of the dedicators and entered a judgment in favor of the plaintiff as prayed for in the complaint. The city has appealed.

The respondent in the lower court made two contentions to the effect: (1) That the tract of land in question was never dedicated as a public street; and (2) if there was a dedication of the tract as a street, that the same has never been accepted or opened for public travel and has therefore been vacated under the provisions of section 3803, Ballinger's Code.

[1] The rule is well settled that: "An official survey, map, or plat, or one which is duly filed or recorded in the proper office, is not subject to be contradicted, impeached, or invalidated by parol or other extrinsic evidence. But evidence allunde is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter, or where the survey was not made according to law." 17 Cyc. p. 584.

"An implied dedication may be rebutted by parol testimony, but, where the dedication is express and evidenced by a recorded plat, the intent, as expressed in such plat, cannot be

contradicted by parol." See, also, *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Baltimore R. R. v. City of Seymour*, 154 Ind. 17, 55 N. E. 953; *Rhodes v. Town of Brightwood*, 145 Ind. 21, 43 N. E. 945.

"The acknowledgment and recording of a town plat sufficiently defines the grant, and no declarations of presumed intention of the donors can divert it to a different purpose." *Brown v. Manning*, 6 Ohio, 298, 27 Am. Dec. 255. See, also, *Jones v. Johnston*, 59 U. S. 150, 15 L. Ed. 320; *Strunk v. Pritchett*, 27 Ind. App. 582, 61 N. E. 973; *Frauenthal v. Slaten*, 91 Ark. 350, 121 S. W. 395.

[2] It is apparent, therefore, that the plat itself is the best evidence of the intention of the dedicators; and, unless such plat is uncertain or ambiguous, parol evidence cannot be heard to determine the intention of the dedicators.

[3] With this rule in view, it is apparent, we think, that Alki avenue includes all the land within its boundaries. This street was laid out as a street 80 feet in width. It is irregular in shape. It is located upon the top of a hill and extends around Alki point near the edge of the hill. The north line of this avenue when it reaches the point designated as C upon the plat extends north about 20 feet as a solid line to the water's edge; it is clearly the street line. It then begins at B and extends south as a solid line. The intention of the dedicators, as evidenced by the plat, is plainly shown to be that the triangle, A, B, C, is a part of the avenue, otherwise the line would have been drawn as a solid straight line from C to B. We think under the rule stated that the respondent cannot now claim that it was the intention of the dedicators not to include that tract within the avenue. It was therefore error for the court to receive or consider oral evidence of the intention of the platters with regard to this triangular tract.

[4] But it is argued by the respondent, that, inasmuch as this tract has never been improved or used by the public authorities as a street, it was vacated under section 3803, Ballinger's Code, as construed in *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115. We think this does not necessarily follow. While it is true that the triangular tract of land in question has never been improved or used, we have seen above that it is a part of Alki avenue. It is conceded in the record that Alki avenue was opened as a street soon after the plat was filed and has been continuously used as a street. It is not necessary that every part of a street shall be used or improved. It is sufficient if the street has been opened and used by the public. The street was dedicated to the public and it has been used. This is sufficient to prevent the street, or the part of it which may be necessary for the public in the future, from becoming automatically vacated. We think it is plain from the plat itself that this tract was intended as a part of the

street, probably for the purpose of affording access to the water at that point. It is true that there is a declivity at that point some 10 or 15 feet down; but the mere fact that this declivity has never been specially improved does not vacate that part of the street.

Respondent also contends that, because this portion of the street was not named and because a part thereof was embraced within dotted lines, the intention of the dedicators is made doubtful and ambiguous. *Col. & Puget Sound Ry. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670, is cited as sustaining that position. In that case, however, the blank space was left without any marked boundaries or any designation by name, while other streets and alleys were distinctly marked by boundaries and also by name. In this case the triangular tract is marked by definite boundaries, and there was evidently no intention to give this offset in the avenue an independent name; it was a part of Alki avenue and so designated and shown on the plat. There is no evidence to indicate the meaning of the dotted lines; but these were evidently projections of other lines and nothing more. We think the trial court was in error in receiving testimony to contradict the express intention of the platters as expressed upon the plat. We are also of the opinion that this part of the street was not vacated under the rule announced in *Murphy v. King County*, supra.

The judgment of the trial court is reversed, and the cause ordered dismissed.

CROW, C. J., and PARKER, J., concur.

GOSE, J. (dissenting). The tract of land in controversy extends over "a very abrupt bluff" about 12 feet in height to the line of ordinary high tide. Since the filing of the plat, the respondent and its predecessor in title have at all times had the uninterrupted possession of the property. No public money has been expended upon it, and it has never been used by the public. The plat shows that at all other points there is a strip of upland north of the north line of Alki avenue. The tract has been treated as private property for more than 20 years following the filing of the plat. As I read the plat, it is ambiguous as to this property. "An intention to dedicate will not be presumed, and a clear intention must appear." *Columbia, etc., v. Seattle*, 33 Wash. 513, 74 Pac. 670. An intention to dedicate the strip of land in controversy is not clearly apparent from the plat of dedication. The intention of the dedicators is obscure, and in such cases parol evidence is admissible to prove their intention. The evidence submitted upon the question shows conclusively that there was no intention to dedicate the tract as a street; on the contrary, the evidence is that the

owners intended to reserve it as private property. This is the spoken testimony, and the conduct both of the dedicators and the public, since the filing of the plat, speak to the same effect. Hence we have the positive spoken words of one of the dedicators aided by both contemporaneous and subsequent interpretation covering a period of 20 years. Moreover, since the filing of the plat, Alki avenue, aside from this strip, has been used by the public. The strip in controversy has never been so used. We think that its situation and topography are such as to establish a vacation by nonuser. 2 Rem. & Bal. Code, § 5673; *Murphy v. King County*, 45 Wash. 587, 88 Pac. 1115. Counsel for the appellant criticises the *Murphy Case*, but I think it announces a sound rule of interpretation.

For the reasons stated I think the judgment should be affirmed. I therefore dissent.

CHADWICK, J., concurs.

JOHNS v. ARIZONA FIRE INS. CO. et al.
(Supreme Court of Washington. Nov. 3, 1913.)

1. APPEAL AND ERROR (§ 895*) — REVIEW — TRIAL DE NOVO.

On a trial de novo in the Supreme Court, findings of the trial court will be given great weight, and if based on conflicting evidence will not be disturbed unless clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3645-3648; Dec. Dig. § 895.*]

2. INSURANCE (§ 35*)—AGENT FOR CORPORATION — TRANSACTION OF BUSINESS — SECRET PROFIT—EVIDENCE.

Evidence held to warrant a finding that defendant B., while secretary and general manager of a fire insurance company that was in financial difficulties, in reinsuring its risks in another company obtained from the latter a secret profit of 10 per cent. on the unearned premiums for carrying out the deal, and that such commission was in compensation for services thereafter to be rendered to the reinsurer in establishing the latter in Washington and looking after the risks.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 40; Dec. Dig. § 35.*]

3. EVIDENCE (§ 253*) — DECLARATIONS OF THIRD PERSON.

Where, in an action against the former secretary and general manager of an insolvent insurance company to recover an alleged secret profit, alleged to have been received and fraudulently retained by him in reinsuring the company's unexpired policies in another company, he admitted that he was to receive 10 per cent. of the unearned premiums, and such fact was never disclosed to the officers of his company, declarations of the secretary and general manager of the reinsuring company with reference to the contract were admissible as bearing on the nature of the transaction, though in the absence of the secretary of the company whose risks were reinsured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. § 253.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. INSURANCE (§ 35*)—INSURANCE COMPANIES—ACTS OF OFFICER—SECRET PROFIT—RECOVERY.

Where the secretary and general manager of an insurance company in financial straits obtained a contract with another company, reinsuring his company's risks, prior to a receivership, and in so doing occupied a position of trust and confidence, and the reinsuring company, with knowledge of the facts, paid him a secret commission for obtaining the contract for which he did not account, both he and the reinsuring company were liable therefor to the receiver of the company whose risks were reinsured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 40; Dec. Dig. § 35.*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Joseph Johns, as receiver of the Pioneer Fire Insurance Company, against the Arizona Fire Insurance Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Van Dyke & Thomas, Higgins & Hughes, and Hyman Zettler, all of Seattle, for appellants. Burkey, O'Brien & Burkey, of Tacoma, for respondent.

ELLIS, J. A statement at some length of the issues and evidence is necessary to any intelligent discussion of this case.

The plaintiff, as receiver of the Pioneer Fire Insurance Company, a Washington corporation, brought this action against the defendants Arizona Fire Insurance Company, an Arizona corporation licensed to do business in the state of Washington, and the defendants J. H. Bridgeford and wife for an accounting, claiming a balance of a discount as due to the Pioneer Company on a contract whereby the Arizona Company agreed to reinsure the outstanding risks of the Pioneer Company, which balance, it is alleged, was secretly paid by the Arizona Company as a commission to the defendant J. H. Bridgeford, who was at the time secretary and general manager of the Pioneer Company and its authorized agent in negotiating the contract of reinsurance. The balance claimed was \$3,307.13 less an unpaid balance of \$1,310.66 of the unearned premiums agreed to be paid to the Arizona Company in consideration of the reinsurance. The answer of the Arizona Company denied the allegations of the complaint, and set up a counterclaim for the \$1,310.66, with interest, praying that it be established as a preferred claim against the assets of the Pioneer Company, and, in the alternative, that the Arizona Company be allowed to deduct all losses paid by it on the reinsurance risks, and surrender to the plaintiff the remainder of the unearned premiums, and rescind the contract of reinsurance. The answer of the defendants Bridgeford and wife was to the effect that the Arizona Company agreed to reinsure the outstanding risks of the Pioneer Company for 85 per cent. of the unearned premiums,

allowing a discount to the Pioneer Company on the unpaid premiums of 15 per cent., and that, by an independent agreement between Bridgeford and the Arizona Company, which was one of the moving considerations to the Arizona Company for entering into the contract of reinsurance, it was agreed that Bridgeford, as general agent of the Arizona Company, should devote his time and incur considerable expense in establishing agencies and preserving the business so reinsured for the Arizona Company, and that the money received by him from the Arizona Company was not more than sufficient to meet this purpose. For convenience, we will throughout designate the two companies as "Pioneer Company" and "Arizona Company."

Certain facts are not seriously disputed. In the latter part of the year 1910 and early in 1911 the Pioneer Company was in financial straits, and its directors, anticipating a receivership for the winding up of its affairs, reinsured its then existing risks in the Arizona Company by a contract signed on March 17, 1911. At that time Bridgeford was secretary and general manager of the Pioneer Company. He was also acting as general agent in the state of Washington for the Arizona Company, which position he held mainly for the benefit of the Pioneer Company. The contract of reinsurance was negotiated between Bridgeford, as secretary and general manager of the Pioneer Company, and one Gough, as secretary and general manager of the Arizona Company. The final contract was actually signed by the Arizona Company by Bridgeford, as its general agent, and by the Pioneer Company by J. L. Carman, as its president, and Bridgeford, as its secretary. By this contract the reinsuring company agreed to reinsure all existing policies at a discount of 15 per cent. upon the amount of unearned premiums, and to accept payment of the 85 per cent. in bonds of the National Realty Company of Tacoma at their par value. The amount thus required to be paid was \$28,110.66. The Pioneer Company, in pursuance of this contract, turned over bonds of a par value of \$26,200, and on June 9, 1911, Bridgeford, who in the meantime had been appointed and qualified as receiver of the Pioneer Company, paid an additional sum of \$600 in cash. There then remained unpaid on the reinsurance contract \$1,310.66. By an agreement between Bridgeford and Gough, apparently consummated at about the same time that the contract of reinsurance was entered into, Bridgeford was retained as general agent in Washington for the Arizona Company, and was to receive 10 per cent. of the amount of the total unearned premiums of the Pioneer Company's policies from the Arizona Company. The conflict arises as to the character and legal effect of this agreement. The plaintiff claims that this 10 per cent. was a secret commis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sion paid to Bridgeford for negotiating the reinsurance contract. The defendants claim that it was a fund received by Bridgeford to be used in establishing the Arizona Company in the state of Washington.

The negotiations leading up to the contract of reinsurance were conducted between Gough and Bridgeford by letters and telegrams. On March 2, 1911, Bridgeford wrote to Gough, submitting a proposition that the Arizona Company reinsure the Pioneer business, allowing the Pioneer Company a commission of 15 per cent. on the unearned premiums on the outstanding policies. To this Gough replied by night letter of March 7 and 8, 1911, indicating that the proposition was favorably received, and authorizing Bridgeford to close the arrangements on the terms stated should a contingency arise requiring quick action. This was followed by a letter of March 8th, confirming the telegram. On March 10th Bridgeford wired the Arizona Company, asking whether first mortgage 6 per cent. bonds of the National Realty Company of Tacoma would be accepted in payment for the reinsurance. To this the Arizona Company replied by telegram of March 13th, agreeing to accept the bonds. This was followed by a letter from Gough to Bridgeford dated March 13th, confirming the telegram agreeing to accept the bonds, and expressing the hope that Bridgeford could engineer the deal for the Pioneer Company on the terms of Bridgeford's letter of March 2d, which would enable Bridgeford to keep entire control of the business for the Arizona Company with himself as general agent. On March 17th Bridgeford wired the Arizona Company that he had closed the reinsurance contract as of noon of that day, and had forwarded the papers by mail. On March 2d, the same day of the letter from Bridgeford to Gough proposing the reinsurance contract on a basis of 15 per cent. discount to the Pioneer Company on the unearned premiums, Bridgeford wrote to his son, who was then in the employ of the Arizona Company at its head office in Phoenix, stating that Gough would expect him, Bridgeford, to hold the Pioneer business, that the expense would be considerable, and that he could not do this without an allowance for services and expenses above the commissions on the business, and that he considered that an allowance of 10 per cent. on the reinsurance premiums would be a fair basis to allow him for reorganizing the field, appointing agents, etc., and asked his son to take the matter up with Gough at once, and let him know the result. In reply, Bridgeford received a letter from his son, dated March 13th, the same day upon which the Arizona Company agreed to accept the National Realty Company bonds, and finally authorized the closing of the contract on that basis. In this letter Bridgeford is advised by his son that he had talked with Gough, who seemed to think

Bridgeford's terms reasonable, and agreed to meet them.

Bridgeford continued to act as receiver till July 15, 1911. The plaintiff is his successor. The plaintiff's witnesses J. P. Burkey and J. F. O'Brien, who were attorneys for the receiver, testified that on September 4, 1911, they received their first information concerning the 10 per cent. paid to Bridgeford. It appears that in the latter part of August Gough, conceiving that Bridgeford had misled him as to the value of the National Realty Company bonds, came to Tacoma to investigate the matter. At that time he called upon J. L. Carman, president of the Pioneer, and, as Carman testified, stated to him that when the matter of reinsurance was first broached it was understood between Gough and Bridgeford that the Arizona Company would allow a discount of 25 per cent. to the Pioneer Company as a commission on the reinsurance, and that Bridgeford had written Gough that he wanted the arrangement to be 15 per cent. to the Pioneer Company and 10 per cent. to Bridgeford. Both O'Brien and Burkey testified that when Gough called upon them on September 4th he stated that when Bridgeford first took up the matter of reinsurance the Arizona Company offered to reinsure at a discount of 25 per cent., and that Bridgeford wrote back, asking if the Arizona Company could not make it 15 per cent. to the Pioneer Company and 10 per cent. to him, as he would have the work of making up the schedules and looking after the other details, and ought to be paid for it. Gough testified that he told Burkey, O'Brien, and Carman that Bridgeford was to receive the 10 per cent., but denied that the Arizona Company ever offered a discount of 25 per cent. to the Pioneer Company. He claimed the gist of his statement was as follows: "I said, 'Well'—or some such expression—'this was an arrangement with Bridgeford to give him funds so that he could carry on our general agency.' I don't know that I said, 'Protect the plant to us,' but gave that understanding. I further said, 'You know, Mr. Burkey, it is quite usual in negotiating reinsurance contracts between one company and another for whoever carries on the negotiations to receive a commission. It is the same as if one man is instrumental in selling a business for another man; he would get his commission for it.'" He also testified that the directors of the Arizona Company did not understand that they were allowing more than 15 per cent. for the reinsurance risks, and that the general agency contract with Bridgeford and the agreement to pay the 10 per cent. to him as general agent were oral agreements. Bridgeford testified that he was originally appointed general agent of the Arizona Company for Washington with the knowledge and consent of the Pioneer Company, it being a custom among insurance companies to employ a common general agent, and that the profit accruing from business written for the Arizona

Company was to belong to the Pioneer Company, since it was paying him a salary; that the letters and telegrams to which we have referred constituted the entire correspondence regarding the contract of reinsurance; that he received the 10 per cent. in controversy in bonds of the National Realty Company, and had spent over \$2,900 after the contract of reinsurance was signed in establishing the Arizona Company in this state, and that neither Gough nor any one else representing the Arizona Company ever, at any time, offered to allow 25 per cent. of the unearned premiums to the Pioneer Company for turning over the business; that he never had a written agreement with the Arizona Company in reference to the 10 per cent. in dispute; and that, though he had paid various expenses connected with his general agency for the Arizona Company subsequent to the closing of the contract for reinsurance, he never received any money from the Arizona Company to reimburse him therefor except the 10 per cent. on the reinsurance, which he considered a reasonable sum to be used in establishing the Arizona Company in this state.

Upon this evidence, the court found, in effect, that Bridgeford, in violation of his duties to the Pioneer Company as its secretary and general manager, and as its agent especially authorized to procure the reinsurance, in fraud of the Pioneer Company, solicited the Arizona Company to pay him 10 per cent. as a secret commission for negotiating the reinsurance, and to allow the Pioneer Company only 15 per cent. discount of the aggregate unearned premiums on policies reinsured, and that the Arizona Company, with full knowledge of Bridgeford's relations to the Pioneer Company, agreed to Bridgeford's request to pay him the 10 per cent., and that the amount so agreed to be paid was \$3,307.13. The court further found that the Arizona Company had offered and was willing to pay for the reinsurance a discount of 25 per cent. on the unearned premium, and that, by reason of the secret agreement between Bridgeford and the Arizona Company, the Pioneer Company was defrauded and deprived of the sum of \$3,307.13. The court also found that the officers, trustees, and stockholders of the Pioneer Company had no notice or knowledge of the secret agreement until after Bridgeford, as receiver, had paid to the Arizona Company \$600 cash in addition to the delivery of the bonds mentioned, and then made demand upon both Bridgeford and the Arizona Company for an accounting, which was refused; that immediately on learning of the secret agreement, and before the 10 per cent. had been paid to Bridgeford, and in order to prevent the rescission of the reinsurance contract which was threatened by the Arizona Company, the plaintiff offered to the Arizona Company the sum of \$1,310.66, the balance due under the terms of the written contract,

provided that company would agree not to pay Bridgeford the disputed 10 per cent. until it could be legally determined to whom that sum rightfully belonged, which offer was refused by the Arizona Company. On these and other findings, the court made conclusions of law that the plaintiff was entitled to judgment against the Arizona Company and against J. H. Bridgeford and the community composed of Bridgeford and wife in the sum of \$3,307.13, with interest from March 17, 1911, less a credit in favor of the Arizona Company of \$1,310.66; that the contract of reinsurance should remain in full force and effect; and that the affirmative defenses of the Arizona Company should be dismissed upon the merits. Judgment went accordingly, from which the defendants have appealed.

The many assignments of error may be epitomized in two principal contentions: (1) That the findings of the court are not supported by the evidence. (2) That the court's conclusions and judgment are not sustained by the law.

[1] 1. This is a trial de novo, and we are not bound by the findings of the trial court as we would be by the verdict of a jury. But, in an unbroken line of decisions, we have held that even on a trial de novo the findings of the trial judge are entitled to great weight, and will not be disturbed when based upon conflicting evidence unless clearly against the weight of evidence. *Helphrey v. Strobach*, 13 Wash. 128, 42 Pac. 537; *Skeel v. Christenson*, 17 Wash. 649, 50 Pac. 466; *Ford v. Jones*, 22 Wash. 111, 60 Pac. 48; *Bank v. Cook*, 31 Wash. 477, 71 Pac. 1094; *Poler v. Poler*, 32 Wash. 400, 73 Pac. 372; *Prospectors' Development Co. v. George Brook*, 32 Wash. 315, 73 Pac. 376; *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Cullen v. Whitham*, 33 Wash. 366, 74 Pac. 581; *Chantler v. Hubbell*, 34 Wash. 211, 75 Pac. 802; *Miller v. Miller*, 38 Wash. 605, 80 Pac. 816; *Eno v. Sanders*, 39 Wash. 238, 81 Pac. 696; *Brill v. Hayford*, 41 Wash. 468, 83 Pac. 1119.

[2] Three witnesses testified in effect that Gough stated to them that the Arizona Company was willing and had offered to take the contract of reinsurance on a basis of 75 per cent. of the unearned premiums to that company and 25 per cent. to the Pioneer Company. It is true that two of these witnesses were attorneys for the respondent, and it is true that according to respectable authority such testimony should be viewed narrowly. *2 Moore on Facts*, § 1107; *O'Donoghue, Ex'x, v. Title Guaranty & Trust Co.*, 79 Ill. App. 263; *Little v. McKeon*, 3 N. Y. Super. Ct. 607. But in this case the testimony of the attorneys was corroborated by that of the president of the Pioneer Company, who was certainly no more directly interested in the result of the litigation than Gough was, and whose testimony was entitled *prima facie* to as much weight as that of Gough. Moreover, Gough admitted that he told the attor-

neys that the payment of the 10 per cent. to Bridgeford was in the nature of a commission on the reinsurance deal, which pro tanto further corroborated the attorneys.

It is argued that the written evidence was entitled to more weight than any oral testimony founded upon the memory of witnesses. It may be conceded that this is the ordinarily accepted rule; but to give the letters between Gough and Bridgeford such absolute weight as contended for in a case of this character would be to close the door against the proof of fraud in almost every instance. If these men were actually intending to secretly profit by the transaction, one would hardly expect to find the evidence of that fact in letters which would necessarily be submitted to the officers of the Pioneer Company. Even when the written evidence alone is considered, it is not free from inferences tending to support the findings of the trial court. It is significant that on the same day that Bridgeford wrote submitting the matter of reinsurance at a 15 per cent. discount on the unearned premium he wrote his son to submit the offer to accept 10 per cent. for his own pay for reorganizing the field for the Arizona Company, and that on the same day when Gough wired accepting the National Realty Company bonds, and finally authorized that the deal be closed with the Pioneer Company, Bridgeford's son wrote Bridgeford that the 10 per cent. arrangement with Bridgeford was also satisfactory to Gough. If the 10 per cent. transaction was entirely free from shadow in the minds of these parties, why were the negotiations touching it carried on in this unusual and roundabout way? There seems to have been a studied effort to keep out of any correspondence which would have to be submitted to the officers of the Pioneer Company any reference to Bridgeford's 10 per cent. There was an evident fear somewhere that, if those officers knew that the Arizona Company was actually allowing a discount of 25 per cent. instead of 15 per cent., they might either decline the reinsurance contract or insist on receiving the full discount. It is argued that the retention of Bridgeford's services was one of the moving considerations to the Arizona Company. That may be true; but that is no good reason why the facts should have been withheld from the Pioneer Company. That was no excuse for Bridgeford using his relations with the Pioneer Company to secretly secure the new employment, nor for the Arizona Company to connive with him in keeping the matter secret unless, by so doing, both parties to the secret arrangement profited by keeping it secret, the one by securing a liberal remuneration, the other by making payment of that remuneration without any outlay on its own part. All of these considerations doubtless influenced the trial court in making his findings, and we cannot say that they should not

have done so, nor can we say that the findings are against the clear weight of the evidence.

[3] On behalf of the appellant Bridgeford it is urged that the declarations of Gough, in the absence of Bridgeford, could not bind Bridgeford. Viewed as mere admissions against interest, that might be true; but they were admissible in any event as tending to prove the true character of the transaction, especially in view of Bridgeford's admission that the agreement was that he should receive the 10 per cent., and the clear evidence that this fact was never disclosed to the officers of the Pioneer Company. Gough's declarations, though not conclusive as against Bridgeford, were competent to be considered in connection with the other circumstances in determining the nature of the transactions. On an issue of fraud great latitude of inquiry is necessarily allowed, especially where, as here, other evidence tended to show that both parties participated in the fraudulent intent. *O'Hare v. Duckworth*, 4 Wash. 470, 30 Pac. 724; *Anderson v. White*, 18 Wash. 658, 52 Pac. 231.

[4] 2. If the findings were sufficient to support the conclusions of law and the judgment founded thereon, the judgment must be affirmed. This brings us to the crucial legal question involved: Was the agreement to pay Bridgeford 10 per cent. of the unearned premiums on the policies reinsured illegal under the circumstances as to the Pioneer Company, for which Bridgeford was then acting as its general manager and secretary? Bridgeford's relation to the Pioneer Company was one of trust and confidence. He was its officer acting for pay, and, in addition, had been intrusted with the negotiations for reinsuring its outstanding risks, and was authorized as its special agent for that purpose. It was his duty to make the best bargain possible for the Pioneer Company in effecting such reinsurance. On plainest principles of public policy, it was his duty to exercise the utmost good faith in the transaction, and to divulge to his principal every material circumstance entering into or affecting the subject-matter of his agency.

"It is well settled that an agent occupies a fiduciary relation towards his principal, and that he is bound, in the execution of the agency, to act in the most perfect good faith and with loyalty to the interests of his principal, and so sedulously is this principle guarded that all departures from it are esteemed frauds upon the confidence bestowed. An agent will not be allowed to assume any position which is inconsistent with his duty, or to acquire any rights by violation of it. This duty necessarily arises out of the nature of the relation. The principal trusts to the agent, whom he has employed, to faithfully use all reasonable efforts to advance his interests. Many details of the transaction are conducted by the agent without the principal

having any knowledge thereof, and in the course of the transaction the agent acquires knowledge of facts that are unknown to the principal. Thus the agent has many opportunities of acquiring an interest or benefit to himself out of the transaction, to the detriment of the principal, and against which the latter may be unable to protect himself. For this reason the law jealously guards all the agent's dealings or actions in reference to the subject-matter of the agency, and requires that they shall be strictly in good faith and loyal to the interests of his principal. As stated above, an agent will not be allowed to assume any position which is inconsistent with his duty to be loyal to his principal, or to place himself in an attitude of antagonism to the interests of his principal. He not only will not be allowed to acquire any personal interest or advantage by an actual violation of his duty, but he also will not be allowed to take a position, without his principal's knowledge and consent, which will have a tendency to cause him to violate such duty, and to act in his own interest rather than that of his principal. If he does so, the principal may compel him to account, or set the transaction aside, according to circumstances, and no local custom or usage can be shown to avoid this rule." 1 Clark & Skyles on the Law of Agency, §§ 404, 405.

"As a general rule it is a breach of good faith and loyalty to his principal for an agent, while the agency exists, so to deal with the subject-matter thereof, or with information acquired during the course of the agency, as to make a profit out of it for himself in excess of his lawful compensation, and if he does so he may be held as a trustee, and be compelled to account to his principal for all profits, advantages, rights, or privileges acquired by him in such dealings, whether in performance or in violation of his duties, and be required to transfer them to his principal upon being reimbursed for his expenditures for the same, unless the principal has consented to or ratified the transaction with knowledge that a benefit or profit would accrue or had accrued to the agent. The application of this rule is not affected by the fact that the principal did not suffer any injury by reason of the agent's dealing, or that he in fact obtained a better result, nor by the fact that there is a usage or custom to the contrary." 31 Cyc. p. 1434, 1435.

"Unfortunately there appears to prevail in commercial circles in which perfectly honourable men desire to play an honourable part an extraordinary laxity in the view taken of the earning of secret profits by agents. The sooner it is recognized that such secret profits ought to be disapproved by men in an honourable profession, the better it will be for commerce in all its branches." Hippisley v. Knee Brothers, 1 Q. B. Div. 1, 7. See, also,

Lum v. McEwen, 56 Minn. 278, 57 N. W. 662; Powell & Thomas v. Jones & Co., 1 K. B. Div. 11.

These principles underlie the following decisions of this court: Shepard v. Hill, 6 Wash. 605, 34 Pac. 159; Fowler v. Burke, 13 Wash. 13, 42 Pac. 624; Hindle v. Holcomb, 34 Wash. 336, 75 Pac. 873; Watson v. Bayliss, 62 Wash. 329, 113 Pac. 770, 34 L. R. A. (N. S.) 1210. Applying these principles to the situation here presented, it seems plain that Bridgeford, occupying the position not only of a salaried officer of the Pioneer Company, but also that of a special agent for the purpose of negotiating the reinsurance, was guilty of a violation of duty to his principal in secretly dealing with the subject-matter of his trust in such a way as to make a profit for himself. On plainest principles of equity and fair dealing, he should at least have advised the officers of the Pioneer Company of the fact that he was entering into this 10 per cent. agreement for his own benefit. The consideration of the 10 per cent. agreement was so intimately connected with the contract of reinsurance that ordinary good faith required that he divulge the full facts. It is manifest that the Arizona Company, whatever the purpose of the 10 per cent. agreement with Bridgeford, intended all along that he should be paid from the same fund from which the Pioneer Company received its discount or commission. It fairly appears that the Arizona Company conceived that they could handle the reinsurance of the Pioneer Company's outstanding risks with profit to themselves at a discount of 25 per cent. on the unearned premiums, and it is also plain that any reduction of this discount as going to the Pioneer Company, by a payment to Bridgeford, was a matter which necessarily concerned the interests of the Pioneer Company. The evidence wholly fails to establish the appellants' claim that the 10 per cent. contract with Bridgeford was an after consideration entered into after the reinsurance contract had been consummated. As we have seen, the correspondence leading up to both of these contracts was passing through the mails at the very same time, that relative to the reinsurance directly between Bridgeford and Gough, and that relative to the 10 per cent. agreement indirectly between Bridgeford and his son to Gough. The whole transaction, as divulged by this correspondence, bears internal evidence of the fact that, in the minds of both Bridgeford and Gough, the two agreements were interdependent, and that the one would not have been entered into by the Arizona Company but for the other. Bridgeford thus put himself in a position where his own interests were in direct conflict with the interests of his principal, and where every effort made to further his own interests would have a corresponding influence in injuriously affecting the interests of his principal. In such a case he

must be held to account for any profit derived from his secret agreement.

There can be no question that Gough, and consequently the Arizona Company which he represented, had full knowledge of Bridgeford's fiduciary relation to the Pioneer Company, nor can there be any question but that Gough knew and appreciated the full effect upon the reinsurance contract which the 10 per cent. agreement with Bridgeford would necessarily have. Knowing that Bridgeford, the officer and agent of the Pioneer Company, was dealing with the subject-matter of his agency for his own benefit, Gough and the Arizona Company must be charged with a culpable participation in the legal fraud thereby perpetrated upon the Pioneer Company. Moreover, the court found—and there was evidence justifying the finding—that this 10 per cent. was paid to Bridgeford after notice of the claims of the receiver of the Pioneer Company, and with full knowledge of the fact that Bridgeford had, up to this time, kept all knowledge of the 10 per cent. agreement away from the officers of the Pioneer Company. By thus knowingly performing an agreement in fraud of the rights of the Pioneer Company, the Arizona Company rendered itself liable to an accounting for the same reason and to the same extent as Bridgeford.

The further claim on Bridgeford's part that, in any event, the judgment as to him should be reduced by his expenses is without merit. These expenses in no sense redounded to the benefit of the Pioneer Company, which would be the only reasonable basis for such a claim.

There was evidence sufficient to support the findings, and the law sustains the conclusions.

The judgment is affirmed.

CROW, C. J., and MAIN, J., concur. FULLERTON, J., concurs in the result.

FOLLIOTT v. LORD et ux.

(Supreme Court of Washington. Nov. 1, 1913.)
BAILMENT (§ 31*)—RECOVERY OF RENT—PERSONAL PROPERTY.

In an action for the use of certain dirt-moving cars and railway track rented by plaintiff to defendants at an agreed rental per day, in which plaintiff claimed \$974 on the theory that the agreed rate was to be paid for each day during which the cars and track were in defendants' possession, and defendants claimed that there was due only \$215 on the theory that the rent was to be paid only for the number of days the cars and track were used, plaintiff held entitled to recover \$500.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124-181; Dec. Dig. § 31.*]

Crow, C. J., and Gose and Chadwick, JJ., dissenting.

En Banc. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by F. Kerr Folliott against W. H. Lord and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Bell & McNeil, of Seattle, for appellants. Williams & Price, of Everett, for respondent.

PARKER, J. The plaintiff commenced this action seeking recovery of the sum of \$974 from the defendants for the use of certain dirt-moving cars and railway track rented by him to them at an agreed rental of 25 cents per day for each car and 25 cents per day for each 100 feet of track. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff for \$500, from which the defendants have appealed.

There was no controversy upon the trial as to the agreed amount per day appellants were to pay respondents for the cars and track. The main controversy, so far as the questions here involved are concerned, was as to whether the contract was that appellant should pay the agreed per diem rate for the whole time the cars and track were in their possession or only for the time the cars and track were used by them. There was also some controversy as to the number of days the cars and track were used. Respondent claims there was due him \$974 upon the theory that the contract by its terms entitled him to compensation at the agreed per diem rate for the whole time the cars and track were in appellants' possession, while appellants claim that there was due respondent the sum of \$215 only, which they tendered before trial, upon the theory that that sum was the full amount due, computed upon the number of days the cars and track were used, and that the contract did not require them to pay for any other time, even though the cars and track were in their possession.

Appellants seek a new trial upon the ground that the trial court erred in rejecting certain offers of evidence made in their behalf. The nature of the evidence so offered, the purpose thereof, and counsel's claim of error in its rejection by the court are stated in their brief as follows: "By way of circumstantial evidence and for the purpose of showing the unreasonableness of the respondent's contentions and for the purpose of showing the improbability of appellants' ever having entered into any such agreement as set forth by the respondent, and for the purpose of discrediting the testimony of the respondent, the appellants sought to introduce evidence for the purpose of showing that the dirt in question could have been moved in other ways at a much less cost than contemplated by the alleged agreement set forth by the respondent, and further to show that the cars and track in question could have been purchased outright for a sum not in excess of the amount asked as rental. The

court below refused to admit the testimony for either of these purposes, to which refusal the appellants duly excepted." This has reference to respondent's claim for \$974 made upon the theory that by the terms of the contract he is entitled to compensation at the agreed per diem rate for the whole time the cars and track remained in appellants' possession. Counsel for appellants rest their claim of error in the rejection of this evidence upon the general rule that, in controversies where an express agreement is alleged on the one side and denied on the other, it is relevant to put in evidence any circumstance tending to make the existence of the fact as claimed by either side, more or less probable. *Robertson v. O'Neill*, 67 Wash. 121, 125, 120 Pac. 884; 9 Cyc. 767. It may well be argued, as has been done by counsel for respondent, that this offered evidence is too remote from the main issue and too liable to mislead to render it admissible here under the rule invoked, for collateral facts which, though in some degree logically relevant, may be excluded because of their meager probative force or because of their tendency to obscure the main issue in a maze of collateral inquiries. 1 *Greenleaf, Evidence* (16th Ed.) § 14a; 16 Cyc. 1112. However, we need not pursue this inquiry further, since we are of the opinion that the rejection of this offered evidence was in no event prejudicial to the rights of appellants.

We have noticed that the jury found for the respondent in the sum of \$500 only, which was but little more than one-half the \$974 claimed by him upon the theory that he was entitled under the contract to pay for all of the time the cars and track were in appellants' possession. It is manifest that this offer of proof was not made merely to show the improbability of the contract being for an agreed per diem rate for every day the cars and track were in possession of appellants, but it was for the purpose of showing the improbability of the contract being such as to entitle respondent to recover the large sum of \$974 upon the theory that he was entitled to compensation for every day the cars and track remained in appellants' possession. It is apparent from what was manifestly in contemplation by the parties at the time of the making of the contract that the probative force of this offered evidence would have been too slight to render its exclusion reversible error had there been nothing involved but the naked question of whether the contract in fact included a stipulation that the per diem rate should be operative every day the cars and track remained in appellants' possession. This is true because it is conclusively shown by the evidence that when the contract was made the parties did not contemplate that the rental period would be longer than about six weeks, though no specific time was agreed upon,

and that in no event would more than about \$300 be likely to become due thereon. It seems plain to us that, had respondent not claimed this large sum, this evidence offered by appellants of collateral facts might have been properly excluded because of its almost infinitesimal probative force as tending to prove the improbability of such a stipulation being in the contract; and, since the jury manifestly rejected the \$274 claim of respondent made upon that theory, the exclusion by the court of the evidence offered to counteract such theory did not work to the prejudice of appellants and therefore did not constitute reversible error.

Some contention is made that the trial court committed prejudicial error when, in ruling upon this offered evidence, it made the remark relative to the contract that "there was a meeting of the minds." This, it is insisted, was a prejudicial comment upon the evidence. A reading of the record showing the connection in which this remark was made, we think, renders it plain that the court was referring to the fact that there was a meeting of the minds as to the per diem rate to be paid and had no reference to the question of whether such rate was chargeable only for the days the cars and track were in use or for all of the days they were in appellants' possession. This remark was not addressed to the jury but to counsel while the court was giving its reasons in ruling upon the offer of evidence. We are of the opinion that this was not prejudicial error.

The judgment is affirmed.

MOUNT and FULLERTON, JJ., concur.
MAIN and ELLIS, JJ., concur in the result.

GOSE, J. I think the evidence offered was admissible and that its exclusion was error within the rule announced in *Robertson v. O'Neill*, supra, and the authorities there reviewed. I therefore dissent.

CROW, C. J., and CHADWICK, J., concur.

**FIRST CHURCH OF CHRIST, SCIENTIST,
v. SOUTHERN SEATING & CABINET CO.**

(Supreme Court of Washington. Nov. 5, 1913.)

**1. SALES (§ 442*)—BREACH OF CONTRACT BY
SELLER—MEASURE OF DAMAGES.**

Where a buyer properly rejected the goods purchased because of their defective quality, it was entitled to recover the difference between the contract price and the fair market value at the time of the rejection, and also the part of the purchase price paid before delivery, and the seller was not entitled to the balance of the purchase price after deducting the difference between the contract price and the market value.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

2. SALES (§ 481*)—ACCEPTANCE—RETENTION AND USE.

Where the title to pews sold to a church was retained by the seller, and upon delivery they were rejected because of their defective quality and the seller notified to remove them, their retention and use by the church did not prevent a recovery of damages as in case of a rejection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1449-1455; Dec. Dig. § 481.*]

Department 1. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by the First Church of Christ, Scientist, against the Southern Seating & Cabinet Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John E. Gallagher, of Tacoma, for appellant. Huffer & Hayden, of Tacoma, for respondent.

CHADWICK, J. The plaintiff contracted with the defendant for certain church pews, to be delivered and set up in the church building owned by plaintiff. The contract was in writing, and provided, among other things, that the property should be "delivered and set up in church by the Southern Seating & Cabinet Company, said Southern Seating & Cabinet Company to pay freight and drayage." Title was retained by the vendor. Upon the arrival of the furniture in Tacoma, the plaintiff, at the solicitation of the attending agent of the defendant, advanced the sum of \$618.48 to pay the freight then due the railroad company, and for cartage and like expenses. The furniture was thereafter set up and rejected by plaintiff as not conforming to the contract. Defendant was notified to remove its property. This it refused to do, and the furniture has since remained in the churchhouse of the plaintiff. Plaintiff brought this action to recover the amount advanced to pay the freight and for damages. The court found that the pews were defective; that plaintiff was not bound to accept the same, and was entitled to recover the difference in value between the fair market value of the pews and the contract price, to wit, the sum of \$800, together with the amount advanced on the purchase price, and rendered judgment accordingly. Defendant has appealed.

[1] It is first assigned that the court erred in allowing plaintiff to recover damages on account of the increase in the market value, based on the difference between the contract price and the fair market value at the time the pews were rejected, and at the same time allowing plaintiff to recover that portion of the purchase price paid by it. The case of *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925, is relied on. That case is not in point. In that case a breach of warranty was set up, and the court held that a vendee could not rely upon a breach of warranty and at the same time rescind the contract. The

fault in appellant's reasoning in the instant case lies in the fact that it assumes that there has been a rescission. This is not so. A rescission implies an acceptance. If plaintiff had accepted the pews, it would, under the case relied on, be bound as in a case for breach of warranty. There was no acceptance, and therefore no rescission, so that recovery of that part of the purchase price paid before delivery, together with general damages, is not an inconsistent measure. *Philadelphia Whiting Co. v. Detroit White Lead Works*, 58 Mich. 29, 24 N. W. 881; *Taylor v. Saxe*, 134 N. Y. 67, 31 N. E. 258; *Ash v. International Harvester Co.*, 101 Miss. 542, 58 South, 529.

It is also complained that "the court erred in allowing plaintiff damages based on the difference between the contract price and the fair market value at the time the pews were rejected, and refusing to allow the defendant the balance of its unpaid purchase price after deducting the difference between what the pews furnished were actually worth and the contract, plus the amount paid thereon by the plaintiff." The fallacy of this argument lies, as does the first contention, in the fact that it assumes an acceptance. If this were so, the rule contended for would undoubtedly follow. There are cases where the right to recover the difference in value is disallowed, but these cases are infrequent and depend upon exceptional circumstances. There is no statement of facts in this case, and we must assume that the findings of the court are based upon competent testimony. This being so, plaintiff is entitled to recover its damages under the general rule.

[2] Neither can the fact that the pews have been left in the possession of plaintiff militate against its right of recovery. If the pews had been sold under an ordinary contract of sale, and title had passed and the action had been for damages as for breach of warranty, the retention and use of the pews would have been inconsistent with the measure allowed in this case. The terms of the contract, however, preclude the application of this principle. The title was reserved in the vendor, and the pews have been at all times subject to its order.

We find no error, and the judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and GOSE, JJ., concur.

PICKFORD v. BORLAND et al.

(Supreme Court of Washington. Nov. 3, 1913.)

1. COURTS (§ 251*)—AMOUNT IN CONTROVERSY—INTEREST.

Where the original amount in controversy was \$630, with interest at 10 per cent. on \$200 from February 3, 1913, defendant's tender into

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court of \$430 did not reduce the amount in controversy below that required to sustain an appeal to the Supreme Court, under the rule that the original amount in controversy, for purposes of appellate jurisdiction, includes interest, when recoverable, computed to the commencement of the action.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 251.*]

2. TRIAL (§ 405*)—EXCEPTIONS—SUFFICIENCY—FINDINGS.

Separate exceptions taken to each finding and each conclusion by number are sufficient, without a statement of the basis or reasons therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 963-965, 967; Dec. Dig. § 405.*]

3. EVIDENCE (§ 423*) — PAROL EVIDENCE — WRITTEN CONTRACT—CONDITIONAL SALE—EXTENSION OF LIEN.

Where a conditional sale contract purported to reserve a lien to secure \$430, which, so far as the buyer knew, was the total consideration for the sale, and it was not alleged that notes given by two others, whom the buyer was assisting in the transaction, were omitted from the contract by inadvertence, mistake, or fraud, or that for any other reason the contract did not disclose the intention of the parties, parol evidence was inadmissible to show that it was intended that the lien should cover such additional sum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.*]

4. SALES (§ 300*)—LIEN—PURCHASE PRICE.

There is in Washington no such thing as a seller's lien on personal property for the purchase price, where the possession is delivered to the buyer, in the absence of contract to that effect.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 856, 860; Dec. Dig. § 300.*]

5. SALES (§ 313*)—PURCHASE PRICE—LIEN—WAIVER.

Where a seller makes a written contract of conditional sale limiting the security reserved to a specified sum, he thereby waives a right to a lien for any further or other sum.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 870, 872, 878-884; Dec. Dig. § 313.*]

6. SALES (§ 279*)—CONDITIONAL SALE—CONTRACT OF WARRANTY—ESTOPPEL.

Defendant's son and an associate, desiring to purchase a pool hall business at an agreed price of \$1,000 for the business and \$430 for the stock of tobacco, cigars, etc., defendant, not knowing that the price exceeded \$800, together with the price of the tobacco stock, agreed to advance that sum, and in order to effectuate the transaction the property was sold to him under a conditional sale contract, which recited that the price was \$800, together with the \$430 for the tobacco stock, plaintiff accepting notes of defendant's son and his associate for the \$200 additional without disclosing the same to defendant. *Held*, that plaintiff was not entitled to a reformation of the written contract so as to extend the lien to cover the additional \$200; plaintiff being estopped by his contract of warranty to claim any other lien than that specified in the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 783-792; Dec. Dig. § 279.*]

7. SALES (§ 428*)—CONDITIONAL SALE—WARRANTY—INCUMBRANCES—TAXES.

Where a conditional sale contract contained an express warranty against all incumbrances save the deferred payments mentioned therein, the buyer was entitled to set off mon-

ey paid for taxes which were a lien on the property when the contract was made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.*]

Department 1. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Charles Pickford against William Borland and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

C. M. Riddell, of Tacoma, for appellants. Otis Johnson and J. W. A. Nichols, both of Tacoma, for respondent.

ELLIS, J. The plaintiff seeks, in this action, to recover a balance claimed to be due upon the purchase price of certain personal property conveyed to the defendant William Borland by a conditional contract of sale, and to have the lien reserved in the sale contract extended to certain notes not mentioned therein, nor executed by William Borland. The conditional contract of sale, so far as material to the questions here presented, was as follows: "This indenture, made this 2d day of January, 1913, by and between Chas. Pickford, party of the first part, and William Borland, party of the second part: Witnesseth, that the said party of the first part has this day delivered to said party of the second part, the following described personal property, to wit [here follows description]. Upon the following terms and conditions, to wit: Said party of the second part may use said property, and shall pay to said party of the first part therefor the sum of \$800.00 at the date hereof, and the sum of \$430.00 within 60 days from date hereof, and if paid within 30 days from date hereof, the party of the second part shall receive a discount of 2 per cent. on said sum of \$430.00. * * * And the party of the first part agrees that upon the receipt by him of said amount of \$430.00 and interest before default has been made in any of the foregoing conditions by the party of the second part he will execute to them a bill of sale of said goods and chattels. But it is expressly understood and agreed by the parties hereto, that no title in any of said goods or chattels shall pass to or vest in said party of the second part until the final payment has been made as above set forth. * * * Party of the first part hereby covenants and agrees to warrant the title to the goods and chattels unto the party of the second part, his heirs and assigns, that the same are free and clear of all incumbrance whatsoever, and that he has a good right to sell and convey the same." It was executed by the plaintiff and the defendant William Borland alone. The complaint alleged, in substance, that on or about January 3, 1913, the plaintiff sold and delivered to the defendants J. N. Sprinker and George Borland four pool tables and other equipment and furniture of a

pool hall business, at an agreed price of \$1,000, and a stock of tobacco, cigars, and cigarettes at an agreed price of \$430, all situated in a certain storeroom in Tacoma, Wash.; that these two defendants then paid \$800 of the purchase price, and gave to the plaintiff their four promissory notes (copies of which were attached to and made a part of the complaint) for \$50 each, all dated January 3, 1913, and falling due, respectively, February 3, March 3, April 3, and May 3, 1913, each by its terms bearing interest at the rate of 10 per cent. per annum from date until paid; that the two last-mentioned defendants further agreed to pay to the plaintiff, within 60 days from January 3d, the sum of \$430, the agreed price of the tobacco stock; that the plaintiff, as security for himself, and at the request of all of the defendants, at the same time executed to the defendant William Borland, father of the defendant George Borland, a conditional bill of sale of the property according to the terms of which "plaintiff was to receive from the defendants within sixty days from the date thereof the sum of \$430"; that this sum of \$430 is due and unpaid; that two of the notes for \$50 each, with the interest thereon, are due and unpaid; that the defendants Sprinker and George Borland with intent to hinder, delay, and defraud the plaintiff, have placed the defendant William Borland in possession of the goods; that William Borland claims title thereto, and refuses to pay or to recognize the plaintiff's claims against the property; that the plaintiff claims against the property and against the defendants the aggregate sum of \$630, with interest on \$200 thereof from January 3, 1913. The prayer is for judgment accordingly, and that the whole amount be declared a first lien upon the property described in the conditional sale contract.

The defendants Sprinker and George Borland made no appearance, so far as the record shows. The defendant William Borland answered, denying both the sale and the delivery of the goods to Sprinker and George Borland, denying that they ever conducted the business for themselves, denying any knowledge of the four promissory notes executed by them, denying any refusal of William Borland to pay the \$430 mentioned as a deferred payment in the conditional sale contract, admitting the execution of that instrument, and pleading affirmatively that he purchased the pool hall furniture and tobacco stock in his own right, and for no other person, paying thereon \$800, and agreeing to pay \$430 additional within 60 days, taking the conditional sale contract, which conditional sale contract contained all of the terms, conditions, and considerations of the sale and purchase of the property, and further alleging a tender of the \$430 when due, and a refusal of the plaintiff to accept the same, and to convey the property as pro-

vided in that instrument. The record contains no reference to any reply to this affirmative matter. Its absence would warrant a reversal of the judgment; but, inasmuch as its omission may be through inadvertence, in which case it might be supplied, and inasmuch as a reversal must be had in any event, we will assume that these affirmative matters were denied. At the trial the defendant William Borland was granted leave to amend the answer by setting up by way of counterclaim the payment of taxes upon the property for the year 1912, in the sum of \$41.01. While no formal amendment appears to have been made, proof of the payment of these taxes was received without objection on that ground.

Counsel for plaintiff, in his opening statement, said, in substance, that the action was to establish a trust; that the sale was made to Sprinker and the younger Borland; that William Borland loaned to them \$800 to pay on the purchase price, and that for his protection the conditional contract of sale was made to him as vendee; that the two young men took and retained possession of the property for 30 days, when William Borland took possession; that the four notes were executed by the boys alone, but that they evidenced a part of the purchase price. Upon the complaint and this statement counsel for the defendant William Borland moved for a dismissal of the action. The motion was denied.

The case was tried to the court without a jury. The court found, in substance, that the property was sold and delivered to Sprinker and the younger Borland for \$1,000 for the furniture and \$430 for the tobacco stock; that they paid \$800 in money and gave their four notes for \$50 each for the balance of the \$200; that, as security to William Borland, for the sum of \$800 loaned to the two young men, and at the request of all of the defendants, the plaintiff executed to William Borland a contract of conditional sale, in which the purchase price was \$800, and according to the terms of which the plaintiff was to receive, within 60 days, \$430 as the purchase price of the tobacco stock, and that the defendant William Borland agreed to deliver his title to Sprinker and George Borland upon their payment to him of the money advanced by him on the purchase; that Sprinker and the younger Borland took possession and conducted the business for 30 days, when William Borland took possession, claiming title; that Sprinker and George Borland refused to pay any of the deferred payments, but that William Borland, before trial, tendered into court the sum of \$430 for the plaintiff, and demanded a bill of sale of the property, which the plaintiff has refused. Upon these findings, the court rendered a personal judgment against the defendants Sprinker and George Borland for the amount of the four \$50

notes, with interest, attorney's fees and costs, aggregating \$318.20, adjudged this sum a lien against the property in question, and that the plaintiff was entitled to the sum of \$430 paid into court as his property. The defendant William Borland appealed.

[1] The respondent moves to dismiss this appeal on the ground that the amount in controversy is insufficient to invoke our appellate jurisdiction. The original amount in controversy, as shown by the complaint, was \$630, with interest at 10 per cent. per annum on \$200 from February 3, 1913. Even granting respondent's claim that the amount was reduced to \$200 and interest by the tender in to court of the \$430, the amount in controversy would still exceed \$200 to the extent of the interest from February 3, the date of the notes, to March 27, 1913, the date when the action was commenced. The original amount in controversy, as conferring our appellate jurisdiction, includes interest, when recoverable, computed to the commencement of the action. *Ingham, Administrator, etc., v. Harper & Sons*, 71 Wash. 286, 128 Pac. 675. The motion to dismiss is denied.

[2] Respondent also moves to strike the statement of facts on the ground that no sufficient exceptions have been taken to the findings of fact and conclusions of law, in that the exceptions were taken to each finding and each conclusion separately by number, and did not state the basis or reasons for the exceptions. This court has repeatedly held such exceptions a sufficient compliance with the statute. *Young v. Borzone*, 26 Wash. 4, 8, 66 Pac. 135, 421; *Burrows v. Kinsley*, 27 Wash. 694, 698, 68 Pac. 332; *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255; *Hallidie Co. v. Washington Brick, Lime & Mfg. Co.*, 70 Wash. 80, 126 Pac. 96. The motion to strike is denied.

We find no merit in the further claim that the appellant's brief should be stricken for failure to point out and separately discuss the errors relied upon for reversal.

On its merits, the appellant contends for a reversal on the grounds: (1) That the complaint failed to state a cause of action to establish a lien against the property in question for the \$200 and interest; (2) that there was no evidence to sustain the claim that the appellant took the conditional sale contract in trust as security for the respondent so far as the \$200 and interest is concerned; (3) that the court erred in refusing to allow appellant's counterclaim for the taxes paid by him for the year 1912.

[3] 1. The complaint did not state a cause of action to establish a trust in appellant's favor for any sum in excess of \$430. By the most liberal construction it merely alleged that the conditional sale contract was executed in trust to secure \$430 therein mentioned, and that the notes were taken as a personal claim against the two young men. There was no allegation that these notes

were mentioned in, or in terms secured by, the sale contract, nor was there any allegation that mention of these notes was omitted from the contract through inadvertence, mistake, or fraud, or that for any other reason the contract did not speak the intention of the parties. In the absence of some such allegation, parol evidence was inadmissible to vary or change the terms of the contract, or to extend its security to any other sums. The writing was not ambiguous. Even had this contract been made directly to the two young men, it would have evidenced a lien in the respondent's favor only for the sum of \$430.

[4, 5] There is, in this state, no such thing as a vendor's lien on personal property, where its possession is delivered to the vendee, in the absence of some contract to that effect. But even if there were such a lien, the taking of the written contract limiting the security reserved to the amount of \$430 would be a waiver of a lien for any other sum. Even granting the trust pleaded in the complaint as the purpose of the contract, it extended no further than the security mentioned. No facts were pleaded which would warrant a reformation, nor was a reformation sought. The admission in counsel's opening statement that the appellant had an interest, at least to the extent of a loan of \$800, to secure the payment of which he was named as vendee, entitled the appellant to a dismissal of the action upon his motion then made. On the most elementary principles, the complaint stated no facts sufficient to warrant the introduction of parol testimony to vary the terms of the written instrument. *Allen v. Farmers' & Merchants' Bank of Wenatchee*, 135 Pac. 621.

[6] 2. But, even assuming that the complaint had been sufficient to authorize the admission of parol evidence to enlarge the scope of the written contract, no such evidence was produced or offered. The respondent, in addition to his own testimony, introduced that of each of the defendants. The appellant testified that his son and Sprinker had been contemplating the purchase of the property, and wanted to borrow from him \$800 and give him, as security, a mortgage on the property for that amount; that when the contract by which they were to take the property was presented to him, he refused to accept the security on the terms which it would permit, and the deal on that basis was abandoned; that he then offered to buy the property and pay for it himself, on the terms as he understood them to be, namely, \$800 for the business and fixtures, and \$430, the invoice price of the tobacco stock; that the contract was accordingly drawn up and executed by himself and the respondent; that he was not aware of the payment, or agreement to pay any other sum, and knew nothing of the giving of the notes by his son and Sprinker; that toward the end of the 60

days after the date of the contract, he tendered to the respondent the \$430, but the respondent refused to accept the same and give him an unconditional bill of sale, as provided in the contract. The other two defendants both testified that the appellant knew nothing of the execution of the notes, and that when they executed these notes, they were advised by one of the respondent's attorneys not to mention the matter to the appellant. The respondent testified that he had been carrying on certain negotiations with Sprinker and George Borland for the sale of the property for \$1,000 cash and \$200 in notes, plus the invoice price of the tobacco stock; that after the papers were drawn up and ready to sign, he then learned that the two young men were borrowing \$800 from the appellant to pay on the purchase price; that the appellant then stated that the papers were not satisfactory to him because he was not properly secured for the \$800, and demanded better security. The respondent admitted that he refused to give to the appellant an unconditional bill of sale unless the appellant would pay to him the notes evidencing the \$200 debt and interest.

Granting to the respondent the benefit of every inference of which this evidence is capable, it falls far short of showing any ground for a reformation of the written contract. It shows a sale to William Borland alone. The notes were doubtless given by the two young men to induce the respondent to execute the contract, but there is absolutely no evidence that the appellant knew of that fact. The uncontradicted evidence shows that he did not know of their existence until the respondent refused to abide by the terms of the written contract. The finding that the contract was given merely as security to the appellant for his advancements is not supported by the evidence and was not, in any event, material. Clearly he took the property under the terms of the contract, subject only to the payment of the \$430. Whether he took it as security for the \$800 or as his own property, subject to the reserved lien for \$430, can make not the slightest difference to the respondent. In either case the respondent is estopped by his contract and warranty to claim any other lien on the property as against the appellant. *Davis v. Bartz*, 65 Wash. 395, 402, 118 Pac. 334.

[7] 3. At the trial it was proved and, in fact, admitted without dispute that the appellant, in order to avoid a distraint against this property, paid taxes for the year 1912 in the sum of \$41.01. These taxes constituted a lien upon the property when the contract was made. *Klickitat Warehouse Company v. Klickitat County et al.*, 42 Wash. 299, 84 Pac. 860; *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578; *Lewis Construction Co. v. King County*, 60 Wash. 694, 111 Pac. 892;

State v. Snohomish County, 71 Wash. 320, 128 Pac. 667; *Rem. & Bal. Code*, § 9235. The contract itself contains an express warranty against all incumbrances save the deferred payment therein mentioned. The appellant was entitled to an allowance upon the \$430 deferred payment in the sum of \$41.01 because of this payment.

We are unable to perceive any theory upon which the judgment of the trial court can be sustained. It is reversed, and the cause is remanded, with direction to enter judgment in accordance with the views herein expressed.

CROW, C. J., and CHADWICK, GOSE, and MAIN, JJ., concur.

STATE v. JAKSHITZ.

(Supreme Court of Washington. Nov. 1, 1913.)

BAIL (§ 80*)—FORFEITURE—VACATION—JURISDICTION—STATUTES—EFFECT.

Rem. & Bal. Code, § 2231, provides that in criminal cases where a default has been entered a recognizance shall be declared forfeited, and the court shall enter judgment against the principal and sureties and may issue execution therefor; section 2232 authorizes a stay of execution for 60 days by giving bond; and section 2233 declares that, if execution is stayed, and the person for whose appearance the recognizance was given shall be produced before the expiration of 60 days, the judge may vacate the judgment on terms, otherwise execution shall forthwith issue as well against the sureties in the new bond as against the judgment debtors. *Held*, that section 2233 should be construed as directing the vacation of a judgment against sureties on a bail bond on the production of accused within the 60-day period, without limiting the court's common-law power, in a proper case, to vacate a forfeiture of bail and order the amount paid into court returned to the bondsmen on their surrender of accused and her satisfaction of the judgment against her, though after more than the 60-day period had elapsed.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 328-334; *Dec. Dig.* § 80.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Theresa Jakshitz, having been convicted of an offense and fled the jurisdiction of the court, was returned and surrendered herself and performed the judgment, whereupon her bondsmen petitioned for an order vacating the forfeiture of the bail or judgment against them and for the return of the cash bail paid to the county. From an order granting such relief, the State appeals. *Affirmed*.

John F. Murphy and H. B. Butler, both of Seattle, for the State. Edward Judd, of Seattle, for respondent.

CHADWICK, J. Respondent was convicted of a crime. At the time of conviction she was under a penal bond to answer the judgment of the court. Pending the motion for a new trial appellant fled the jurisdiction of the

court, whereupon one of the bondsmen substituted the sum of \$2,000 in lieu of his personal liability. A release of personal liability was entered, and at the same time an order was made forfeiting the cash bail. About ten months thereafter respondent, "owing to the persuasion of her friends and bondsmen," as the court finds, voluntarily surrendered herself and has performed the judgment of the court. Upon petition the order of forfeiture or judgment, as the case may be, was vacated, and the cash bail ordered returned to the bondsmen. An appeal from this order is prosecuted by the county.

It is contended that the surrender was not made in time. Section 2233, Rem. & Bal. Code, is relied on: "If a bond be given and execution stayed, as provided in the last preceding section, and the person for whose appearance such recognizance was given shall be produced in court before the expiration of said period of sixty days, the judge may vacate such judgment upon such terms as may be just and equitable; otherwise execution shall forthwith issue as well against the sureties in the new bond as against the judgment debtors." It is insisted that this court has so construed this section in *State v. Johnson*, 69 Wash. 612, 126 Pac. 56. We do not so read the case. It reaffirms the words of the statute and holds that, on the facts there found, the court had abused its discretion and as a further reason that the surrender had been made before the expiration of the stay. Whether a court has an inherent power to grant relief in such cases was not considered by the court.

It is said in 3 Enc. Pl. & Pr. 241, that the power of the court after forfeiture of a bail has been questioned, except as such power may be and frequently is given by statute. The text following, as well as many of the cases cited, shows that courts are constantly granting relief in such cases, and that the order of the court will not be reversed on appeal except for a manifest abuse of discretion. We shall not review the authorities. They are to be found in the footnotes of the text cited. There is sound reason for the order appealed from. Bail is not taken on forfeiture as money is taken for a debt due upon a valid consideration. The object of bail is to insure the attendance of the principal and his obedience to the orders and judgment of the court. There should be no suggestion of bounty or revenue to the state or of punishment to the surety. "The object of an appearance bond is to secure the trial of offenders rather than to fill the state coffers by forced contributions from sureties." *State v. Williams*, 37 La. Ann. 200, 202. These things may result but should not be insisted upon when the purpose of the law (that is, the surrender, conviction, and incarceration of the principal) has been accomplished. "It is the manifest policy of the statute to encourage the giving of bail in proper cases

rather than to hold in custody at the state's expense persons accused of bailable offenses. The court should so administer cases arising under this statute as to give effect to this manifest policy." *State v. Johnson*, supra.

In *United States v. Feely*, 1 Brock. 255, 259, Fed. Cas. No. 15,082, John Marshall said: "The object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused but not proved to be guilty. If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance but repairs the default as much as is in his power by appearing at the succeeding term and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done. If the accused prove innocent, it would be unreasonable and unjust in government to exact from an innocent man a penalty, intended only to secure a trial, because the trial was suspended, in consequence of events which are deemed a reasonable excuse for not appearing on the day mentioned in the recognizance. If he be found guilty, he must suffer the punishment intended by the law for his offense, and it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial. The reasonableness, then, of the excuse for not appearing on the day mentioned in the recognizance ought to be examined somewhere, and no tribunal can be more competent than that which possesses all the circumstances of the original offense and of the default."

The right of bail is so fundamental that it is guaranteed in the Bill of Rights. The giving of bail should be encouraged for various reasons: That the state may be relieved of the burden of keeping an accused person; that the innocent shall not be confined pending a trial and formal acquittal; that in cases of flight a recapture may be aided by the bondsmen who, it is presumed, will be moved by an incentive to prevent judgment or, if it has been entered, to absolve it and to mitigate its penalties. To accomplish these things and others, courts have been liberal in vacating judgments entered on bail bonds, exercising always a broad discretion, and in proper cases preserving the equities of the public by deducting such costs and expenses as may have been incurred by the state. To hold otherwise would discourage the giving of bail and defeat the "manifest purpose of the statute." Our construction of the statute relied on is that it undertakes to direct, almost as a matter of right, that a judgment shall be vacated within the 60-day period without limiting the common-law power of the court in proper cases.

The point is made that the statute has no reference to the forfeiture of cash bail and applies only to cases where a personal judg-

ment is entered. This point may be well taken, but we find no hesitation in resting our judgment upon the broader principles of the law. It is also contended that no proper showing has been made in this case. That part of the findings and judgment of the court hereinbefore quoted is, in our judgment, sufficient to warrant the court in the exercise of its discretion, and there has been no abuse of discretion.

Judgment affirmed.

CROW, C. J., and ELLIS and GOSE, JJ., concur.

MCKAY v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington. Nov. 1, 1913.)

1. APPEAL AND ERROR (§ 1005*)—VERDICT—REVIEW.

Where the evidence on questions of fact was conflicting and properly submitted to the jury, the court's denial of a motion for a new trial because of insufficiency of the evidence to sustain the verdict for plaintiff will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

2. EVIDENCE (§ 506*)—OPINION—SUBJECTS OF OPINION.

Where plaintiff claimed that he was injured by having the gates of one of defendant's cars from which he was about to alight closed on his foot, causing him to be thrown to the street and injured, and evidence was received for both plaintiff and defendant as to their respective claims concerning the type and construction of the car, the manner in which the gates opened and closed, and whether they in fact closed over the upper or lower step, the court properly refused to permit an expert witness to testify for defendant that it would be impossible for plaintiff to have sustained the injuries in the manner alleged, and that the position of his body with relation to the steps and gates of the car while he was in the act of alighting would necessarily have been such that the gates could not have been closed against his foot while it was on the step as he alleged; that question being an issue for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

3. APPEAL AND ERROR (§ 1050*)—RULINGS ON EVIDENCE—PREJUDICE.

Defendant in an action for injuries was not prejudiced by the admission of hearsay evidence on examination of a witness by the court, which was merely cumulative of competent testimony given by other witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

4. TRIAL (§ 234*)—INSTRUCTIONS—PRESUMPTION—SOBRIETY.

In an action for injuries to a passenger on alighting from a street car, whether plaintiff was intoxicated at the time was a material issue, where he admitted that a short time prior to the accident he had been drinking, and it was error to charge that there was a presumption of his sobriety, and that the burden was on defendant to overcome that presumption by a fair preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.*]

5. TRIAL (§ 236*)—INSTRUCTIONS—DEGREE OF PROOF.

An instruction that the burden was on defendant to establish to the jury's "minds and conscience" by a preponderance of the evidence that plaintiff on the night of his injury was intoxicated to a degree that his recollection was impaired, etc., was erroneous as requiring too high a degree of proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.*]

6. TRIAL (§ 235*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

An instruction that circumstantial evidence is legal and competent in all cases, and, if it is of such a character as to exclude every reasonable hypothesis other than the one asserted, it is entitled to the same weight as direct evidence, that strong circumstantial evidence in cases is often the most satisfactory of any from which to draw the main conclusion, and is to be regarded by the jury in all cases, and when it is strong and satisfactory the jury should consider it, etc., was erroneous as in effect instructing that circumstantial evidence was only to be considered when it was strong and satisfactory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539-541, 543-548, 551; Dec. Dig. § 235.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by A. L. McKay against the Seattle Electric Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

James B. Howe and A. J. Falknor, both of Seattle, for appellant. Revelle, Revelle & Revelle, of Seattle, for respondent.

CROW, C. J. Action by A. L. McKay against the Seattle Electric Company, a corporation, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, defendant has appealed.

Respondent alleged that he was injured on one of appellant's "pay as you enter" street cars by having the gate closed on his foot as he was alighting, which caused him to be thrown to the street and injured. The appellant operates an electric street railway system in the city of Seattle, a portion thereof being known as the Eastlake line, running from the business portion of the city past the University district to Cowen and Ravenna Parks. Before reaching the University district the cars run easterly upon North Fortieth street for some eight or ten blocks, crossing intersecting streets as follows: Eleventh avenue N. E., Twelfth avenue N. E., Brooklyn avenue, and Fourteenth avenue N. E. The cars then run on Fourteenth avenue N. E. to their destination. On May 11, 1911, respondent was living on Brooklyn avenue about one block south of its intersection with North Fortieth street. He contends that about 11:30 o'clock p. m. on that date he and one J. O. Craven met in the business portion of the city and agreed to go home together; that they went into a saloon, had a glass of beer and cigar; then walked to Third avenue and Union street to board the Eastlake car;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that two cars which passed were overloaded, and they could not obtain passage; that they continued walking east on Union street to Sixth avenue, where they boarded an East-lake car; that Craven alighted at Twelfth avenue N. E., one block short of Brooklyn avenue, respondent's destination; that respondent informed the conductor he desired to alight at Brooklyn avenue; that the necessary signal was given; that just as respondent had his left foot on the lower or last step of the car, and was taking his right foot off, and was about to alight, the conductor closed the gate on his foot, causing him to be thrown to the street and injured. It is conceded that the accident, if it occurred at all, occurred upon a car operated by one Derry as motorman and one Warner as conductor. The trip sheet of the company, which was introduced in evidence, shows that their car left its southern terminus, some 14 blocks south of Union street, at 11:30 p. m., and again at 1:00 a. m. The car on the latter trip being known as the "Owl" car. Appellant denies that respondent was injured by falling or being thrown from the car, but contends that he was so intoxicated and unable to care for himself that in wandering around after alighting from the car he fell upon the paved street and was injured. Respondent testified that as he was thrown from the car he was stunned and became unconscious; that when his consciousness was restored he endeavored to and did remove himself from the tracks, but laid on the street for an hour or an hour and a half, during all of which time he was conscious; that he saw two cars pass going north and three pass going south; that he "hollered" to each of them as loud as he could; that he finally saw a policeman a block away, to whom he also "hollered"; that the policeman picked him up, carried him to a nearby store, and later helped him to his home. The motorman and conductor testified that plaintiff was intoxicated when he boarded and also when he left the car. The motorman testified that he remembered respondent because respondent asked him if the car went to Brooklyn avenue, and attempted to board it at the front end. The conductor and motorman further testified that on their return trip they saw respondent staggering in the street near the corner of Brooklyn avenue; that their car was stopped; that respondent told them he was lost; and that the conductor directed him to his home. The motorman and conductor of another car testified that they also saw respondent staggering along Brooklyn avenue about 1:40 a. m., as though he was lost. The police officer testified that he thought respondent was intoxicated, and that he so stated in his report to police headquarters. Respondent denied his intoxication, as did his companion Craven and one other witness who saw him after the accident; but he and Craven admitted having

taken a drink together, and respondent admitted having taken more than one drink.

There is no question but that respondent was injured in some manner on the night of May 11th or early on the morning of May 12th in the vicinity of Brooklyn avenue and North Fortieth street. He insists that he was injured by being thrown from the car in the manner above stated, while appellant contends that he, in some manner, received the injury after he had alighted from the car, and while he was wandering around in an intoxicated, lost, and dazed condition. The only evidence produced on behalf of respondent in support of his contention that he was thrown from the car was his own testimony. In his version of the accident itself he is not corroborated by any other witness. On the contrary, he is contradicted by the testimony of the witnesses who saw him leave the car. Therefore it became a vital issue to determine whether respondent was intoxicated when he left the car, and, if so, whether his intoxication was such as to impair his consciousness and his recollection of the incidents to which he testified.

[1] Appellant's first contention is that the trial court erred in denying its motion for a new trial on the ground of insufficiency of the evidence. There was a sharp conflict of evidence as to whether respondent was intoxicated, and whether he was thrown from the car and was injured in the manner claimed by him. Conceding that the preponderance of the evidence as disclosed by the record may seem to be with appellant, yet both of these propositions were questions of fact for the consideration of the jury. There was evidence to sustain the verdict, which was approved by the trial judge. Under uniform rulings of this court, we conclude that we would not be warranted in disturbing the ruling of the trial judge that the evidence was sufficient to sustain the verdict.

[2] It is contended that the trial court erred in excluding the testimony of one G. A. Richardson, an expert witness, by whom appellant sought to show that it would be impossible for respondent to have sustained the injuries of which he complains in the manner alleged; that the position of his body with relation to the steps and gates of the car while he was in the act of alighting would necessarily have been such that the gate could not have been closed against his foot while it was on the step as he alleged. The controlling dispute was whether the gates closed over the upper or lower step. The witness Richardson was appellant's superintendent of transportation, and had been in its employ for a considerable time. It is contended that his testimony was competent and material as tending to show the construction and operation of the gates, and the impossibility of the happening of the accident in the manner and under the circumstances claimed by respondent. Although the witness

may have been more familiar with the construction of the cars than the ordinary individual who became a passenger, yet it was not for him to say whether the accident could have happened in the manner contended, but was a question for the jury, and we cannot conclude that it was prejudicial error to reject the testimony. Evidence was admitted on behalf of both respondent and appellant showing their respective claims as to the type and construction of the car, the manner in which the gates opened and closed, and whether they in fact closed over the upper or lower step. It was for the jury to determine from this conflicting evidence how the car was constructed, and also to determine whether the appellant was injured, or could have been injured, in the manner alleged.

[3] It is further contended that the trial court erred in admitting hearsay evidence of Dr. Bailey, a physician who attended the respondent on the morning after the accident. As above stated, the intoxication of respondent at the time of the alleged accident was a vital issue in the case, affecting his consciousness and credibility as a witness. There was a sharp conflict in the testimony on this issue. Several witnesses, in addition to the motorman and conductor, had testified that he was intoxicated when or shortly after he alighted from the car. Respondent denied this, as did Craven, and a lady witness who saw him an hour and a half or two hours after the accident. Dr. Bailey testified as to the mental and physical condition of respondent on the morning following the accident when he was attending him, stating that his breath smelled of liquor, although he did not think he was then under the influence of liquor, that he was perfectly rational, but that he was somewhat dazed as might have been expected in the case of an old man who had been lying out in the cold. Thereupon the following appears in the record: "The Court: Did you know anything about why his breath smelled of liquor? Was that accounted for? The witness: I was told why his breath smelled of liquor. Q. At that time you were told why his breath smelled of liquor? A. Yes, sir. Q. What did they tell you? Mr. Falknor: I object to that as incompetent and hearsay. The Court: Overruled. Q. Answer the question. A. He had been given some liquor there at the house, I was told, some whisky or brandy." While the testimony admitted was clearly hearsay, and was elicited by the trial judge, which fact might have given it some weight with the jury, nevertheless it was cumulative of competent testimony given by other witnesses, and could not have been prejudicial.

[4] The trial judge instructed the jury that there was a presumption of respondent's sobriety, and that the burden of proof was upon the appellant to overcome such presumption by a fair preponderance of the evi-

dence. When facts are testified to by litigants and their witnesses, ordinary presumptions of fact will not prevail. Respondent admitted that a short time prior to the accident he had been drinking. This being so, there was no room for a presumption of his sobriety. That was a material issue which should have been determined by the jury on the testimony of respondent, and also of other witnesses who saw him upon the car, or in the street after he alighted. It would be just as fair to presume that a man who had taken several drinks was intoxicated to some extent as it would be to presume he was sober, and require his adversary to assume the burden of proving that he was not. The inapplicability of the presumption mentioned and the erroneous character of the instruction are manifest.

[5] The court instructed the jury as follows: "Therefore it follows as a natural consequence that the burden of proof is upon the defendant in this case to establish to your minds and conscience by a preponderance of the evidence that the plaintiff on the night in question was in a condition of intoxication to any degree that his recollection was impaired, or that said intoxication did on the night in question contribute in any material manner to the proximate cause of his injury." Now, if it were to be admitted that there was room for a presumption of sobriety in this case, and that the burden of proof was upon appellant to show respondent's intoxication, the law most certainly does not impose on appellant the burden of satisfying the conscience of the jury upon that issue. Such instructions have been condemned in at least two instances by this court. In *Nilsson v. Martinson*, 72 Wash. 286, 130 Pac. 106, the trial judge told the jury to follow their own consciences. We said: "Such instructions should not be given. They tend only to confusion. If not actually telling the jury that it must be convinced to a moral certainty, which would in many cases make verdicts impossible, it does encourage the jury to reject testimony which it has no right to reject, and to ignore all of the pertinent instructions theretofore given. The instruction, wherever questioned, has been held to be error, and would be now, if it were possible to send the case back for a new trial." In *State v. Harris*, 132 Pac. 735, a similar instruction was condemned. To satisfy the conscience is to be convinced of the absolute truth of a proposition. We said that the effect of the instruction complained of was to tell the jury that they must be satisfied beyond a reasonable doubt, and: "A preponderance of the evidence does not necessarily mean beyond a doubt or even beyond a reasonable doubt. The jury might well have concluded that the weight of the evidence showed that the defendant was insane, and still not have been convinced beyond a doubt that he was insane. The term 'preponderance of the evidence' merely means

the greater weight of the evidence. 14 Ency. Evidence, p. 84. To require the defendant to establish his insanity by the greater weight of the evidence is all that is necessary. He is not required to prove that he was insane beyond a reasonable doubt or beyond a doubt, as the court in substance tells the jury they must find."

[6] Furthermore, the court instructed upon the weight to be given to circumstantial evidence as follows: "Circumstantial evidence is legal and competent in all cases, and if it is of such a character as to exclude every reasonable hypothesis other than the one asserted, it is entitled to the same weight as direct evidence. Strong circumstantial evidence in cases is often the most satisfactory of any from which to draw the main conclusion. It is to be regarded by the jury in all cases, and, when it is strong and satisfactory, the jury should consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury, and, when it is all taken as a whole, the jury should act on such evidence." This instruction, passing the fault of its argumentativeness, is wrong, in that it in effect tells the jury circumstantial evidence is to be regarded when it is strong and satisfactory, and is to be disregarded when it is not. If the circumstances are competent, they may have but slight probative force; but, however slight, they are to be regarded by the jury, and weighed with all other evidence in the case.

For the errors above mentioned, the judgment is reversed, and the cause remanded for a new trial.

CHADWICK, MOUNT, GOSE, and PARKER, JJ., concur.

STATE v. BEAUDIN.

(Supreme Court of Washington. Nov. 1, 1913.)

1. CRIMINAL LAW (§ 415*)—EVIDENCE—COMPLAINT BY PROSECUTRIX—DETAILS OF COMPLAINT.

While, in a prosecution for sodomy, evidence was admissible that prosecutrix, a child 2½ years of age, had complained about the time of the alleged act, evidence of the details as stated to witness by prosecutrix was not admissible if not a part of the *res gestæ*, since that would indirectly permit prosecutrix to testify when she could not have given the testimony because of her tender years.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 937-949; Dec. Dig. § 415.*]

2. CRIMINAL LAW (§ 476*)—TESTIMONY OF EXPERTS—PHYSICAL CONDITION—CAUSE AND EFFECT.

Where, in a prosecution for sodomy, a physician had testified for the state that the condition of prosecutrix's person, discovered shortly after the alleged offense, might have resulted from the act charged, a physician, testifying for the accused, could testify as to whether any other causes would produce the condition testified to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1062; Dec. Dig. § 476.*]

3. CRIMINAL LAW (§§ 636, 898*)—TRIAL—PRESENCE OF ACCUSED—NECESSITY.

Under Rem. & Bal. Code, § 2145, providing that no person prosecuted for an offense punishable by confinement in the penitentiary, etc., shall be tried unless personally present during the trial, it was fatal error to give an instruction to the jury in accused's absence, which was not cured by recalling the jury and repeating the same instruction in accused's presence, since accused does not personally know that the two instructions were identical, notwithstanding the trial judge's certificate to that effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2118-2121; Dec. Dig. §§ 636, 898.*]

Department 2. Appeal from Superior Court, Lewis County; E. H. Wright, Judge.

John S. Beaudin was convicted of sodomy, and appeals. Reversed and remanded.

J. H. Jahnke, of Centralia, and Wesley Lloyd, of Tacoma, for appellant. C. D. Cunningham, of Centralia, and H. E. Donohoe, of Chehalis, for the State.

CROW, C. J. The defendant was convicted of the crime of sodomy, alleged to have been committed upon the person of his daughter, a child 2½ years of age, and has appealed from the judgment and sentence entered upon the verdict.

Appellant attacks the sufficiency of the information, and contends that the evidence was insufficient to sustain the verdict of the jury. Without stating the information of the evidence, we announce our conclusion that there is no merit in either contention.

[1] The evidence is revolting, and will not be stated in this opinion further than is absolutely necessary. The state produced a witness who testified that on certain occasions, after the alleged commission of the crime, the child made complaint, and further testified to statements which the child made to her. Error is assigned upon the court's refusal to exclude evidence of this character, further than a mere statement of the fact that the complaint had been made. This contention must be sustained. It was proper to permit the witness to testify that complaint had been made at or about the time of the alleged act, but it was error to permit the witness to repeat statements made to her by the child. To do so was an indirect method of introducing evidence which could not have been given by the child herself, owing to her tender years; there being no contention that the remarks made by the child were any part of the *res gestæ*.

[2] The state introduced a witness showing the condition of the child's person shortly after the commission of the alleged offense, and also produced a physician, who, as a medical expert, testified that such a condition might have been the result of acts constituting the crime with which appellant is charged. Thereafter, appellant produced another physician as a witness, who was asked what other causes, if any, would pro-

duce the condition to which the first physician had testified. Upon objection by counsel for the state this evidence was excluded. In this the trial court erred. It was competent for the physician to say what other causes could have produced the condition to which the state's witness had testified.

[3] After the jury had been instructed, had retired to deliberate upon their verdict, and had deliberated about four hours, they returned into the court and requested the trial judge to give them further instructions upon one point in the case. Thereupon the trial judge prepared and read to them a written instruction, doing so in the absence of appellant, who was confined in the county jail. Then, after having observed appellant's absence, he recalled the jury and read the identical instruction which he had given during appellant's absence. The giving of an instruction in appellant's absence constituted prejudicial error, which was not cured by the subsequent proceedings. Section 2145, Rem. & Bal. Code, provides that: "No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial." The instruction given constituted a portion of the proceedings of the trial. In *Linbeck v. State*, 1 Wash. 338, 25 Pac. 452, the trial court, upon the request of the jury and in the defendant's absence, repeated certain instructions which he had theretofore given, and orally explained their meaning. This court held that the error thus committed was not cured by the fact that the defendant's attorney was present and made no objection. Respondent contends that the error, if any, was not prejudicial, in that it was cured by recalling the jury and repeating the same instruction in the appellant's presence. Appellant does not personally know that the instruction given in his presence was the identical one given in his absence, and he cannot be compelled to accept the certificate of the trial judge as to what transpired at the trial during his absence. In *State v. Wroth*, 15 Wash. 621, 47 Pac. 106, this court said: "The law does not subject parties litigant to the disadvantage of being required to accept the statement of even the judge as to what occurs between himself and the jury at a place where the judge has no right to be, and where litigants cannot be required to attend. It is the lawful right of a party to have his cause tried in open court, with opportunity to be present and heard in respect to everything transacted. It is his right to be present and attended by counsel whenever it is found necessary or desirable for the court to communicate with the jury, and he is not required to depend upon the memory or sense of fairness of the judge as to what occurs between the judge and jury at any time or place, when he has no lawful right to be present.

His right in this respect goes to the very substance of trial by jury."

The judgment is reversed, and the cause is remanded for a new trial.

PARKER, MOUNT, and MORRIS, JJ.,
concur.

OSBORNE, TREMPER & CO., Inc., v. KING
COUNTY.

(Supreme Court of Washington. Nov. 1, 1913.)

1. COUNTIES (§ 122*)—FISCAL MANAGEMENT.

If the officers of a quasi municipal corporation, such as a county, have power to make a contract for services or property and to agree to pay therefor in some manner, the county is not excused from payment because the contract provides for payment in an illegal manner or from a fund not applicable to such a debt but must pay the obligation in some manner.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 82, 136, 181, 182; Dec. Dig. § 122.*]

2. COUNTIES (§ 124*)—FISCAL MANAGEMENT—
VALIDITY OF CONTRACTS.

Where the officers contracting for the payment of money by a municipal or quasi municipal corporation do not have legal authority to make the contract, it is void and unenforceable.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. § 124.*]

3. COUNTIES (§ 124*)—CONTRACTS—ESTOPPEL
TO DENY—WANT OF POWER.

If the officers of a quasi municipal corporation do not have power to make a particular contract binding upon the municipality, it will not be estopped to defeat payment under the contract by accepting benefits thereunder.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. § 124.*]

4. COUNTIES (§ 124*)—CONTRACTS—CANAL IMPROVEMENTS—POWER OF COUNTY COMMISSIONERS.

Acts 1907, c. 236, § 1 (Rem. & Bal. Code, § 8148), authorizes every county "whenever the government of the United States is intending or proposing the construction or operation of any river, lake, canal," etc., partly within the county, and the board of county commissioners shall adjudge upon the petition of certain qualified freeholders that it is for the public welfare that the canal be completed, to establish an assessment district and levy an assessment upon specially benefited realty to pay the expenses of the improvement. *Held*, that the board of county commissioners had no power to entertain a petition to create an assessment district for constructing a canal in absence of an act of Congress, referred to in the order establishing the district, which showed the intention of the United States to construct a canal, and, in the absence of such declared intention, all the proceedings were void, so that an agreement by the county river and harbor improvement commission to pay for making an assessment roll out of the assessment was void and unenforceable against the county out of any fund.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. § 124.*]

5. COUNTIES (§ 124*)—RATIFICATION — VOID CONTRACT.

If a contract by a county river and harbor improvement commission to pay for pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

curing an assessment roll to be used in assessing property in a canal improvement district was void because the commissioners did not have power to create the improvement district before the federal government, through an act of Congress, declared its intention to construct a canal, as required by Acts 1907, c. 236, § 1 (Rem. & Bal. Code, § 8148), the contract could not be ratified and was not revived by subsequent acts of Congress declaring such intention.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. § 124.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Osborne, Tremper & Co., Incorporated, against King County. From a judgment for defendant, plaintiff appeals. Affirmed.

Corwin S. Shank and Horatio C. Belt, both of Seattle, for appellant. John F. Murphy and Robt. H. Evans, both of Seattle, for respondent.

ELLIS, J. This action was brought by the plaintiff against King county to recover the sum of \$22,495.30, with interest from February 8, 1908, for services performed under a contract with the river and harbor improvement commission of King county, the history of which is as follows: In May, 1907, a large number of property holders of King county filed a petition with the board of county commissioners of that county, pursuant to the provisions of chapter 236, Session Laws of 1907 (Rem. & Bal. Code, § 8148 et seq.), asking for the appointment of a river and harbor improvement commission. On June 18, 1907, the county commissioners, by an ex parte adjudication, found that the United States was intending and proposing to construct the Lake Washington canal, and that it would be for the general welfare of the people of King county to construct the canal, and ordered that an assessment be levied for the purpose. Accordingly, June 19th the board made application to Hon. C. H. Hanford, judge of the United States District Court, for the appointment of a "river and harbor improvement commission." Thereupon Judge Hanford appointed 11 men to constitute such commission. On August 7, 1907, the first contract was entered into between the commission and the plaintiff. That contract was superseded by another of September 25, 1907, in which, in consideration of the promise of \$1,000 additional compensation, the plaintiff agreed to the substitution. This substituted contract is the basis of the present action. The river and harbor commission is therein designated as the first party and the plaintiff as the second party. The provisions, so far as material to this inquiry, are as follows:

"The second party will make and deliver to the first party a correct list, together with a duplicate list of descriptions of all pieces and parcels of real property within the limits

of the assessment district to be created by first party, and of the reputed owners and the assessed valuations, respectively, of each such piece or parcel, at ten (10) cents per description, payment to be made from the assessment fund hereinafter mentioned, when the same shall become available.

"The assessment fund intended in the foregoing stipulation is the assessment fund to be raised by an assessment upon the pieces and parcels of real property in said assessment district, under the provisions of the act of the Legislature of the state of Washington in such case made and provided."

The plaintiff, pursuant to this contract, prepared an assessment roll comprising 214,953 descriptions, which roll was deposited with the county commissioners by the improvement commission on May 27, 1908. On the next day the board of county commissioners entered on their minutes an acceptance of the roll. On September 28, 1908, the county commissioners passed resolutions rescinding all of their former acts in reference to the appointment of the commission and refusing to act as a board of equalization on the rolls; the resolutions being as follows:

"Be it resolved by the board of county commissioners of King county that the action of said board taken at a meeting held on the 24th day of June, 1907, wherein and whereby said board, on an ex parte hearing, made a finding that the government of the United States was intending and proposing the construction and operation of a canal connecting the waters of Puget Sound with Lake Washington, be, and the same is, hereby revoked and rescinded, said board, upon sufficient proof, being now of the opinion, and having been advised, that there is no record in the acts of Congress of a declaration of such intention on the part of the United States government."

"Be it resolved by the board of county commissioners of King county that it refuses and it hereby does refuse to sit as a board of equalization upon the assessment roll presented to it by the river and harbor improvement commission of King county, on the ground and for the reason that said board has no authority in law to equalize said roll, and that the law of 1907, in regard to the creation of said board of equalization, is unconstitutional and void."

On appeal from a judgment in mandamus requiring the county commissioners to equalize the roll and levy the assessment, this court found that the appointment of the river and harbor commission was premature, holding that the county commissioners were therefore without authority, under the act of 1907, to create an assessment district or to levy special assessments in aid of the construction of the canal, because the United States government had then declared no intention to construct or operate the canal. State ex

rel. *Burke v. Board of County Commissioners*, 58 Wash. 511, 109 Pac. 350. Nothing further has ever been done toward the creation of a district or the levying of an assessment for the purpose of aiding in the construction of the canal, and there is no fund such as that specified in the contract available for the purpose of paying the plaintiff for its work in preparing the assessment rolls. These rolls have remained in the possession of the county commissioners but have never been used for any purpose. On August 30, 1911, the plaintiff presented a claim against the defendant for the amount claimed on the contract, which was rejected by the county commissioners. There is no serious dispute on these facts or the further fact that subsequent to the appointment of the river and harbor commission, and subsequent to the letting of the contract and making of the rolls, certain acts of Congress have been passed indicating an intention of the general government to build the canal. It is admitted that one member of the river and harbor improvement commission was a stockholder, trustee, and officer of the plaintiff company, but the evidence shows that he called the attention of the other members of the commission to that fact and refused to take part in the discussion when the matter of letting the contract was under consideration and refused to vote or take part in the proceedings leading to the award of the contract to the plaintiff. It is also admitted that the county commissioners, after receiving the roll, sent out notices of a hearing thereon and spent from the general funds of the county something over \$5,750 in clerk hire, postage, printing, and the like, preparatory to the equalization of the rolls, before revoking their former action and finally refusing to proceed with the assessment.

The cause was tried to the court, which made findings of fact in substance as follows: That on June 12, 1907, 100 or more freeholders of King county, possessing property of the necessary amount and valuation, filed a petition with the county commissioners, praying for the appointment of a river and harbor improvement commission; that the county commissioners requested Judge Hanford of the United States District Court to appoint such a commission, which he did; that the commission so appointed signed the first contract with the plaintiff and on September 25th entered into the substituted contract; that the plaintiff, in accordance with that contract, prepared the assessment rolls, consisting of 214,953 separate descriptions of property to be included within the assessment district, and on May 9, 1908, the roll was presented to the board of county commissioners and left in its possession; that the board never approved the contract with the plaintiff nor authorized the commission to enter into it and had no knowledge of

the same until the roll was deposited with, and placed in the possession of, the board; that by the terms of the contract the plaintiff was to receive its pay "from the assessment fund hereinafter mentioned when same shall become available"; that by the express provisions of the contract "the assessment fund intended in the foregoing stipulation is the assessment fund to be raised by an assessment upon the pieces and parcels of real property in said assessment district, under the provisions of the act of the Legislature of the state of Washington in such cases made and provided for"; that the plaintiff was to receive 10 cents a description and \$1,000 for its consent to the modification of the first contract; that the commission has never since that time acted, but thereafter dissolved, and that the project of creating the assessment district has been abandoned by the county; that no attempt has been made since the resolution of the county commissioners refusing to act as a board of equalization to equalize the roll or do anything toward creating the district or building the canal; that such roll has remained since that time in the custody of the county and has never been used by, or been of any benefit to, the county; that the plaintiff has never attempted to recover the roll from the board or sought to compel the board to equalize the roll or collect any money upon the property; and that there is no money in the fund referred to in the contracts. The court expressly declined to make findings as to whether or not the government was intending to construct the canal but left that question for the decision by this court in case of an appeal.

From these findings the court made conclusions of law as follows: "That owing to the provisions of the contract of September 25, 1907, * * * the plaintiff is entitled to receive its pay out of the special fund levied and collected from an assessment upon the property specially benefited and included within said assessment district; that the plaintiff is not entitled to recover a general judgment against King county for the work done." The court expressly declined to enter any conclusions of law as to whether or not the defendant established a defense based upon the contention that at the time the petition was filed the government was not intending to construct the canal and that the proceedings were therefore void ab initio. Upon these findings and conclusions the court adjudged that the plaintiff was not entitled to any recovery and that the defendant recover its costs. From that judgment the plaintiff prosecutes this appeal.

The facts being practically conceded, the case presents three questions of law, the answer to some or all of which must be determinative of the rights of the parties. (1) Can the appellant, having contracted to take its pay out of the special assessment fund, maintain an action against King county for

a judgment payable out of its general fund? (2) Did the act of 1907 authorize the appointment of a river and harbor improvement commission until Congress had signified its intention to construct the canal, and, if not, was the contract void ab initio in all of its parts? (3) Was the contract, in any event, void as against public policy because a member of the commission was a stockholder, trustee, and officer of the appellant company at the time the contract was made?

1. The appellant contends that under the act of 1907 (Rem. & Bal. Code, § 8148 et seq.) the expenses to be incurred in establishing the improvement district and in levying the assessment are made payable only out of the general fund of the county; that the contract, in so far as it provided for payment out of the assessment fund, was founded on a mutual mistake of the parties as to the legal source of payment; and that, notwithstanding the stipulation for payment from a special fund, payment from the fund legally applicable can be enforced. It is obvious that this contention can only be sustained upon an initial assumption that the contract was valid and within the power of the county, through its authorized agents, to make. Even assuming that the act of 1907 can be construed as requiring the payment of the initial expense looking to the formation of the district and levying of the assessment out of the general fund alone, the appellant's position would be sound only if the county commissioners, at the time of making the contract, possessed the power and authority to form a district and levy an assessment to pay for the canal.

[1] No case cited by the appellant goes further than to hold that, where there exists full power and authority on the part of the officers or agents of a municipal or quasi municipal corporation to make a contract for services or property and to agree to pay therefor in some manner or out of some fund, payment is not excused because of a stipulation in the contract to accept payment in an illegal manner or from a fund not legally applicable to payment for such services or property as contemplated by the contract. In such a case, there being the initial power to make a valid contract, the contract, when made, raises an obligation to pay in some manner or from some fund. In *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 656, the plaintiff agreed to construct certain sidewalks for the defendant and take its pay in "Galveston city bonds for sidewalk improvement, at par." It developed that the city could not legally issue such bonds, and it thereupon sought to cancel the contract and avoid payment for the work. The court held that, inasmuch as the city had power to make the improvement and to contract for its construction, the fact that the contractor agreed to take bonds which the city had no power to issue in payment did not defeat the

contract nor relieve the city from its obligation to pay. The court said (see opinion, 96 U. S. 350, 24 L. Ed. 656): "They [the contractors] are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law." The other cases cited by the appellant to this point all rest upon this same principle that, where the power to make the contract and bind the city to pay from some fund existed, it cannot escape payment by reason of a stipulation to pay out of a fund not legally applicable. *Barber Asphalt Paving Co. v. Harrisburg*, 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401; *Miller v. Milwaukee*, 14 Wis. 642; *Bucroft v. Council Bluffs*, 63 Iowa, 646, 19 N. W. 807; *Louisville v. Bitzer*, 115 Ky. 359, 73 S. W. 1115, 61 L. R. A. 434. The distinction is clearly recognized in *Barber Asphalt Paving Co. v. Harrisburg*, supra, by reference to the case of *Saxton v. St. Joseph*, 60 Mo. 153, which, it is said, "rests on the city's want of power to contract as it did." An examination of the *Saxton Case* shows that it was there held that the city could not be made liable on a contract entered into by its council; the charter only authorizing contracts to be made by its mayor and council. It is also held that the contractor must be held to know the law and was chargeable with knowledge of the lack of the council's power to make the contract, hence could not recover for the work.

[2] It is a general rule that, where the officers making a contract for a municipality or quasi municipality have not the power or legal authority to make the contract at all or to stipulate for payment out of any fund, the contract is void for lack of the initial power to make it, and payment cannot be enforced. This court has repeatedly so held. *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Chehalis County v. Hutcheson*, 21 Wash. 82, 57 Pac. 341, 75 Am. St. Rep. 818; *State v. City of Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836; *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601; *State v. Town of Monroe*, 40 Wash. 545, 82 Pac. 888; *Turner Investment Co. v. Seattle*, 70 Wash. 201, 126 Pac. 426, 41 L. R. A. (N. S.) 781; *State v. Town of Newport*, 70 Wash. 286, 126 Pac. 637.

[3] These authorities clearly establish the

rule in this state that, where there is a want of power to make a contract or a want of power on the part of the body of officers making the contract to bind the municipality, there can be no estoppel against the municipality to defeat payment by reason of accepting the benefit conferred by the contract.

"The appellant also contends that the town, having received the benefit of the contract, should be estopped to deny liability thereon. After a careful examination of the authorities, we held, in the case of *Turner Inv. Co. v. Seattle*, 70 Wash. 201, 126 Pac. 426 [41 L. R. A. (N. S.) 781], that there could be no estoppel to deny liability where there was an absolute want of power to make the contract, and that the municipality could only be estopped to raise the defense of ultra vires where the officers had acted within their powers but had exercised these powers in an illegal way." *State v. Newport*, 70 Wash. 286, 292, 126 Pac. 637, 640.

"It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified." *State v. City of Pullman*, 23 Wash. 583, 586, 63 Pac. 265, 266 (83 Am. St. Rep. 836).

[4] 2. Addressing ourselves to the second question, it is at once manifest that, if there existed any power to make the contract in question, it must be traceable to the power to levy the assessment and to form an assessment district and, as incidental thereto, to the power to initiate the appointment of the river and harbor improvement commission under the act of 1907. That act, so far as here material, reads as follows: "Every county in this state is hereby authorized and empowered, by and through its county commissioners, whenever the government of the United States is intending or proposing the construction or operation of any river, lake, canal or harbor improvement, partly or wholly within such county, and whenever said board of county commissioners shall adjudge, upon a petition therefor filed with it and signed by at least one hundred (100) freeholders of said county, who each own realty of the assessed valuation of not less than five thousand dollars, situated within the limits of the improvement district sought to be created, that it is for the general benefit and welfare of the people of the county, that such river, lake, canal or harbor improvement be made and completed to define and establish an assessment district within such county and to levy an assessment upon so much of the taxable real estate of such county as shall be specially benefited by such

improvement as hereinafter provided, for the purpose of paying the expenses of such improvement, or so much thereof, as said board of county commissioners shall determine, not in any instance exceeding one per cent. of the taxable valuations of all real and personal property in the entire county as appearing on the then last assessment roll. Such improvement shall be known as river and harbor improvement." Rem. & Bal. Code, § 8148.

A reading of this section makes it plain that the jurisdiction of the county commissioners to entertain the petition and to make any finding is, by the act itself, made dependent upon an antecedent intention or purpose on the part of the government of the United States to construct the canal. Such an antecedent intention or purpose could only be known through and by an act of Congress. It is plain, therefore, that the board of county commissioners had no power to create a jurisdiction in themselves, which could not exist in the absence of some congressional action, by a mere finding that such an intention existed. The statute here in question confers no such power and in fact does not apparently contemplate any such finding on their part. The recital or reference to some such specific act of Congress was therefore necessary to the validity of their order looking to the formation of an assessment district or to any effective force in their finding that the construction of the canal would be for the benefit of the people of the county. In *State ex rel. Burke v. Board of County Commissioners*, 58 Wash. 511, 109 Pac. 350, this court, after an exhaustive review of all of the acts of Congress and of the Legislature of this state upon the subject antecedent to the act here in question, and up to the action of the county commissioners of September 28, 1908, rescinding their former action, held as follows: "In all this legislation we fail to find any act or declaration by the national government which discloses any intention or proposal on the part of the government to construct or operate this canal now, or within a reasonable time in the future, or at all"—concluding that: "It is manifest from the record that the people of King county have expended much money upon the enterprise and have earnestly labored to induce the government to undertake the work; but it is also apparent from the acts of Congress above referred to that, while the government has placed no obstacle in the way of the work by King county or private citizens, it has manifested no intention to construct or operate the canal within a reasonable time. The county commissioners were therefore without authority under the act of 1907 to create the assessment district or to levy a special assessment in aid of the canal."

The appellant claims that the "Burke Case" does not touch the point as to the authority

of the county commissioners to incur the expense incident to the creation of such an assessment district." With this claim we cannot agree. It is clear that, if the board of county commissioners had no authority to create the district, it had no authority to incur any expense incident to the creation of the district. The whole includes all of its parts. If the assessment had proceeded, it is obvious that the persons whose property was included in the roll could have raised this objection to the roll, and it seems equally clear that the county, on behalf of its taxpayers, can raise the same objection of lack of authority as to the expense of making the roll. This is certainly true, wanting an estoppel, which as we have seen, in the absence of the initial authority, cannot be invoked. It is clear that our holding in the Burke Case establishes the fact that the appointment of the river and harbor improvement commission and all steps looking to the formation of the assessment district and the making of an assessment roll were premature and void ab initio.

It is true that, subsequent to the decision in the Burke Case, this court, in the case of Bilger v. State, 63 Wash. 457, 116 Pac. 19, held the act of 1907 constitutional, but it did not overrule nor modify the former decision nor intimate that, at the time of the former decision, any such intention or purpose to construct the canal had been evinced by the general government as would then have rendered the act of 1907 operative as authority to the county commissioners to proceed thereunder. On the contrary, the following language from the opinion in the Bilger Case is a clear intimation that, but for acts of Congress subsequent to the Burke decision, the decision in the Bilger Case would have been ruled by the former holding: "Again it is said that the United States has never undertaken to construct the canal, and that this court so held in *State ex rel. Burke v. Board of Com'rs*, 58 Wash. 511, 109 Pac. 350. In the case cited we did say that there was no sufficient evidence of any intention or proposal on the part of the government to construct or operate the canal, but that was said prior to the act of the second session of the Sixty-First Congress, which appropriated \$150,000 for that purpose and made available for the same purpose some \$2,124,000 more. This latter act set all doubts on the question at rest, and there can no longer be any question as to the intent and purpose of the government."

The case before us is just as clearly controlled by the facts existing at the time the proceedings were instituted and the contract made and performed by the appellant as was the Burke Case. If the appellant ever acquired any legal rights under this contract, they accrued immediately on the making and performance by it of the contract.

[5] If the contract was void for lack of

power or legal authority to make it when made, it is void now, since it was not and could not be ratified. It is certain that the subsequent acts of Congress could not and did not operate as curative acts, breathing life into a contract void when made.

The appellant contends that, by the act of 1907, the board of county commissioners became a tribunal empowered to exercise an independent judgment, and that, when it found that the general government was intending and proposing to build the canal, that finding became a quasi judicial determination, conclusive of the fact, upon which the appellant had the right to rely. Two cases are cited which, it is claimed, support this contention. In the case of Commissioners of Douglas County v. Bolles, 94 U. S. 104, 24 L. Ed. 46, the right of recovery by bona fide holders of negotiable bonds issued by the county in aid of the construction of a railroad was involved. It was there held that the recital by the board in the bonds that authority had been granted to the board to issue the bonds by a vote of the electors was conclusive as in favor of a bona fide holder for value. A similar question was involved in the other cases cited (*Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579), and the decision was the same way. Both of these cases are rested squarely upon the rights of bona fide holders for value of negotiable bonds. The gist of each decision was that the recitals in the bonds were a sufficient protection to such bona fide holders. No such element is found in the contract here. No rights of bona fide holders for value are involved.

3. We find it unnecessary to enter into any lengthy discussion of the question whether the contract is void as against public policy because of the interest therein, as stockholder, trustee, and officer of the appellant company, of one of the members of the river and harbor improvement commission. The following decisions of this state strongly support that view: *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204; *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272, 28 L. R. A. (N. S.) 735; *Miller v. Sullivan*, 32 Wash. 115, 72 Pac. 1022; *Gladwin v. Cheney*, 67 Wash. 151, 121 Pac. 48; *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374. While these cases arose upon statutes applicable to cities and towns, expressly prohibiting and avoiding contracts in which any officer of the municipality shall be interested directly or indirectly, such statutes are but declaratory of the common law, and the same considerations of public policy which underlie the statutes would seem to apply to all public officers. 2 Dillon, *Municipal Corporations* (5th Ed.) § 773; *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772. We prefer, however, to rest our decision upon the broad ground that the proceedings looking to the formation of the district and leading to the appointment

of the river and harbor improvement commission were premature and void ab initio, and that the contract was made without legal authority and conferred no rights enforceable against any fund, and that, by reason of the lack of any initial power to make the contract, it could not be ratified.

The judgment is affirmed.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

STATE ex rel. GRANT REALTY CO. et al.
v. SUPERIOR COURT OF GRANT
COUNTY et al.

(Supreme Court of Washington. Nov. 7, 1913.)

1. PROHIBITION (§ 10*)—GROUNDS.

In a proceeding to condemn lands at the outlet of a lake on which to build a dam to raise the lake level so as to store the water for irrigation, judgment of condemnation was entered, and a date set to try the question of damages. Prior to that time third parties were permitted to come in, who applied for leave to file an answer alleging rights to the use of the lake waters prior to that of the condemning corporation, which rights had not been adjudicated, and also abandonment and forfeiture by the corporation of its rights, and praying that the judgment of condemnation be set aside and the question retried as against them. Leave to file the answer was denied. *Held*, that the question whether the court would retry the issue of the corporation's right to condemn, or would leave the interveners to try their rights in an independent proceeding, was not outside or in excess of the court's jurisdiction, and hence prohibition would not lie to prevent proceeding to try the issue of damages.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

2. CERTIORARI (§ 16*)—DECISIONS REVIEWABLE—INTERLOCUTORY JUDGMENT.

An order denying an application by intervening parties for leave to file an answer after entry of judgment of condemnation, and ordering the cause to proceed to try the question of damages actually before it, was an intermediate and interlocutory order, reviewable, if at all, only after the final judgment in the cause was entered, so that a writ of review would not lie.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 31, 32; Dec. Dig. § 16.*]

3. JUDGMENT (§ 736*)—RES JUDICATA—MATTERS CONCLUDED.

An order, entered in a proceeding to condemn land for a dam at the outlet of a lake, refusing to permit interveners to file an answer setting up superior rights to the use of the water, and praying that the judgment of condemnation be set aside and their rights adjudicated, was not res judicata as to their rights, where the merits of that question were not attempted to be passed on, but merely amounted to a dismissal without prejudice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.*]

Department 2. Original application for a writ of prohibition, and in the alternative for a writ of review, by the State of Washington, on the relation of the Grant Realty Company and another, against the Superior Court of Grant County, Wash., and R. S. Steiner, Judge thereof. Application for writ denied.

Cannon, Ferris & Swan, of Spokane, R. B. Williamson, of North Yakima, and P. W. Kimball, of Spokane, for relators. Voorhees & Canfield, of Spokane, for respondent.

FULLERTON, J. This is an original application for a writ of prohibition, and in the alternative for a writ of review.

On October 7, 1910, Ham, Yearsley & Ryrie, a corporation, instituted eminent domain proceedings against the Northern Pacific Railway Company, a corporation, Arthur L. Pettigrew, F. S. Pettigrew, R. F. Pettigrew, and Bessie Pettigrew, his wife, "and all unknown owners and all persons unknown having or claiming an interest or estate in the lands affected by the action," to condemn certain lands at the outlet to Moses Lake, in Grant county, averring in its petition that the land was to be used for the purpose of constructing a dam across the outlet to such lake, and "thereby to raise the height of the water to said Moses Lake, and to convert the said Moses Lake, which is now a large navigable body of water, into a storage reservoir" for water to be used in irrigating certain of its arid lands. The defendants served with process in the proceedings were those individually named in the petition. These appeared and put in issue the allegations of the petition, and a trial on the issues made resulted in a judgment in the superior court denying the right of the petitioners to condemn. A review of the proceedings was taken to this court, where the judgment of the superior court was reversed, with directions to enter an order of condemnation for the land necessary to be taken for the dam site, and to proceed to ascertain the damages to be awarded to owners of the land for such taking in the manner provided by law. State ex rel. Ham, Yearsley, etc., v. Superior Court, 70 Wash. 442, 126 Pac. 945.

On the going down of the remittitur from this court the petitioners caused an order of condemnation to be entered, and caused the proceeding on the question of damages to be set for trial for October 21, 1913. Some days prior to the day fixed for the trial the original defendants moved that they be dismissed from the proceeding, and that the relators in the proceeding now before us be substituted in their stead, on the ground that such relators had, pending the first proceedings, become possessed of all of the rights of the original defendants therein, and with other rights not adjudicated in the first proceeding, and were then the sole parties in interest. The court denied the motion to dismiss and for substitution, but permitted the relators to appeal in the action for the purpose of participating in the trial of the question of damages.

The relators thereupon tendered an answer in the proceedings, supported by affidavits, in which it was alleged that the present re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

lator F. H. Nagel had acquired by mesne conveyances from the Northern Pacific Railway Company, and the other defendants by mesne conveyances, all their right, title, and interest to the land sought to be condemned, in trust, however, for other persons; that he, in his trust capacity, and the other present relators are possessed of the sole right to the use of the waters of Moses Lake, which such right was acquired by purchase and appropriation prior in point of time to the purported appropriation of Ham, Yearsley & Ryrie, and which had been perfected and completed by actual storage of the waters, and by diversion and use of the same upon lands owned by them abutting upon and adjacent to such lake; and that their rights to use of such waters had not been adjudicated in the proceedings leading up to the order of condemnation. They further alleged abandonment of the project by Ham, Yearsley & Ryrie, after their purported appropriation, delay, such as to work a forfeiture of any rights that corporation may have acquired by its attempted appropriation, and further facts, all tending to show a want of right in the corporation, Ham, Yearsley & Ryrie, to condemn the land described in the petition. They prayed that the order of the court setting the case for trial on the question of damages be abated; that the court set aside the order of condemnation theretofore entered; and that the question of the right to condemn be tried as against the claims and rights of the answering relators. The court denied the application to file the answer, and ordered that cause proceed to trial on the original order. The relators thereupon applied to this court for the writs before mentioned.

[1] The questions presented by the record do not in our judgment require an extended discussion. The writ of prohibition, it must be remembered, arrests the proceedings of a court of record only when such court is acting without or in excess of its jurisdiction, and there is no plain, speedy, and adequate remedy at law. Rem. & Bal. Code, §§ 1027, 1028. It will not restrain the erroneous exercise of acknowledged jurisdiction. Here there was no question of the jurisdiction of the court to make the order it did make. Whether it would in this proceeding set aside its former order of condemnation and try anew that question, or whether it would relegate the parties to a separate and independent action to try the question and proceed with the trial of the question of damages actually before it, were matters wholly within its jurisdiction to determine, and prohibition will not lie to control its action, whether it acted erroneously or otherwise. *State ex rel. Foster v. Superior Court*, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690; *State ex rel. Griffith v. Superior Court*, 71 Wash. 386, 128 Pac. 644.

[2] Nor will the writ of review lie at the present stage of the proceedings. The order made was intermediate and interlocutory, and, if it is subject to review at all, a question we do not now determine, it can only be reviewed after the final judgment in the cause is entered.

[3] Some question was made at the argument as to the conclusiveness of the order of the court denying the relators the right to try in this proceeding their claim of superior title to the waters of the lake; it being feared apparently that the order had the effect of *res judicata* as to these claims of superior right. But it is clear that the order cannot have such an effect. The merits of the claims have not been determined, and the effect of the order of the court was a dismissal without prejudice.

The application for the writ is denied.

OROW, C. J., and PARKER and MORRIS, JJ., concur.

GROTE-RANKIN CO. v. BROWNELL et al.
(Supreme Court of Washington. Nov. 3, 1913.)

1. REPLEVIN (§ 65*) — SCOPE OF ACTION — PLEADINGS—CROSS-COMPLAINT.

Where, in replevin for property, conditionally sold, from the buyer's transferees, the buyer and her husband appeared in the action by answer and by cross-complaint, which the transferees answered, claiming a right to recover over against the buyer, the court in that action had jurisdiction to determine the issues raised as between the buyer and the transferees as framed by their pleadings, notwithstanding they were not germane to the original issue in replevin.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 242; Dec. Dig. § 65.*]

2. HUSBAND AND WIFE (§ 270*)—COMMUNITY PROPERTY — JUDGMENT AGAINST COMMUNITY.

Where a wife conducted a hotel, having full power of attorney from her husband to do so and to sell and dispose of the business, and in making a sale, including furniture purchased under a conditional sale, the transferees acquired a right to recover an amount due to the conditional sellers which they had not agreed to pay, they were entitled to judgment over against both husband and wife, enforceable against the community.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 968-971, 973-984, 988; Dec. Dig. § 270.*]

Department 2. Appeal from Superior Court, King County; O. B. Thorgrimson, Judge, Pro Tem.

Action by the Grote-Rankin Company against D. C. Brownell and others. From a judgment for plaintiff, defendants Brownell, and Winter, and Gertrude Corlew appeal. Judgment for plaintiff against Brownell and Winter affirmed, and judgment in favor of such defendants over against Gertrude Corlew modified so as to authorize judgment against her and her husband, Thomas D. Corlew.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—10

Jerold Landon Finch, of Seattle, for appellants. Wm. Martin and Julius L. Baldwin, both of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover the possession of certain personal property, or, in lieu thereof, a money judgment. The cause was tried to the court without a jury. The facts as found by the trial court, so far as necessary to an understanding of the questions here presented, are substantially as follows: On October 12, 1908, Gertrude Corlew, by contract of conditional sale, purchased from the plaintiff certain furniture and other hotel furnishings. Subsequent to this, other furniture was sold to Mrs. Corlew which was not covered by the conditional sale contract. But one account was kept by the plaintiff, and there was charged thereon both the items which were covered by the contract of conditional sale and those which were subsequently sold upon open account. Mrs. Corlew remained in possession of the property, and made various payments, which, aside from the initial payment made upon the property purchased under the contract of conditional sale, were applied first by the plaintiff on the amounts due on the open account. The last payment made by Mrs. Corlew was on or about the 28th day of May, 1909. Some time early in the month of July, 1909, Mrs. Corlew sold all her right, title, and interest in and to the furniture which she had purchased from the plaintiff to the defendants Brownell and Winter. Under the terms of this sale Brownell and Winter assumed and agreed to pay the plaintiff the balance due from Mrs. Corlew. Subsequent thereto, they took possession of the Hotel Corlew and all of the furniture, and remained in possession until the time of trial. Brownell and Winter made various payments to the plaintiff; but there remained due and unpaid on the conditional sale contract the sum of \$539.93, together with interest from the first day of June, 1910. The time for the payment of the balance due the plaintiff under the contract expired prior to the commencement of the action, and Brownell and Winter refused to make further or additional payment. Prior to the commencement of the action, demand was made upon Brownell and Winter for the possession of the property. At the time of the transfer of the hotel by Mrs. Corlew to Brownell and Winter there was an unpaid interest balance due Grote-Rankin Company in the sum of \$118.54; but Brownell and Winter were not aware of this interest being due under the agreement between them and Mrs. Corlew. They did not agree to pay this sum. Subsequently, however, they did make the payment under protest. There was due, therefore, from Mrs. Corlew to Brownell and Winter the sum of \$118.54, together with interest. The court entered judgment in favor of the plaintiff, and against the defendants Brownell and Winter

for the return of certain property which was specified in the judgment, and in the event that the property was not returned that then the plaintiffs have judgment in the sum of \$539.93, together with interest. Judgment was also entered in favor of Brownell and Winter, and against Mrs. Corlew for the sum of \$118.54, together with interest at the legal rate from July 9, 1909. Both Brownell and Winter and Mrs. Corlew appeal.

Brownell and Winter complain of the judgment entered against them for the reason, as they contend, that they only assumed the balance due on the conditional sale contract, and that the payments which had been made from time to time had been credited upon this account, and it was fully liquidated. The plaintiffs claim that as payments were made from time to time they were credited first upon the open account, and that the balance due was upon the conditional sale contract. The conditional sale contract provided that "any payment made by the vendee may be applied upon any debt due the vendor as the vendor may see fit." The trial court found that Brownell and Winter assumed and agreed to pay the plaintiff the balance due at the time of the purchase from Mrs. Corlew, and that there remained due and unpaid on the conditional sale contract the sum of \$539.93, together with interest. Whether Brownell and Winter when they purchased from Mrs. Corlew agreed to pay the entire balance of her account, or only agreed to pay the balance due upon the conditional sale contract, is a question of fact. Also, it is a question of fact whether the payments made to Grote-Rankin Company from time to time were credited first against the charges made for goods sold upon open account. Upon these questions the trial court found against Brownell and Winter. From an examination of the record we are unable to say that this finding is not sustained by the fair preponderance of the evidence.

[1] The Corlews complain because they were not dismissed out of the action, contending that, it being an action in replevin, the court was without power to adjudicate any question arising between them and another defendant. Gertrude Corlew and her husband, Thomas D. Corlew, appeared in the action by answer and cross-complaint. The defendants Brownell and Winter filed an answer and cross-complaint to the cross-complaint of the Corlews. It will therefore be seen that not only the subject-matter but also the parties were before the court. The judgment rendered against Mrs. Corlew was within the scope of the issues as framed by the pleadings. To at this time direct that the action as to the Corlews be dismissed would simply mean the sending of the parties out of court in order that they again return to have their rights litigated. It does not appear that in determining the matter in this proceeding any of the parties have been prejudiced. Where the

parties and the subject-matter are both before the court, judgment may be entered which gives relief consistent with the case made by the pleadings. As was said by the court in *Standard Furniture Co. v. Burrows*, 59 Wash. 455, 110 Pac. 13: "Again, under the ordinary rules of pleading, where there is an answer to the complaint and issues joined, the court has jurisdiction to enter any judgment and give any relief consistent with the case made by the pleadings."

It is also contended by Mrs. Corlew that Brownell and Winter assumed and agreed to pay the entire balance which she owed at the time of the transaction to Grote-Rankin Company. Upon this question the evidence is inharmonious; but we think the weight of the evidence sustains the conclusion of the trial court.

[2] Finally, it is contended by Brownell and Winter that their judgment should have been against both of the Corlews rather than against Mrs. Corlew only. Brownell and Winter, in paragraph 4 of their cross-complaint, allege that Gertrude Corlew was conducting the hotel in question under the name of Hotel Corlew, and had full power of attorney for her husband so to do and to sell and dispose of the business. In the answer and reply of the Corlews to this cross-complaint the allegation of paragraph 4 appears to be admitted. The Corlews, in their brief, substantially admit that the fact that the judgment was rendered against Mrs. Corlew instead of against herself and husband was an inadvertence. It would seem plain that this judgment should have been against the community composed of Mr. and Mrs. Corlew.

The judgment in favor of the plaintiff and against Brownell and Winter will be affirmed. As to the judgment in favor of Brownell and Winter and against Mrs. Corlew, the superior court will be directed to enter a judgment in accordance with the views herein indicated. The respondents will recover costs in this court against the appellants. No other costs will be allowed.

CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

STATE ex rel. KEASAL v. SUPERIOR COURT OF PIERCE COUNTY et al.

(Supreme Court of Washington. Nov. 1, 1913.)

1. CERTIORARI (§ 5*)—RIGHT TO WRIT—OTHER REMEDY—APPEAL.

Where the superior court sitting in probate refused to appoint an alleged surviving partner as administrator of the partnership assets, because the partnership was denied, and an appeal from the order could not be prosecuted and heard in time for relator, even if successful, to obtain any fruits of his victory, and it appeared that the partnership was engaged in performing an important contract that needed immediate supervision, and would, in the natural course of events, be completed before an appeal could be heard, relator did

not have an adequate remedy by appeal, and was entitled to review by certiorari.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

2. COURTS (§ 201*)—DEATH OF PARTNER—ADMINISTRATOR OF FIRM—APPOINTMENT—JURISDICTION—SURVIVING PARTNER.

Const. art. 4, § 6, and Ballinger's Ann. Codes & St. § 6355, conferring probate jurisdiction on the superior court, merely imposed jurisdiction of probate matters as an additional duty on the aggregate jurisdiction of such courts as courts of general jurisdiction, to be exercised in connection with other legal and equitable powers, and as a part of the court's general jurisdiction; and hence, on an application of an alleged surviving partner of a firm to be appointed administrator of the firm's assets, the court had jurisdiction to determine a contest as to the existence of the firm.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 86, 87; Dec. Dig. § 201.*]

3. JUDGMENT (§ 663*)—RES JUDICATA—APPEAL.

Relator applied for administration on the assets of an alleged partnership between himself and decedent, which application was denied because it was premature and for the further reason that the court could not determine the existence of the partnership on such an application when it was denied. Decedent's widow then applied for administration, which was granted, and after she had filed her inventory relator filed a second petition, alleging that he was a partner of decedent, and praying letters of administration on the partnership property. The administratrix denied the existence of the partnership, whereupon the application was denied on the ground that the court sitting in probate had no jurisdiction to determine the issue of partnership. *Held*, that the order denying relator's first application on the ground that the court could not determine the existence of the partnership, when not conceded, was a final order, affecting a substantial right, and, relator having sued out certiorari to review both orders within the time fixed for an appeal from the original one, it was not res judicata of relator's asserted right.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1174; Dec. Dig. § 663.*]

4. EXECUTORS AND ADMINISTRATORS (§ 20*)—PARTNERSHIP ASSETS—APPOINTMENT OF SURVIVING PARTNER—APPLICATION—TIME.

Rem. & Bal. Code, § 1437, requiring an application by a surviving partner for administration of the partnership assets to be made within five days from the filing of an inventory by the general administrator, was intended merely to fix a limit beyond which the application might not be made unless an extension of time was granted, and did not prohibit the making of such an application prior to the filing of the inventory.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 83-105; Dec. Dig. § 20.*]

Department 1. Certiorari by the State, on relation of F. A. Keasal, against the Superior Court of Pierce County and others. Writ granted, and determination reversed.

Walter M. Harvey, Ralph Woods, and Frank H. Kelley, all of Tacoma, for relator. Hayden, Langhorne & Metzger, of Tacoma, for respondents.

ELLIS, J. Certiorari to review the proceedings of the superior court of the state of Washington for Pierce county in the Matter

of the Estate of Nelson Bennett, Deceased. The proceedings, as disclosed by the record, were as follows: On July 23, 1913, the decedent died, as it is claimed, intestate, leaving estate within Pierce county. On petition of the widow, a special administrator was appointed, qualified by giving a bond of \$10,000, and took possession of the estate on July 25th. The petition disclosed as a part of the assets of the estate a partially performed contract with the Northern Pacific Railway Company to construct what is known as the Point Defiance tunnel in the northwestern part of the city of Tacoma, and assigned as one of the reasons for the appointment of a special administrator that the work contemplated by the contract required immediate supervision. Thereafter the widow filed her petition for appointment as administratrix of the estate. On July 30th the relator filed his petition, alleging that he was a general partner of the decedent for the construction of the tunnel under contract with the railroad company, and prayed that letters of administration of the partnership be issued to him. Both petitions were set for hearing on August 9th. By continuance the matters came on for hearing on August 13th, before Hon. Ernest M. Card, one of the judges of the superior court for Pierce county, and the widow answered the petition of the relator, denying the partnership, and filed a motion challenging the jurisdiction of the court to determine the issues raised by that petition and her answer thereto, on the grounds: First, that the relator's petition was premature, in that no inventory of the estate had been filed; and, second, that the superior court sitting in probate had no jurisdiction to determine whether or not the alleged partnership actually existed. The court sustained the motion upon both grounds. On August 13th the widow was appointed administratrix of the estate, filed her bond fixed in the sum of \$101,000, qualified, and has since acted as administratrix. On August 26th, she filed an inventory of the estate, which disclosed the tunnel contract above mentioned, and a large amount of tools, materials, and equipment used in connection therewith, as a part of the property of the estate. Within five days after the filing of this inventory, the relator filed his petition setting up the facts upon which he claimed to be a partner of the decedent in the construction of the tunnel, and prayed that letters of administration of the partnership property be issued to him as surviving partner. Citation was issued to the administratrix, and notices regularly posted. The administratrix answered, denying the material allegations of the petition, and setting up in bar to the petition a former adjudication upon the relator's first petition. To this affirmative matter the relator demurred. With her answer the administratrix filed a motion, challenging the jurisdiction of the court to hear and de-

termine the question involving the existence of the partnership on two grounds: First, because the superior court sitting in probate was without jurisdiction to determine whether, in fact, the partnership existed; second, that the court was without jurisdiction to appoint an administrator of a partnership estate except when the existence of partnership property is conceded. The matter was transferred from the probate department of the court to the department presided over by Judge Card, for the reason that he had made the original order in vacation. Upon the hearing Judge Card sustained the relator's demurrer to affirmative matter in the answer of the administratrix, and also sustained the motion of the administratrix attacking the court's jurisdiction, and entered an order dismissing the relator's petition with costs. Thereupon this court, upon petition and affidavit of the relator, granted a writ of review. The petition and affidavit for the writ, after setting forth the matters above mentioned, alleged, in substance, that the relator's right to administer the partnership estate is a valuable right; that the partnership property is of great value, not less than the sum of \$100,000; that the relator's interest therein is not less than the sum of \$25,000; that it is in jeopardy because the contract fixes September 1, 1913, as the time for its performance, and the work is now so far advanced that it would be completed with 90 days; that the contract is being performed by strangers thereto; that an appeal from the court's order would, in the ordinary course, not be heard and determined before April 1, 1914, within which time the contract would be fully performed, which time is in excess of the six months allowed by law for the administration of partnership estates, and that the relator would be deprived of the fruits of an appeal, even if successful, by reason of the delay, and that his right to administer the partnership property and supervise the performance of the contract would be lost, to his great damage and pecuniary loss, for which he would have no adequate remedy, either at law or in equity. The relator assigns as error: First, the denying of his petition filed July 30, 1913; second, the denying of his petition filed August 27, 1913, and dismissing the petition with costs. The respondents move to quash the writ on the grounds: First, that it was improvidently issued, in that the petition of the relator shows that he has an adequate remedy by appeal; second, because of lack of jurisdiction to grant the writ upon the facts stated in the petition; third, insufficiency of the petition in law to justify the issuance of the writ. The respondents also demur to the petition on the grounds: First, that the allegations therein contained do not justify the relief prayed for; second, that there is an adequate remedy by appeal. It is thus apparent that the case presents but three

questions for our consideration: (1) Would the remedy by appeal be adequate? (2) Has the superior court power, in a probate proceeding, to consider and determine the question of the existence of a partnership where the existence of the partnership is not conceded? (3) Was the denial of the first petition of the relator *res judicata* of the question here presented? We will consider these in this order.

[1] 1. The relator admits the existence of the remedy by appeal, but insists that it is inadequate to preserve the fruits of the appeal if successful. If, as a matter of fact, the contract provided that the tunnel should be completed by September 1, 1913, and if, as a matter of fact, it will be completed within 90 days from the time of the relator's application for letters, as alleged in his petition and affidavit, it is obvious that the purpose and subject-matter of the alleged partnership will have largely ceased to exist before an appeal could be prosecuted to final determination. The right to administer the partnership property is a valuable right. This is clearly recognized by the statute, which provides that where the general administrator administers the partnership property, he shall give additional bond in double the value of such property. Rem. & Bal. Code, § 1440. If there was a partnership, and if the court committed error in refusing to inquire into and determine whether, in fact, there was a partnership, it deprived the relator of a valuable right without the additional security contemplated by the statute. Moreover, the period of six months within which the statute (Rem. & Bal. Code, § 1438) contemplates partnership estates shall be settled unless extension be granted will, in all probability, expire before the final determination on appeal could be had. The relator would not only be deprived of the right to administer within that time, but also of any standing to ask for an extension of time. Manifestly, assuming a successful appeal, the fruits of the victory would be largely lost to the relator by lapse of time. In such cases we have repeatedly held that the remedy by appeal is not that adequate remedy which precludes review by the extraordinary writ.

"This adequate remedy has not been construed to be as speedy a remedy as the remedy by extraordinary writ might be, but a remedy which preserves the fruits of the appeal when won. In other words, the status quo of the parties litigant must be preserved, and, if by awaiting the result of an appeal the fruits of the litigation would be lost, the remedy has not been considered an adequate remedy" (State ex rel. Smith v. Superior Court, 26 Wash. 278, 282, 283, 66 Pac. 385, 386). In re Sullivan's Estate, 38 Wash. 217, 78 Pac. 945; State ex rel. Wyman, etc., Co. v. Superior Court, 40 Wash. 443, 82 Pac. 875, 2 L. R. A. (N. S.) 568, 111 Am. St. Rep. 915, 5 Ann. Cas. 775; State ex rel. Royce v. Superior Court, 46 Wash. 616, 91 Pac. 4, 12 L.

R. A. (N. S.) 1010, 123 Am. St. Rep. 948, 13 Ann. Cas. 870; State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 Pac. 942; State ex rel. Shwabacher Bros. & Co. v. Superior Court, 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C, 814; State ex rel. Meredith v. Tallman, Judge, 24 Wash. 426, 64 Pac. 759.

Our decision in State ex rel. Quigley v. Superior Court, 71 Wash. 503, 129 Pac. 83, is not contrary to the views here expressed. In that case the term of office in question extended beyond the term necessary for the determination of the appeal, and the status quo could be preserved by a mere preservation of the ballots offered in evidence as exhibits, as physical evidence is preserved in other cases. Moreover, to have accorded the writ in that case, there being no showing of any peculiar circumstances requiring greater speed than in other cases of election contest, would have been to abrogate the special statute granting the appeal as incidental to the right of action. We there said: "The Legislature, in enacting section 4956, providing the remedy by appeal in election contests in the very same statute allowing a contest, must be presumed to have considered that remedy adequate in such cases. To hold that it is inadequate in this case is to hold that it is inadequate in any such case. It is, in effect, to repeal the statute, and declare a policy contrary to that expressly declared by the Legislature upon a subject clearly within its province." No such considerations are found in the present case. A review in detail of the many other decisions cited by the respondent would be of no profit. They are all distinguishable from the case before us.

[2] 2. The respondent contends that the superior court has power to appoint the surviving partner as administrator of the partnership estate only in case the existence of the partnership is conceded. The Constitution, article 4, § 6, has conferred original jurisdiction upon the superior courts generally of all matters of probate and of all cases in equity, and of all actions at law, not expressly excepted. As said in Moore v. Perrott, 2 Wash. 1, 4, 25 Pac. 906: "The language of the Constitution is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leaving the Legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created." In conferring jurisdiction upon the superior courts in probate matters, the Constitution makers did not carve out a section of the jurisdiction of the courts of this state and confer it, as a limited subject, upon the superior courts as probate courts of limited jurisdiction. The failure at all times to observe this fundamental fact has led to some confusion in our own decisions. The Constitution simply throws probate matters into the aggregate jurisdiction of superior courts as courts of general jurisdiction, to be

exercised along with their other jurisdictional powers, legal and equitable, and as a part of those general powers. The respondent claims that only the powers expressly enumerated in section 1278, Rem. & Bal. Code, can be exercised by the courts in probate matters, but this court has held that the inherent powers of the superior court, conferred by the section of the Constitution creating the court (Const. art. 4, § 6) are not dependent on statutory sanction for their existence and exercise.

"By statute (section 6355, Bal. Code) it is made the duty of the court sitting in probate upon the settlement of the final account to distribute the estate among the persons who are by law entitled thereto. This statute, we think, confers upon the court jurisdiction to determine who are entitled to the property, as the power to distribute includes the power to determine to whom distribution should be made. But, if this were not so, the court has inherent power to determine the question, and this in a probate proceeding on the application of one claiming to be an heir or legatee. The Constitution does not make the superior courts probate courts. On the contrary, it vests the superior courts with jurisdiction 'of all matters of probate'; hence the court is not shorn of its general powers simply because the cause before it may be one which was cognizable formerly in a court of probate. It possesses in every case and at all times its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. A statute, therefore, can neither add to nor take away the power, and it is immaterial to inquire whether or not one conferring such a power is in existence." *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 646, 72 Pac. 502, 504. See, also, *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492; *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990. When a superior court has presented to it through a petition in any matter of probate, any issue touching the estate, it has jurisdiction both of the parties and of the subject-matter, and it deals with them not as a court of limited, but of general, jurisdiction. It may exercise all of its powers, legal or equitable, and may even invoke the aid of a jury to finally determine the controversy. The Constitution has no more limited its powers in such cases than in others of which jurisdiction is conferred by the same constitutional provision.

"In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called 'probate procedure,' as distinguished from what is denominated 'civil' or 'criminal procedure.' But when the court,

sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil cause. The court may require the proceeding to be separately docketed, if, when the issues are formed, it appears to be such as should be thus docketed. Whether a citation should have issued on the strength of this petition or not, it is nevertheless true that appellant responded to the citation, and appeared generally by demurrer to the petition, and asked its dismissal simply on the ground that the court could not hear it as a probate proceeding. We think it was not necessary to sustain the demurrer and dismiss the proceeding on that ground. But under our liberal practice as to the form of actions the petition could be treated as in the nature of a complaint. The issues could be framed thereunder, and the cause tried without requiring another statement of the same facts under some other form or name. If it developed that it was not properly a probate proceeding, it would not be treated as such. We think the court did not err in overruling the demurrer and in refusing to dismiss the petition." *Fillee v. Murphy*, 30 Wash. 1, 5, 70 Pac. 107, 108.

The decision in *Re Gorkow's Estate*, 28 Wash. 65, 68 Pac. 174, is not authority for the contrary view. It holds no more than that the powers of the court cannot be invoked in a probate matter "to hear and determine controversies between third persons which in no way affect the interests of the estate itself." This fact is pointed out in *Re Murphy's Estate*, supra. The respondents insist that the holding of this court in *Re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593, is decisive of this case. It is true that in that case this court held that the superior court in a probate proceeding to settle an administrator's accounts and distribute the estate had not jurisdiction to determine the claim of the administrator to one-half of the estate as a partner of the deceased. That decision, however, as it seems to us, contravened the manifest purpose of the Constitution, and was too soon qualified and in effect disregarded to make it a basis for the invocation of the rule stare decisis. Though never in express terms overruled, it was so soon, and has been so often, impinged by other decisions, not distinguishable in principle, that it has long ceased to reflect the views of this court, and in now frankly overruling it we merely put into direct statement what was said in effect in the language above quoted from *Fillee v. Murphy*, supra, and from *Reformed Presbyterian Church v. McMillan*, supra, and what we have said even more emphatically in the later decisions, *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885, *Sloan v. West*, 63 Wash. 623, 628,

629, 116 Pac. 272, and *In re Williamson*, 134 Pac. 1066. The last-mentioned case cannot be distinguished in principle from the *Alfstad* Case. In the *Alfstad* Case, the administratrix claimed adversely to an estate in her hands in the process of settlement. In the *Williamson* Case, the guardian claimed adversely to the estate of her ward. In both cases the argument was advanced that, claiming adversely and in a right antedating the probate, the claimant was a stranger to the estate whose claim could not be determined over her objection and against her consent in the probate proceeding. The contention was sustained in the *Alfstad* Case, but it was denied in the *Williamson* Case. In the *Williamson* Case, we said: "The argument of counsel apparently is, in substance, that as to all such sums claimed by Mrs. Hazzard she is a stranger to the guardianship estate, and that therefore she cannot be required to account for such sums in the guardianship proceedings. If this guardianship matter were pending in a court of exclusive, statutory probate jurisdiction, instead of a court possessing general equity powers, there might be some plausible grounds upon which to rest counsel's argument. In the case of *In re Sell*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885, this court had occasion to notice the nature and extent of the jurisdiction of the superior courts of the state in the guardianship of the estates of incompetent persons. It was there held that the jurisdiction of the superior courts in such matters is not limited like that of an exclusive probate court proceeding under statutory power, but that it proceeds with all the incidental powers of a court of equity. It is apparent, therefore, that the superior court of Kitsap county had jurisdiction as a court of equity, by way of an accounting, over the subject-matter of every question that it determined in the settlement of the account of Mrs. Hazzard, and the only way Mrs. Hazzard could escape the effect of the court's accounting decree, upon her relations with Miss Williamson prior to the actual commencement of the guardianship by appointment of the court, would be to successfully show that the court did not have jurisdiction over her person for the purpose of adjudicating such matters. This, we think, she has not successfully done, in view of the fact that she voluntarily became the guardian of the estate of Miss Williamson." This language is as clearly applicable to the facts in the *Alfstad* Case as in the case where used. In the former case, the administratrix became no less voluntarily the administratrix of the estate than did the guardian assume the similar relation of guardian in the latter case. The court had the same general jurisdiction over the person of the administratrix in the one case as over the person of the guardian in the other. There is no possible distinction, and, the de-

cisions being in direct antagonism, the former is overruled by the latter.

So also here. Both the general administratrix and the relator, by their application for letters, voluntarily submitted themselves to the jurisdiction of the court as a court of general jurisdiction, with authority to invoke all of the powers incidental to such a court necessary to the determination of the controversy in which the estate as such had a direct interest.

The decision in *Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150, cited by respondents, holding, in effect, that the territorial probate court in the probate of an estate had no power to determine whether a homestead claimed by the husband of the deceased as his separate property was or was not community property belonging to the estate, is not decisive of the question here presented. It arose on appeal to the superior court from a decision of the territorial probate court, a court of limited jurisdiction. The estate was never in the superior court as a probate court, but only as an appellate court, reviewing powers of an inferior probate court of limited jurisdiction and circumscribed power. The case has no bearing upon the powers of the superior court sitting in probate as now constituted. Under our present Constitution it is clear that upon proper petition and hearing, the adjudication of the question involved in *Stewart v. Lohr*, supra, under the rule announced in *Alaska Banking & Safe Deposit Co. v. Noyes*, supra, would be held determinative of the question of title where all of the parties had submitted themselves to the jurisdiction of the court in a probate proceeding. In the latter case, we held that a decree of distribution, determining that the property subsequently claimed to have been the separate property of the deceased husband was the community property of the deceased and his wife, and setting off one-half of it to her as not affected by his will, was a valid, final, and conclusive determination of the status of the property in the absence of an appeal. If the superior court in probate proceedings can thus conclusively determine that property is community property when the issue is presented, it would be an anomaly to say that it had no jurisdiction to determine the same question the other way on proper evidence.

The decision in *Re Belt's Estate*, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916, properly considered, does not militate against our conclusion in this case. Though it is there said on authority of *Stewart v. Lohr*, supra, "that the probate court is without jurisdiction to try the title to property as between representatives of an estate and strangers thereto," the court seems to have overlooked the fact that *Stewart v. Lohr*, supra, had reference to the territorial probate court, which was a court of limited jurisdiction. In any event, the trial court, in the probate proceed-

ings in the Belt Case, did determine as a fact that "moneys mentioned in the petition are not any part of the assets of the estate of the deceased," and was by this court sustained in that decision. This was certainly nothing more nor less than determining the question of title so far as the estate was concerned.

Our statute expressly confers upon the surviving partner making timely application therefor, if a person qualified and competent to act as a general administrator, the right to administer the partnership estate. Rem. & Bal. Code, §§ 1436, 1437, 1438. The statute further provides that if the surviving partner be not appointed to administer the partnership estate, its administration devolves upon the executor, or general administrator, who is then required to give additional bond; that the surviving partner, on demand, shall exhibit and give information concerning the partnership property, and on demand deliver and transfer to the general administrator all the property, books, papers, and documents pertaining to the partnership, and that on his failure so to do, he may be cited to appear before the court, and, unless he show cause to the contrary, the court shall require him to comply with such demand. Rem. & Bal. Code, §§ 1440-1443. Obviously, these sections of the statute would be of little utility if the court had no power at the outset to determine whether or not there was a partnership. Of what avail would be the requirement of an additional bond if the court had no power to consider and determine the antecedent existence of the partnership? Of what avail a citation if the court had no power to determine the very fact upon which its right to issue the citation must depend? The existence or non-existence of the partnership is a thing of vital importance to the estate itself at every step of the proceedings, from the appointment of the administrator to the filing and settlement of his final account. The assertion on the one hand that there was a partnership, and on the other that there was none, was simply allegation against allegation. The court could not assume, without trying out the fact, that either assertion was correct. This has been held even as to a court of confessed limited jurisdiction. *Schick v. Corbett*, 52 La. Ann. 180, 26 South. 862. The superior court has every power and every facility for the determination of the existence of the partnership in the probate proceedings that it could acquire in an independent action. The matter being one in which the estate, as such, is interested, it was the court's duty to exercise those powers.

A review of the authorities cited from oth-

er jurisdictions to the contrary would be profitless, since, as we have seen, our own decisions are decisive of the question.

[3, 4] 3. The respondents contend, on the argument, though failing to brief the question, that in any event, their plea of *res judicata* must be sustained. The order denying the relator's first application to administer the alleged partnership estate was entered on August 13, 1913. It adjudged: First, that the petition was premature; and, second, that in any event, the court could not consider or determine the question of the existence of a partnership when not conceded. This second holding was, as we have seen, clearly erroneous. We think the first was equally so. The purpose of the statute requiring application to be made within five days from the filing of the inventory (Rem. & Bal. Code, § 1437) was to fix a limit beyond which application may not be made, unless an extension of time be granted. It was never intended to prohibit the consideration of such an application if made before the filing of the inventory. Suppose that neither the next of kin nor any creditor made any application for letters. There would never be any inventory, and if the trial court's view be correct, the partner, though vitally interested, could never apply for letters. The court's ruling on this first branch of the order was interlocutory, but the second was final. It affected a substantial right and, in effect, determined finally and adversely the relator's right to administer. Rem. & Bal. Code, § 1716. It was a final dismissal of the relator's petition. It had the effect of a final judgment thereon. The time for taking an appeal therefrom was therefore 90 days. Rem. & Bal. Code, § 1718. It is too well settled to admit of serious question that the application for writ of review must be made within the statutory period for taking an appeal. The writ before us brought up the whole record for review. The relator assigns as error the granting of the order dismissing his first petition, as well as that dismissing his second petition. The writ, having been applied for well within the period allowed for an appeal from either order, was timely as to both orders. We are therefore not precluded from reviewing the first order in which the initial error was committed. It is clear that the question of *res judicata* is not involved. The orders complained of are reversed, and the case is remanded, with direction to the trial court to try out and determine whether, in fact, there was a partnership, and either to grant or refuse letters to the relator according to that determination.

CROW, C. J., and GOSE, CHADWICK, and MAIN, JJ., concur.

COWART v. PARKER-WASHINGTON CO.
et al.

(Supreme Court of Oklahoma. Oct. 28, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 345*)—TIME FOR APPEAL—EXTENSION.

Where a motion for a new trial is unnecessary to present to this court for review an order or judgment appealed from, such motion and decision thereon by the trial court are ineffectual to extend the time within which to perfect an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.*]

2. APPEAL AND ERROR (§ 289*)—MOTION FOR NEW TRIAL—NECESSITY.

A motion for new trial is unnecessary to enable this court to review the action of the trial court in sustaining an objection to the introduction of any evidence by a plaintiff upon the ground that his petition fails to state a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1691-1696; Dec. Dig. § 289.*]

(Additional Syllabus by Editorial Staff.)

3. PLEADING (§ 428*)—OBJECTION TO INTRODUCTION OF EVIDENCE—EFFECT.

An objection to the introduction of any evidence presents the same question as a general demurrer to the petition, and raises no issue of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433-1436; Dec. Dig. § 428.*]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Nannie Cowart against the Parker-Washington Company and another. Judgment for defendants, and plaintiff brings error. Dismissed.

Harry F. Egan and Campbell & Beall, all of Muskogee, for plaintiff in error. Gibson & Thurman, S. V. O'Hare, and J. C. Davis, all of Muskogee, for defendants in error.

HAYES, C. J. This proceeding in error is prosecuted by petition in error and case-made. Defendants in error have filed a motion to dismiss the proceeding, upon the ground that the case-made is a nullity because not served within the time provided by statute. The appeal seeks to reverse an order of the trial court sustaining an objection by defendants in error, defendants below, to the introduction of any testimony on the part of plaintiff in error, plaintiff below, for the reason that plaintiff's petition failed to state a cause of action. Said order was made on the 1st day of October, 1912, at which time the court, upon sustaining the objection to the introduction of any testimony, dismissed plaintiff's action. At that time section 6074, Comp. Laws 1909, was in force. By this section it is provided that a case-made or a copy thereof must, within three days after the judgment or order is entered, be served upon the party or his at-

torney, unless within said period of time an extension of time for the service of the case-made is granted. No extension of time was asked for or granted within three days after the order complained of was entered; but a motion for new trial was filed, which was on February 21, 1913, overruled. Within three days thereafter an extension of time to serve the case-made was granted, and the case-made was served within that time.

[1] It is the contention of plaintiff that, the case-made having been served within an extension of time granted within three days after the overruling of the motion for a new trial, it is a valid case-made. It is well settled that, where a motion for new trial is unnecessary to present for review to this court an order or judgment complained of, the filing of such motion and decision thereon by the court are ineffectual for the purpose of extending time within which to perfect an appeal, and that the time begins to run from the rendition of the judgment or order complained of, and not from the order overruling the motion for new trial. Healy v. Davis, 32 Okl. 296, 122 Pac. 157; Manes v. Hoss, 28 Okl. 489, 114 Pac. 698; Springfield Fire & Marine Ins. Co. v. Gish-Brook & Co., 23 Okl. 824, 102 Pac. 708.

[2] The principal question presented by the motion to dismiss is therefore whether a motion for new trial is necessary to present to this court for review an order of the trial court sustaining an objection to the introduction of any evidence by plaintiff upon the ground that his petition does not state a cause of action. This question was referred to in M., O. & G. Ry. Co. v. McClellan, 35 Okl. 609, 130 Pac. 916, in the following language: "Referring to the fourth assignment, it has been suggested that, in Golding et al. v. Eldson et al., 2 Kan. App. 307, 43 Pac. 104, it was held that the ruling of a trial court sustaining an objection to the introduction of evidence under the answer of the defendant on the ground that it stated no defense was an error of law occurring at the trial, for which a new trial could be granted by the trial court, and will be deemed waived on appeal when a motion for a new trial was not filed; but we do not deem it material to decide whether such a ruling must be presented by a motion for a new trial in order to be presented for review in this court, for it may be objected for the first time in this court that a petition does not state a cause of action. * * *"

It will be observed from the foregoing quotation that the question was not decided in that case. We think, however, both upon reason and authority, that it must be held that a motion for a new trial is not necessary to review such an order. The purpose of a motion for new trial is to procure a re-examination of an issue of fact in the same court. Where there has never been any ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amination of an issue of fact, there can be no re-examination or new trial.

[3] The objection to the introduction of any evidence raises no issue of fact. Such an objection is frequently resorted to under our practice to challenge the sufficiency of a petition, and, when such objection is made, the sole question presented to the trial court is whether the petition contains sufficient facts to constitute a cause of action. In other words, such objection raises the same question as a demurrer to the petition. The issue raised is one of law, and a motion for new trial is not necessary to review a decision determining an issue of law. *Dodge City Water-Supply Co. v. City of Dodge City*, 55 Kan. 60, 39 Pac. 219; *Nute v. American Glucose Co.*, 55 Kan. 225, 40 Pac. 279. Plaintiff in error, however, insists that the trial court made findings of fact; but the record does not support this contention. Upon considering the objection to the introduction of any evidence, the court did make the following order: "And the court having found from the petition that the death of the plaintiff's husband occurred on the 2d day of January, 1910, more than two years prior to this day, and that an amendment to said petition so as to state the statutory cause of action for death would amount to the stating of a new cause of action and a departure from the original petition, and would be barred by the statute of limitations, it is therefore considered, ordered, and adjudged by the court that the objections of the defendants be sustained, and that this cause be dismissed." This does not, however, constitute a finding of fact upon any issue of fact; it is but a statement of the facts alleged in the petition. There was in fact no trial and the introduction of no evidence upon which any issue of fact could have been determined.

It follows from the foregoing views that the case-made, not having been served within the time prescribed by the statute, is a nullity, and the motion to dismiss should be sustained. All the Justices concur.

HARNAGE et al. v. MARTIN et al.

(Supreme Court of Oklahoma. Oct. 28, 1913.)

(Syllabus by the Court.)

1. INDIANS (§ 13*)—ALLOTMENTS—JURISDICTION OF COURTS.

Courts of equity have jurisdiction, after the Commission to the Five Civilized Tribes and the Secretary of the Interior have exercised their powers and exhausted their jurisdiction, to determine whether by error of law, or through fraud or gross mistake of fact, the Commission or the Secretary has failed to allot land in the Cherokee Nation to the citizen, who, under the law and the treaties, was entitled to the same.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

2. INDIANS (§ 13*)—ALLOTMENTS—DETERMINATION OF CONTEST—QUESTION OF LAW—JURISDICTION OF COURTS.

Whether or not there was any evidence to sustain a finding of fact made in a contest before the Commission and the Secretary of the Interior, involving the rights of two different Indians to select certain lands, is a question of law; and an error in that respect, which results in the issuance of a patent to the wrong party, may be remedied by a proceeding in equity.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

3. INDIANS (§ 13*)—ALLOTMENTS—SUFFICIENCY OF EVIDENCE.

The evidence reviewed, and held sufficient to sustain the finding of fact made by the Secretary of the Interior and the Commission in a contest before them.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

Error from District Court, Washington County; R. H. Hudson, Judge.

Action by Jesse L. Harnage and another against Annie M. Martin and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Veasey, O'Meara & Owen, of Tulsa, for plaintiffs in error. Robert J. Boone, of Tulsa, for defendants in error.

HAYES, C. J. This is an appeal from a judgment of the district court of Washington county, sustaining a demurrer to the evidence of plaintiffs in error, plaintiffs below, and dismissing their petition and rendering a judgment against them in favor of defendants in error, defendants below.

Plaintiff Harnage and defendant Martin are duly enrolled members of the Cherokee Tribe of Indians, and this suit was brought by Harnage in the court below to charge the lands in controversy with a trust in his favor for the alleged reason that in a contest case before the Department of the Interior, involving the right to select said lands as an allotment, the Secretary of the Interior committed errors of fact and law, by reason whereof he awarded the lands in controversy to defendant Martin as a portion of the allotment to which she was entitled as a member of said tribe of Indians, when, under the facts established and the law applicable thereto, plaintiff contends such lands should have been awarded to him. Plaintiff Delokee Gas & Oil Company claims interest in said land by virtue of a gas and oil lease from its co-plaintiff Harnage. Defendant Roth-Argue-Maire Bros. Oil Company claims a like interest under a similar lease from defendant Martin. It is therefore unnecessary to make further reference to the interests of these two companies in the consideration of the case.

Plaintiff made a part of his petition, and introduced at the trial, all the records in a contest case which was instituted and tried before the Department of the Interior for the

purpose of determining whether he or defendant was entitled to select the land in controversy as an allotment. On the 13th day of May, 1904, plaintiff made application to the Commission of the Five Civilized Tribes to have allotted to him the land in controversy, and such application was granted. Thereafter, on the 26th day of May, 1904, defendant made a similar application to the Commission of the Five Civilized Tribes, which was refused, whereupon, on the same day, she instituted a contest proceeding before the Commission to the Five Civilized Tribes against the allotment theretofore made to defendant. The trial before the Commission to the Five Civilized Tribes resulted in a decision in favor of defendant in this case, plaintiff in the contest. From this decision an appeal was taken to the Commissioner of Indian Affairs, where a like decision and judgment was rendered, which, on appeal to the Secretary of the Interior, was affirmed. The trial court had before it the entire record and all the evidence upon which the decisions of the Commission to the Five Civilized Tribes and the Commissioner of Indian Affairs and the Secretary of the Interior were rendered, and, in addition thereto, certain additional evidence in the form of depositions, which need not be noticed here.

[1] Plaintiff urges that the action of the trial court in sustaining a demurrer to his evidence was erroneous, upon three different grounds, and for such reason should be reversed. Under the view we take of the case, it will be necessary to consider only the first proposition advanced by plaintiff, which is that since plaintiff made the first selection of the land in controversy as a part of his allotment, and such fact appears without dispute in the record before the Secretary of the Interior and in the evidence before the trial court, and that there being no evidence whatever to the effect that at the time of the prior selection by plaintiff defendant was the owner of the improvements of the land in controversy, the court erred in not finding the issues for plaintiff. There is no contention that the decision of the Department of the Interior was fraudulently rendered, or that any fraud was exercised by defendant in procuring it. The power of the courts, where the Department of the Interior has awarded to a member of the Five Civilized Tribes certain land as his allotment and patent therefor has been issued to him, to determine the rights of a contestant to such land was decided in *Garrett v. Walcott*, 25 Okl. 574, 106 Pac. 848, wherein it was held that the jurisdiction of the Commissioner of Indian Affairs and of the Secretary of the Interior and the effect of their action on the allotment of the lands of such Indians are the same in effect as the jurisdiction and effect of the Land Department of the United States in the disposition of the public lands within its control. The law applicable to the Land

Department and involved in this case is accurately stated in *Howe v. Parker* (C. C. A.) 190 Fed. 738, 111 C. C. A. 466, in the following language: "The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack. But its judgments and patents do not conclude the rights of claimants to the land. They rest on established principles of law and fixed rules of procedure, the application of which to each case conditions its right decision, and if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law or by a gross mistake of the facts proved, or by a decision induced by fraud, the rightful claimant is not remediless. He may, in a court of equity, avoid the effect of the decision and the patent, and charge the legal title derived from it with a trust in his favor."

By section 11 of an act of Congress approved July 1, 1902 (32 U. S. Stat. at L. p. 716, c. 1375), it is provided that there shall be allotted by the Commission of the Five Civilized Tribes to each enrolled member of the tribe lands equal in value to 110 acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the government survey, *which lands may be selected by each allottee so as to include his improvements*. By section 18 of the same act it is made unlawful, after 90 days after the ratification of the act, for the member of the tribe to inclose or hold in his possession more land in value than 110 acres of the average allottable lands of the Cherokee Nation, either for himself or his wife or for each of his minor children. These provisions of the act clearly contemplate that any member of the tribe shall have a right to select as his allotment lands upon which he owns the improvements, and that his wife and minor children shall have the right to select as their allotments lands upon which he owns the improvements, and that after 90 days after the ratification of the act, the fact that an Indian has theretofore owned the improvements and held possession of lands in acreage in excess of what he is entitled to take as allotment for himself, his wife, and his minor children shall not preclude others from taking such land as their allotment, because it is made unlawful for a member of the tribe, although he owns the improvements, to hold the lands, unless needed as allotment for himself, or his wife and minor children.

Plaintiff in the instant case filed first upon the lands in controversy. Defendant was entitled to prevail in the contest only by showing that she had some preference right to select the lands in controversy as a portion of her allotment; that she was the owner

of the improvements and entitled to the benefits of the provisions of section 11, securing her the right to select the lands whereon she owned the improvements as her allotment. It is the contention of plaintiff that there was not any evidence before the department to establish this fact.

Defendant's first contention is that in the absence of fraud the courts cannot inquire as to whether there was any evidence to support the finding of fact of the department upon which the contest case was determined. This contention, we think, is settled by decisions of this court, as well as by the decisions of the federal courts.

In *Jordan v. Smith*, 12 Okl. 703, 73 Pac. 308, it was said: "So far as the courts are concerned the findings of fact by the land department in a contest proceeding are as conclusive and binding upon the courts as the verdict of a jury in their own tribunal, and the only inquiry the court can make is, Was there any evidence on which to base the finding?" See, also, *Paine v. Foster*, 9 Okl. 213, 53 Pac. 109.

[2] In *Howe v. Parker*, supra, Judge Sanborn, who delivered the opinion for the court, said: "Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it is in his and in every judicial and quasi judicial tribunal a question of law." In support of this statement of the law numerous authorities are cited. If the Secretary of the Interior in rendering his decision assumed a fact established which was necessary to the rights of the prevailing party, but which there was wanting any evidence to support, the error committed by him was one of law, and plaintiff may have it reviewed by a court of equity in a proceeding brought to avoid the effect of the decision of the Secretary of the Interior.

[3] The facts found in the contest case by the Commission to the Five Civilized Tribes, by the Commissioner of Indian Affairs, and by the Secretary of the Interior, although not stated by these respective officers in the same language, are substantially the same. The land in controversy constitutes part of a large tract known as the Thursday place, and was held at the time of the institution of the contest case, and had been for several years prior thereto, by a family of which Mary Thursday, the grandmother of defendant, is the Indian head. The southern portion of the said place was held and occupied by this family for several years prior to 1893. Whether this portion of the place was originally acquired by the family through

purchase or original segregation the evidence is not clear. In 1893 Mary Thursday purchased the improvements upon the northern part of said place, which embraces the land in controversy. She paid therefor the sum of \$800, which payment she made out of funds received by her as payments to her as a member of the Indian tribe, and to her grandson, Samuel Bob, the brother of defendant; and a bill of sale was executed by Mary Thursday and said Samuel Bob for said improvements. Both of defendant's parents died prior to 1890. Before their death, for a number of years she and her parents resided with her grandmother, Mary Thursday. Subsequent to her parents' death she continued to reside for a time with her grandmother. Samuel Bob, defendant's brother, continued to reside at the same place until he became of age. Within a year or two after the death of her parents, defendant was stolen from her home with her grandmother by a man by the name of Frenchman, by whom she was kept, and with whom she resided until she went away to school. In 1898, when she was about 18 years old, she married George Martin, her present husband, with whom she has since resided. Defendant's grandmother, during the time she lived with her, collected defendant's payments from the government to which defendant was entitled as a member of the Indian tribe, and which the grandmother collected as the Indian head of the family, of which defendant was then a member. During the foregoing mentioned time, one Wallace Thursday, the step-grandfather of defendant, resided at the home of Mary Thursday. In 1899, about a year after defendant's marriage, while she and her husband were visiting at the Thursday home, her grandmother told her that she need not look elsewhere for lands to allot; that there was sufficient in the home place for her, and that she could select her allotment out of the lands in that place; that the family would remain in possession of the same until time to make the allotment, but that there were sufficient lands there for the grandmother and defendant's brother, Samuel Bob, who had theretofore been a member of the family, and the defendant, and gave her the right to select her allotment out of said place.

The evidence establishes that conversations to the foregoing effect were had between defendant, her husband and the grandmother, or with the step-grandfather at different times. Prior to the time defendant filed her contest, Mary Thursday had selected her allotment in the southern part of the home place, and Samuel Bob had selected his in the northern part, and the land lying between these two allotments was left for defendant, which, when she made application to allot, she found to have already been allotted to plaintiff; and she thereupon instituted her contest. The evidence is con-

sifting relative to some of the facts stated above, but with the substantial conflict in the evidence this court has nothing to do. It is true that the evidence does not disclose that there was ever any formal conveyance of the improvements upon the identical land in controversy made by Mary Thursday to defendant; but it is clear from the evidence that Mary Thursday intended, in consideration of the fact that she had collected and expended, in establishing and maintaining the home, moneys to which defendant was entitled and received as a member of the Indian tribe, and out of affection and love she bore for the daughter of her deceased son, to provide for her an allotment, and that she gave to defendant the right to take her allotment out of said lands, and in giving her such right gave her every interest therein necessary to effectuate the allotment, which included the improvements thereon. There was no law that required that such gifts or conveyances or improvements upon lands of the tribe held by an individual Indian before allotment should be made by written contract or conveyance. After a careful review of the evidence before the Secretary of the Interior, we are of the opinion that it is sufficient to establish that defendant had such an interest in the improvements upon the land in controversy as entitled her, under the provisions of the statute above referred to, to select these lands as her allotment. Plaintiff does not claim that he ever acquired this right from her, or that she ever conveyed it to others.

Other questions are presented by this appeal; but, since our view upon this one question requires an affirmance of the judgment of the lower court, it is unnecessary to consider them.

The judgment of the trial court is affirmed. All the Justices concur.

MIDLAND VALLEY R. CO. v. SHORES.

(Supreme Court of Oklahoma. May 13, 1913.
Rehearing Denied Nov. 4, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 300*)—CROSSING ACCIDENT—NEGLIGENCE—PRESUMPTION OF PUBLIC ROAD.

Although a railroad crossing may not be upon a public highway, yet, if the track has been used by travelers as a public crossing for a long time with the knowledge of the company, and without objection, and the company has treated the same as a public crossing, it will be presumed to be such, and the railway company will be bound to exercise ordinary care to prevent injury to persons using the same.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 955; Dec. Dig. § 300.*]

2. RAILROADS (§ 307*)—CROSSING ACCIDENT—NEGLIGENCE—SIGNALS.

Where a railway company has established the practice of giving signals or keeping a flagman at a place frequently used as a crossing,

and such practice is notorious, the traveler has the right to expect that the usual warning will be given, and the failure of the company to do so is a proper fact for the jury to consider in determining the question of the defendant's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 972-977, 979, 980; Dec. Dig. § 307.*]

3. RAILROADS (§ 350*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

By virtue of section 6, art. 23, Williams' Ann. Const. Okl., the defense of contributory negligence shall in all cases be a question of fact, and shall at all times be left to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Dunn, J., dissenting.

Appeal from District Court, Osage County; John J. Shea, Judge.

Action by A. J. Shores against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edgar A. De Meules, of Muskogee, for plaintiff in error. Boone, Leahy & MacDonald, of Pawhuska, for defendant in error.

KANE, J. This was an action for damages for personal injuries alleged to have been inflicted upon the defendant in error, plaintiff below, by the plaintiff in error, defendant below, at a public railroad crossing. Upon trial to a jury, there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The specific act of negligence alleged is: "That the defendant, its servants, agents, and employes carelessly, negligently, and recklessly failed and refused to give any warning whatever to the plaintiff by ringing its bell or blowing its whistle, notwithstanding the fact that there is near said crossing a whistle post, and notwithstanding the fact that it is the habit and custom of said defendant, its agents, and employes to blow the whistle for said crossing."

The answer was a general denial and a plea of contributory negligence on the part of plaintiff. The case is very voluminously briefed on behalf of the plaintiff in error, and a great many errors are assigned; but we are of the opinion that all the points necessary to notice may be grouped under the following heads: (1) The court erred in refusing to take the case from the jury, for the reason that the evidence showed that the place where the plaintiff was injured was a private, and not a public, crossing, and therefore the only duty owed by the railroad company towards the plaintiff was not to willfully produce a situation of danger to which he would be subjected, and to use reasonable care to prevent injuring him after his peril was discovered. (2) The second contention

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

has to do with the sufficiency of the evidence to establish negligence on the part of the defendant; the contention being that there was no evidence reasonably tending to show that the alleged act of negligence was the proximate cause of the injury. (3) Error in giving and refusing to give instructions.

[1] We do not understand in cases of this class that it is incumbent upon the plaintiff to show that the road over which he was passing was a regularly created public road—that is, that the road was dedicated, laid out, and accepted in pursuance to some provision of law—in order to require the railroad company to give the customary signals at such places, and otherwise exercise ordinary care toward persons using the same. There was evidence to the effect that the road was generally traveled by the public without objection for 15 or 18 years prior to the accident; that it was so used long prior to the construction of the railroad; that the railroad company upon the construction of its tracks across the old road put in a crossing at that point, over which travel continued as before. As one witness testified, "After the building of the Midland line the travel then followed the road that was indicated by the railroad company." We think that evidence of this class was sufficient to establish that the road upon which the plaintiff was traveling was a public road, and that the crossing was a public crossing. There is abundant authority to the effect that a railroad crossing may not be upon a public highway, yet, if the track has been used by travelers as a public crossing for a long time with the knowledge of the company, and without objection, and the company has treated the same as a public crossing, it will be presumed to be such, and the railway company will be bound to exercise ordinary care to prevent injury to persons using the same. The above rule is approved in 2 Elliott on Roads and Streets, § 1019, where the authorities will be found collected in a footnote. This rule does not relieve the plaintiff from the necessity of proving the *animus dedicandi*, but allows it to be inferred from legitimate evidence.

A case in point which illustrates the rule as well as any we have been able to find is *Webb, Adm'r, v. Portland & Kennebec R. R. Co.*, 57 Me. 117, wherein it was held that: "In the trial of an action for an injury alleged to have been received while passing along a 'public street and highway across the railroad track of the defendants,' if the evidence of a legal location is wanting, it is proper to instruct the jury that there was no legal highway by reason of any proper location, but that, if the jury should find that, with the consent of the company owning the track and having the right of passage there with trains, and of the owners of the fee in the land, there had been a thoroughfare in open and continuous use by the public, and

all who had occasion to go between the termini mentioned, and that use commenced prior to the running of the defendants' trains there, and continued to the time of the accident without objection made by the company owning the track, or the owners of the fee, or the defendants, they might thence infer the existence of such a way and right of crossing the railroad at grade there, as would bind the defendants to the use of the same precautions, prudence, care, and diligence in running their engines, as they would be bound to exercise if a highway had been located across the track there at grade."

[2] The petitions contained an allegation, and there is evidence tending to sustain it, to the effect that it was the habit and custom of the railroad company, its agents, and employes to maintain a whistle post near said crossing, and that it was the habit and custom of said railroad company, its agents, and employes to blow the whistle thereat. It has been held that, where a railway company has established the practice of giving signals or keeping a flagman at a place frequently used as a crossing, and such practice is notorious, the traveler has the right to expect that the usual warning will be given, and the failure of the company to do so is a proper fact for the jury to consider in determining the question of the defendant's negligence. 3 Elliott on Roads, § 1154; *Nash v. N. Y., etc., R. Co.*, 48 Hun, 618, 1 N. Y. Supp. 269; *Westaway v. Chicago, etc., R. Co.*, 56 Minn. 28, 57 N. W. 222; *Pittsburgh, etc., R. Co. v. Yundt*, 78 Ind. 373, 41 Am. Rep. 580; *Wolcott v. New York, etc., R. Co.*, 68 N. J. Law, 421, 53 Atl. 297.

[3] The next contention is to the effect that the plaintiff violated the rule which required him to look and listen before driving upon the track. On this point the plaintiff testified as follows: "There was a good crossing at the place where I was injured. There was sunflowers and tall grass and weeds along the right of way, so that you could not see. When a person is in the middle of the track he could see a quarter of a mile back; but he could not see from the point where I looked back, which was 15 or 20 rods from the crossing."

Counsel for plaintiff in error contends that the foregoing evidence should be disregarded because the physical surroundings were such that to look was to see, and the mere utterance that he did look and did not see must be disregarded as testimony by the court, and no additional value is to be given to the utterance because of the fact that a jury predicated a finding thereon, and certain photographs taken at or near the vicinity of the accident are called to our attention to sustain this contention. There is a sharp conflict in the oral testimony as to the physical conditions at or near the scene of the wreck; but we are unable to find anything in the record that convinces us that the story

told by the plaintiff cannot by any possibility be true. As far as the credibility of witnesses who testified on this question is concerned, that was for the jury, and the photographs and the evidence in connection with them do not convince us that we would be justified in saying that the plaintiff testified directly in the face of and in opposition to obvious physical facts.

In *Clark v. St. L. & S. F. R. R. Co.*, 24 Okl. 764, 108 Pac. 361, where the facts were somewhat similar to those disclosed by the record before us, it was held that the question of negligence on the part of the defendant and contributory negligence on the part of the plaintiff were questions of fact for the jury. The same may be said of the instant case. By virtue of section 6, art. 23, *Williams' Ann. Const. Okl.*, the defense of contributory negligence shall in all cases be a question of fact, and shall at all times be left to the jury.

We have examined the instructions given by the court, and those refused, and are of the opinion that on the whole the jury was correctly instructed as to the law of the case.

Finding no reversible error in the record, the judgment of the court below must be affirmed. All the Justices concur, except DUNN, J., who dissents.

ST. LOUIS & S. F. RY. CO. v. NICHOLS.†
(Supreme Court of Oklahoma. July 22, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 280*)—DUTY TO PASSENGERS.

A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. Section 800, *Harris-Day Code*.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

2. CARRIERS (§ 316*)—INJURY TO PASSENGERS—BURDEN OF PROOF.

In a suit by a passenger for injuries occasioned by the derailment and wreck of a train, proof of such derailment and wreck, the circumstances thereof, and the injury occasioned thereby makes a prima facie case of negligence and casts upon the carrier the burden of showing that it was not negligent.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.*]

3. CARRIERS (§ 239*)—PASSENGERS—ESSENTIALS OF RELATION.

The payment of fare or the possession of a ticket or pass, although the usual evidence of the right of a person to ride on a train, are not absolutely essential to the creation of the relation of passenger and carrier, so far as relates to the carrier's liability for injuries to a passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 974, 975; Dec. Dig. § 239.*]

4. CARRIERS (§ 242*)—PASSENGERS—CARE-TAKER.

N. procured a shipping contract for the transportation of a horse from Lawton to Oklahoma City, which on its face contained strong

indications that he was entitled to free passage on the train for the purpose of caring for the horse. He loaded the horse into a car with the assistance of a trainman and placed in the car a water bucket and feed for the horse. The reverse side of the contract, called the pass provision, had not been signed and made effective. He presented himself in the caboose of the train and the conductor saw his live stock contract and made no objection to his riding. N. was not asked for, nor did he pay any fare, although provided with ample means. The train did not in fact carry passengers, except those with live stock passes. Nor did the conductor have authority to permit persons to ride. These facts were not known to N. After the train had proceeded about 40 miles it was wrecked and N. was injured while sitting in the caboose. Held, that under the circumstances N., having taken passage in good faith with the acquiescence of the conductor, and without knowing that he was not entitled to ride on the train, nor that the conductor had no authority to permit it, was a passenger and was entitled to the protection and care due such on the ground that it was within the apparent scope of the authority of the conductor to receive him as a passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 980; Dec. Dig. § 242.*]

5. CARRIERS (§ 244*)—PASSENGERS—TRESPASSER.

An intruder or trespasser, or one who gains his presence on a train surreptitiously, fraudulently, or deceitfully or through collusion or illegal contrivance with the train crew, does not thereby become a passenger and entitled to the care due passengers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1115, 1116; Dec. Dig. § 244.*]

6. RELEASE (§ 57*)—ACTION FOR PERSONAL INJURIES—EVIDENCE—SUFFICIENCY.

Evidence examined in the opinion, and held sufficient to justify the jury in avoiding a release of damages signed by plaintiff.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

(Additional Syllabus by Editorial Staff.)

7. RELEASE (§ 17*)—BINDING EFFECT—FRAUD.

Where a release of damages for personal injuries received in a train wreck is obtained while the injured person is suffering from such nervous shock that he does not understand or comprehend its purport or meaning or is obtained by false and fraudulent representations of a claim agent, it is not binding.

[Ed. Note.—For other cases, see *Release*, Cent. Dig. § 32; Dec. Dig. § 17.*]

8. EVIDENCE (§ 359*)—PHOTOGRAPH—INJURY TO PASSENGER.

In a passenger's action for injuries from a train wreck, photographs of the derailed train, overturned engine, and broken cars, taken on the day of the wreck while the conditions remained unchanged, were properly admitted in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by Gilbert A. Nichols against the St. Louis & San Francisco Railway Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. Moss & Turner, of Oklahoma City, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied November 4, 1913.

BREWER, C. All the questions in this case grow out of or relate to the following two: (1) Was the plaintiff below a passenger on defendant's train at the time of his injury? (2) Was the jury justified in avoiding an alleged settlement for the damages growing out of such injuries?

On March 28, 1908, the plaintiff entered into a live stock contract to ship a horse from Lawton to Oklahoma City; the contract was in the usual form and was signed by plaintiff and the station agent. Regulations on the reverse or back side of the contract pertaining to the transportation of a caretaker were not signed by either party. The plaintiff, with the assistance of trainmen loaded the horse into a box car, depositing therein feed and a bucket for watering the animal. Before the train started he entered the caboose, meeting the conductor in charge of the train and other employes. The conductor examined his shipping contract and knew that plaintiff was transporting a horse on the train. No objection to his riding or demand for fare was made and none was paid, although the plaintiff had with him ample means. The undisputed evidence shows: After the freight train had proceeded to within a few miles of Cement, that it attached to, and carried with it, in front of the engine, a coal car filled with stone, higher than the edges of the car in the center. That in a mile or two after the car had been taken on, while the train was moving down-grade and rapidly, the car of stone, the engine, the tender, and other cars were derailed and wrecked at a trestle; several employes being badly hurt. Broken flanges from the rims of car wheels showing old rusty fractures were found scattered along the track for several hundred yards. The plaintiff was thrown from his seat in the caboose against the front end, striking his head, rendering him unconscious for a short time. When he revived sufficiently he got out, assisted the injured and in the flagging of trains. A wrecker coming out from Lawton in an hour or two brought a claim agent, who, upon the scene of the wreck, obtained the plaintiff's signature to a paper agreeing to settle and fully compromise all his claims for damages for the sum of \$20; the same to be later paid him. After arriving at Oklahoma City and receiving medical attention and advice, the \$20 was refused upon tender made by the defendant, and later this suit for \$1,999.99 alleged as the damages was brought.

When the above facts were shown in evidence, a prima facie case of negligence was established, together with the right of the plaintiff to recover for any damages sustained, if the relation existing between him and the company was that of carrier and passenger. It may be well to observe at this point that, after the prima facie case of negligence had been established by the evidence,

the burden was then cast on the defendant to show that it had not been negligent in the premises, and that nowhere in the evidence is an attempt made, or a word of proof introduced, tending to relieve the defendant of this burden.

[1] This relieves us to start with from the necessity of discussing alleged errors of the court in defining the duty and degree of care imposed by law, where the relation of carrier and passenger exists, since the court might have very correctly informed the jury, under the evidence in this case, that liability existed, if plaintiff was a passenger, unless precluded by his alleged settlement. "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." Section 429, Stat. 1909; section 800, Harris-Day Code; C., R. I. & P. Ry. Co. v. Stibba, 17 Okl. 97, 87 Pac. 293; Lane v. C. O. & G. R. Co., 19 Okl. 324, 91 Pac. 883; St. L. & S. F. Ry. Co. v. Gosnell, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892; St. L. & S. F. Ry. Co. v. Kerns, 136 Pac. 169 (recently decided and not yet officially reported). For rule and valuable discussion, see Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898.

[2] In a suit by a passenger for injuries occasioned by the derailment and wreck of a train, proof of such derailment and wreck, the circumstances thereof, and the injury occasioned thereby makes a prima facie case of negligence and casts upon the carrier the burden of showing that it was not negligent. Hutchinson on Carriers, vol. 3, § 1413 et seq. Was the plaintiff a passenger?

[3] The payment of fare or possession of a ticket or pass, although the usual evidence of the right of a person to ride on a train, are not absolutely essential to the creation of the relation of passenger and carrier, so far as relates to the carrier's liability for injuries to a passenger. Simmons v. Oregon R. R. Co., 41 Or. 151, 69 Pac. 440, 1022; Hutchinson on Carriers, vol. 2, § 1019.

[4] The live stock contract made with the company, in the main body thereof, after designating the company as party of the first part and the shipper as party of the second part, contained scattered through it the following expressions: "That, for and in consideration of the consideration hereafter named, party of the first part will transport for the said party of the second part and the parties in charge thereof as hereinafter provided."

The shipper agreed to "select the car or cars" and after stock is loaded, and before it leaves the station, "will again examine said car or cars and will see that all doors * * * are closed and fastened and afterwards kept so closed and fastened as to prevent the escape of live stock therefrom."

That shipper "will load, unload, and when necessary reload said stock and feed, water, and attend to same at his own risk and expense while the same are in the cars of the company," and the second party "shall bear all damages from his negligence or failure to do any of the things which he herein contracts to do. * * *". In section 12 of the contract it is said: "In consideration of free transportation for person or persons to accompany the live stock * * * it is agreed that the said cars and said live stock contained therein will and shall be in the sole charge of such person * * * for the purpose of attention to and care of the said live stock," etc. After securing the shipping contract referred to, the plaintiff loaded his horse into a car, put his feed and water bucket therein so as to give the horse care and attention. He then presented himself in the caboose for passage on the same train and exhibited his contract to the conductor in charge of the train. He had no notice from the company, its station agent or the conductor, that the train did not carry passengers nor that he was not entitled to be carried thereon free. He was not asked for fare, but his presence and right to passage were acquiesced in. No objection was raised, and the conductor in charge of defendant's train very likely supposed, as plaintiff did, that he had a right to go on the train. But it is vehemently urged that the train did not carry passengers, and that the rules of the company did not allow persons to ride on it, and that the conductor had no authority to permit it, and his acquiescence amounted to nothing. This argument is based on the fact that the freight charged was for the weight of the horse at so much per hundredweight. It is admitted that, if the charge had been at a car load rate, plaintiff would have been entitled to free transportation and to passage on that train. It is probably true that under the rules of the company the plaintiff was not entitled to free passage, but it is not shown that he knew, or that a word was said to him by any one, about such rules or regulations. And the excerpts from the shipping contract, and much else that has been said on this point, is not for the purpose of showing that he was entitled to free passage, or in fact to passage at all, but to show that from the contract and the conduct of the company's agents he had a reasonable and well-grounded right to believe that he was entitled to passage on that particular train; that he acted in good faith; and that under the circumstances, if he did not in fact have such right, it was the duty of the company to so inform him, which was not done. We think that, assuming that the contract did not entitle plaintiff to free passage, this train did not ordinarily carry passengers, and that the conductor was without authority to agree to his passage, yet that under the circumstances the plaintiff had the right to, and it was perfectly reasonable for him to

suppose that the conductor was acting within his powers and within the general scope of his employment. In other words, that it was within the apparent authority of the conductor of the train to allow plaintiff to ride thereon and thereby to create the relation of passenger and carrier between him and the company. This case rests on the apparent or implied authority of defendant's agent in accepting him as a passenger and the good faith of the plaintiff in becoming such.

[5] Of course an intruder or trespasser, or one who surreptitiously, fraudulently, or deceitfully gains his presence on a train, cannot thereby become a passenger. Nor can he become such through collusion or illegal contrivance with the train crew, but none of these things are even claimed here. There is an abundance of authorities in support of the view stated above. *Whitehead v. St. L., I. M. & S. R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409, and cases cited; *Lucas v. M. & St. P. R. Co.*, 33 Wis. 41, 14 Am. Rep. 735; *Alabama G. S. R. Co. v. Yarbrough*, 83 Ala. 238, 3 South. 447, 3 Am. St. Rep. 715; *Lake Shore & M. S. R. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *Everett v. Oregon, S. L. & U. N. R. Co.*, 9 Utah, 340, 34 Pac. 289; *Schuyler v. Southern Pac. Co.*, 37 Utah, 612, 109 Pac. 1025; *Simmons v. Oregon R. R. Co.*, 41 Or. 151, 69 Pac. 440, 1022; *Fitzgibbon v. Chi. & N. W. R. Co.*, 119 Iowa, 261, 93 N. W. 276; *Spence v. Chi. R. R. Co.*, 117 Iowa, 1, 90 N. W. 346; *Denison & S. R. R. Co. v. Johnston*, 36 Tex. Civ. App. 115, 81 S. W. 780; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Chi. & W. R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923.

[6] 2. The jury found under the evidence that the settlement pleaded in defense had been obtained by improper means at a time when, by reason of plaintiff's injuries, and the shock occasioned by the wreck, and the sight and circumstances thereof, plaintiff was not mentally competent to contract relative to so important a matter. On the question of the settlement and plaintiff's mental condition at and following his injuries, numerous witnesses, including a number of experts, have testified. This evidence fills nearly 100 pages of the record. The plaintiff's version of the facts which led up to his signing the release is that the agent tried to settle with him for the probable damages to his horse, and he told the agent he did not know that the horse was in any way damaged. That the agent then asked him if he was injured, and he thought at the time and told the agent he was not hurt sufficiently to amount to any damage. That the agent then told him as he had lost a great deal of time in the wreck, and had been of service to the company in looking out for trains and otherwise, that the company would remunerate him for these things and handed him a folded piece of paper with two or

three lines of writing he had put on it and told him to sign it and he would have the agent at Oklahoma City pay him \$20 whenever he called for it. The plaintiff said he told the agent he was not damaged or injured and made no charge for what assistance he had rendered, but if they wanted to give him \$20 he had no objection. This was all denied by the claim agent. This all occurred at the wreck in a short time after it happened. When plaintiff arrived in Oklahoma City that evening he immediately was seen by a physician, and during the next several months he had the services of at least five different physicians. One of the physicians, who roomed next door to plaintiff, saw and examined him about 7:30 of the day of the injury and treated him continuously for some weeks, after detailing his condition as to physical wounds, his mental and nervous condition in a few hours after the injury, and for weeks thereafter, stated as an expert that these facts, taken in connection with what occurred at the wreck, showed that the plaintiff was not mentally normal or competent to understand and appreciate the nature and consequences of the release contract he signed. That he was not competent to contract. Upon hypothetical questions being asked, two or three other physicians corroborated this view. Some of the experts for the defense contradicted it. There was as much evidence on one side as on the other. It was for the jury to decide the matter. The jury had the right to consider all the circumstances surrounding this settlement; the insignificant amount agreed upon (nothing was ever accepted by him although offered); the condition of plaintiff's physical injuries at the time, and they were by no means unimportant; his nervous state in the presence of a bad wreck with wounded men about him, one of whom was pinioned under the engine and whom plaintiff tried to get out but was unable to assist. The fact that, although badly bruised with contusions on his person, he confidently maintained that he was not hurt and continued for days to so claim, even to his physician, who states that at that time he was in a serious condition. All these circumstances lend strength to the testimony of the medical men that at the scene of the wreck, and for some time afterwards, he did not have the normal sound use of his mind. There is no doubt in our minds but that the jury was justified in avoiding the release. The case of *St. L. & S. F. Ry. Co. v. Richards*, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032, in some of its phases is in point. *A. T. & S. F. Ry. Co. v. Peck*, 79 Kan. 413, 100 Pac. 54.

[7] The instructions on this point are complained of, but they are substantially correct. The jury were told that, if the release was obtained while the plaintiff was suffering from such nervous shock, he did not under-

stand or comprehend its purport or meaning. Or, if obtained through the false and fraudulent representation of the claim agent, plaintiff relying thereon, that in either event it was not binding. The phraseology might be improved, but they were not improper in the meaning conveyed to the jury under the facts of the case.

[8] 3. Complaint is made that photographs were admitted in evidence, showing the derailed train, overturned engine, and broken cars and the derailed car of stone in front of the engine. The evidence shows the pictures to be correct reproductions of the situation, taken the same day of the wreck and while the conditions thereof remained unchanged. There was no error in admitting the evidence. It was proper to prove what the pictures show, and they afforded very convincing proof of the same. *St. L. & S. F. Ry. Co. v. Dale*, 128 Pac. 137.

4. What we have said on the first branch of the case renders it unnecessary to discuss the refusal of the court to admit in evidence rules of the company, showing that the conductor violated his duty in permitting plaintiff to ride, and other evidence of the same general import.

5. The complaint that counsel in his argument to the jury commenced to explain the peculiar amount sued for by saying that the federal court could have taken jurisdiction if it was greater has some merit. Counsel should stay within the record especially in important cases, but there does not seem to have been any improper motive, and it evidently had no effect one way or the other.

6. Nor was the verdict excessive. There was proof that \$500 had been expended for medical care; at least 2½ months' total loss of time; that previously plaintiff earned from \$300 to \$500 per month in his profession of dentistry; that his ability to follow his profession had been practically destroyed. All this, saying nothing of pain and suffering, leads us to hold that no just complaint can be made as to the amount of the verdict.

There are other minor points urged in the brief, but, while we will not take them up categorically and consider them, they have all had careful attention and are thought to be insufficient to reverse the case and not of sufficient general importance to the profession as to justify extended discussion.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

EBERLE et al. v. DRENNAN et al.
(Supreme Court of Oklahoma. Dec. 3, 1912.
On Rehearing Nov. 4, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1017*)—REFERENCE (§ 51*)—PROCEEDINGS—REPORT—EFFECT.
Under section 2812, Comp. Laws 1909, a trial before a referee is conducted in the same

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

manner as a trial by the court, and when he is to report the facts his report has the effect of a special verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996-4005; Dec. Dig. § 1017; Reference, Cent. Dig. §§ 69, 80; Dec. Dig. § 51.*]

2. MECHANICS' LIENS (§ 72*)—CONTRACT—AGENT OF OWNER.

Section 6151, Comp. Laws 1909, requires that the labor or material for which a lien is claimed must be furnished under a contract with the owner of the land, but a contract made through the agency of one who is authorized to represent the owner, or whose acts are fully ratified by the owner with full knowledge of all the facts, is the contract of the owner of the land, within the meaning of the statute.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 86; Dec. Dig. § 72.*]

3. PARTIES (§ 84*)—DEFECT—WAIVER OF OBJECTION.

It is well settled that a defect of parties must be taken advantage of by demurrer if the defect appears upon the face of the pleading, otherwise by an answer, and if such objection is not made by way of demurrer or answer, then the defect is deemed to be waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 134-142, 171; Dec. Dig. § 84.*]

4. MECHANICS' LIENS (§ 94*)—RIGHT TO LIEN—SUBCONTRACTORS.

Where the referee finds upon sufficient evidence that certain materialmen and laborers furnished material and performed labor which was used for the construction of a building under a contract with the contractor, such materialmen and laborers are entitled to obtain a lien upon the land whereon such building is erected, in accordance with the provisions of section 6153, Comp. Laws 1909.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 126; Dec. Dig. § 94.*]

5. APPEAL AND ERROR (§ 757*)—PRESENTATION FOR REVIEW—SUFFICIENCY.

The Supreme Court will not pass upon assignments of error based upon the action of the court below in sustaining a demurrer to a pleading, where the party complaining fails to comply with that part of court rule No. 25 (95 Pac. viii) which requires him to set forth the material parts of the pleading upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

6. MECHANICS' LIENS (§ 5*)—CONSTRUCTION OF STATUTE.

The provisions of the mechanics' lien law should be interpreted so as to carry out the object had in view by the Legislature in enacting it, namely, the security of the classes of persons named in the act, upon its provisions being in good faith substantially complied with on their part.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.*]

7. MECHANICS' LIENS (§ 141*)—STATEMENT OF LIENS—SUFFICIENCY.

Where materials are furnished by a subcontractor to a firm of building contractors composed of K. & S., for the erection of a building, and in his statement for a lien such subcontractor names K. as the person with whom he dealt as the contractor, and where there is nothing to indicate that the owner of the land whereon the building was erected was misled

or injured by the failure of the subcontractor to correctly state the name of the contractors, such subcontractor's lien will not be declared invalid by cause of such error.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 243-245; Dec. Dig. § 141.*]

On Rehearing.

8. MECHANICS' LIENS (§ 263*)—FORECLOSURE—PARTIES.

Under the provisions of section 6156, Comp. Laws 1909, where an action is brought by a subcontractor or materialman to enforce a lien against the property of the owner, the original contractor is an indispensable party thereto.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 471-481; Dec. Dig. § 263.*]

9. BANKRUPTCY (§ 215*)—MECHANICS' LIENS—FORECLOSURE—PARTIES—TRUSTEE IN BANKRUPTCY.

Where, however, in such case the original contractor during the construction of a building is adjudged a bankrupt, the bankruptcy trustee should be made a party defendant in actions by subcontractors or materialmen, and the unenforceable judgment taken against him made the basis upon which the liens claimed against the property are predicated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 324-326; Dec. Dig. § 215.*]

10. BANKRUPTCY (§ 215*)—FORECLOSURE—BANKRUPTCY OF PRINCIPAL CONTRACTOR—EFFECT.

Where on the construction of a building the principal contractor becomes a bankrupt, and the owner requests or consents to an order of the bankruptcy court directing the receiver or trustee of such contractor to complete his contract, and such order is made, the mere fact of bankruptcy of the original contractor will not preclude recovery against the owner, of the enforcement of a lien against the property for services rendered or materials furnished within the scope of the contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 324-326; Dec. Dig. § 215.*]

11. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CAUSE—FORECLOSURE OF MECHANICS' LIEN.

On an action brought to enforce against the property liens claimed by subcontractors and materialmen, and the original contractor is not made a party, the judgment will not be reversed and rendered, but the case will be remanded to allow such original contractor to be made a party, and a new trial granted therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Error from District Court, Oklahoma County; Wm. M. Bowles, Special Judge.

Action by R. H. Drennan against Lena L. Eberle and others. From the judgment, defendants Eberle bring error, and defendant Oklahoma Brick Company files cross-petition in error. Remanded on rehearing.

John S. Hunter, of Oklahoma City, for plaintiffs in error. Burwell, Crockett & Johnson, of Oklahoma City, for Oklahoma Brick Company. O. C. Black, of Oklahoma City, and H. Y. Thompson, of Britton, for H. Y. Thompson, trustee.

KANE, J. This was a suit to foreclose a mechanic's lien, commenced by the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in error, R. H. Drennan, who was plaintiff below, against Lena L. Eberle and John M. Eberle, in which the other defendants in error and the cross-petitioner, the Oklahoma Brick Company, were made defendants. A referee made findings of fact and conclusions of law, upon which there was a decree entered in favor of all the lienholding defendants, except the Oklahoma Brick Company (and a few other claimants who did not appeal), whereupon Lena L. Eberle and John M. Eberle, plaintiffs in error, commenced this proceeding in error, to reverse the decree of the several lienholders, and the brick company appealed from the action of the court in refusing to allow its lien.

It seems: That on the 7th day of July, 1906, Robert Kruger and John M. Eberle signed a written contract in their own name, by the terms of which Kruger was to erect and complete a brick business house for Eberle on certain lots, which, it afterwards developed, belonged to Eberle's wife. In pursuance to said contract, said Kruger, together with one Henry Sessing, proceeded to erect the house upon said lots, and it was in furnishing materials to Kruger on this contract the liens sought to be foreclosed arose. That on the 19th day of December, 1906, and before the completion of said building, Robt. Kruger filed his voluntary petition in bankruptcy, and was on the same day adjudged a bankrupt, and Robt. Eacock was duly appointed receiver for the bankrupt estate, and the proceedings in bankruptcy were then and there duly referred to the referee in bankruptcy for final settlement. Thereafter the defendants in error filed with the clerk of the district court their several mechanics' lien statements against the property in controversy, and about the same time they each filed with the court of bankruptcy their money demand and claim against the estate of Robt. Kruger, bankrupt, covering the same items and subject-matter, and in like amount as set forth in their several mechanics' lien statements, except they did not plead their claim for a mechanic's lien in the bankruptcy court. Each of the claims thus filed were approved in favor of the claimants, and judgment rendered thereon against the estate of Robt. Kruger. Thereafter Mr. Drennan commenced this action, as aforesaid, making the Eberles the trustee in bankruptcy, and all the other lien claimants parties defendant.

The contentions of plaintiffs in error are indicated by the following propositions in the form of questions quoted from the brief of their counsel: "(1) Can a mechanic's lien be had, or maintained, where the contract for the improvement of a tract or piece of land is not made with the owner? (2) Can a subcontractor or materialman or workman bring an action and foreclose his mechanic's lien against the owners of property, where there is no privity of contract between the owner and such subcontractor or materialman or

workman, without making the original contractor, or his personal representative, a party to such action, and procure first a personal judgment against the original contractor? (3) Were any of the mechanic's lien claimants in this case subcontractors or materialmen that come within the terms of our statute?"

[1] The referee found, and his findings are entitled to the same weight as the special verdict of a jury, that John M. Eberle and Lena Eberle were husband and wife, and that the title to the property described was in Lena Eberle; that whilst the title to the land in question was in Lena Eberle, and the contract for the building was signed by John M. Eberle, yet he was acting as the agent of the wife in his transactions with Kruger, and all his actions were ratified by his wife, with full knowledge of all that had been done. As this finding is amply supported by the evidence, it disposes of the first contention of plaintiffs in error.

[2] It is true, as contended by counsel, that the statute (section 6151, Comp. Laws, 1909) requires that the labor or material for which a lien is claimed must be furnished under a contract with the owner of the land, but a contract made through the agency of one who is authorized to represent the owner, or whose acts are fully ratified by the owner with full knowledge of all the facts, is the contract of the owner of the land within the meaning of the statute.

[3] On the second proposition, the referee found that, the claims having been adjudicated and allowed in the bankruptcy court, the trustee being a party to this action, and a general prayer for relief being asked, the principal obligor is sufficiently a party to this action to entitle the parties otherwise entitled thereto to a foreclosure. No authorities are cited in support of this proposition by counsel for any of the parties. Counsel for plaintiffs in error cites some authorities to the effect that an original contractor is a necessary and indispensable party to an action to foreclose a mechanic's lien by a subcontractor. Phillips on Mechanics' Liens, § 395, p. 643; Rockel on Mechanics' Liens, § 229, p. 553; O'Brien v. Gooding et al., 194 Ill. 466, 62 N. E. 898; 27 Cyc. 435. Those cases differ from the one at bar, however, in that there was no trustee in bankruptcy in them who was made a party to the foreclosure proceedings. Whatever may be said upon the merits of the foregoing contention or the correctness of the referee's conclusion, the second contention of the plaintiffs in error must be decided against them on another ground. It is well settled that a defect of parties must be taken advantage of by demurrer if the defect appears upon the face of the pleading, otherwise by an answer, and if such objection is not made by way of demurrer or answer, then the defect is deemed to be waived. Wyman v. Herard, 9 Okl. 35, 59 Pac. 1009; Miller et al. v. Camp-

bell, etc., Co., 13 Okl. 75, 74 Pac. 507; Culbertson v. Mann, 80 Okl. 249, 120 Pac. 918. The plaintiffs in error, having failed to raise this question in any of their pleadings, are precluded from raising it at this time.

[4] On the third proposition the referee found that the successful lienholders furnished the material and performed the labor which was used in the construction of said building under contracts with Kruger, the contractor. The statute (section 6153, Comp. Laws 1909) provides that: "Any person who shall furnish any such material or perform such labor under a subcontract with the contractor, or as an artisan or day-laborer in the employ of such contractor, may obtain a lien. * * * There is no contention that the finding of the referee is not based upon sufficient evidence. It seems to us that under that finding the materialmen and laborers embraced therein were entitled to a lien.

[5] There is another assignment of error, to the effect that the court erred in sustaining a demurrer to the first, third, and fourth counts of the plea and answer, filed by these plaintiffs in error to the amended petition, and several cross-petitions in the district court. As counsel has not complied with rule 25 of this court in that he has not set forth the material parts of the pleadings to which the demurrer was sustained, together with such other statements of the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court, we will not pass upon this assignment.

[6, 7] The finding of the referee in relation to the claim of the Oklahoma Brick Company was set aside by the court, and a new finding of fact by the court was substituted therefor, as follows: "That the Oklahoma Brick Company furnished the material, consisting of building brick for use in the erection of the building in controversy herein, to N. E. Sessing and Robt. Kruger, a partnership composed of Robt. Kruger and N. E. Sessing; that said brick were all used in the erection of said building, but that, the same having been furnished to the said firm of Sessing & Kruger, the said Oklahoma Brick Company is not entitled to any lien on said building; that there remains due and unpaid on said account the sum of \$223.56."

On the authority of First National Bank of Shawnee v. Oklahoma National Bank of Shawnee, 29 Okl. 411, 118 Pac. 574, the cross-petitioner contends that the court below was without authority to reject the findings of the referee and substitute findings of its own. Without passing upon that question, it seems to us the court drew an erroneous conclusion of law from the facts found by it. It is true that there is some evidence in the record tending to support the findings of the court that Kruger and Sessing were partners

in so far as the brickwork of the building under construction was concerned; but, it being admitted that the brick company furnished the material for use in the building in controversy under a contract with Kruger, a member of the firm, the fact that Kruger and Sessing were partners would not deprive the claimant of its lien merely because its statement named Kruger alone as the person to whom the materials were furnished. The purpose of the mechanic's lien law is to afford security to a designated class of persons. The statute provides the procedure to be followed in order to come within the provisions of the law, and if one of that class furnishes material which is actually used in the construction of a building, and subsequently complies with the provisions of the law relative to the procedure necessary to establish a lien, he should not be divested of his right by reason of his failure to state with precision the party to whom the material was furnished. This is particularly true where it is not made to appear that the party against whose property the lien is claimed has been injured by reason of any such technical defect. The essential fact to be set out in the lien statement is that certain materials were furnished which were actually used in the construction of the building on certain described premises. The purpose of naming the contractor in such statement is apparently to apprise the owner under what authority the material was furnished, and thereby afford him protection as to payments to be made to the contractor, and unless the owner has been misled to his injury by reason of the erroneous designation of the parties by whom the materials were furnished, such a defect is not fatal.

In Putnam et al. v. Ross et al., 46 Mo. 337, the notice of claim stated that the indebtedness was due from Ross & Shane, contractors. It turned out that the claim was against Ross alone, his former partner. The owners of the premises insisted that the error in the notice was fatal to the plaintiff's lien, but the court held: "The defendants' view seems to be founded upon the theory that the mechanic's lien enactment is in derogation of the common law, and that its provisions are therefore to be construed with a rigid strictness against those who seek to avail themselves of its intended benefits. There may be decisions which lend support to that theory, but the better opinion is that the provisions of the mechanic's lien law should be interpreted so as to carry out the object had in view by the Legislature in enacting it, namely, the security of the classes of persons named in the act, upon its provisions being in good faith substantially complied with on their part. It has become the settled policy of this state, as in most, if not all, the states, to secure mechanics and materialmen by giving them a lien upon the property they have contributed to improve or

create. The law itself has grown up from small beginnings to its present unquestioned importance. And the whole course of legislation on the subject shows that it has been the intention of the Legislature to avoid unfriendly strictness and mere technicality. The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions. It has therefore been enacted (Gen. Stat. 1865, p. 911, § 19) that when a party who deals with the principal contractor, and not directly with the owner, wishes to avail himself of the benefits of the enactment, he shall notify the owner, 10 days in advance of filing the lien, of his purpose to do so, stating in the notice the amount of his claim, and 'from whom it is due.' The plaintiffs sought to comply with that requirement, but failed to state with precision who was their debtor, giving the name of a business firm, instead of the name of the party who had been the senior member of that firm. He gave the name of his real debtor, but erroneously coupled with it the name of a third party who was not liable. Were the defendants misled to their injury by this mistake? If so, they ought not to suffer in consequence of the plaintiffs' inadvertence. But there is no probability that they were harmed by the error. At all events, it is not to be so presumed in the absence of evidence. If the error wrought the defendants any harm, it cannot be difficult for them to show it; but they aver nothing and prove nothing in that direction. Their objections rest on purely technical and overcritical grounds."

Substantially the same conclusion was reached in *Tibbetts v. Moore*, 23 Cal. 208, where it was held that a notice which stated that the materials were furnished to "Moore & Co." was sufficient, although the materials were in fact furnished to Moore alone. And in *Hauptman v. Catlin*, 3 E. D. Smith (N. Y. Com. Pleas) 666, where it was held that where a notice stated a claim against A. and B., his wife, upon a contract with A. alone, and the contract was in fact made by the husband, acting merely as the agent of his wife, the notice was sufficient.

The Supreme Court of Kansas (First Presbyterian Church of Hutchinson v. Santy et al., 52 Kan. 462, 34 Pac. 974) passed upon the same question in a case somewhat similar to the case at bar. In that case the materials were actually furnished to a partnership, but in the lien statement the subcontractor named only the individual member with whom he dealt as the contractor. In discussing the question now under consideration, Mr. Justice Allen, says: "In the statement filed by the Hutchinson Hardware Company, the trustees are named as the owners of the building, and George E. Thompson, one of the contractors, alone is named as the contractor. It is urged that this is insufficient; that the church corporation

should have been named as the owner, and the firm name of Thompson, Hanna & Co. should have been given as the contractors. Section 8, art. 12, of the Constitution reads: 'The title to all property of religious corporations shall vest in trustees, whose election shall be by the members of such corporation.' In the statement five persons are named as trustees of the First Presbyterian Church of Hutchinson. As the legal title to the property, under the constitutional provision, is vested in the trustees, and, as they were named, not as individuals, but as trustees of the church corporation, the statement is clearly sufficient in that respect. George Thompson, one of the firm of Thompson, Hanna & Co., is alone named as the contractor. It appears that the materials furnished by the hardware company were in fact sold and charged to Thompson, but were so sold to be used in the erection of the church building, and the items charged were entered on the daybook as for the church. Thompson alone was not the contractor, but he was the head of the firm who were the contractors. He, in fact, bought all of the hardware from the company for the purpose of using it in the erection of the building. It was so used. The plaintiff in error had the full benefit of it, and unless the defendants in error have failed to comply substantially with the law, they should be protected in their lien. The objection of naming the contractor would seem to be to apprise the owner and other persons by what authority and under whom the subcontractor claims a right to his lien. Now, it might happen, doubtless often does, that subcontractors are not informed as to the names of all persons interested in the original contract and the firm name in which the contract is taken. It would not be just, nor does the spirit of the statute require, that subcontractors should be defeated of their liens if they make a mistake by incorrectly naming the original contractors, where the name is given of the contractor with whom they dealt, and who was, in fact, in charge of the work of erecting the building as a contractor. *Tibbetts v. Moore*, 23 Cal. 208; *Davis v. Livingston*, 29 Cal. 283; *Putnam v. Ross*, 46 Mo. 337; *Brown v. Welch*, 5 Hun (N. Y.) 582."

It seems to us that under the foregoing authorities the court should have allowed the lien of the Oklahoma Brick Company upon its own findings of fact. In all other respects the judgment of the court below is affirmed, and the cause remanded, with directions to enter judgment in accordance with the views herein expressed. All the Justices concur, except DUNN, J., absent.

On Rehearing.

DUNN, J. [10] On the coming down of the original opinion in this case plaintiffs in error filed their petition for rehearing, as also did H. Y. Thompson, successor of W. C. Pierce, who was trustee in bankruptcy for

Kruger, the original contractor. It is insisted by plaintiffs in error: First, that by and on account of the bankruptcy of the original contractor, the claims for liens against the property of these plaintiffs in error on the part of the subcontractors and materialmen were wiped out; that there is but one debt, which is the debt of the contractor, and when this is settled, either by payment or bankruptcy, the foundation for the lien fails, and to support this claim cites the case of *Pike Bros. Lumber Co. v. Mitchell*, 132 Ga. 675, 64 S. E. 998, 26 L. R. A. (N. S.) 409, and some other cases from that jurisdiction. Counsel for the lien claimants as against this contention cite, among others, the following authorities: In *re Adam Huston*, 7 Am. Bankr. Rep. 92; *Crane Co. v. Smythe*, 42 Misc. Rep. 338, 86 N. Y. Supp. 711, 94 App. Div. 53, 87 N. Y. Supp. 917, 11 Am. Bankr. Rep. 747; *Matter of Grissler*, 136 Fed. 754, 99 C. C. A. 406, 13 Am. Bankr. Rep. 508—to support the proposition that an adjudication of bankruptcy of the original contractor does not cut off the right of a subcontractor or materialman to file and enforce his lien against the owner's land, and in our judgment it was not the intention of the Legislature in its passage of the mechanic's lien act to provide that the insolvency or bankruptcy of the principal contractor should defeat the claims mentioned. See, also, *John P. Kane Co. v. Kinney et al.*, 174 N. Y. 69, 66 N. E. 619. It is true section 6156, Comp. Laws 1909, provides that the original contractor shall be made a party defendant in all such actions, and it is further true that where he has become a bankrupt he cannot be sued and the liability enforced personally against him, but the very purpose of the act is to subject the property of the owner to the payment of the debts incurred by the original contractor when he does not pay them himself, and it would be a strange anomaly if, when that very condition arises and the original contractor availed himself of the bankruptcy statute, the law which was made to protect such of his creditors would then, when needed most, wholly fail. When the owner begins to construct his building, engages his contractor, and the contractor purchases material or employs laborers, they all act with this statute in view, and with the knowledge on the part of all that the liability of the original contractor to materialmen and laborers within the scope of his contract may, on his failure to meet it, be enforced against the property. Under the authorities, the death of the original contractor will not defeat such claims, and his executor or administrator is properly made a party to the proceeding. *Vernon, Adm'r. v. Harper et al.*, 79 Ohio St. 181, 86 N. E. 882, 20 L. R. A. (N. S.) 44. And we can see no reason why the trustee in bankruptcy might not likewise be made the party defendant. Hence we conclude and agree with counsel for the claimants that the bankruptcy

of the original contractor in this case did not wipe out the right to the lien of the materialmen and subcontractors.

[8, 9] But, it is contended, and the record discloses, that although nominally made a party, no prayer was made against the trustee, and no judgment taken establishing the debt of the subcontractors and materialmen as a foundation for their lien against the property of the plaintiffs in error, and this failure is made the ground for the insistence of the plaintiffs in error that the action must fail and the liens awarded by the judgment of the trial court be set aside and its judgment reversed. In this contention we are constrained to concur.

The statute, section 6156, supra, provides: "In such actions all persons whose liens are filed as herein provided, and other incumbances, shall be made parties; and issues shall be made and trials had as in other cases. Where such action is brought by a subcontractor, or other person not the original contractor, such original contractor shall be made a party defendant, and shall at his own expense defend against the claim of every subcontractor, or other person claiming a lien under this act, and if he fails to make such defense the owner may make the same at the expense of such contractor; and until all such claims, costs, and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he may be required to pay: Provided, that if the sheriff of the county in which such action is pending shall make return that he is unable to find such original contractor, the court may proceed to adjudicate the liens upon the land and render judgment to enforce the same with costs." No contention is made in this case that the proviso contained in the statute existed, and hence the terms of the statute are before us. While there is some conflict in the authorities on the proposition, in our judgment the great weight of them makes the original contractor in an action to enforce a lien such as in this case, not only a proper and necessary, but indispensable, party to the proceeding. Authorities, supporting in full or inferentially and effect this proposition, may be noted as follows: *Alberti v. Moore et al.*, 20 Okl. 78, 93 Pac. 543, 14 L. R. A. (N. S.) 1036; *Emmett et al. v. Rotary Mill Co.*, 2 Minn. 286 (Gil. 248); *Estey v. Hallack & Howard Lumber Co. et al.*, 4 Colo. App. 165, 34 Pac. 1113; *Sayre-Newton Lumber Co. v. Park et al.*, 4 Colo. App. 482, 36 Pac. 445; *Union Pac. Ry. Co. v. Davidson*, 21 Colo. 93, 39 Pac. 1095; *Steinmann et al. v. Strimple et al.*, 29 Mo. App. 478; *Edward McLundie & Co. v. Mount*, 145 Mo. App. 660, 123 S. W. 966; *O'Neill Lumber Co. v. Greffet et al.*, 154 Mo. App. 33, 133 S. W. 113; *Wagner v. St. Peter's Hospital*, 32 Mont. 206, 79 Pac. 1054; *Missoula Mercantile Co. v. O'Donnell et al.*

24 Mont. 76, 60 Pac. 594, 991; Kerns et al. v. Flynn, 51 Mich. 573, 17 N. W. 62; Godfrey Lumber Co. v. Kline, 160 Mich. 565, 125 N. W. 682; Augir v. Warder et al., 68 W. Va. 752, 70 S. E. 719; Flake v. Central Hardware Co., 96 Miss. 838, 51 South. 461; Tracy v. Kerr, 47 Kan. 656, 28 Pac. 707.

The Supreme Court of Kansas in the case last cited, after quoting the foregoing statute, which is a part of the practice act adopted by us, speaking on this subject says: "The language is so plain, the command that the contractor be made a party so imperative, that requirement is so mandatory, and the result of a failure or refusal to make him a party is so specifically stated, that there seems to be no fair ground, either by construction or otherwise, on which to place approval of the ruling of the trial court." Which ruling was to the effect that he was not an indispensable party. Dealing further with the same subject, it is said: "It may be suggested that if the subcontractor, or other person not the original contractor, neglect or refuse to make the contractor a party, the owner may do so on his own motion, and while it is probably true that the trial court would permit or order this to be done, yet the plain command of the statute is that the contractor shall be made a party, and we think it is primarily the duty of the party instituting such an action to do so."

Speaking to this same point, the Colorado Court of Appeals in the case of Estey v. Hallack & Howard Lumber Co. et al., supra, says: "Davis v. Lumber Co., 2 Colo. App. 381 [31 Pac. 187], is conclusive of this case. The necessity of making the contractor a party is carefully examined and discussed fully. The court said: 'It has been often held that the contractor was an indispensable party to the action. With this we agree, and adjudge that the contractor is not only a proper, but a necessary and indispensable, party, against whom a debt must be established as the foundation of the decree for the foreclosure of the lien.' This conclusion is well sustained by authority. See Phillips on Mech. Liens, § 397; Vreeland v. Ellsworth et al., 71 Iowa, 347 [32 N. W. 374]; Kern v. Flynn, 51 Mich. 573 [17 N. W. 62]; Sinnickson v. Lynch, 25 N. J. Law, 317; Pennoyer v. Neff, 95 U. S. 714 [24 L. Ed. 565]. The conclusion is founded on principle and sound legal logic. No privity of contract exists between the owner and the subcontractor; the contractor is the primary debtor; if the amount could be collected from him there would be no resulting claim against the property of the owner; the claim against the property is secondary, ancillary. Not only must there be a primary judgment against the contractor, but there must be an adjudication or settlement of the amount due subcontractors—matters of which the owner can have no knowledge whatever—and in order to fix the amount for which sub-

contractors could charge the property, an adjudication or accounting between the owner and the contractor is indispensable. It is claimed that by proceeding to trial without urging and relying upon the want of the contractor as a necessary party the irregularity was waived. In such cases there can be no waiver. A judgment against the contractor is an indispensable prerequisite to a lien upon the property. The owner and subcontractors cannot adjudicate and settle the accounts and equities between the contractor and the subcontractors, nor can they adjudicate and adjust claims and matters between the owner and the contractor. In one case the owner and contractor are the contracting parties, in the other the contractor and the subcontractors. The right to the lien is purely statutory, is subsidiary and contingent, dependent upon the enforcing the judgment against the contractor. The owner is not primarily liable; hence the indispensable necessity of the contractor being before the court as a party to a triangular adjudication, and the necessity, primarily, of a judgment against the contractor as a basis of proceedings against the property of the owner."

We, therefore, hold that the original contractor, by and through his trustee in this case, was an indispensable party to the proceeding brought for the purpose of establishing the liens in this case.

In reference to the claim of the estate of the bankrupt, represented by H. Y. Thompson, Esq., it is claimed that Robert Kruger, the original contractor, became a bankrupt during the time he was engaged in constructing the building, and had earned, under his contract, something over \$1,400, but the same had not been paid because not due until the completion of the building. The receiver of the bankrupt applied to the referee in bankruptcy for an order directing him to complete the building, in order that the estate might receive the amount of money due, and at the same time J. M. Eberle, one of the plaintiffs in error, and agent for the other in the construction of the building, appeared in court and urged the referee to finish the building. Under this an order was made, and the building was completed at an additional expense to the bankrupt's estate, for all of which the trustee asked a lien. This the referee allowed, but the trial court denied, holding that the contractor and his trustee in bankruptcy, having failed to build and deliver to the owners the building, and having failed to pay for the materials furnished by the various lien claimants, were not entitled to recover any judgment or lien upon the building, from which action the trustee, by cross-petition in error, has brought the matter to this court for review, and asks judgment upon the evidence to discover which we are referred to the 1,100-page record before us. None or but little of the evidence is set out in the abstract and briefs,

either to support or defeat the claim of the trustee. The presumption is that the judgment of the trial court is correct, and the burden in this court is upon him who assails it to show that it is wrong. We have no way of knowing that the claim made and lien claimed by the trustee does not include within it some or all of the claims of the other parties who are likewise seeking to enforce them against the property of plaintiffs in error. The inequitable result of such a situation is too apparent to require more than its statement, if true, to reject it. We will not, however, foreclose the trustee in this manner, but will remit his claim to the same course that we do the others, for the authority was vested in the bankruptcy court to authorize the business of this bankrupt to be conducted for a limited period by the receiver. See Bankruptcy Act, § 2 (5); 1 Remington on Bankruptcy, § 387; In re Richards et al. (D. C.) 127 Fed. 772; Matter of Reinboth, 157 Fed. 672, 85 C. C. A. 340, 18 L. R. A. (N. S.) 341, 19 Am. Bankr. Rep. 15. And, if otherwise entitled to the lien, the fact that it arose out of service rendered by the contractor's receiver or trustee in bankruptcy will not be sufficient to defeat it.

[11] This action has been an expensive one for all the parties, and it is to be deplored that it cannot be ended at this time, but it is better to conclude it later and have justice rendered between the parties than to conclude it now, and perhaps wrongfully.

The case of Godfrey Lumber Co. v. Kline, supra, was one similar to the case at bar. In that case the plaintiffs failed because the principal contractor was not made a party defendant, just as the plaintiff and the other lien claimants have failed in this case, and for the same reason. That court, exercising, in our judgment, a righteous discretion, decreed that: "The decree of the circuit court is reversed, with costs of both courts in favor of defendant, and the cause will be remanded to the circuit court, with permission to amend the bill of complaint by making the principal contractor a party defendant. Casserly v. Wayne Circuit Judge, 124 Mich. 157, 82 N. W. 841, 83 Am. St. Rep. 320; Prather Engineering Co. v. Railway, 152 Mich. 585, 116 N. W. 376. If the parties so elect, the case may proceed to a hearing on the record already made."

The same order will be made in the case at bar. The filing of the claims in the bankruptcy court was not a compliance with the mechanic's lien statute, and could not affect this case, except, of course, any allowance there secured would reduce the amount of the lien, and, in our judgment, the order of the court appointing the referee was sufficiently broad, and was intended to require him to report the evidence. The entire matter on the record is before the court, and the parties may amend their pleadings, mak-

ing the trustee in bankruptcy a party, with a prayer for judgment against him; and, if the present record already made is sufficiently broad upon which to predicate a finding by the court, the parties may, if they elect, avail themselves thereof, tending such additional evidence as they may desire. The determination of the mooted points of law, it is hoped, will enable these litigants to settle the case and so close up the controversy, but, should this not be accomplished, it is expected that the evidence relied on for recovery in this court will be properly abstracted and the requirements of rule 25 as to briefs observed.

The petition for rehearing is otherwise denied.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

ST. LOUIS & S. F. R. CO. v. KERNS.
(Supreme Court of Oklahoma. June 11, 1913.
Rehearing Denied Nov. 13, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 343*)—MOTIONS—JUDGMENT ON PLEADINGS.

A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact to be tried.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

2. CARRIERS (§§ 242, 280*)—"PASSENGER"—RIGHTS—CONTRIBUTORY NEGLIGENCE.

Kerns made and entered into a special shipment contract with the railroad company covering transportation of a car of household goods and live stock. As consideration for the feeding, watering, and caring for the live stock, Kerns was given free transportation. The special contract provided, among other things, that Kerns should have the sole care of said live stock and should feed, water and otherwise care for them; that he would remain in the caboose attached to said train, while the train was in motion and would not get on or off any freight car while switching was being done at stations. Held:

(a) That Kerns was a passenger, the consideration for his passage being the care given the stock.

(b) That as such he was entitled to the highest reasonable and practicable skill, care, and diligence from the railroad company.

(c) That in the discharge of his imposed duty under the contract he had a right to enter the car at a station, at noon, for the purpose of feeding and caring for the stock.

(d) That he, having no control of the movement of the cars, or the train, violated no valid term of said contract by being in said car as aforesaid while the same was being switched.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 980, 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. §§ 242, 280.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

3. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMING FACTS.

Instruction examined and held to be a correct statement of the law under the facts of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE.

Evidence examined, and *held* sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Tillman County; J. T. Johnson, Judge.

Action by J. K. Kerns against the St. Louis & San Francisco Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiff in error. Gray & McVay, of Oklahoma City, and Hudson & Mounts, of Frederick, for defendant in error.

ROBERTSON, C. The plaintiff in his petition charges: "That on the 27th day of October, 1908, the plaintiff was by the permission, knowledge, and the consent of the defendant, its agents, servants, and employes, in a certain freight car looking after his live stock being shipped by the defendant, said car being upon the track of the defendant at and near the oil mill in the city of Frederick, state of Oklahoma, and while in said freight car at the place aforesaid, and while engaged as aforesaid in taking care of his live stock as aforesaid and without fault and negligence on his part, the defendant, its agents and employes, carelessly and negligently ran an engine into and against said car, knocking plaintiff down upon the floor of said car by said collision and grievously bruising, mangling, and wounding him and which made him sick and sore, injuring him in the following particulars, to wit: Greatly bruising his left side, severely injuring or breaking one rib, greatly injuring the muscles and tendons of his left side, and causing an enlargement of the spleen, thereby permanently injuring the plaintiff, rendering him unable to perform physical labor, and disfiguring him for life. * * * That said collision and the injury thereby inflicted on the plaintiff were caused by the negligence, mismanagement, and want of care of the servants, agents, and employes of said defendant in the negligent management and control of the said engine and said freight car which was being managed and controlled by the defendant, its agents, servants, and employes."

The defendant, on the 11th day of November, 1909, filed its answer to said petition, which sets up, in substance, the following defenses: "(1) A general denial. (2) That when said shipment of live stock mentioned in plaintiff's petition was received, a contract was entered into by the defendant and one J. A. Davis, the owner of said live stock, which said live stock contract is mark-

ed 'Exhibit A' and made a part of said answer (12). And that in consideration of same, and of the transportation, furnished to plaintiff, plaintiff and defendant entered into a special written agreement which was signed by plaintiff, and the duly authorized agent of the defendant, wherein it was provided as follows: 'The undersigned, owners in charge of the live stock mentioned in the within contract, in consideration of the free pass granted us by the St. Louis & San Francisco Railroad Company, shall not be liable for any injury or damage of any kind suffered by us while in charge of said stock or on our return passage, and we hereby further agree to observe the following regulations, and do hereby release said railroad company, or those operating the same, from all liability for any injury or damage suffered by us, if injured while violating said regulations: Will remain in the caboose car attached to the train drawing said car while the train is in motion. Will get on and off said caboose car only while the same is still. Will not get on, or be on, any freight car while switching is being done at station. Will not walk or stand on any track or station or other place at night without lantern. J. K. Kerns. J. W. Hall, Agent.' And defendant alleges that, if plaintiff received the injuries alleges to have been received by him, they were received while said car was being switched in the yards of defendant and in violation of the terms of said contract without any fault on the part of defendant, its agents, servants, or employes. That it was further provided by said contract that no agent of said company has any authority to waive or modify the terms of said agreement."

The plaintiff on March 24, 1910, filed his reply to said answer. The allegations of said reply are substantially as follows: "(1) A general denial of each and every allegation contained in the answer except such as are specifically admitted. (2) That plaintiff was in said freight car while the same was on the track of the defendant at or near the oil mill near the city of Frederick, and while in said car he was discovered by the defendant, its agents or employes, in time to escape from and avoid the danger of injury had he been notified by them, and that said agents and employes carelessly and negligently, knowing plaintiff to be in said freight car, ran said engine into same, inflicting the injuries set forth in plaintiff's petition, and that said agents and employes of defendant, after discovering plaintiff in said car, failed to give him notice that the engine was to be run against the same."

The cause was tried on March 25, 1910, resulting in a verdict for plaintiff for \$300, and thereafter, on motion of defendant for new trial, said verdict was set aside and a new trial granted, and said cause reassigned

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for trial. And thereafter, on October 11, 1910, said cause again came on for trial, and, before entering upon the same, the defendant moved for judgment on the pleadings, which said motion was overruled and the defendant excepted. The trial resulted in a verdict for the plaintiff in the sum of \$1,500, and the railway company brings error and assigns, as grounds for reversal: (1) The court erred in overruling defendant's motion for judgment on the pleadings. (2) The court erred in overruling defendant's demurrer to the evidence. (3) The court erred in giving instruction No. 3. (4) The court erred in overruling defendant's motion for a new trial.

[1] In support of the first assignment of error, the railway company insists that when affirmative matter of defense is set up in the answer, and plaintiff seeks by reply to meet such defense by way of confession and avoidance, the matter alleged in avoidance must be sufficient to overcome the defense set up in the answer. It is urged that by the allegations of plaintiff's reply it is admitted that the injury complained of was occasioned by the violation of the terms of the contract pleaded in defendant's answer, but that a waiver of the conditions of said contract is attempted by the reply of plaintiff; but the company insists that even though the allegations of the reply were true they would not constitute a waiver. The company also insists that by virtue of the terms of the contract it was not its duty, nor the duty of its agents, to inform plaintiff that his presence in the car, while the same was being switched, was attended by danger, for the reason that his signature to the contract was a sufficient warning that such conduct was dangerous. In support of these contentions the railway company relies upon the doctrine announced in *St. L. & S. F. Ry. Co. v. Phillips*, 17 Okl. 264, 87 Pac. 470, and *St. L. & S. F. Ry. Co. v. Cake*, 25 Okl. 227, 105 Pac. 322, where it is said: "It would certainly seem to be the duty of the defendant in error (plaintiff), upon admitting the execution of the contract, to either especially allege compliance with the terms thereof, or to especially plead some of the facts, if any such there were, which might tend to show a substantial compliance with the terms of said contract, and which might tend to relieve him from compliance therewith, or he should in some form have alleged a waiver of the terms of said contract on the part of the defendant."

The plaintiff insists that the foregoing reasons and authorities do not apply in this case for that, while it is true that the reply is unverified and the execution of the contract set up in defendant's answer thereby admitted, yet that part only excused defendant from proving the contract, but did not in any wise take away the right of plaintiff to establish the truthfulness of the allegations of his reply. The execution of the contract is admitted by the plaintiff, but by such ad-

mission plaintiff does not admit the truthfulness of the allegations of the answer, or that the mere execution of the contract, with its stipulations and conditions, precludes him from showing that the said conditions had been waived, or were otherwise inoperative on him; on the contrary, plaintiff by his reply set up a state of facts, which, if found to be true by the jury, according to his theory, will entitle him to recover notwithstanding the terms and conditions of the contract. We are inclined to disagree with counsel for the railway company in their position on this question. We do not think the cases cited, *supra*, are at all applicable. In both of those cases the reply of the plaintiff was an unverified general denial; no facts were pleaded in addition to the general denial that could in any manner be construed as constituting a defense to the new matter set up in defendant's answer, and, inasmuch as the general denial amounted only to a legal conclusion, it follows, of course, that it was insufficient in law to entitle the plaintiff to recover. But in the case at bar we have a wholly different condition confronting us. The reply, in addition to the general denial, charges the existence of certain facts, which, if true, would relieve plaintiff from the effects of the literal terms and conditions of said contract, in so far as said contract is relied upon to relieve the company from the results of its negligence in connection with the accident complained of. Thus, in said reply, it is alleged: "That plaintiff was in said freight car while the same was on the track of the defendant at or near the oil mill near the city of Frederick, and while in said car he was discovered by the defendant, its agents or employes, in time to escape from and avoid the danger of injury had he been notified by them, and that said agents and employes carelessly and negligently, knowing plaintiff to be in said freight car, ran said engine into same, inflicting the injuries set forth in plaintiff's petition, and that said agents and employes of defendant, after discovering plaintiff in said car, failed to give him notice that the engine was to be run against the same."

Section 1 of the special contract pleaded by defendant contains the following provision: "That he will load, unload, and when necessary reload said stock and feed, water and attend to the same at his own risk and expense, while the same are in the cars of the company or any connecting line or lines, or while in any stockyards of the company or any connecting line," etc. While section 12 thereof provides that, "In consideration of free transportation for person or persons to accompany the live stock, * * * it is agreed that the said car and said live stock contained therein, are, and shall be in the sole charge of such person or persons for the purpose of attention to and care of said live stock," etc.

The evidence shows that there were four head of horses in the car; that Mr. Kerns, when the train stopped at Frederick, at noon, left the caboose and went to and entered the car for the purpose of feeding the horses; that such trip was necessary and that it was his specific duty to care for the stock; that while thus engaged one of the brakemen came along and told him to look out as the engine was coming; that thereupon he took hold of the door of the car to brace or support himself when the engine struck the car with such force as to throw not only himself, but the horses, to the floor, knocking them down, and breaking the partitions down, and shaking things up generally and giving to plaintiff the injuries complained of.

From a consideration of the foregoing it is clearly apparent that the court did not commit error in denying the company's motion for judgment on the pleadings. A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact to be tried. *Noland v. Owens*, 13 Okl. 408, 74 Pac. 954. That there were issues of fact raised by the reply none will deny, and that these facts, if true, would entitle plaintiff to prevail, is likewise true. To be sure, the special contract provides that plaintiff "will not get on or be on any freight car while switching is being done at station"; but this contract, like all others, must be construed as a whole, and the same must be so construed as to render the same consistent and reasonable, in order to carry out the intention of the parties.

[2] If the contract required plaintiff to feed and care for the live stock and imposed on him the sole care, which it does, then it was certainly in contemplation of the parties that he should enter the car, and it is a matter of common knowledge that he could enter the car for this purpose only when the train made stops at stations. Plaintiff did not have charge of the movement of the train at any place, and if, in the discharge of an imposed duty, he was in the car caring for the horses and the train crew, in the discharge of their duties, found it necessary to move this particular car in switching, it certainly cannot be said that plaintiff violated any of the provisions of his contract. It is quite clear that the horses had to be fed and cared for, and it is equally clear that the train would not be held at any place for this particular purpose; hence it follows that in order to perform a rightful duty the plaintiff had a right to be in the car at the time and place of the accident complained of. The special contract provided that he should ride in the caboose while the train was in motion, and that he should get off and on said caboose only while the same was standing still. These provisions emphasized the foregoing contention that from the very nature of the duty imposed by the contract the plaintiff was compelled to enter the car,

if at all, when the train was standing still at the station, and, he having no control of the car, ought not to be held culpable if the train crew, without his knowledge or consent, took the car and placed it on the switching track where the accident occurred.

It is hinted, also, that plaintiff assumed all the risk of injury on account of the free transportation guaranteed him by this special contract. This is not true. He did, perhaps, assume certain risks, but he did not assume the risks consequent on the gross negligence of the company. If that be the contention of the defendant, it is only necessary to say that such a contract would be void and unenforceable. The company furnished plaintiff free transportation for a consideration. This consideration was that he should feed, water, and care for the live stock. Had plaintiff not done this, the duty would have been imposed by law upon the carrier, and this service, on the part of the plaintiff, was the consideration for the free transportation and was as good and sufficient as though he had paid the regular passenger fare.

And it is also contended that plaintiff did not occupy the relation of passenger to the defendant company. This contention is also erroneous. In *Railroad Co. v. Beaver*, 41 Ind. 493, it was held that a person who is traveling with the consent of the railroad company on a freight train in charge of stock, or goods carried by the company for him, is a passenger. In *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, it is held that, when such a person is traveling in charge of cattle on a drover's pass, he is a passenger for hire. The consideration for his passage is the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping cattle. See, also, *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Railway v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Railway Co. v. Brown*, 123 Ill. 182, 14 N. E. 197, 5 Am. St. Rep. 510; *Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809. Therefore, if the plaintiff was a passenger, which, under the foregoing authorities he certainly was, it was incumbent upon the defendant company to exercise toward him the highest reasonable and practical skill, care, and diligence. Under the facts of this case, it is apparent that no such care and diligence was used.

Counsel for the railroad company contend in their brief that nowhere in the record is it stated, or shown, that the engine struck the car with any unusual violence, and pretends to say that the plaintiff does not charge or say that the violence was out of the ordinary, and cite as supporting their contention the case of *St. Louis & San Francisco Ry. Co. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892; but a reading of that case shows the facts to be so different as to render it worthless as an authority herein. In

the Gonnell Case, the plaintiff was a passenger for hire on a freight train and took a seat in the caboose; just before reaching a station the engine stopped at a water tank about 150 yards from the depot when plaintiff, thinking it had reached the station, stepped out on the rear platform to talk to a friend seated on the car steps; learning that the train had not reached the station, the plaintiff, when the train started again, stepped back into the caboose on the way to his seat, and was standing with his hands against the casings of the rear door, when the train suddenly stopped at the depot with such a jar that he was knocked off his feet and injured. It was held in that case that from these facts no inference of negligence on the part of the company could be legitimately drawn, that a motion to direct a verdict for defendant should have been sustained. This undoubtedly states a correct rule of law; but we submit that, under the facts of this case, it is wholly inapplicable, and therefore not controlling as an authority. In this case the plaintiff was not injured by a mere jerk while in a place where he ought not to have been, but the evidence shows that the accident was occasioned by the gross negligence of the defendant in the operation of its engine.

Counsel for the railway company in their brief insist that "nowhere in the record is it stated that the engine struck the car with any *unusual* violence" (page 21). We do not know whether the force used in this particular instance is or is not unusual with the Frisco. The undisputed evidence shows that a brakeman passing by the car immediately prior to the accident called to plaintiff to "be careful, the engine is coming," whereupon plaintiff took hold of the door to protect himself; that just after the warning the engine struck the car with sufficient violence to not only knock plaintiff down, but also all four horses, besides breaking down the partitions that were nailed to the sides and bottom of the car to keep the horses in one end and away from the household goods. This may be the usual and ordinary method of handling cars on defendant's lines, but the jury evidently did not believe it to be the reasonable way, nor are we very much impressed with counsel's contention in this respect. The evidence above referred to is nowhere in the record denied, and it occurs to us that such statements in the brief as the one above alluded to are not supposed to be seriously considered.

[4] It is next contended that the allegations of plaintiff's reply are not sustained by the evidence. It is unnecessary to enter into a detailed discussion of this alleged error. The evidence shows that the train crew knew

about the horses in the car, and knew that plaintiff was in charge of the car, and knew that he had been in the car prior to the time of the accident, and the undisputed evidence shows that plaintiff, shortly prior to the time the engine struck the car, was warned by the brakeman to "be careful, the engine is coming." Saying nothing about the duty of the defendant concerning the manner of handling the car under the contract, it is apparent that there was some evidence in the record reasonably tending to support the verdict on this particular point. So, too, as to the other allegations of plaintiff's reply. Such being the case, it is unnecessary to give further consideration to this alleged error. *City of Wynnewood v. Cox*, 31 Okl. 563, 122 Pac. 528.

[5] Complaint is also made on account of giving instruction No. 3, which reads as follows: "You are instructed that it is the duty of the defendant to operate its trains in such manner as to avoid injury to persons rightfully using the same, and if you find from the evidence that defendant, in making the coupling between its engine and the car in which this plaintiff was caring for his stock on the occasion in question did so in a needlessly violent and careless manner, and this plaintiff was injured thereby, then you will find for plaintiff and assess his damages at such sum as you may think him entitled, not to exceed \$1,950." It is urged that this instruction does not correctly state the law applicable to the facts in this case, inasmuch as it assumes that plaintiff was "rightfully using" the car at the time of the injury, when as a matter of fact he was using it in open violation of the terms of his contract, and for the further reason that it permits the jury to find that the coupling was made in a needlessly violent and careless manner, when as a matter of fact there is no evidence to support such finding. Neither contention is sound. As has been seen heretofore, plaintiff was rightfully in the car at the time of the accident, and the jury properly found that the accident was occasioned by the needlessly violent and careless manner in which the engine struck the car. There was no error in the giving of this instruction.

For the reasons hereinabove given it also necessarily follows that defendant's demurrer to the evidence and its motion for a new trial were properly overruled.

From a careful consideration of the entire record, we fail to discover any error of sufficient magnitude to warrant an interference, and therefore the judgment of the district court of Tillman county should, in all things, be affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. NEWBURN.

(Supreme Court of Oklahoma. Aug. 6, 1913.
Rehearing Denied Nov. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE.

Where there is any evidence in the record reasonably tending to support the verdict of the jury, the same will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. APPEAL AND ERROR (§ 1002*)—VERDICT—EVIDENCE.

In order to determine whether there is any evidence in the record reasonably tending to support the verdict, it is the duty of the court to treat all the evidence offered by plaintiff as true and treat all the evidence offered by the defendant in conflict as having been rejected, and when all the evidence supporting the verdict, taken together and given all the presumptions and deductions to which it is reasonably susceptible, is sufficient, the verdict will be allowed to stand, notwithstanding the counter-veiling evidence in the record would have been sufficient to have sustained a verdict for the other party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. PRINCIPAL AND AGENT (§ 171*)—AGENCY—RATIFICATION—LIABILITY OF PRINCIPAL.

One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own with all its burdens, as well as all its benefits.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

4. TRIAL (§ 296*)—INSTRUCTION—CURE OF ERROR.

Where an instruction given may misstate the law, yet if, when taken with the other instructions, it is apparent that the jury were not misled, it will not constitute reversible error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

5. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR.

The court, in every state of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.*]

6. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTION.

Instructions examined, and held open to criticism, but not sufficient to warrant reversal of judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Le Flore County; John H. Pitchford, Judge.

Action by Geary L. Newburn against the Chicago, Rock Island & Pacific Railway Com-

pany. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 27 Okl. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432.

C. O. Blake, H. B. Low, R. J. Roberts, W. H. Moore, and J. L. Hale, all of El Reno, for plaintiff in error. T. T. Varner, of Poteau, for defendant in error.

ROBERTSON, C. This action was originally begun in the United States Court for the Central District of the Indian Territory, sitting at Poteau on April 8, 1907, by Geary L. Newburn against the Chicago, Rock Island & Pacific Railway Company, to recover damages alleged to have been received by plaintiff by reason of having been unlawfully ejected from one of the defendant's passenger trains on the night of December 13, 1906, at a point between McAlester and Halleyville. Plaintiff alleged in his complaint that on the date last above named he purchased, from the agent of the St. Louis & San Francisco Railway Company, at Poteau, Ind. T. (who was authorized by defendant to sell the same), a round trip ticket from Poteau to McAlester, and on said day used the going part of said ticket to pay his fare between said points; that on the evening of said day he took passage on one of defendant's regular east-bound passenger trains expecting to return home; that said train was late and behind its regular schedule time; that it did not leave McAlester until after 11 o'clock p. m.; that after he had so taken passage on said train he tendered to the auditor the return part of the ticket, purchased at Poteau as aforesaid, as fare for his passage on said train; that said auditor refused to accept said ticket and demanded that he should pay money in lieu thereof; that he did not have sufficient funds to pay his fare and had no means then and there of getting the same, and was therefore unable to pay the same, but insisted that he had a right to be carried on said ticket; that on his failure to pay his fare, as required by the auditor, he was, by the servants and agents of said defendant forcibly and violently ejected from said train at a place between Alderson and Halleyville, at a spot remote from any habitation, in a strange country, at or near midnight; that it was dark, cloudy, and windy; that he was compelled to walk from said point where he was ejected to Halleyville, a distance of six miles, before he could find rest or shelter; that on account of the exposure thus occasioned, his ailments, viz., varicose veins and rheumatism, were greatly aggravated and he was made sick and confined to his room a long time and otherwise damaged to the extent of \$2,000. Defendant filed an answer, and the cause was tried on January 2, 1908, to a jury and resulted in a verdict in favor of plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff in the full amount prayed for. The cause was appealed to the Supreme Court, where it was reversed (27 Okl. 9, 110 Pac. 1065, 30 L. R. A. [N. S.] 432) and remanded for a new trial. The second trial was had on April 17, 1911, and again resulted in a verdict for plaintiff in the sum of \$2,000, and defendant again brings error.

Since the rendition of judgment in the lower court the plaintiff has died, and on June 29, 1911, after the appeal had been filed in this court, and within the time allowed by statute, the cause was revived and proceeds now as the Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error, v. T. T. Varner, Administrator of the Estate of Geary L. Newburn, Deceased.

The only assignment of error in the petition in error is that the trial court erred in overruling its motion for a new trial. Under this assignment is grouped the following specifications, viz.: (1) The verdict of the jury is not sustained by the evidence. (2) The verdict of the jury is contrary to the evidence. (3) The court erred in giving instruction No. 2 to the jury. (4) The court erred in giving instruction No. 5 to the jury.

We will consider the first and second specifications together.

[1, 2] Plaintiff in error, in presenting the propositions embraced in these specifications in its brief, among other things, says: "We confidently assert that an examination of the evidence must convince an impartial mind that the plaintiff was not ejected from the defendant's train on the night in question. Plaintiff's case, from beginning to end, bears all the earmarks of a fabrication." This is the burden of the argument in support of these assignments of error. No attempt is made to cite an authority that will warrant an interference with the verdict of the jury other than the argument that plaintiff's story is unworthy of belief. That there is testimony in the record tending to establish the allegations of plaintiff's petition is not denied. There was an irreconcilable conflict between the testimony offered by plaintiff and that offered by defendants, and, measured by the well-established rule of this court, we are not at liberty to weigh the evidence in order to ascertain where the preponderance lies; but where there is any evidence in the record tending reasonably to support the verdict, the same will not be disturbed on appeal, and, in order to determine whether there is any evidence in the record reasonably tending to support the verdict, when challenged in this manner on appeal, it becomes our duty to treat all the evidence offered by plaintiff as true and to reject all the evidence offered by defendant, in conflict, as having been rejected, and when all the evidence supporting the verdict, taken together and given all the presumptions and deductions to which it is reasonably susceptible, is sufficient, the verdict will

be allowed to stand notwithstanding the countervailing evidence in the record would have been sufficient, under the rule, to have sustained a verdict for the other party. In other words, it was the exclusive province of the jury to weigh the evidence and to judge of the credibility of the witnesses, taking into consideration their knowledge of the matters and things testified about; their appearance and demeanor on the witness stand; their interest or lack of interest, their bias and prejudice, if any; and all other matters and things which would bear directly, or indirectly, upon the issues under consideration. At the oral argument counsel for plaintiff in error did not urge these specifications, and, as said above, under the rule frequently enunciated and followed by this court, we do not feel authorized in weighing the evidence in order to determine whether or not a different result could have been reached by the jury. There is evidence in the record reasonably tending to support the verdict and that is sufficient for the purpose of this investigation. Yukon M. & G. Co. v. Imperial Roller Mills, 34 Okl. 817, 127 Pac. 422; Federal Trust Co. v. Spurlock, 34 Okl. 644, 126 Pac. 805; Clawson v. Cottingham, 34 Okl. 493, 125 Pac. 1114; Brissey v. Trotter, 34 Okl. 445, 125 Pac. 1119; Enid City Ry. Co. v. Reynolds, 32 Okl. 405, 126 Pac. 193; Bank v. Martin, 33 Okl. 319, 125 Pac. 724; Creek Bank & Trust Co. v. Johnson, 33 Okl. 696, 127 Pac. 480; McMaster v. City Nat. Bank, 23 Okl. 550, 101 Pac. 1103, 138 Am. St. Rep. 831; Bird v. Webber, 23 Okl. 583, 101 Pac. 1052; Hobbs v. Smith, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697.

The next assignment presents the alleged error of the trial court in giving to the jury instruction No. 2, which reads as follows: "The burden of proof in this case is on the plaintiff to establish that he was a passenger on defendant's train on the day and date mentioned in his complaint, that he was entitled to passage thereon, and that he was forcibly ejected therefrom; and if you find from the preponderance of the evidence that the plaintiff purchased the ticket introduced in evidence from the agent of the St. Louis & San Francisco Railway Company at Poteau, and that said ticket was honored by the defendant on its train going from Wister to McAlester, then the remaining portion of said ticket did entitle the plaintiff to be carried as a passenger back from McAlester to Wister. And if you find that while the plaintiff had the remaining portion of said ticket, and that he tendered the same to the conductor or auditor of the defendant's train, and having tendered said ticket was ejected from said train, then your verdict must be for the plaintiff." Plaintiff in error insists that this instruction is erroneous, in that it bases plaintiff's right to ride upon the ticket between McAlester and

Wister upon the fact that he had been permitted to ride upon it between Wister and McAlester, and that before the jury would be authorized to find that plaintiff was entitled to ride upon the train upon the presentation of the ticket they must find, not that it had already been honored on defendant's line, but that its issuance by the St. Louis & San Francisco Railroad Company was authorized by defendant, and that it was a ticket authorizing the holder to ride between the points named, and further that said instruction overlooks the necessity of showing authority of the issuing office on another line, as well also as the right of plaintiff to use the ticket between the stations named.

The court in another instruction told the jury that plaintiff must prove by competent evidence that he purchased the ticket from the agent of the issuing line, and that, if it was honored by defendant on its train from Wister to McAlester, the remaining part or portion of said ticket did entitle plaintiff to be carried as a passenger from McAlester to Wister. The ticket in question was introduced in evidence, and the instruction objected to referred to the ticket as introduced in evidence. The record discloses from the evidence of Walter Price (C-M, p. 38), the station agent at Poteau, for the Frisco Railroad, then he sold the identical ticket to plaintiff for the defendant company; that it was his duty and the custom of his office to sell tickets over the defendant's line such as the one offered in evidence. Plaintiff testified that he purchased the ticket from the agent of the Frisco at Poteau; that he used the going part as fare for passage to McAlester and no question was raised concerning its validity. All this evidence was undisputed and uncontradicted. The ticket itself showed it to be one issued by the Frisco Railroad over the lines of the Chicago, Rock Island & Pacific Railway Company, and that it was good for one first-class passage between Poteau and McAlester and return. This assignment is practically waived by plaintiff in error in its brief, as no argument to speak of is made in support thereof, and not a single citation of authority to sustain the proposition is cited. There was ample testimony to warrant the court in giving this instruction and to conclude, as a matter of law, that the relation of agency existed between the railroads in the matter of the selling of said ticket.

[3] Even though there was no direct testimony on the subject, yet the acts of defendant, under the pleadings and the proof, were such as to warrant the giving of this instruction on the ground of ratification alone, and it will not be heard to disclaim responsibility on this ground when the record indisputably shows that the benefits of the contract of sale, made by the Frisco agent, who, according to the record, was authorized to and did sell the ticket, were vol-

untarily accepted by the defendant company. "One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own, with all its burdens, as well as all its benefits." U. S. Fid. & G. Co. v. Shirk, 20 Okl. 576, 95 Pac. 218.

[6] The fourth assignment of error is the giving of instruction No. 5, which reads as follows: "You are instructed that you are to consider all the testimony in the case bearing on the issues of fact submitted to you, to reconcile any and all apparently conflicting statements of the witnesses, and, if practicable, to deduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses, and it is your duty to adopt that theory, than one which would require you to reject any testimony as intentionally false." It is insisted that by this instruction the court invaded the province of the jury by telling them to adopt any theory of the case which will harmonize the testimony of all the witnesses, instead of telling them that it was their duty to examine and weigh the testimony and to accept such as is true and reject such as is false. If such is the effect of this instruction, it is erroneous; but from a careful reading of the same we cannot agree with the conclusion reached by counsel.

This identical instruction was taken from Brickwood's Sackett on Instructions, vol. 1, § 330, where it is given as an approved form, and cites H. Hirschberg O. Co. v. Michaelson, 1 Neb. (Unof.) 141, 95 N. W. 461. The court in that case, in considering a similar objection to this instruction, said: "It would have been better, perhaps, to have said to the jury that they should adopt any *probable or reasonable* theory that would harmonize the evidence, rather than to state it in the absolute and unqualified form used by the court; but we cannot think that the jury was misled by the instruction as given or that reversible error can be predicated thereon."

In Price v. State, 114 Ga. 855, 40 S. E. 1015, the court in discussing a similar instruction said: "It is not error to charge that 'It is the duty of the jury to reconcile the testimony of the witnesses * * * so as to impute perjury to no witness,' where the context shows that the charge means that the jury should do so if they can." We cannot say, reading this instruction with the balance of the charge, that it is wholly erroneous; the most that can be said against it is that it is inaccurate; but its inaccuracy is such that it could not, under the facts of the case, have misled the jury, and hence is not ground for reversal. Redus v. Mattison, 30 Okl. 720, 121 Pac. 253; Ward v. Richards, 28 Okl. 629, 115 Pac. 791.

[4] The verdict of a jury should not be reversed for misdirections in the law unless

it appears that the jury might have been misled thereby. *Oklahoma City v. Meyers*, 4 Okl. 686, 46 Pac. 552. "And where an instruction given may misstate the law, yet if, when taken with the other instructions, it is apparent that the jury were not misled, it will not constitute reversible error." *Snyder v. Stribling*, 18 Okl. 168, 89 Pac. 222.

We have read the cases cited by counsel for plaintiff in error in support of their theory, but do not think they support the view presented. In the case at bar there was no possible chance for the jury to reconcile the conflicting testimony of the various witnesses. One side was right, while the other side of the controversy as presented by the opposing party must of necessity have been wrong. Newburn was, or he was not, ejected from defendant's train on the night in question. This is the principal fact in the case, and the jury were required to determine, from the evidence, whether he was, or was not, ejected as charged in his petition. He testified positively that he was, and offered the return part of the ticket in evidence as corroborative of, and part of, his story. The witnesses for the defendant company with equal directness testified that he was not ejected at all. Thus it is clearly evident that it was *not practical* for the jury to reconcile the conflicting stories of the various witnesses, and the jury did not try to do so, because such course was not only not practicable, but absolutely impossible; but they weighed all the evidence, according to the rule given them by the trial court, and decided in favor of plaintiff, as under the evidence they were warranted in doing. This instruction, while not a model to be followed by trial courts, is not susceptible to the criticism offered.

It was the duty of the jury to reconcile any and all apparently conflicting statements of witnesses, and it was likewise their duty to deduce from the evidence "if practicable" some (any) theory of the case which would harmonize the testimony of all the witnesses, and it was their further duty to adopt that (some) theory (if such a one there was) that would produce such result, rather than to have adopted one that would have required them to reject testimony as willfully false. To our mind, it is clearly apparent that no prejudicial error was committed in giving this instruction, when we read it in connection with the others given, especially the fourth, which immediately preceded this one in the general charge, and which tells the jury that they are the "sole judges of the credibility of the witnesses and of the weight to be given to their testimony. You may take into consideration their interest, bias, or prejudice, if any; their relationship to the parties and to the case, if any; the probability or improbability of the story related by them; and any and all of the facts and circumstances in evidence which, in your

judgment, would add to or detract from their credibility or the weight of their testimony."

[5] We are convinced, from a careful reading of the record, that the jury, under the facts submitted, was warranted in its conclusion, and while the instruction complained of may be, and is in fact, open to slight criticism, yet, under the recognized rule, that "the court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect" (Revised Laws 1910, § 4791), we do not feel warranted in interfering with this judgment. No complaint is made that the judgment is excessive; therefore we are not at liberty to consider that phase of the controversy. It seems that the defendant company was content to and did rely solely upon the theory that plaintiff was not ejected from its train as charged in his petition. This theory was repudiated by the verdict of the jury, and, as stated hereinabove, with that finding we can find no fault, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

HORTON v. STATE.

(Criminal Court of Appeals of Oklahoma. Nov. 15, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1174*)—HARMLESS ERROR—JURY.

Where, after the jury had retired for deliberation, the judge noticed some of the jurors in the open windows of the jury room, and directed the sheriff to tell the jurors to keep out of the windows, and the sheriff told the jurors to "get out of the windows and get together and reach a verdict," *held*, that the words spoken were not of such a nature that prejudice to the defendant will be presumed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3170-3178; Dec. Dig. § 1174.*]

2. CRIMINAL LAW (§ 923*)—NEW TRIAL—GROUNDS—DISQUALIFICATION OF JURORS.

When affidavits charging jurors with having expressed opinions as to the guilt of the defendant prior to their being called as jurors are relied upon to annul the verdict and obtain a new trial, it must be clearly shown that neither the defendant nor counsel for the defendant knew the facts averred in such affidavits at the time the jury was impaneled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. § 923.*]

3. CRIMINAL LAW (§ 923*)—NEW TRIAL—DISQUALIFICATION OF JUROR—OBJECTION.

Where a defendant accepts a juror without availing himself of the right to examine such juror on voir dire, or without availing himself of the right to challenge him for cause, he will not, after conviction, be allowed to make the objection that the juror has formed and expressed an

opinion averse to him, as a ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. § 923.*]

4. JURY (§ 110*)—DISQUALIFICATION—OBJECTION—WAIVER.

A known ground of disqualification of a juror, before or during the progress of the trial, is waived by withholding it, or refusing or declining to raise the objection until after verdict.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. § 110.*]

5. CRIMINAL LAW (§ 1166½*)—HARMLESS ERROR—DISQUALIFICATION OF JURORS.

As a general rule, a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the juror was sworn, but which was unknown to the defendant until after conviction, unless it appears from the whole case that the defendant suffered injustice from the fact that the juror served in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.*]

6. CRIMINAL LAW (§ 1160*)—APPEAL—NEW TRIAL—FINDINGS.

As a general rule, the finding of the trial court upon an issue of fact, arising upon affidavits and evidence adduced on a motion for new trial, will not be disturbed, where the evidence reasonably tends to support such finding.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

(Additional Syllabus by Editorial Staff.)

7. CRIMINAL LAW (§ 855*)—CONDUCT OF JURORS—CONVERSATION WITH OTHERS.

The statutory rule (Rev. Laws 1910, § 5906), prohibiting conversation between the jurors and the officer in charge, will not prevent the officer from enforcing an order of the court in a criminal case by telling the jurors to keep out of the open windows of the jury room.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2048-2053; Dec. Dig. § 855.*]

Appeal from District Court, Jefferson County; Frank M. Bailey, Judge.

R. D. Horton was convicted of manslaughter in the first degree, and appeals. Affirmed.

The plaintiff in error was convicted of manslaughter in the first degree, on an information charging him with the murder of Reuben Horton on the 5th day of August, 1911. On the 19th day of September, 1911, judgment was rendered, and, in accordance with the verdict of the jury, he was sentenced to be imprisoned in the penitentiary for the term of six years. To reverse the judgment an appeal was perfected.

The evidence shows that the defendant, R. D. Horton, was an elder brother of the deceased, Reuben Horton; that the defendant operated a telephone exchange in his dwelling house at Sugden, which was on the principal street of the town. On the evening of August 5th the defendant was in the telephone exchange and the deceased outside on the porch, and they were quarreling; the

defendant stepped out, shooting at the deceased. The deceased fell from the porch, and died almost instantly. There were five wounds in his body. The defendant picked up the body and laid it on the porch and walked into his office, and laid down two pistols, an automatic 38 and a 45 Colt's.

J. J. Garner, a witness for the state, testified that he was standing across the street and saw the deceased standing on the porch opposite the door of the telephone office, and the defendant was shooting; the deceased backed from the porch and fell, the defendant picked him up and laid him on the porch; that he did not see any gun in the deceased's hands, nor did he see him make any effort or attempt to shoot.

J. O. Sanders, a witness for the state testified that he was a farmer; that he was standing across the street talking to the witness Garner, and saw the Horton brothers on the porch in front of the phone office; that the deceased was stepping backwards, and the defendant was shooting him; that he did not see the deceased make any demonstration with his hands or arms, and did not see a gun in his hand.

N. Johnston testified that he was standing about 500 feet away, and saw the difficulty; that the time was about sundown; that when the first shot was fired the deceased was on the porch and started to walk away; the defendant stepped out the door and shot him four or five times more; the deceased took four or five steps, and fell; that he did not see anything in the hands of the deceased.

Ode Ellis testified that he was engaged in the furniture business at Sugden, and was walking down the street, and saw the deceased step onto the porch, and heard him say something when he reached the door, but did not understand what it was; heard the defendant swear, and tell the deceased not to come in there, to go on; that he walked towards the post office, heard a shot, and looked back and saw the defendant standing in the door shooting at the deceased; that he shot five or six times; that the deceased fell, and witness went for a doctor.

J. S. Irick testified that he issued the Sugden Signal; that he was in the Signal office, and heard persons quarreling; that he stepped out and saw the defendant and the deceased standing in front of the phone office; that they were both swearing; that the deceased came towards him, and he went back in his office, and the deceased came in and borrowed a match and then walked out; he heard him step upon the porch in front of the phone office, and say, "Well, I would like to talk to you a minute if you will," and then one shot was fired, an interval, and then several more shots. The defendant picked up a large gun that was lying near the deceased.

Several other witnesses for the state testified to substantially the same state of facts.

In behalf of the defendant his wife, Mrs. Nellie Horton, testified that her husband, her sister, and herself were eating supper, and her husband had to go in the office to attend to the switchboard; that the deceased came in, and she invited him to eat supper; that she went in the bedroom with her sister to dress, and saw a pistol lying on the bed and asked the deceased where it came from; that the deceased picked up the pistol and put it in the waistband of his pants, and said, "Have you a shirt?" and she said, "Yes," and the defendant said, "I thought Lizzie wanted one," and then said, "Have you any supporters?" and she said, "Reuben, you are drinking; you had better go on out"—and her husband said, "Come on, Reuben, and let the girls get ready for church, and the deceased said, "I will get out of your G—d d—n house and never set my foot in it again, you are a G—d d— black son of a b—h." And her husband said he did not want him to talk that way in his house, and for him to get out, go home, and go to bed. That he went out, and she did not hear any more of him until he came back on the front porch, and he called her husband and said, "Come out here, you damn son of a b—h, and I will shoot your head off," and her husband told him to go away, and he went over to the Signal office, about 20 steps away; that he came back in a short time and repeated his abusive and offensive language, and called witness a damn liar, and pulled his gun and threw it on her, and she ran into the bedroom and heard five shots.

Miss Lizzie Wilson testified that she was the defendant's wife's sister. Her testimony was substantially the same as that of her sister.

The defendant as a witness in his own behalf testified: That he noticed the gun laying on the bed; that the deceased used abusive and offensive language to him. That he asked him not to swear before the women folks, and he went out. That he came back on the front porch and used abusive language and told him to come out; that he wanted to shoot his damned head off. That he then went to the Signal office, and was there a minute or two and came back and began again to curse and abuse him. That he said to him, "You are drinking, Reuben, and go on away, I am not coming out there," and that after some more abusive language he said to his wife, "You are a G— damn liar," and drew his gun, and he then reached for his gun that was on the switchboard. That he heard the deceased's gun click, and he fired six shots. That he stepped off the porch and dropped his gun and fell. That he picked him up and laid him on the porch. That he shot him "because I knew or believed that he would kill me which he was try-

ing to do." That his gun was a 38 caliber Colt's automatic.

Fred Bear testified that he saw a six-shooter lying between the hand and body of the deceased before the defendant picked the body up.

Four witnesses testified as to the reputation of the deceased in that community as being a quarrelsome and dangerous man.

In rebuttal several witnesses testified that the deceased was not intoxicated that afternoon.

The foregoing statement of facts is sufficient for the purpose of this opinion.

Stewart, Cruce & Gilbert, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., (Monroe Osborn, of Ardmore, of counsel), for the State.

DOYLE, J. (after stating the facts as above). A number of alleged errors in the trial of the case are assigned, which, in so far as they are deemed essential in reviewing the case, will be discussed in the order presented.

The first four assignments are the usual ones: That the court erred in overruling motion for new trial; that the verdict is contrary to law, and is not sustained by the evidence; and errors of law occurring during the trial.

[1] The fifth assignment is, in effect, that after the case had been submitted to the jury, the sheriff was guilty of misconduct in talking to the jury before they had agreed upon their verdict. The record shows that John Wright, sheriff, had charge of the jury; that the jury room was across the street from the hotel; that some of the jurors would lie in the windows of the jury room, and could be seen from the hotel. The judge and the sheriff noticed this, and the judge told the sheriff to tell the jurors to get out of the windows. The sheriff testified that he told the jurors not to lie up in the windows; that the judge had told him to tell them to "get out of the windows and get together and reach a verdict, or get to work and do something"; that the people gathered outside could hear them.

The defendant's counsel cite the case of *Ridley v. State*, 5 Okl. Cr. 522, 115 Pac. 628, and numerous cases from other states in support of their position.

[7] Our Code provides (section 5906, Rev. Laws): "After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to re-

turn them into court when they have so agreed, or when ordered by the court."

It is the duty of the court and sheriff to prevent, if possible, any misconduct on the part of the jury, and it is the duty of the officer in charge to see that jurors properly conduct themselves and observe the requirements of law, and that they do nothing that would prevent a full and fair consideration of the case. The court noticed that some of the jurors were sitting in the open windows within the hearing of people outside, and directed the sheriff, who was the officer in charge, to tell them not to do so. If the court had seen fit to tell the sheriff to remove the jury from that room to another room, the sheriff would have to tell the jury to enter another room. It may be that the sheriff in enforcing the order of the judge said more than was necessary, but under the evidence in this case nothing short of error prejudicial to the substantial rights of the defendant would justify us in setting aside the verdict. Private communications, or conversations between jurors and third persons, or the officer in charge, are absolutely forbidden by law, and a defendant is entitled to the presumption that such misconduct would be prejudicial to him, and the burden of proof would be on the state to show that a defendant suffered no injury by reason of such misconduct. *Selstrom v. State*, 7 Okl. Cr. 345, 123 Pac. 557. However, this rule has no application to the objection here made. It is manifest that the words spoken by the sheriff in enforcing the order of the court were not of such a nature that injury may be fairly presumed. The language used was neither threat nor advice, nor even a suggestion. We think the objection is without merit.

[2] The sixth assignment of error is that John Spivey, one of the jurors, had formed and expressed an opinion adverse to the defendant previous to his being sworn as a juror. In his verified motion for a new trial the defendant states "that said juror was by his counsel fully examined and stated under oath that he had no opinion as to the guilt or innocence of the defendant, and had no knowledge concerning the circumstances surrounding the killing; that he could try the defendant fairly and impartially, and would do so, and that he had no prejudice against the defendant merely because he was charged with the murder of his brother." In support of this ground the affidavit of J. T. Tampen is attached, wherein affiant states that on the 25th day of August, 1911, he had a conversation with the juror, John Spivey, at Nocona, Tex., and while discussing the defendant's case, Spivey said: "From what I have heard Dick Horton ought to be mobbed, and I would be willing to help mob him, any man that would take his brother's life, no punishment would be too bad." The juror Spivey, being duly sworn, testified that

he made no such statement, nor any similar statement; that he knew the affiant Tampen; that when he was a justice of the peace at Fleetwood, affiant was convicted of gambling before him.

[6] In *Smith v. State*, 5 Okl. Cr. 282, 114 Pac. 350, it is said: "The mere fact that two parties attempted to impeach a juror does not, by any means, settle the question of credibility as between such parties and the juror. If it did, but few verdicts could be sustained, because in almost every case it would be possible to find two or more persons who would make affidavits impeaching a juror. * * * The question of credibility was one to be determined by the trial court, and, in the absence of a showing that this discretion was abused, it cannot be reviewed here. There is nothing in this record to indicate any abuse of discretion on the part of the trial judge." It is a settled rule of this court that the finding of the trial court upon a question of fact, arising upon affidavits and evidence adduced on a motion for new trial, will not be disturbed where the evidence reasonably tends to support such finding.

[3] The seventh assignment of error is that Josh Wheeler, another one of the jurors, had formed and expressed an opinion adverse to the defendant previous to his being sworn as a juror, as shown by the affidavit of one A. E. Rogers, attached to the motion for new trial. According to this affidavit, Rogers had a conversation with the juror Wheeler at the home of William Rogers on the 10th day of September, 1911, and said juror stated to him, while discussing the defendant's case, "that he had heard of the case of Dick Horton, and that he was on the jury down at Ryan, and that he did not believe that they would get a jury out of the 24 jurors, because he had been talking to all of them about the case, and he did not think any of them would sit on it, for he would not himself. That he saw him in the courthouse, and when he went out he looked as if he had done nothing more than kill a chicken, and that most any man ought to be willing to sit on his jury, and that any man who would kill his brother ought to have to serve a term, but that he did not want to be the man who put it onto him." Counsel contend that the trial court erred in refusing to set aside the verdict on account of the disqualification, prejudice, and misconduct of the juror Wheeler, as shown by the affidavit of A. E. Rogers, which the state did not introduce any proof to deny or contradict. For some reason, not apparent from the record, there is considerable difference between the allegations of the motion for new trial as to the juror Spivey and the juror Wheeler. As to Spivey there is an allegation that in the examination of the jurors on voir dire said juror was asked as to his bias and prejudice, but as to the juror Wheeler, no such allegation is made. The only evidence showing

that the juror Wheeler was ever placed on his voir dire in this case is shown by the record as follows: "Thereupon said jurors were duly sworn to true answers made to the questions propounded to them touching their qualifications to serve as jurors in said case. Thereupon said jurors were interrogated by counsel for both the state and the defendant." In view of the condition of the record presented, we cannot say that the defendant's complaint is well founded. In order for the defendant to predicate error on account of the declaration of the juror Wheeler as averred in Rogers' affidavit, it would be necessary for the record affirmatively to show that said juror had been duly examined on voir dire, and had stated under oath that he was not biased or prejudiced, and had not formed or expressed an opinion as to the guilt or innocence of the defendant. The record contains no recital of such examination. It only appears from the statement of counsel in their brief. It is not even alleged in the verified motion for a new trial. A defendant must exercise all the rights that he has under the statutes to find out whether or not a juror is qualified before he can take advantage, after verdict, of such juror's incompetency or disqualification.

[4] A defendant cannot sit supinely by and allow disqualified and incompetent jurors to be selected to try him, and then take advantage of his own indifference or negligence, nor can a defendant call upon this court to presume that he asked a juror certain questions, in the absence of a showing in the record that such questions were asked. A known ground of disqualification of a juror before or during the progress of a trial is waived by withholding it or refusing, or declining to raise the objection until after verdict. See *Queenan v. Territory*, 11 Okl. 261, 71 Pac. 218, 61 L. R. A. 324; *Id.*, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175.

We think it may be safely said that upon principle, if the defendant accepts a juror without availing himself of the right to examine such juror on voir dire, for the purpose of testing his impartiality, or without availing himself of the right to challenge him for cause, and it should be discovered after verdict that he was incompetent by reason of prejudice, the defendant would not be entitled to a new trial on that ground under our statute.

In the case of *State v. Morrison*, 67 Kan. 144, 72 Pac. 554, it is said: "Again, we believe it is a rule of universal application, when a motion for a new trial is supported by affidavits charging members of the jury with having expressed an opinion as to the guilt of the defendant prior to the trial, such affidavits must unequivocally state that both

defendant and counsel for defendant were ignorant of such fact at the time of impaneling the jury. In the case at bar the affidavits filed close with the following language, either in substance or exact words: 'The affiant further says that he never told the defendant or any of her attorneys of said conversation until after the trial had closed and the verdict had been rendered in said case.' Neither the defendant nor any of her counsel made any statement as to their knowledge of the making of such statements alleged to have been made by the jurors prior to the trial of the case. * * * There is no allegation in the affidavits that affiant did not communicate to others than the defendant or her counsel the fact that such statements were made. Error is never presumed. The record is insufficient to show the statements alleged to have been made by the jurors, if made, were unknown to the defendant or her counsel prior to the impaneling of the jury." See, also, *Robinson v. Territory*, 16 Okl. 241, 85 Pac. 451.

[5] In the case of *Stouse et al. v. State*, 6 Okl. Cr. 415, 119 Pac. 271, it is said: "It is well settled that, as a general rule, a verdict will not be set aside for reasons that would be sufficient to disqualify on a challenge for cause which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the accused suffered injustice from the fact that the juror served in the case."

Under the evidence in this case, we think it would be sufficient to say that the verdict returned is almost conclusive of the fact that the defendant was tried by a fair and impartial jury.

Finally, it is claimed that the court erred in giving instruction No. 12. No objection was made or exceptions taken to the instructions given by the court, and no other instructions were requested to be given. We have examined the instruction criticized, and we think that this instruction correctly states the law applicable to this case, and we further find that the charge of the court contains a full and fair presentation of the defense.

Having noticed and considered all of the assignments of error presented by the defendant's brief, and upon a careful examination of the entire record, we are of the opinion that no error was committed by the trial court prejudicial to the substantial rights of the defendant. The judgment of conviction is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

JONES v. STATE.

(Criminal Court of Appeals of Oklahoma. Nov. 1, 1913.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1159*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Under the law in this state issues of fact arising in the trial of a criminal action are for the jury, and when there is a clear conflict in the testimony their finding thereon will not be disturbed by this court on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 15*)—REPEAL OF PENAL STATUTE—EFFECT—CONTINUANCE OF PROSECUTION.

Under the common law the repeal of a penal statute operated as a remission of all penalties for violations thereof committed before its repeal, unless the repealing statute contained a provision expressly reserving the right to the state to continue such prosecution, but under the Constitution and laws of our state this rule is abrogated; there being a constitutional provision and a general statute reserving this right to the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1, 16-20; Dec. Dig. § 15.*]

(*Additional Syllabus by Editorial Staff.*)

3. WORDS AND PHRASES—"PENALTY"—"LIABILITY"—"FORFEITURE"—"PUNISHMENT."

The words "penalty," "liability," and "forfeiture" are frequently treated as synonymous with the word "punishment," in connection with crimes of the highest grade.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5272-5276; vol. 8, p. 7750; vol. 9, pp. 4111-4116; vol. 3, pp. 2893-2899; vol. 3, p. 7665; vol. 7, pp. 5850, 5851; vol. 8, p. 7775.]

Appeal from District Court, Carter County; S. W. Russell, Judge.

Oce Jones was convicted of larceny, and appeals. Affirmed.

Johnson & McGill and Cruce & Potter, all of Ardmore, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, Oce Jones was convicted at the November, 1911, term of the district court of Carter county on a charge of larceny of domestic animals, and his punishment fixed at imprisonment in the state penitentiary for a period of 10 years. To review the judgment of conviction he has brought this appeal. The prosecuting witness, W. R. Cypert, and the accused were near neighbors, living in Carter county, Okl. On the night of January 18, 1911, four horses and one mule were stolen from Cypert, and were later found in the Arbuckle Mountains, in a pasture used by the accused. Warren Yell and Bryant Ballew were jointly charged with the offense. They testified against the accused that on the evening of the larceny he gave them \$10 each to help him move the horses up into the Arbuckle Mountains to his pasture; that he told them he would see that

they did not get into trouble. The accused bought some carbolic acid at Heflin's drug store just before the trip. This fact is testified to by witness Coffee and by the druggist Heflin. The three left Jones' house on horseback, the accused riding a large, brown bay horse, the property of Yell, the other two riding smaller horses; each horse being shod all round. They rode north to the pasture of prosecuting witness, and there found the horses and mule. The accused cut the wire fence with clippers, and they took four horses and one mule. They had some trouble catching the horses, and left one they could not get hold of. They left the field and traveled south along what the accused told his associates was the Ardmore road, for the purpose of turning people off their track and leaving the impression that the horses had gone south. After going some distance they doubled back on an old road, and went back north to the Arbuckle Mountains, to a pasture commonly known as "No Mans" pasture, in which the accused had been keeping stock. It appears that this pasture is on top of the Arbuckles, and is made by adjoining landowners fencing their lands on all sides of it. No one seems to have any legitimate claim to the tract of land constituting this pasture. This is apparently a place scarcely ever visited, and practically impossible of being found except by those being very familiar with the surrounding country and its particular location. This place was reached early in the morning of January 19th, and is apparently about 15 miles from where the horses were taken. After reaching the pasture the stock were rebranded with the carbolic acid purchased the day before at Heflin's drug store in Lone Grove. Three or four days later, when the horses were found, there were fresh brands on them which had the appearance of having been made by acid and bore the odor of carbolic acid. There was a leather halter on the mule, which was taken off and hidden under a rock. One of the accomplices told the officers where this halter could be found, and later took the officers to this place and the halter was so found. After branding the stock the parties separated; Jones going one direction, Yell and Ballew in another. It appears that the horse the accused rode on the night of the larceny belonged to Accomplice Yell; that he recovered the same about a month later from a brother-in-law of the accused. Yell and Ballew were arrested a short time after the larceny. The accused was not located for six or seven months, and not until he came into Ardmore and surrendered to the officers. His family, however, continued to live at Lone Grove and near the town of Dixie.

[1] The accused entered a plea of not guilty and undertook to establish an alibi. The principal witnesses testifying thereto

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were two brothers, and from a reading of the record it is not surprising that the jury found against him, as the testimony of these witnesses is thoroughly impeached by the state, and their stories are most unlikely. In fact there is very little straightforward, reasonable, convincing testimony on behalf of the accused. There are many other corroborating circumstances supporting the stories told by the accomplices, entirely sufficient in our judgment to warrant the finding of the jury. With this in view this court will not reverse this judgment, in the absence of substantial errors of law.

[2] The only material law point raised by counsel for plaintiff in error is based on the contention that the crime was committed on the 18th of January, 1911, and that the prosecution was not begun until August 31, 1911; that during this interim the Legislature repealed the statute under which the crime was prosecuted.

The statute on which the prosecution was based reads as follows: "Any person in this state who shall steal any horse, cow or hog shall be guilty of a felony and upon conviction shall be punished by confinement in the state penitentiary for a term of not less than one year nor more than ten years; provided that where the horse or horses stolen are proven to be work stock the punishment shall be not less than three years nor more than ten years. The word 'horse' as used in this act shall include all animals of the equine species, and the word 'cow' shall include all animals of the bovine species." Laws 1910, c. 98.

The amendment which counsel contend repealed that statute is as follows:

"Section 1. That section 1, chapter 98, 1910, Session Laws of Oklahoma, be and the same is hereby amended to read as follows: .

"Section 1. Any person in this state who shall steal any horse, shall be guilty of a felony and upon conviction shall be punished by confinement in the state penitentiary for a term of not less than five years nor more than ten years; and any person in this state who shall steal any cow, or hog shall be guilty of a felony and upon conviction shall be punished by confinement in the state penitentiary for a term of not less than two (2) years, nor more than ten years. The word 'horse' as used in this act, shall include all animals of the equine species, and the word 'cow' shall include all animals of the bovine species." Laws 1911, c. 92.

There are two reasons why this contention is not well founded, only one of which we will discuss.

Section 54 of article 5 of our Constitution is as follows: "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute."

Section 2972, Compiled Laws of Oklahoma 1909, provides: "The repeal of any statute by the Legislative Assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

[3] The construction of an identical statute was before the United States Supreme Court in the case of *U. S. v. Reisinger*, 128 U. S. 401, 9 Sup. Ct. 100, 32 L. Ed. 480, in which the court said: "It is conceded that, under the general principles of the common law, the repeal of the penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution. In this case the court is of the opinion that section 13, Rev. St., contains such provision. It reads as follows: 'The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.' This section, we think, clearly excepts offenses committed before the passage of the repealing act of 1884. To show this, it is only necessary to read the act of 1884 in connection with section 13, Rev. Stat., as one act. It would then be read substantially as follows: 'Be it enacted, etc., 'that the act entitled "An act relating to claim agents and attorneys in pension cases," approved June 20th, 1878, is hereby repealed: Provided, that said repeal shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder, and that the same shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty or liability.' The only ground upon which the correctness of this interpretation may be doubted is that the words 'penalty,' 'liability,' and 'forfeiture' do not apply to crimes and the punishment therefor, such as we are now considering. We cannot assent to this. These words have been used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment,' in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of this

department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties,' and repeatedly refers to laws that inflict the 'penalty of death.' He refers to the other acts prescribing certain punishments for treason as 'acts of pains and penalties.' That the Legislature intended that this thirteenth section should apply to all offenses is shown by section 5598, Rev. Stat., under the title of 'Repeal Provisions,' which is as follows: 'All offenses committed and all penalties of forfeitures incurred under any statute embraced in said Revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made.'

Even though this view of the law had not been enunciated by the highest court of our land, we would feel inclined to announce the doctrine ourselves, in view of the fact that in this state our criminal laws, by legislative enactment, are entitled to a liberal construction, and without doubt the legislative enactment and provision of the article of the Constitution, supra, were intended for this very purpose. It follows that the court committed no error in overruling the demurrer.

A careful examination of the entire record discloses no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore in all things affirmed.

DOYLE, J., concurs. FURMAN, J., absent, and not participating.

WASHMOOD v. UNITED STATES.
(Criminal Court of Appeals of Oklahoma.)
Nov. 12, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 431*) — JURISDICTION — CRIME COMMITTED BEFORE STATEHOOD.

The district court has jurisdiction to try a defendant for a crime committed prior to statehood, where the defendant was indicted prior to the erection of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1143-1149; Dec. Dig. § 431.*]

2. CRIMINAL LAW (§§ 101, 105*)—TRANSFER OF CAUSE—SEAL—WAIVER OF OBJECTION.

(a) In transferring a case from a place of holding court in the Indian Territory to another place in the same district, it is not necessary for the seal of the court to be attached to the certificate of transfer.

(b) By making a motion to change the venue, defendant waives the right to raise the question that no seal was attached to the certificate of transfer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 199-205, 216-218; Dec. Dig. §§ 101, 105.*]

3. CRIMINAL LAW (§ 542*)—TESTIMONY AT PRELIMINARY HEARING—ADMISSIBILITY.

Testimony given at a preliminary hearing is admissible upon proper proof of the death of witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1232, 1236; Dec. Dig. § 542.*]

4. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—REASONABLE DOUBT—CURE OF ERROR.

For instruction held not entirely correct but insufficient to reverse judgment, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

5. CRIMINAL LAW (§§ 778, 823*)—INSTRUCTIONS—BURDEN OF PROOF—CURE OF ERROR.

An instruction which says: "If you find from the evidence that the defendant, A. Washmoood, was not present at the scene of the killing of the said Ben Collins, or that he did not aid, abet, encourage, and advise the taking of the life of said deceased, or if, after a careful consideration of all the evidence, facts, and circumstances in the case, as disclosed upon the trial, you entertain a reasonable doubt as to the killing, and as to his having aided, abetted, encouraged, and advised its commission, then you should acquit said defendant, and return a verdict of not guilty"—held error, as placing the burden of proof upon the defendant, and requiring him to prove his innocence. The error in this respect was not cured by other instructions in the usual form as to the "presumption of innocence" and "reasonable doubt."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967, 1992-1995, 3158; Dec. Dig. §§ 778, 823.*]

6. HOMICIDE (§ 174*)—CRIMINAL LAW (§§ 423, 424*)—CONSPIRACY (§§ 23, 47*)—EVIDENCE—SUFFICIENCY—ADMISSIBILITY—"CONSPIRACY."

(a) Testimony reviewed and held insufficient to constitute a conspiracy.

(b) Testimony that certain parties who were indicted with the defendant had been hanged by a mob held inadmissible.

(c) A conspiracy is a combination between two or more parties to do a thing criminal or unlawful in itself, and may be proven by facts and circumstances if sufficient, and, when shown to have existed, then the statements and acts of each of the conspirators made or done in pursuance of the common design may be proven against the others upon a prosecution against them for the commission of the crime; but nothing said or done by them after the crime has been accomplished is admissible. Certain declarations and acts held not to be in pursuance of the common design, and therefore not admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.* Criminal Law, Cent. Dig. §§ 989-1001, 1002-1010; Dec. Dig. §§ 423, 424.* Conspiracy, Cent. Dig. §§ 30-39, 105-107; Dec. Dig. §§ 23, 47.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1455-1461; vol. 8, p. 7613.]

Appeal from District Court, Carter County; George W. Clark, Judge.

A. Washmoood was convicted of murder, and appeals. Reversed and remanded.

The plaintiff in error, A. Washmoood, was on the 17th day of October, 1906, indicted by grand jury in the southern district of the Indian Territory, at Ada, charged in eight counts with conspiracy to murder and with the murder of one Ben Collins. J. B. Miller,

Henry Pruitt, Clint Pruitt, and Dan Sie were jointly indicted with plaintiff in error. It was alleged in said indictment that the crime was committed August 1, 1906, in the southern district of the Indian Territory, being in what is now known as Johnson county, Okl. Prior to said trial and upon application of the defendants the case was transferred on change of venue from Ada to Ardmore in the Southern district of the Indian Territory. After the erection of the state and on motion of the county attorney of Carter county, Okl., when neither the defendant nor his attorneys were present, an order was entered transferring the case to Johnson county, for the reason that said crime had been committed in said county. The defendant, through his attorneys, made a motion to retransfer the case to Carter county, setting up in their motion that, when the change of venue had been granted from Ada to Ardmore, said motion was also to the effect that the change of venue should be granted from Tishomingo as well as from Ada, and that the court in passing upon the motion had granted the change of venue to Ardmore, and that the case should be tried there. The court sustained the motion to transfer the case back to Ardmore in Carter county, where it was tried on the 15th day of March, 1911. The defendant was convicted and sentenced to be hanged and has appealed to this court. For convenience the parties will be referred to as the state and the defendant. Judge Furman being disqualified, the Governor appointed Hon. B. B. Barefoot, as special judge, to sit in his place.

Guy H. Sigler and R. A. Howard, both of Ardmore, and S. A. Maginnis, of Salt Lake City, for plaintiff in error. Charles West, Atty. Gen., for the United States.

BAREFOOT, Special Judge (after stating the facts as above). [1] First. The first assignment of error is that the district court of Carter county was without jurisdiction to try the defendant for the reason that the crime with which he stood charged was one against the laws of the United States; the crime as alleged having been committed before the erection of the state. To substantiate this contention we are cited to the case of *Sill Pickett v. United States*, 216 U. S. 456, 30 Sup. Ct. 285, 54 L. Ed. 566, which has been recently decided by the Supreme Court of the United States; the same being a case which went to the Supreme Court from the Western district of Oklahoma. The Supreme Court of Oklahoma soon after the erection of the state had before it this identical question in the case of *Higgins v. Brown*, 20 Okl. 355, 94 Pac. 703. And in that case the Supreme Court held, in an opinion by Chief Justice Williams, that the state courts had jurisdiction to try cases arising before statehood. This case was followed by this court in the case of *Baker*

v. State, 3 Okl. Cr. 285, 105 Pac. 379, and the Supreme Court of Oklahoma, since the decision by the Supreme Court of the United States in the *Pickett* Case, in the case of *Coyle v. Smith*, 28 Okl. 121, 113 Pac. 944, has held that the *Pickett* Case was not in conflict with the case of *Higgins v. Brown*, supra, and, whatever might be our individual opinions as to the ultimate decision by the Supreme Court of the United States when this exact question reaches them, we at this time follow the rule heretofore made by the Supreme Court of this state in *Higgins v. Brown*, supra, and of this court in *Baker v. State*, supra.

[2] Second. The second assignment of error is that the seal of the court was not attached to the papers in this case when the same was transferred from Ada to Ardmore, and also when the transfer was made from Tishomingo back to Ardmore, and that therefore the court had no jurisdiction to try defendants. We do not think that this contention is sound, for the reason that Ada, Ardmore, and Tishomingo were all situated in the Southern district of the Indian Territory, and the same clerk was clerk at each of these places, and that it was not necessary for the seal to be attached where the transfer was made from one place to another in the same district. And, besides, the defendant made application for the transfer from both Ada and Tishomingo, and by making this transfer should not be allowed to make a technical objection which would result to his benefit. We think in making the motion to transfer he waived this irregularity.

[3] Third. The third assignment of error relied upon by the defendant is the admission of the evidence of one Dr. Thomas which testimony was given at the preliminary hearing. Proof being made that the witness was dead, his testimony was read at this trial. This question has been passed upon by this court against the contention of the defendant in the case of *Mendenhall v. United States*, 6 Okl. Cr. 436, 119 Pac. 594. See, also, *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409. The Supreme Court of the United States, in the *Mattox* Case, fully and completely discussed this question, giving reasons very fully as to why such testimony is not in conflict with that provision of the Constitution which gives the defendant a right to be confronted with the witnesses against him. It is useless for us to quote these reasons as they can be seen by reading that opinion.

[4] Fourth. It is next contended by the defendant that the court erred in instruction No. 10, which is as follows: "If the evidence, facts, and circumstances disclosed upon the trial establish to your satisfaction, beyond a reasonable doubt, that Ben Collins was murdered in the Southern district of the Indian Territory on August 1, 1906, between two or more of the persons referred to in the

indictment, and that the defendant, A. Washmood, prior to said murder became a party to said conspiracy, and joined in the furtherance of the common design to murder said Ben Collins, and the circumstances introduced in evidence and relied on by the state having reference to said conspiracy and murder, when taken together and as a whole, tend to show that the defendant, A. Washmood, either committed said murder, as charged, in some one of the last counts of the indictment, or that he was present, aiding and abetting, or ready and consenting to aid and abet, in the commission of said crime, or that he had advised and encouraged the perpetration of said crime, although not personally present at the time of its commission, and the circumstances in evidence are not susceptible of any other reasonable conclusion or explanation than that to a moral certainty said defendant, A. Washmood, is guilty as so charged, then the requirements of the law as to the degree of proof necessary to support a verdict of guilty upon circumstantial evidence would be satisfied."

It is contended by counsel for the defendant that this instruction was so worded that it deprived defendant of his right to be acquitted, if there was reasonable doubt in the minds of the jury as to his guilt. There can be no question but that there is some merit in the contention of counsel. This instruction as it is worded has a strong tendency to confuse the question of reasonable doubt, and to tell the jury that they might convict the defendant whether they believed him guilty beyond a reasonable doubt. The reasonable doubt part of the instruction seems to refer only to the jury believing that Ben Collins was murdered beyond a reasonable doubt, and not that the defendant committed the murder, or was present aiding and abetting therein, beyond a reasonable doubt. However, if this was the only error committed in this case, this court would not reverse the case upon that ground, for the reason that in the last part of the instruction the court states that "the evidence must not be susceptible of any other reasonable conclusion or explanation than that to a moral certainty said defendant, A. Washmood, is guilty as so charged." We believe that the jury would have inferred from the last part of the charge that it was necessary to convict the defendant beyond a reasonable doubt; but, while we believe that the instruction is not worded as it should have been, yet this error alone would not be sufficient to reverse this cause.

[5] Fifth. It is next contended by the defendant that the court erred in instruction No. 18, which is as follows: "If you find from the evidence that the defendant, A. Washmood, was not present at the scene of the killing of the said Ben Collins, or that he did not aid, abet, encourage, and advise the taking of the life of the said deceased, or

if, after a careful consideration of all the evidence, facts, and circumstances in the case, as disclosed upon the trial, you entertain a reasonable doubt as to the said killing, and as to his having aided, abetted, encouraged, and advised its commission, then you should acquit said defendant, and return a verdict of not guilty. (Given and excepted to by defendant.)"

In our opinion this instruction was erroneous. Practically the same kind of instruction has been passed upon by this court in the following cases: *Weber v. State*, 2 Okl. Cr. 329, 101 Pac. 355; *Rea v. State*, 3 Okl. Cr. 270, 105 Pac. 381; *Clendenning v. State*, 3 Okl. Cr. 379, 106 Pac. 540. As stated by the court in the above cases, this instruction tends to put the burden of proof upon the defendant by stating: "If you find from the evidence that the defendant, A. Washmood, was not present at the scene of the killing of the said Ben Collins, or that he did not aid, abet, encourage, and advise the taking of the life of the said deceased." These words place the burden of proof upon the defendant, and, as stated by Judge Furman in the *Rea* Case, supra, "is the exact reverse of the law. Under our system the burden of proof is on the state. The defendant is presumed to be innocent until his guilt is established by the state by legal evidence beyond a reasonable doubt, and, if the state fails to do this, the defendant should be acquitted, whether the jury believe him innocent or not."

The Criminal Court of Appeals of the state of Texas, in the case of *Johnson v. State*, 29 Tex. App. 151, 15 S. W. 647, had under consideration the following instruction: "If you believe from the evidence that the defendant, acting either alone or in concert with Jeff Wood, did not poison Elizabeth Rucker as explained in paragraph 3, or if you believe that the deceased was poisoned by accident or by her own voluntary act, or if you believe that the deceased died from natural causes, or if you believe that the deceased was poisoned by some other person than the defendant, acting alone or in connection with Jeff Wood, then you will find the defendant not guilty." The court says: "We think the paragraph is subject to an exception that it requires the jury to believe from the evidence of the existence of conditions which entitled him to acquittal. It virtually requires the jury to believe from the evidence that he is innocent before finding him not guilty, whereas, the correct rule is that the jury must presume his innocence until his guilt has been established by the evidence beyond a reasonable doubt. If the jury entertained a reasonable doubt upon the whole evidence of the defendant's guilt, it was their duty to acquit him, although they might not believe from the evidence the existence of the facts and conditions, or any of them, mentioned in said paragraph. It is true that in concluding his charge the learn-

ed judge gave the usual instruction as to the presumption of innocence and as to reasonable doubt, and ordinarily such instruction is sufficient; but in this case we do not think it was sufficient to correct and counteract the error in paragraph 5. * * * The vice of the paragraph is in requiring the jury to believe from the evidence that some one of said conditions existed in order to warrant a verdict of acquittal because thereof."

As stated by Judge Furman, in the case of *Rea v. State*, supra, after quoting from the Criminal Court of Appeals in the case of *Johnson v. State*, supra: "It is apparent that within itself this instruction is inconsistent and contradictory. This court has held that, where the instructions on a material point in a criminal case are inconsistent, some correct, and others incorrect to the extent that they may be misleading to a jury, a conviction will be reversed"—citing *Price v. State*, 1 Okl. Cr. 358, 98 Pac. 447.

We think that the instruction given in this case was misleading; that in the first part of the instruction the court placed the burden of proof upon the defendant, and that the last part of the instruction cannot be harmonized with the first part of said instruction; that the giving of the same was prejudicial to the rights of the defendant.

[6] Sixth. It is next contended by the defendant that the testimony of the state is insufficient to sustain a verdict of guilty. In this connection we will pass upon the admissibility of certain testimony, which was offered by the state over the objection of the defendant, and in order to pass upon these objections intelligently it is necessary to review the testimony offered in this case.

The first witness called by the state was Tom Smith, who testified that he was sheriff of Pontotoc county, Okl.; that he saw Jim Miller and B. B. Burrell at Ada; that he saw them the last time on April 9, 1908; that they were dead at that time. It was then asked the witness: "Q. Do you know the cause of his (Jim Miller's) death? A. Yes; he was hanged by a mob. Q. Do you know a man by the name of B. B. Burrell? A. Yes, sir. Q. Was he living or dead the last time you saw him? A. He was dead. Q. Do you know the cause of his death? A. He was also hanged by the mob." All this testimony was introduced over the objection of the defendant. The witness then gave a description of both Jim Miller and B. B. Burrell. It is the contention of the state that this was the purpose of the witness' testimony; but it certainly seems to us, after reading the whole record in this case, that the testimony of this witness in reference to the hanging of Jim Miller and B. B. Burrell at Ada by a mob was inadmissible, and highly prejudicial to the rights of the defendant. This was the first witness placed upon the stand. Nothing at this time had been shown to connect the

defendant in any way with either Miller or Burrell, and this testimony could have had but one effect at the outset of this trial, to prejudice the minds of the jury against the defendant by showing that the men who had been indicted with him had been hanged by a mob in an adjoining county. It is therefore our opinion that this testimony was inadmissible, in so far as the witness was allowed to testify to the lynching of Miller and Burrell by a mob at Ada.

Mrs. Ben Collins, the wife of the deceased, was the next witness. She testified that the defendant, Washmoor, had come to their house several times prior to the killing of her husband; that her husband and the defendant had talked about insurance; that the defendant came to their house in a buggy just about sundown on Wednesday, August 1, 1906, the day of the killing; that there were two roads going from the Collins home to the little town of Emmet, one known as the East road and one as the West road; that her husband had gone to Emmet on Tuesday, and had not returned at the time the defendant was there about sundown; that the defendant inquired of the hired man, Jasper Jones, where Mr. Collins was, and, on being told that he had gone to Emmet, the defendant left in his buggy, going in an easterly direction toward Emmet; that about 9 o'clock on the same night she heard a buggy and team drive up fast to the front gate of their home, which was about 200 yards east of the house, and drive away very fast; that in a few moments she heard the repeated firing of guns; and that not less than eight shots were fired. She saw the flash of the guns, and hurried to the gate, and found her husband dead. The shots had been fired by some one standing behind a fence near the gate. Her husband's face was powder burned, and he was lying on his left side, holding his pistol.

Jasper Jones, the next witness, testified that he was working for Ben Collins, and had seen the defendant at Ben Collins' on several occasions just prior to the killing, talking insurance, and the defendant had met witness and Mr. Collins on Monday prior to the killing on Wednesday when they were peddling beef, that Mr. Collins had gotten out of the wagon, and got into the buggy and rode with the defendant, and was going with the defendant on Tuesday up about Wapanucka on some insurance business; and the witness also testified in reference to the killing in about the same manner as Mrs. Collins, and to finding shotgun shells the next morning in the corner of the fence near the gate where the deceased Ben Collins was killed.

J. D. Stephens, the next witness, testified that he lived about a mile and a quarter from Ben Collins, and on the road to Emmet; that he saw a man whom he took to be the defendant drive past his place in a buggy Sunday prior to the killing on Wednesday,

and inquired the way to Ben Collins'. He came back about 11 o'clock in the morning of the same day, going toward Emmet. He also saw a man whom he took to be the same man going toward Ben Collins' house about sundown in a buggy on the day of the killing, which was about 7 o'clock. Somewhere about three-quarters of an hour after this he saw this same man in a buggy pass by his house, going toward Emmet; that there was only one man in the buggy, nor was there any one near him. He also testified that he heard the shots fired about 9 o'clock in the direction of Ben Collins' house. He also testified to hearing a buggy pass his house after the shooting, and to his best opinion there were two men in the buggy.

Henry Whatley testified that he lived three or four miles from Ben Collins' place, and after the killing stayed there all night; that the next morning he saw shotgun shells and tracks near the scene of the killing.

Lee Dunn testified that on the evening of the killing he passed two buggies about sundown about 200 yards from the witness J. D. Stephens' house, one being driven by a man whom he believed to be the defendant, and the other by a man whom he afterwards believed to be Jim Miller; he had never seen either of them before, and only saw Miller at Ada after he was dead; that the buggies were about five steps apart; and that the defendant was in the front buggy. It will be noted here that these buggies were at this time, according to the witness, within 200 yards of J. D. Stephens' house, yet Stephens testifies that there was only one buggy passed his house, in which the defendant was driving, and that he saw this buggy pass back about the time it would have taken to have gone to Collins' house. The testimony of this witness seems to be in direct conflict with the testimony of the witness Stephens.

Willie Stephens testified that on the night of the killing he was staying at George Turnbull's house near Ben Collins' farm; that he heard the firing of the guns about 9 o'clock in the direction of Ben Collins', and that in about 30 or 40 minutes he heard a buggy pass the Turnbull residence; that two men were in the buggy, whom he heard talking. The men were traveling fast, and ran into a treetop that had fallen across the road. He also testified to tracking a team the next morning.

James Vaughn also testified to being at George Turnbull's house on the night of the killing, and he heard the buggy pass after the shooting with two men in it. Mrs. Little Vaughn, the wife of the witness James Vaughn, testified to the same facts as her husband.

W. G. Jones, a deputy marshal, testified to going to the scene of the killing on the morning after it occurred, and to finding what he described as two ambushes near Ben Collins' house, and to tracking a team near one of these ambushes. He testified that one of

the horses had a nick out of its right hind foot, which compared with the description of the horses driven by the defendant, Washmood, on the day of the killing. He also testified to finding the saddle and bridle taken from the horse Ben Collins was riding on the night of the killing.

James H. Bridges, deputy marshal, testified to tracking horses and buggies near the scene of the killing, and that he heard the defendant say the next morning at Tishomingo that he was not around Ben Collins on the day of the killing.

P. W. Martin testified to working at a livery stable in Tishomingo, and that the defendant hired a certain team from him on the day of the killing, and that one of the horses had a nick out of its right hind foot.

Mrs. Allie Armstrong testified that she was running a hotel at Tishomingo, and that the defendant stayed at her hotel the night before the killing, and engaged a room for Wednesday night for himself and two friends, and that he did not stay there.

James H. Bridges, on being recalled, testified to finding a paper, a Daily Ardmoreite, dated July 28, 1906, and also a brown hat in the woods near the road not far from the killing, and also finding some cans and a can of peaches about ten feet from the road.

L. W. Pearson testified that he was a salesman in a general merchandise store at Emmet, and that he sold the defendant some canned goods a few days before Ben Collins was killed. He did not remember just how long, but identified the cans offered in evidence as being the cans sold to the defendant.

George Dunn testified to seeing two men by the side of the road eating canned goods on the morning before Ben Collins was killed in the evening. He could not identify them, and could not testify that the defendant was one of them.

Wiley Melton testified to being city marshal at Tishomingo, and arresting the defendant the morning after the killing, and that the defendant told him he had not been to Ben Collins', and that the defendant was wearing a straw hat.

U. D. Latham testified to seeing the defendant in a buggy on Monday before the killing, and that the defendant asked him the way to Bee.

Luther Horton testified to seeing the defendant pass his house in a buggy the day before the killing, going toward Emmet. He also testified to seeing a man whom he took to be Jim Miller in a buggy near Ben Collins' on the morning of the killing.

E. R. Peachland testified that he was a liveryman at Tishomingo, and that he met the defendant on the road in the evening of the killing going from Tishomingo toward Ben Collins' house; that the defendant told him he was going to Emmet that night, and to Bee the next morning.

Mrs. Mary Thomas testified to being the wife of the hotel keeper at Emmet; that Washmood, the defendant, stayed all night there several times prior to the killing; that two other men were there, and got supper, started away, and came back, and stayed all night; that afterwards she was told that one of them was Jim Miller. She also testified to the defendant's coming to their hotel after the killing; that he drove up, and "hollered," and awoke her and her husband; that the defendant said that it was early; that the defendant put up his team, and after putting it up came into the house, and went to bed. She testified that it was after 10 o'clock when the defendant came to the hotel. She also testified that her children and another boy, who was staying at the hotel, by the name of Newt. Dugger, had gone to church that night, and had returned before the defendant arrived. It will be noted that this is in direct conflict with the testimony of Newt. Dugger and her husband, Dr. Thomas, each of whom testified that the defendant, Washmood, had gone to bed prior to the time of the arrival of the children from church.

Lem Thomas testified that he was the son of Dr. Thomas, who ran the hotel at Emmet; that he went to church on the night of the killing, and came back about 10:30, and was awakened by the defendant, Washmood, "hollering."

Jacob L. Thompson, the next witness, testified that he was secretary of Governor Johnson; that he met a man in a buggy between sundown and dark near Ben Collins' place, and the man asked him if he was Ben Collins. He testified that it was a slim, stoop-shouldered man, who looked like Jim Miller, who was hanged at Ada, and whom he saw after he was hanged by the mob.

Push Cheedle testified that he went to church at Emmet on the night of the killing, and after church was over he went down by a bridge near the church about 10:30 or 11 o'clock, and saw a buggy pass going toward Emmet with the horses in a gallop.

W. J. Horton testified to meeting the defendant two weeks before the killing. Washmood asked him if Ben Collins had not come that road. He also met Washmood on the Sunday before the killing, and that he was in a buggy. He also saw Jim Miller coming out of Emmet the day Collins was killed. He saw canned goods in the buggy. He also saw him a third time about sundown in that vicinity on the day of the killing. The defendant, Washmood, was not with him at any of the times. He also saw Dr. Thompson, the secretary of Governor Johnson, pass, and then saw Jim Miller pass in a buggy on the East road. He saw the deceased, Ben Collins, going towards his home, and saw Jim Miller following Collins in a buggy by himself. This was just a short while be-

fore Ben Collins was killed. He also testified to seeing B. B. Burrell about two weeks before the killing near one of the ambushes, and that he was driving a mule team.

A. P. Kirkwood testified that he owned a store at Lynn, which was about four miles south of Ben Collins' house, and across the Washita river; that on Friday before the killing he saw the defendant, Washmood, at his store; that the defendant asked him if he had seen two men during that day; that he again saw the defendant on Monday before the killing, and that he came into the store with two other men, and bought three bottles of Longhorn and some canned goods; that after drinking the parties left. And he afterwards identified one of the parties who was with the defendant as being Jim Miller, and he identified him at Ada after he was hanged; that being the only time he had ever seen him.

Vessie Hendricks testified that she was living near the witness Stephens' house, about two miles from Ben Collins', prior to the killing; that she saw buggies at the spring near her house on Sunday, Monday, and Tuesday, and Tuesday night before the killing; that there were two men riding in the buggy. Charles Hendricks, husband of Vessie Hendricks, testified to the same facts as his wife, and also testified to hearing the buggy running after the killing.

W. F. Gilmer, the next witness, testified that he saw the defendant in Durant on Saturday or Monday before the killing. He saw him at a restaurant, and also testified that he saw Jim Miller at the same restaurant. It will be noted that the other witnesses for the state testified that the defendant, Washmood, was in the vicinity of Ben Collins' house, in Johnson county, both on Saturday and Monday prior to the killing of Collins on Wednesday, yet this witness for the state testified that he saw the defendant in the town of Durant on Saturday or Monday prior to the killing.

B. F. Phillips, the next witness, testified that he saw the defendant at a ferry on the Washita river between Ben Collins' house and the town of Lynn a few days before the killing. He also testified that two men crossed the ferry at the same time as the defendant, but that he does not believe that either of them was Jim Miller.

W. D. Graham testified that he was ferryman near Lynn, and that he saw the defendant, Washmood, several times before the killing, and also saw two other men in that vicinity at different times just prior to the killing.

Tom Campbell testified that he saw the defendant, Washmood, pass his house in a buggy, and that he inquired the way to Ben Collins' house, on Saturday, July 7th, and also saw him in a buggy going south toward Lynn on the following Sunday.

The testimony of Dr. Thomas, who was

dead at the time of the trial, was read from the stenographer's report of the preliminary hearing. He testified that he was running a hotel in the town of Emmet; that the defendant, Washmood, came to his house on the night of the killing; that he arrived there about 10:15. He testified that his children came home from church after Washmood had arrived and gone to bed. He also testified that the defendant told him that he had passed Ben Collins on the road beyond the church, and that when the defendant first arrived at his house he made some remark about it being early; and that he told the defendant that it was not early, but that it was about 10 o'clock. He also testified that the defendant seemed to be nervous, and that a brother of Ben Collins came to his house before the defendant left for Tishomingo.

W. W. Carter testified that he was in the hotel business at Madill, and that the defendant registered at his hotel on July 5th, and that the defendant, Washmood, and a man by the name of Alford registered on July 6th; that Washmood did not occupy his room on the 5th, and Alford signed for him on the hotel register on July 6th. He also testified that they had a friend there with them during one of the times they were there.

Fred V. Kinkaid testified that he was a court reporter; that Washmood testified at the former hearing that he had never met Jim Miller before he saw him in the Ada jail, and did not know the Pruitt boys until after the killing. George Terry testified to seeing the defendant, Washmood, and Jim Miller together several times before the killing at Tishomingo, Durant, and at Ardmore. He testified that he saw them together six years prior to that time.

N. H. Simmons testified to knowing the deceased for six or eight years and the defendant, Washmood, for eight years, and testified that he saw them come in a buggy together to Ardmore about a week or ten days before the killing:

W. E. McLemore testified that he saw Henry Pruitt and Pote Pruitt in Ardmore a day after the killing, and saw Clint Pruitt come in the next day.

Martin Cavins testified that he saw Clint Pruitt and Pote Pruitt at a picnic in Orr some time in June or July, 1906, and saw a man with them at that picnic whom he heard was Jim Miller.

Henry Davenport testified to being at the Orr picnic, and saw Clint and Pote Pruitt, and that Clint Pruitt introduced him to a man who was with them, calling him by the name of Jackson, and told him that he was a mean man. This conversation was not in the presence of the defendant.

Jim Cavins testified to being at the Orr picnic along the latter part of July, 1906, and saw Clint and Pote Pruitt, and saw with them a tall, slender man, weighing about 150 pounds, and also saw Miller twice after

that in Ft. Worth, once after he was dead, and he testified to hearing Clint Pruitt saying on the day of the Orr picnic that that fellow came there to kill Ben Collins, and he also testified that there was a picnic at Hewitt on one of the days that the picnic was held at Orr, and that Clint Pruitt told him that they would "get him" at one of the picnics. His exact testimony was: "Q. What did Clint say? A. He said—he told me that evening that that fellow came there to kill Ben Collins, is what he told me." This testimony was not in the presence of the defendant.

J. A. Cummings was the next witness, and he testified that in June before the killing he bought a bunch of cattle at a sale with Henry Pruitt; that they drove the cattle to Duncan, and while on the way he told Henry Pruitt that he ought to send Pote Pruitt to New York City for the purpose of getting certain medical attention, Pote Pruitt being paralyzed in one of his legs by a bullet, which had been fired by Ben Collins; and that Henry Pruitt made the remark that Pote would outlive the son of a bitch that shot him. "I have got a man after him that will get him. It will cost me \$500; but I will gladly pay it. I have got an old Quantrell man after him." This testimony was not in the presence of the defendant, and was introduced over the objection of the defendant.

Luke Jackson testified that he saw Jim Miller and B. B. Burrell and Henry Pruitt at the Board of Trade Saloon in Ft. Worth, Tex., about a month or six weeks before the killing; that he saw B. B. Burrell introduce Henry Pruitt to Jim Miller at that time, and that Jim Miller and Henry Pruitt went into the back of the saloon, and had a long talk together.

G. P. Wallace, the next witness, testified that he saw the defendant, Washmood, at Pote Pruitt's house in October or November, 1909, and that he came into the house, and was introduced by Pote Pruitt to the defendant as a man by the name of Johnson, of the Standard Oil Company.

Robert Homer, an Indian boy, testified that he carried the defendant, A. Washmood, in a buggy to within five miles of Waurika, in Jefferson county, and that the defendant, Washmood, got out of the buggy, and walked to the town of Waurika.

T. N. Robnett testified to seeing Clint Pruitt and possibly Pote and Henry Pruitt at the Hewitt picnic during the month of June, and that there was with them at that time Jim Miller, whom he knew well.

V. A. Niblack testified that he was United States jailor at Ardmore, and identified J. B. Miller's handwriting.

Perry Maxwell testified that he was a bank cashier, and identified the handwriting of J. B. Miller.

D. E. Becker testified to seeing J. B. Miller in Ardmore on the morning after the

killing; that he came and registered at the Gilmer Hotel; and that he saw where Miller and Washmood were registered together on August and at this hotel.

A. B. Brown testified that he was on the police force at Durant, and that a man by the name of E. P. Alford, along about the 1st of July, 1906, wrote the initials "B. C." on a notebook, and told him that a man of that initials would be killed in 15 days. He identified the notebook which was introduced in evidence.

T. W. Anderson testified that he was on the police force at Durant, and that Policeman Brown showed him a book with the initials "B. C." on it after Ben Collins was killed. He also testified that the defendant, Washmood, and Alford were in the insurance business in Durant.

This closes the testimony for the state.

The defendant, Washmood, testifying in his own behalf, said: That he was 67 years old. That he was in the insurance business, and had been for a long time prior to August 1, 1906. That he lived in the town of Durant at that time; but that he wrote some insurance in Johnson county also. That he and one E. P. Alford were partners in the insurance business, and worked together. That they wrote both life insurance and fire insurance, and gave the names of several parties for whom they wrote life insurance in and around Emmet, and in Johnson county, and around Madill, prior to the killing of Ben Collins. He testified that he came to Madill near the 1st of July, and on Saturday, either the 6th or 7th of July, he went to Ben Collins' house, as testified to by the witness Tom Campbell. That he inquired the way to Ben Collins' house, and arrived there about noon on Saturday, either the 6th or 7th of July. That he inquired of Mrs. Collins as to the whereabouts of her husband, and found out that he was away from home. He went to the town of Emmet. That he telephoned to his partner, Mr. Alford, asking him to meet him in the town of Lynn that afternoon. That he drove to Lynn that afternoon. That he thought he would meet Mr. Alford. That while there he met two other parties, who drove up in a buggy. That he had never seen these parties before, and he got into a conversation with them. That they had some whisky. That he went into the store of the witness, A. P. Kirkwood, where he bought some Longhorn, and he and these parties he met there drank this together. That when he first saw these parties he thought that it was Mr. Alford, and this was the reason for getting into a conversation with them. That he left the town of Lynn that afternoon. That he thought he would stay all night at Ben Collins' house, as his wife had told him he would be back. When he got to Ben Collins' house, he asked about staying all night, and Collins told him that he could stay at his uncle's, who

lived near there. That he had plenty of horse feed. That he went to the uncle's house, stayed all night, and the next morning drove into the little town of Emmet. That during the conversation that he had with Ben Collins on the evening before Mr. Collins agreed to help him write some insurance in that vicinity, and he agreed to pay Collins for his services. This conversation occurred on Sunday morning prior to his going to Emmet. He next testified to going to Madill, and then going to his home at Durant, and after that made different trips into that section of the county in and around Emmet in connection with this insurance business. He testified that he came to the witness Marshall's hotel on Saturday prior to the time that Ben Collins was killed. He stayed there all night. The next morning he hired a buggy and team, and went from there to see Ben Collins. He met Mr. Collins at his home, and that he and Ben Collins had several drinks together out of a bottle, which he had. That during that conversation Mr. Collins agreed for him to write an insurance policy on his life for the sum of \$5,000, and that the premium on such policy would be \$161.50, and that his part of the premium would be \$80 or \$90, and that Ben Collins promised to go with him to Tishomingo on the following Monday for the purpose of being examined preparatory to taking out said policy of insurance. That on Monday morning he hired a buggy and team, the same team he had driven before, and went to Mr. Collins' house. That when he arrived there he found that Mr. Collins was gone, and that some of the children told him that Mr. Collins had killed a breachy cow, and was down and meeting the hired man, Jasper Jones, and Collins, as testified to by that witness. He also testified that Mr. Collins got out of the wagon, and got into the buggy and rode with him for quite a way. When they came to the Milburn road, Collins got out of the buggy, and got back into the wagon, and that he and Mr. Collins agreed to meet the next morning in the town of Emmet. That he, Washmood, drove that evening to Tishomingo, had dinner, and from there drove to Milburn, the place from where he had started. He stayed all night in Milburn, and early next morning took the same team and went to Emmet, where he found that Mr. Collins had already been, having passed there on horseback. That he transacted certain business in that community relative to collecting insurance notes, and that he had returned to Milburn, and took the train to Tishomingo, where he stayed all night and the next day until 3 o'clock in the afternoon. This was on Wednesday, the day of the killing. He hired a buggy and team from the livery stable in Tishomingo about 3 o'clock, and started towards Ben Collins' house. He stopped and collected some insurance notes on the way over there. On the way over

there he met Mr. Peachland, the livery stable man, as testified to by him. He arrived at Mr. Collins' house between sundown and dark. That he went by the witness Stephens' house, as testified to by him; but that there was no buggy near him at the time he passed there, as testified to by George Dunn. That when he reached Mr. Collins' house the hired man, Jasper Jones, told him that Mr. Collins was not there, but had gone to Emmet. That he turned around and drove leisurely toward Emmet, passing by the witness Stephens' house, as testified to by him, taking what is known as the West road to Emmet. He stated that on his way he met some man, and asked if it was Mr. Collins, and immediately saw it was not. That he went on towards Emmet, and just before getting to Emmet he met Ben Collins on horseback going towards his home. He testified to passing the church, about which the witnesses testified, but denied that he saw any one at the bridge, and denied that he got to the hotel near 10 or 10:30, but that it was near 9 o'clock. That Dr. Thomas had gone to bed himself. That he looked at his watch, and that it was 15 minutes after 9 o'clock. That he got up early next morning, and went to Tishomingo, and left on the noon train for Ardmore. He also testified that the relations between him and Ben Collins had been very friendly. That he knew nothing of the assassination, and was not in any wise a party to it. That he had formerly gone to the Emmet neighborhood to write Ben Collins' insurance, and that as soon as he learned of his assassination he knew that it was useless for him to stay there any longer, and that this was his reason for going to Ardmore, and from there to Durant, his home. He testified that while in Ardmore he had no arrangements to meet J. B. Miller, and did not at that time know either Henry, Pote, or Clint Pruitt. That he stayed all night in Ardmore, and took the first train out in the morning to Durant. After going home he was arrested on a charge in connection with the murder of Ben Collins. After his preliminary examination in Durant he made bond, and was living in Idabel, Okla., with Capt. McGinnis, who is now one of his counsel, when he heard that some officer from Ardmore was in that country for the purpose of rearresting him. That he did not understand why this was, as he was out on bond, and he did not believe that his bondsmen would turn him up. That acting upon the advice of Capt. McGinnis he went to Ardmore about that time, having heard that his case was set for November 16th. That he was advised by Capt. McGinnis to go to see the attorneys of the Pruitts when he got to Ardmore, and take their advice. That immediately upon reaching Ardmore he went to the office of the attorneys for the Pruitts, and they informed him that in the transfer of the case from Johnson to Carter

county his bond had been lost, and was on that morning, for that reason, forfeited. That they asked him if he could at that time make bond, and he told them that he did not know whether he could or not. That the lawyers advised him that, owing to the high state of feeling in that community, and on account of the lynching of J. B. Miller and B. B. Burrell at Ada, it would be dangerous for him to be placed in jail, and that they advised him to go to see Henry Pruitt, who lived near Cornish. He testified that at first he protested against this; but on being informed of the danger of staying there he walked out to Pote Pruitt's house near Cornish. That while there he was introduced to one of the neighbors by Pote Pruitt as being a man by the name of Johnson, of the Standard Oil Company. That this party came up to where they were talking unexpectedly, and that Mr. Pruitt introduced him by that name of his own accord. That he had never seen Pote Pruitt prior to coming to his place on this occasion. That he stayed there for three or four days, and that an Indian boy carried him near to Waurika one night, and that he got out of the buggy, and walked into Waurika, and took the train for San Antonio, Tex. That he was afterwards arrested in San Antonio, and when coming to Ardmore escaped from the train. That he returned to San Antonio, and of his own accord made arrangements with a friend at Ft. Worth to accompany him to Ardmore. That he came and surrendered of his own accord, and had been in jail up to the time of this trial.

J. W. Marshall testified in behalf of the defendant that he was a hotel keeper at Emmet and Milburn; that Mr. Washmood stayed at his hotel at both places prior to the killing of Ben Collins; that it was his understanding that the defendant was in the insurance business at that time, and that he, himself, took out an insurance policy with the defendant; that the defendant stopped at his hotel and stayed all night on Saturday, Monday, and Monday night before the killing of Collins on Wednesday, and was there Tuesday morning; that he came there Saturday evening about 1:30 or 2:00, and had late dinner; and that he was there for supper, and left Sunday morning, and was back for supper Sunday night, and stayed all night there Monday night, and left, saying that he had to go out into the country on some business.

Horace Tanner testified in behalf of the defendant that he was residing at Milburn, and remembered seeing the defendant, Washmood, at the hotel in Milburn just prior to the time Ben Collins was killed; that he remembered the night Ben Collins was killed; and that he went to the hotel late that night, and saw three parties riding through the town of Milburn between 12 and 1 o'clock

on horseback, coming from the direction of Ben Collins' place.

Lutie Johnson testified in behalf of the defendant to having certain insurance transactions with the defendant during the time he was in and around Emmet just prior to the killing.

Newt. Dugger, whose testimony was given at the preliminary examination, was read in behalf of the defendant. He testified that he was at Dr. Thomas' hotel on the night Ben Collins was killed; that he went to church that night, and when he returned home that the defendant's, Washmood's, coat was hanging up; and that he went to bed about 11 o'clock.

W. L. Hilton testified in behalf of the defendant that he knew the defendant, Washmood, and had known him for several years, since 1905; that he had some property near Emmet, and was building a house down there in July, 1906; that the defendant, Washmood, was writing insurance there in the country at that time; that he saw him in July, 1906; and that he had on a brown Fedora hat, as testified to by the defendant, and that the hat exhibited as being found near the killing was not the hat worn by the defendant, Washmood, at that time.

W. I. Cruce, an attorney of Ardmore, testified in behalf of the defendant, Washmood, and corroborated his testimony as to advising the defendant, Washmood, to go to Pruitt's residence, in Jefferson county, when his bond had been lost.

R. C. Edland testified that he was a merchant at Lynn, and that the defendant, Washmood, came to his store on Saturday evening and also Sunday before the killing, and was there Monday and Tuesday.

This concludes the testimony, both for the state and for the defendant.

It is the contention of the state that Pote Pruitt had been shot by Ben Collins while Ben Collins was deputy United States marshal, and, as a result of this shot, one of Pote Pruitt's limbs had become paralyzed, that for this reason Henry, Clint, and Pote Pruitt, who were brothers, had employed J. B. Miller and B. B. Burrell to assassinate Ben Collins, and that the defendant, Washmood, had also been employed by the Pruitts for the purpose of getting Ben Collins to leave his home in order to give said Miller and Burrell an opportunity to assassinate him, and this is the theory upon which this case was tried; it being the contention of the state that said Ben Collins was assassinated as a result of said conspiracy between said parties.

We have reviewed the testimony of every witness who testified in this case, for the reason that after careful consideration of the whole record we have come to the conclusion that the evidence offered by the state was not sufficient to show that the defendant, A. Washmood, entered into a conspiracy to assassinate Ben Collins, and therefore that

the testimony of certain witnesses to declarations and acts of others which were not in the presence of the defendant was inadmissible. It will be recalled that certain witnesses testified to being present at the picnic at Orr and Hewitt during the month of June, 1906, at which places the Pruitt boys were present and in company with a strange man, who afterwards was proven to be Jim Miller. On each of these occasions the Pruitt boys made declarations with reference to this stranger being present there for the purpose of killing Ben Collins; also declarations of Henry Pruitt to the witness J. A. Cummings in June, before the killing in August, that: "I have got a man after him that will get him. It will cost me \$500; but I will gladly pay it. I have got an old Quantrell man after him"—also acts of Henry Pruitt, as related by the witness Luke Jackson, concerning the meeting of Henry Pruitt with J. B. Miller and B. B. Burrell at the Board of Trade Saloon in the city of Ft. Worth, Tex., about a month or six weeks before the killing. These declarations and acts were not in the presence of the defendant, and were allowed to be introduced by the state upon the theory that a conspiracy had been proven between Henry, Clint, and Pote Pruitt, and J. B. Miller, B. B. Burrell, and the defendant, A. Washmood, to murder the deceased, Ben Collins. It will not be controverted that the above statements were very damaging to the defendant, in view of the testimony of Tom Smith, sheriff of Pontotoc county, who testified to the lynching of J. B. Miller and B. B. Burrell by a mob at Ada, in an adjoining county to where the defendant was tried. But there is not a line of testimony to connect this defendant with the Pruitts prior to the Orr and Hewitt picnics, and prior to the making of said declarations. There is no testimony to connect the defendant with the Pruitt boys in any way prior to the killing of Ben Collins, yet these damaging declarations and acts of the Pruitt boys were admitted against the defendant for the reason that a conspiracy had been proven between said parties to murder said Ben Collins. We are well aware that a conspiracy can be proven by circumstances as well as by direct and positive testimony, and it is often proven in that way. But in this case there is not only no direct and positive testimony as to the conspiracy, but the circumstances proven in this case are such that after reading them one cannot come to any other conclusion than that no conspiracy existed on the part of the defendant to take the life of the deceased. The mere fact that the defendant had been seen in the neighborhood where the deceased lived and in company with the deceased prior to the killing is not sufficient to establish a conspiracy. State v. Walker, 124 Iowa, 414, 100 N. W. 354; State v. Kennedy, 177 Mo. 98, 75 S. W. 989; Rhodes v. State, 39 Tex. Cr. R. 332, 45 S. W. 1009; Renner v. State, 43

Tex. Cr. R. 347, 65 S. W. 1102; Blain v. State, 30 Tex. App. 702, 18 S. W. 862.

A conspiracy is the combination between two or more parties to do a thing criminal or unlawful in itself, and may be proven by facts and circumstances, if sufficient, and when shown to have existed then the statements and acts of each of the conspirators made or done in pursuance of the common design may be proven against the others upon prosecution against them for the commission of the crime; but nothing said or done by them after the crime has been accomplished is admissible. And for such testimony to be admissible it must be proven first that a conspiracy actually existed, and that the declaration made must be in pursuance of the common design. The testimony in this case does not, in our opinion, prove that a conspiracy on the part of the defendant existed, and the declarations of the witnesses, which were admitted against him, were not made or done in pursuance of the common design to murder the deceased, as the law requires.

In the case of *State v. Walker*, 124 Iowa, 414, 100 N. W. 354, a case with many points similar to the case at bar, it is said: "We think there is another good reason why the declarations of Levich should have been excluded from the consideration of the jury. What Levich said, as testified to by the witnesses, was, in substance, that he had a grudge or grievance against Finkelstein, and that he had hired defendant to do him an injury. This declaration was not made in furtherance of the unlawful plan; * * * it was a mere narrative of a fact, made, * * * not purporting in any way to represent the defendant. The rule, as usually stated, with reference to the admissibility of the declarations of one conspirator as against another, is that such declarations are admissible only where they are made pending the conspiracy, and in furtherance of its unlawful purpose. *State v. Crofford* [121 Iowa, 395], 96 N. W. 889; *People v. Parker*, 87 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578; *Spies v. People*, 122 Ill. 1 [12 N. E. 865], 17 N. E. 898, 3 Am. St. Rep. 320, and note, 497; *McKenzie v. State*, 32 Tex. Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795; *McCaskey v. Graff*, 23 Pa. 321, 62 Am. Dec. 336. It is true that in many if not all cases cited the rule as thus stated is invoked to exclude declarations made after the conspiracy had been completed or abandoned with reference to what took place while the conspiracy was in existence; but in principle the same reasons are applicable to declarations made while the conspiracy is pending, but not in furtherance of the unlawful purpose. The declarations of one conspirator are admissible against another on the theory that each is acting for all—that is, on the principle of agency—and certainly an alleged conspirator is not to be charged with statements made by another which have no re-

lation to the carrying out of the common design. The fact appears to be that Levich made the declarations, to which the witnesses testified, in a spirit either of bravado, or, as one of the witnesses says, in a joking way, and his declarations were not taken seriously, nor did they apparently receive any attention until after the death of Finkelstein, when it was sought through them to connect the defendant with the crime. If these declarations were of any significance, they were much more incriminating as against Levich himself than as against the defendant. It is also to be noticed that some of the declarations to which the witnesses testified were made at a time prior to any connection or relation between Levich and defendant, so far as the other evidence in the case tends to establish it. Of course, declarations of Levich made prior to the formation of the conspiracy, and not in furtherance of any plan with which defendant was shown to have been connected, were not admissible."

It may be contended by the state that the jury had the right to say whether, under all the testimony in this case, a conspiracy existed, and that it was a question of fact for the jury to decide under the instructions of the court. This is answered by saying that defendant was entitled to a verdict as to his guilt free from the prejudice that might reasonably arise from the introduction of the incompetent testimony referred to above. It may have been and doubtless was true that the jury would not have found the defendant guilty beyond a reasonable doubt if the declarations and acts of the Pruitt boys had not been admitted in evidence. It was probably their declarations and acts that satisfied the minds of the jurors as to the guilt of the defendant, and from the verdict rendered in this case it must have had a strong tendency in that direction.

The defendant in this case is strongly corroborated by the state's witnesses in many material matters in connection with this case. The testimony of the witness J. D. Stephens, to our minds, strongly corroborated the defendant's testimony. This witness testified that the defendant passed the witness' house in a buggy by himself on the day of the killing about sundown going toward Ben Collins' home; that in a short while he saw the defendant drive back past the house going toward Emmet, as testified to by the defendant. This was quite a while before the killing, and corroborates the testimony of the defendant.

W. J. Horton, another witness for the state, testified to seeing Jim Miller going out of the town of Emmet on the day of the killing, and that he had some canned goods in his buggy; that there was no one with him at that time; that witness passed Ben Collins on the East road to Emmet coming from Emmet, and in just a few minutes before the killing occurred; that almost immediately after passing Ben

Collins on the East road he passed Jim Miller in a buggy by himself, following Ben Collins. This was just before he heard the firing of the guns at the gate. This testimony is almost conclusive that Jim Miller was the man who murdered Ben Collins, and that in all probability he was assisted by B. B. Burrell, who undoubtedly was the man that the different witnesses had seen with Jim Miller at different times just prior to the killing, and who was the party who left the scene of the killing in the buggy with Miller after the shooting occurred, as testified to by several witnesses. The testimony of this is almost conclusive that the defendant, Washmood, was not present and did not participate in the killing of the deceased. It may be contended that it was not necessary for him to be actually present at the time of the killing, but that he entered into a conspiracy and purposely avoided being present when the killing occurred in order to prove an alibi. However, if this argument is made, as stated, it tends to materially strengthen that part of the defendant's testimony wherein he testified that he arrived at the town of Emmet on the night of the killing soon after 9 o'clock, and that at such time it would have been impossible for him to have been present at the killing, which occurred at 9 o'clock. Besides this, the testimony of the state's witnesses in reference to the time that the defendant arrived at Emmet is conflicting and uncertain. Mrs. Thomas and her son, Lem, testified that he arrived there subsequent to the time that her children and Newt Dugger came from church. However, if he was not actually present at the time of the killing, there certainly was not any reason why he should not have arrived there at the time he stated.

After reviewing all of the testimony very carefully, we have come to the conclusion that the defendant in this case did not have that fair and impartial trial to which he was entitled under the law, and are of the opinion that this case should be reversed and remanded, and it is so ordered, and the warden of the penitentiary is ordered to deliver the defendant to the sheriff of Carter county to await the further action of the district court of Carter county.

ARMSTRONG, P. J., and DOYLE, J., concur.

BERRY v. STATE.

(Criminal Court of Appeals of Oklahoma.
Nov. 17, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 71*)—JURISDICTION—RESIDENCE.

A person holding the office of justice of the peace must reside and hold his court in

the district for which he was elected or appointed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 232, 233; Dec. Dig. § 71.*]

2. JUSTICES OF THE PEACE (§ 71*)—PERJURY (§ 9*)—JURISDICTION.

(a) Under the law in this state a justice of the peace has no jurisdiction to preside over the trial of any civil or criminal proceeding outside of the district for which he was elected or appointed.

(b) Any trial had or any business attempted by a justice of the peace outside of the district for which he was elected or appointed is a nullity.

(c) Perjury cannot be predicated on testimony alleged to have been given in a void proceeding before a justice of the peace for the reason that such proceedings are entirely without legal force and binding on no one.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 232, 233; Dec. Dig. § 71.* Perjury, Cent. Dig. §§ 27-35; Dec. Dig. § 8.*]

Appeal from District Court, Washita County; James R. Tolbert, Judge.

A. D. Berry was convicted of perjury, and appeals. Reversed.

Jones & Bashore, of Cordell, Harris & Nowlin, of Oklahoma City, and Kenneth C. Crain, of Louisville, Ky., for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. A. D. Berry was informed against, tried, and convicted in the district court of Washita county at the October, 1911, term on a charge of perjury and his punishment fixed at confinement in the state penitentiary for a period of five years.

It appears that the plaintiff in error was a party to a civil action tried before G. D. Coker as a justice of the peace in the city of Cordell in October, 1910, and in that trial gave certain testimony upon which the assignments of perjury are based. A statement of the facts is not necessary for the purpose of determining this appeal.

Among many assignments of error is one based on the proposition that the justice of the peace who presided over the trial of the civil action out of which this prosecution grows was without jurisdiction to sit in the trial of said cause for the reason that he was a justice of the peace of Cordell township and undertook to hold his court in the city of Cordell, said city being a city of the first class and as such a separate township having its own justice of the peace; it being the contention of counsel that the proceedings were a nullity and that perjury could not be based on testimony given therein. It appears that C. W. Henson was regularly elected justice of the peace for Cordell township and resigned before the expiration of his term of office; that he was not a justice of the peace of the city of Cordell; that G. D. Coker, a resident of the city of Cordell and

not a resident of Cordell township, was appointed to succeed the said Henson; that upon his appointment and qualification he opened an office in the city of Cordell and transacted business as justice of the peace for Cordell township in said city under the mistaken idea that he was justice of the peace for the city of Cordell. These facts are not disputed, and no effort was made on the part of the state tending to controvert them.

In *Leiber v. Argabright*, 25 Okl. 177, 105 Pac. 341, the Supreme Court of Oklahoma, discussing the powers of a justice of the peace and his jurisdiction to act as such, says:

"* * * But one question is submitted for determination, which is: Has a justice of the peace jurisdiction to receive, file, try, and determine an action by consent of the parties outside of the township where he is elected? Neither the Supreme Court of Oklahoma territory nor of the state has ever had occasion to pass on this question. Section 18, art. 7, of the Constitution (Snyder's Const. p. 221), creates the office of justice of the peace with jurisdiction coextensive with the county. Section 2, art. 17, of the Constitution (Snyder's Const. p. 335), enumerates the different county officers provided for under the Constitution, and a justice of the peace is not among them, and then provides for such municipal and township officers as are provided for under the laws of the territory of Oklahoma. Section 3, art. 1, c. 81 (section 6664), Wilson's Rev. & Ann. Stat. Okla. 1903, enumerates the different township officers, among which are two justices of the peace. Section 4, art. 1, c. 81 (section 6665), of the same statutes, then provides that 'all township officers shall reside and hold their offices in the township for which they shall have been elected or appointed,' etc. Hence we notice that the office of justice of the peace is not included among those provided for the county and is specifically included among those for each township. While the jurisdiction of the justice of the peace is territorially as extensive as the county within which the township in which he is elected is located, yet to our minds the provision of the statute requiring him to reside within his township and to hold his office therein contemplates that he shall be and remain within his township for the transaction of his official business. Other sections of the statutes to which we have not referred are entirely consistent with and strengthen the conclusion herein expressed, and there is no section which conflicts therewith. Counsel for both parties have with commendable zeal briefed this question, and we have with much interest read the authorities cited and considered the arguments made. In addition thereto, we have made an extended, independent investigation but without securing much additional light to that presented by counsel. Many cases tendered were found, on securing the

statutes upon which they were written, not to be in point and hence are not noticed in this opinion. The office of justice of the peace in Oklahoma is the same, and endowed with practically the same power and authority, as is the same office in the state of Kansas. Our statutes relating thereto are identical with the statutes of Kansas. This question has been before the courts of that state in several cases, and the views of its Supreme Court, which to a great extent answer the arguments of counsel for plaintiff in error and with which we are in entire accord, are announced in the following authorities: *Phillips v. Thralls*, 26 Kan. 780; *Wilcox v. Johnson et al.*, 34 Kan. 655, 9 Pac. 610; *A., T. & S. F. Railroad Co. v. Rice*, 36 Kan. 593, 14 Pac. 229. Justice Brewer, speaking for the court in the case of *Phillips v. Thralls*, supra, said: 'Does this extending the limits of their territorial jurisdiction beyond the limits of the territory which elects give them a right to hold court anywhere within the larger limit, or must the locality of the court be confined to the territory which elects and of which they are the officers? My Brethren think the latter, and that, in the absence of express statutory authority, a justice of the peace cannot hold his court outside the locality which elects him and of which he is an officer. Whatever the limits to which process may go out of his court, or whatever the extent of the territorial jurisdiction conferred upon him, he is an officer of the township, his court is a court of the township, and his court as a court has no valid existence outside the limits of that township. One purpose contemplated in the organization of these courts was to have neighborhood courts convenient to every individual for the settlement of minor disputes. If one justice may move his court out of his township to any other place in the county, all may; and we may have the spectacle of all the justices of all the townships in a county congregating in the county seat and holding office there. Thus would one of the beneficent purposes of these inferior courts be defeated.' To the same point, Mr. Justice Valentine, in the case of *A., T. & S. F. R. Co. v. Rice*, supra, said: 'A justice of the peace is a township officer, under the Constitution, and cannot be a county officer or a state officer. It is true that justices of the peace are in some sense "justices of the peace in their respective counties" and also in the state. It is true that a justice of the peace may, within his own township, perform the duties of an examining magistrate in cases, or hear cases, arising in any part of his county; and it is also true that he may, within his own township, issue criminal process to be served in any part of the state; but it does not follow from these powers, given that he may go into any part of the county or into any part of the state and there perform official acts. He can perform his official acts only in his own township. Criminal com-

plaints must be taken to the justice and not the justice to the criminal complaints. If for any reason it is more desirable to commence a criminal prosecution in one township than in another, it must be commenced before some justice of the peace of that township; but, if it is preferable to commence before some particular justice, then the parties must go to that justice and not transport him into some other township. His office is not migratory.' We therefore hold that a justice of the peace is without jurisdiction to sit, hear, and determine any action outside of the township where he is elected, and the consent of the parties cannot confer such authority, where it finds no sanction in the statute." See, also, *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448; *Hilson v. Kitchens*, 107 Ga. 230, 33 S. E. 71, 73 Am. St. Rep. 119.

It appears from the foregoing that our Supreme Court has established the doctrine that a justice of the peace is wholly without authority to hold court outside of his own district. A justice of the peace who is appointed for one district would have no more authority to hold court in some other district in the county than one who was elected. It does not appear that there was a vacancy in the office of justice of the peace in the city of Cordell. We cannot therefore presume that the appointment was intended to be other than for Cordell township and not the city of Cordell. The language used by the county commissioners expressly says that Coker was appointed justice of the peace of Cordell township. This being true, the entire proceedings out of which this prosecution grows were a nullity. The justice of the peace was without jurisdiction to administer oaths and try the cause in the city of Cordell. Prejudice cannot be based on testimony given in such proceedings.

It follows that the judgment should be reversed, and the cause remanded, with directions to dismiss, and it is so ordered.

DOYLE and FURMAN, JJ., concur.

Ex parte OWEN.

(Criminal Court of Appeals of Oklahoma.
Nov. 15, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 97*)—EXTRADITION (§§ 21, 35*)—HABEAS CORPUS (§ 19*)—INTERSTATE—GROUNDS—DETERMINATION—REVIEW BY COURTS—PROCEEDINGS—"MAGISTRATE"—STRICT CONSTRUCTION OF STATUTE.

(a) The power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states of the Union; and no person can be surrendered by one state to another, unless the case falls within the provisions of the Constitution and laws of the United States.

(b) The Governor of a state, upon whom a demand is made for the return of a fugitive from justice to a sister state, must determine

for himself, in the first place, as to whether or not the demand made is in compliance with the law, and as to whether or not the person whose return is sought is in fact a fugitive from justice; but his decision is subject to review by the courts in habeas corpus proceedings, otherwise the Governor would be clothed with arbitrary and despotic power, and there could be no uniform action in such matters in all of the states of the Union.

(c) Under the laws of the United States, an application for a requisition, made upon the Governor of any state for the return of a fugitive from justice, must be accompanied with a copy of an indictment found or an affidavit made before a magistrate of the state seeking to secure such return, charging the person demanded with having committed treason, felony, or some other crime; and, unless this provision of the federal statutes is complied with, an order of the Governor for the return of such fugitive is null and void; and it is the duty of the courts in proper proceedings to so determine and order the release of the alleged fugitive from justice.

(d) A notary public, who has no other power than to swear witnesses and take depositions in the state in which he is appointed, is not a magistrate within the meaning of the law, and an affidavit made before such notary public is not worth anything more than so much blank paper in extradition proceedings.

(e) Extradition proceedings being based upon an act of Congress, and the federal courts having decided that such act must be strictly construed, and that all of its requirements must be respected, this court is without the power or authority to construe such act liberally, but will be compelled to follow the rule laid down by the federal court, and require that all of the provisions of the federal law relating to requisitions must be strictly observed and respected.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 329-333; *Dec. Dig.* § 97.* *Extradition*, Cent. Dig. §§ 26, 39; *Dec. Dig.* §§ 21, 35.* *Habeas Corpus*, Cent. Dig. § 17; *Dec. Dig.* § 19.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4271-4273.]

2. EXTRADITION (§ 36*)—ARREST—REQUISITES OF AFFIDAVIT—RIGHT TO GRANT EXTRADITION.

(a) In order to be the basis of and support requisition proceedings, where an affidavit made before a magistrate is relied upon, such affidavit must be sworn to positively as a matter of fact. It is the law, both of the United States and of the state of Oklahoma, that no warrant can be issued for the arrest of any person unless it is supported by some fact certain positively sworn to before a proper officer. An affidavit verified as a matter of belief by the prosecuting witness is insufficient, and a warrant issued upon such affidavit, if properly objected to, will be set aside.

(b) Courts should not tolerate or condone disregard of law and arbitrary usurpation of power on the part of any officer. Ours is a government of law, and not of men, and before any act of any official will be sustained by the courts such act must be authorized by law.

[Ed. Note.—For other cases, see *Extradition*, Cent. Dig. §§ 40-43; *Dec. Dig.* § 36.*]

Application for writ of habeas corpus by Ralph T. Owen. Writ allowed, and petitioner discharged.

Hon. Lee Cruce, Governor of the state of Oklahoma, having issued his warrant in extradition proceedings for the return of Ralph

*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key-No. Series* & *Rep'r Indexes*

T. Owen to the state of Iowa, as a fugitive from justice, upon the ground that said party was guilty of obtaining money under false pretenses, and the said Ralph T. Owen being in custody by virtue of the warrant issued by the Governor of the state of Oklahoma on such proceedings, applied to this court for a writ of habeas corpus. Upon the hearing of this cause, all the papers which were before the Governor of Oklahoma, and upon which he acted, were admitted in evidence. All the facts involved in the determination of this cause are stated in the opinion. The case was orally argued by McAdams & Haskell for the petitioner, and Clinton O. Bunn for the state of Iowa; and briefs were filed by respective counsel. Writ allowed, and petitioner discharged.

Thomas Marcum, of Muskogee, W. M. Harrison, of Sapulpa, S. M. Rutherford, of Muskogee, and McAdams & Haskell, of Oklahoma City, for petitioner. Clinton O. Bunn, of Oklahoma City, for State of Iowa.

FURMAN, J. (after stating the facts as above). [1] First Section 2, art. 4, of the Constitution of the United States is as follows.

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

In conformity to this provision of the Constitution, Congress has enacted the following law: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory, to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or terri-

tory making such demand shall be paid by such state or territory." See act of February 12, 1793, c. 7 (1 Stat. 302).

The proceeding in this case being authorized by the Constitution and laws of the United States, we are bound in the determination of the questions presented by the decisions of the federal courts.

Chief Justice Taney, delivering the opinion of the Court in *Kentucky v. Dennison*, Governor of Ohio, 24 How. 104, 16 L. Ed. 717, said: "The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The Governor of the state could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department. The executive authority of the state, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the executive authority of the state upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender."

The Supreme Court of Florida, in *Ex parte Powell*, 20 Fla. 807, at page 810, in the body of the opinion, after quoting from the *Dennison* Case, supra, said: "It is very clearly stated by Chief Justice Taney, in the opinion referred to, that the affidavit required by the act of Congress must be made in the due course of judicial proceedings, and that the executive authority of the state in such cases can be interposed only in the aid of the courts in the due administration of justice. The act of Congress requires that the affidavit be 'made before a magistrate' of the demanding state, 'charging the person demanded' with having committed a crime, which affidavit shall be authenticated by the certificate of the Governor of that state. In every similar case reported, so far as we have been able to examine the decisions of other states, the affidavit presented to the Governor was made before a judicial officer in the course of a criminal prosecution. As Judge Taney remarks, 'The Governor of a state could not, upon a charge made before him, demand the fugitive.' An affidavit made before a notary, or other ministerial officer or person having no judicial authority, would not authorize the Governor to

make the demand. It is well known that in every state persons who are not 'magistrates' are empowered to certify the acknowledgment of deeds and to administer oaths, and so it cannot be presumed that because an oath is taken the person certifying it is a judicial officer, and that it is taken in the course of the administration of justice in a criminal prosecution. The act of Congress is explicit, that the 'charge' must be made * * * by the executive authority in aid of the judicial authority in administering laws for the punishment of crime."

In *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706, the Supreme Court of that state said: "The power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states of the Union, and no person can be surrendered by one state to another unless the case falls within the provisions of the United States Constitution."

In *Cook v. Hart*, 146 U. S. 193, 13 Sup. Ct. 43, 36 L. Ed. 939, the Supreme Court of the United States said: "We have no doubt that the Governor upon whom the demand is made, must determine for himself, in the first instance, at least, whether the party charged is in fact a fugitive from justice, * * * but whether his decision thereon be final is a question properly to be determined by the courts of that state."

In *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, the Supreme Court of the United States said: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Article 4, § 2, c. 2. There is no express grant to Congress of legislative power to execute this provision, and it is not, in its nature, self-executing; but a contemporary construction, contained in the act of 1793 (1 Stat. 302), ever since continued in force, and now embodied in sections 5278 and 5279 of the Revised Statutes, has established the validity of its legislation on the subject. 'This duty of providing by law,' said Chief Justice Taney, delivering the opinion of the court in *Kentucky v. Dennison*, 24 How. 66, 104 [16 L. Ed. 717], 'the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for, if it was left to the states, each state might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the Governor of the state, where the fugitive was found, is in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a

law of the state or of Congress to authorize it.'"

Article 6 of the Constitution of the United States is as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Our oaths of office require that we shall support, obey, and defend the Constitution of the United States, and this constitutional provision makes the laws of the United States, made in pursuance thereof, the supreme law of the land. We, therefore, are absolutely bound by the principles announced in the decisions above quoted, and have no discretion in the matter whatever.

In *Ex parte Hart*, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801, the United States Circuit Court of Appeals for the Fourth Circuit said: "The provisions referred to will be strictly construed, and all the requirements of the statute must be respected. * * * If they (the states) wish to rely upon the provisions of the Constitution and laws of the United States relating to fugitives from justice, they must strictly observe and respect the conditions of the same."

This proceeding being based upon a federal statute, we are not at liberty to follow the rule of construction which we apply to our own state statutes, because the common-law doctrine of a strict construction of penal statutes is adhered to by the Supreme Court of the United States, and, under this rule, no person can be deprived of a single right or punished for any offense unless the act complained of, and the proceedings thereon, come strictly within the letter as well as the spirit of the law. In this case it affirmatively appears that the affidavit relied upon was made before a notary public and not made before a magistrate as required by the United States statute. The verification of the affidavit is as follows:

"State of Iowa, Palo Alto County, ss.: I, H. G. E. Oelfke, being first duly sworn depose and say that I am the person who who signed the above and foregoing information and that the statements therein contained are true as I verily believe.

"H. G. E. Oelfke.

"Subscribed in my presence and sworn to before me by the said H. G. E. Oelfke this 27th day of October, 1913.

"A. J. Burt, Notary Public. [Seal.]"

It is true that, upon the hearing of this cause, counsel for the state of Iowa attempted to offer in evidence a certificate from the justice of the peace in Iowa to the effect that, after these proceedings had been instituted, the information had been sworn to before him by the complaining witness; but, upon

the objection being made that this would substantially amount to a confession that the papers acted upon by the Governors of Iowa and Oklahoma were insufficient, and that this court had no right to permit amendments to be made to papers which had already been acted upon by the Governors of Iowa and of Oklahoma, the offer was withdrawn and the cause was submitted upon the papers as they were acted upon by the Governors of the two states. In these papers the following statement appears: "N. B. This application must be accompanied by a duly attested copy of an indictment, or of a certified copy of an information made before a magistrate (a notary public is not a magistrate within the meaning of the statutes) in and for the county in which the offense is alleged to have been committed; and such information must be supported by an affidavit of some person having knowledge, setting forth the details of the commission of the crime."

From this it appears that the attention of the Governor of Iowa, and also of the Governor of Oklahoma, was directly called to the fact that an affidavit made before a notary public would not authorize the issuance of a requisition, but that the affidavit must be made before a magistrate, and that, in Iowa, a notary public does not possess the powers of a magistrate. This notice conclusively shows that the papers in this case were either acted upon without being read, or that the requisition was knowingly applied for, and arbitrarily issued in open defiance of and contempt for law. The same is also true of the action of the Governor of Oklahoma in honoring the requisition. The powers of Governors are great, but they are not above the law, and have no right to substitute their individual views for the law in a single instance. A Governor should set an example of obedience to law, otherwise how could he expect that the people will respect and obey the law. The statutes of the state of Iowa were offered in evidence, and from them it appears that a notary public has no judicial power except to swear witnesses and take depositions, which powers are given him by the law merchant.

Therefore, under the authorities heretofore quoted, we have no discretion, but must hold that the affidavit in the case does not comply with the statute, and is not worth any more than so much blank paper. However, it may be said that a magistrate issued a warrant for the apprehension of petitioner. The answer to this is that, according to the express terms of the United States statute, a requisition is based alone upon the making of an affidavit before a magistrate, and not upon the issuance of a warrant by a magistrate.

[2] Second. The affidavit in this case is not positively sworn to, but is only verified as a matter of belief by the prosecuting witness.

The fourth amendment to the Constitution

of the United States is as follows: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 30 of the Bill of Rights of Oklahoma is as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched, and the person or thing to be seized."

The question as to the verification of an accusation which will authorize the issuance of a warrant was first passed upon by the Supreme Court of the United States in the case of *Ex parte Burford*, 3 Cranch, 448, 2 L. Ed. 495. Chief Justice Marshall then said that a warrant of commitment was illegal and void unless supported by oath upon some good cause certain. The affidavit in this case amounts to no more than an expression of opinion by the prosecuting witness. If a person can be deprived of his liberty simply because some one is willing to swear that he believes that such person is guilty of crime, then, as was well said by Chief Justice Marshall in the *Burford* Case: "If the charge against him was malicious, or grounded on perjury, whom could he sue for malicious prosecution? or whom could be indict for perjury?" and he concludes, "The judges of this court were unanimously of the opinion that the warrant of commitment was illegal for want of stating some good cause certain, supported by oath."

In the Matter of the Rules of the Court, 3 Woods, 502, Fed. Cas. No. 12,128, Justice Bradley, of the Supreme Court of the United States, said that when, in an affidavit made, a person swears that he had good reason to believe, and does believe, that a certain person, naming him, has committed an offense against the law, describing it, such affidavit does not meet the requirements of article 4 of the Amendments to the Constitution of the United States. This question has been repeatedly passed upon by the courts of this state to the same effect. See *Miller v. U. S.*, 8 Okl. 315, 57 Pac. 836; *Mulkins v. U. S.*, 10 Okl. 288, 61 Pac. 925; *Salter v. State*, 2 Okl. Cr. 464, 102 Pac. 719, 139 Am. St. Rep. 935; *De Graff v. State*, 2 Okl. Cr. 519, 103 Pac. 538. In view of these authorities, we believe that the affidavit presented in this case, even if made before a magistrate, would not be sufficient, because it is based upon the belief of the affiant. The laws of this state do not allow the issuance of a warrant of arrest based upon an affidavit founded upon the belief of the party who makes it. Some fact certain must be sworn to positively, suf-

scient to cause the magistrate to believe that the offense has been committed, and that accused is probably guilty. It is true that petitioner is not a citizen of Oklahoma. Section 2, article 4, of the Constitution of the United States, provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Under this provision we must extend to petitioner, although he is only a friendless stranger among us, all the rights, privileges, and immunities that could be claimed by any citizen of this state.

We must therefore hold that the warrant of arrest in this case was unauthorized, if for no other reason, upon the ground that the affidavit relied upon was sworn to as a matter of belief, and not as a matter of fact.

Mexico may tolerate and condone acts of assassination, disregard of law, and arbitrary usurpations of power on the part of its executive; but the courts in the United States will never follow this example, unless controlled by partisan appointees. Ours is a government of law and not of men, and before the act of any official will be sustained by the courts, as long as they are honest, independent, and fearless, such act must be authorized by law.

We therefore have no option except to order that the writ of habeas corpus be allowed, and the relator be discharged.

ARMSTRONG, P. J., and DOYLE, J., concur.

ROBERTS v. STATE.

(Criminal Court of Appeals of Oklahoma.
Nov. 17, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1130*)—APPEAL—PERFECTING APPEAL.

When an appeal is taken to this court from a judgment of the district court, it is the duty of counsel to attach a petition in error to the case-made and file briefs as provided by law and the rules of this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

2. CRIMINAL LAW (§§ 1098, 1182*)—APPEAL AND ERROR—PERFECTING APPEAL—DISPOSITION OF CAUSE.

When an appeal is taken to this court from a judgment of the trial court, and no petition in error is attached to the case-made, and no briefs filed, and no appearance made for oral argument, such appeal may be either dismissed or the judgment affirmed in the discretion of this court for the failure on the part of counsel to properly perfect and duly prosecute the appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2863, 2865, 3203-3214; Dec. Dig. §§ 1098, 1182.*]

Appeal from District Court, Jefferson County; Frank M. Bailey, Judge.

Jim Roberts was convicted of obtaining

money under false pretenses, and appeals. Affirmed.

P. T. Hamilton and J. H. Harper, both of Waurika, for plaintiff in error. Smith C. Matson and C. J. Davenport, Asst. Attys. Gen. for the State.

ARMSTRONG, P. J. The plaintiff in error, Jim Roberts, was tried and convicted at the March, 1912, term of the district court of Jefferson county on a charge of obtaining money from the First National Bank of Ryan, Okl., under false pretenses, and his punishment fixed at imprisonment in the state penitentiary for a period of one year and one day.

[1, 2] A case-made was filed in this court on the 30th day of September, 1912. No petition in error was attached to this case-made at the time it was filed, and none has been filed since. No briefs were filed on behalf of the plaintiff in error, and no appearance was made for oral argument. The appeal has not been perfected as provided by law. It was therefore subject to dismissal upon motion of the Attorney General.

The transcript has been examined for fundamental errors. None appearing, the judgment of the trial court is affirmed, with directions to that court to cause the same to be enforced. Mandate is ordered forthwith.

DOYLE and FURMAN, JJ., concur.

PAYNE v. STATE.

(Criminal Court of Appeals of Oklahoma. Nov. 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 593*)—CONTINUANCE—GROUNDS.

An application for continuance, for the term, on the ground of the absence of leading counsel, is properly denied, where the defendant is duly represented by his other counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1320; Dec. Dig. § 593.*]

2. CRIMINAL LAW (§ 594*)—CONTINUANCE—GROUNDS.

The refusal of a continuance on the ground of absent witnesses held error, on account of the peculiar circumstances of this case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

3. CRIMINAL LAW (§ 622*)—SEVERANCE—DISCRETION OF COURT.

As to whether or not the state shall ask for a severance is a matter entirely within the discretion of the county attorney; and, when asked for by the state, is addressed to the discretion of the court, but the court cannot on its own initiative order a severance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. § 622.*]

4. CRIMINAL LAW (§ 422*)—DECLARATION OF CODEFENDANT—ADMISSIBILITY.

The declarations of a codefendant made in the absence of the defendant to be admissible

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

must be so connected with the offense charged as to constitute a part of the *res gestae*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.*]

5. WITNESSES (§ 405*)—CROSS-EXAMINATION OF ACCUSED—COLLATERAL MATTERS.

It is error to permit the defendant as a witness in his own behalf to be examined as to any distinct collateral fact not brought out in the examination in chief, with the view of impeaching his testimony by introducing other witnesses to contradict him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.*]

6. WITNESSES (§ 398*)—CROSS-EXAMINATION—CONCLUSIVENESS OF TESTIMONY.

When a witness is cross-examined on a matter collateral to the issue, his answer is conclusive, and cannot be subsequently contradicted by way of impeachment by the party putting the question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1267, 1274, 1275; Dec. Dig. § 398.*]

Appeal from District Court, Carter County; S. H. Russell, Judge.

Oscar J. Payne was convicted of assault with intent to kill, and appeals. Reversed.

W. I. Cruce, of Ardmore, A. C. Cruce, of Oklahoma City, and J. C. Thompson, of Ardmore, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the state.

DOYLE, J. The information in this case, after alleging time and place, charges: "They, the said Oscar J. Payne, Edgar M. Payne and Floyd M. Tindle, did then and there unlawfully, feloniously, intentionally and wrongfully shoot one Will Wyent with a certain firearm, to wit, a pistol, with the unlawful and felonious intent then and there thereby to kill and murder him, the said Will Wyent, contrary," etc. Upon a separate trial plaintiff in error was found guilty of assault with intent to kill, and his punishment assessed at imprisonment in the penitentiary for a period of five years.

The evidence shows that all the parties resided in the Deese community, northwest of Ardmore, and on the night of the date alleged in the information attended a religious meeting held under an arbor, near the store there. It would seem that there was an agreement or understanding between the Chaney brothers and others to have John Chaney take Alonzo Payne's girl away from him and escort her home, and these parties were all waiting and watching to see what would happen.

Will Wyent testified: That, on his way to attend the services, he met Oscar and Edgar Payne and Lona Sims and walked on with them; that he sat in a hack near the arbor with Ovey Alexander, Vick Culpepper, and Avery Senter, and saw John Chaney come into the arbor and sit down by Alonzo Payne and Miss Vicle Austin; that when church was dismissed Edgar Payne come up

to John Chaney and made a motion as if to strike him, and he thought Edgar and Oscar Payne were both going to jump on John Chaney, and said, "If you both are going to jump on him, I will pull one of you off"; and Edgar Payne said, "If you will come out of the arbor, I will settle it with you." Edgar Payne walked out, followed by Jack and Jim Chaney and Tom and Horatio Jackson. That he with one or two others went with them, and the defendant followed. That they went about 20 steps. When the defendant reached them, Edgar Payne said: "Shoot him, Oscar! Shoot the damn son of a b—h; he has got a knife." And the defendant shot him in the arm and body. That he had been whittling and had a knife in his hand, but had closed it.

John Chaney testified: That he sat by Vicle Austin, and when the services ended Alonzo Payne asked her if she was ready to go home, and witness said, "I don't know." That Edgar Payne stepped up and said, "Damn you, I am going to whip you"; and Will Wyent walked up and said, "If two of you get on him, I will take one of you off"; and the defendant walked up, and Tom Jackson took hold of his shoulder and said, "Don't have any trouble here"; and Edgar Payne, speaking to witness and Will Wyent, said, "Come out of here"; and he turned around to get his hat and the others walked out, and two of his brothers, Jack and Jim Chaney, went along. That he did not see the shooting. On cross-examination he said he asked Miss Austin to let him go home with her, and she said Alonzo Payne had been going with her and he would go back with her.

Cassie Fisher, the next witness for the state, testified that she saw John Chaney come in and sit down by Miss Austin; that Will Wyent was sitting on the edge of the bench at the edge of the arbor whittling, and she saw Oscar Payne shoot at Will Wyent.

Jack Chaney testified: "I saw John Chaney walk up just as church was breaking up and sit down by the side of them. When John Chaney got up and started off, Edgar Payne asked him what he was looking so straight at him about, and about that time Oscar grabbed him by the neck and shook him." Then Tom Jackson said, "Let's don't have any trouble here to-night"; and Edgar Payne told them to come out; and Will Wyent said, "If two of you jump on him, I will pull one of you off"; and then they started and went about 20 steps from the arbor; and he followed and saw the defendant shoot Will Wyent.

Vera Wyent testified that she saw Edgar Payne draw his hand back as though he was going to hit John Chaney, and say, "You thought you were going home with her"; and Chaney said, "She would not let him";

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and Edgar said, "You would not have gone if she had said you could." He then invited him away from the arbor to settle it.

Horatio Jackson and Jim Chaney testified to substantially the same state of facts.

B. F. Wyent, J. A. Sims, G. N. Gordon, Mrs. G. N.-Gordon, and Avery Senter testified that after the shooting they noticed a closed penknife in the hand of Will Wyent.

In behalf of the defendant, John Payne testified that he was the father of Oscar Payne; that after the services were over he noticed a group east of the arbor having a racket, and as he walked by he said to them, "This is no place to have a racket." Just then he heard his son Edgar say twice as he stepped back, "Will Wyent, put up that knife"; and then his son Oscar said, "Will Wyent, put up that knife"; and the shooting occurred almost instantly.

The defendant as a witness in his own behalf testified: That he walked from the schoolhouse to the arbor that night with Will Wyent. That they were friends. That after the preaching was over he heard some angry voices and saw Edgar Payne and two or three of the Chaney boys and some of the Jackson boys talking, and walked up to where they were, and Will Wyent, who had been sitting there whittling, said something, and they all went out. That he followed the crowd and heard his brother say twice, "Will Wyent, put that knife down," and then say: "Oscar, look out! Will Wyent has got a knife." That as he said that Wyent came towards him with an open knife in his hand, and when he came within three feet of him he shot him in the arm. That he shot in self-defense. That he carried the pistol because he had been held up and waylaid two weeks before this difficulty.

The record is voluminous, but the foregoing statement of facts is sufficient for the purpose of this opinion.

The first and second assignments will be considered together. They are in effect as follows: First, error of the court in overruling the defendant's motion for a continuance. Second, error of the court in ordering a severance upon its own motion over the objection of the defendant.

[1, 2] His affidavit for continuance was filed September 12th, and contained all the formal allegations required by law, and among others the following statement: "Because A. C. Cruce is engaged in the trial of a case in the United States court, as an attorney representing the state. That this defendant employed A. C. Cruce individually, and not the firm of Cruce & Cruce. He has paid him a part of his fee, and this defendant has been relying upon A. C. Cruce as being his leading attorney in this case. That Mr. J. C. Thompson is only associate counsel in this case, and this defendant is relying upon A. C. Cruce to defend him. That he has a right to his presence, and can procure it by the next term of

court. That three of his witnesses, to wit, G. L. Bennett, Omar Bennett, and John Wyatt, are absent without his procurement or consent, and that he cannot safely go to trial without their presence. That he expects to prove by Omar Bennett that she saw Will Wyent just after the shooting, and that the said Will Wyent was lying on the ground with his knife open in his hand. That he expects to prove by G. L. Bennett that one I. N. Chaney, a witness for the prosecution, was not on the ground or at the place of the difficulty, and did not and could not see anything, or know anything about it. That he expected to prove by the said Wyatt that the said witness Chaney has made a statement different to what he swore to in the examining trial, and different from what this defendant expects the testimony of the said Chaney to be. That he had a subpoena issued and served on the said Wyatt. That the said Wyatt was here yesterday as a witness for the defendant, but was taken sick and had to leave for home, and is unable to be here now on account of his sickness. That he has had a subpoena issued for the other witnesses, G. L. Bennett and Omar Bennett, and placed in the hands of the sheriff of Carter county. That the last time he heard of said witnesses before the issuing of said subpoena they were residents of Carter county, but he has since learned that just before the subpoena was issued, or at least before the officer could get to serve it, they had left Carter county, and moved to Hastings, Okl. That he believes he can procure the attendance of all of said witnesses by the next term of said court, and can also procure the attendance of his attorney."

On the following day codefendants Edgar Payne and Floyd M. Tindle were arraigned; asked and were given the statutory time to plead. Thereupon the court overruled the defendant's motion for continuance, allowed an exception, and stated, "If there is no severance asked for, the case will be put off until to-morrow morning." Counsel for the defendant then stated: "We do not ask for any severance in this case; however, we might ask for a severance in the morning." The Court: "If you are going to do that, gentlemen, we will proceed with the trial against Oscar Payne now." To this action of the court the defendant took an exception.

We think the court did not err in refusing to continue the case until the next term on account of the absence of defendant's leading counsel. The defendant had the benefit of the services of two thoroughly competent and experienced lawyers, W. I. Cruce and J. C. Thompson, and the motion on account of the absence of his leading counsel was not to postpone the trial to some day of the term, but to continue the case until the next term. To reverse the case on the grounds here set up with reference to the ab-

sence of counsel would be to place it within the power of counsel to control the running of the courts and the disposition of cases. We are inclined to think, however, that on account of the peculiar circumstances of this case, the court should have granted the continuance on account of the absence of the witnesses named in his affidavit. The diligence used was sufficient and the facts proposed to be proved were material. In our opinion the court exceeded its discretionary power in compelling the defendant to go to trial at that time.

[3] We are also of opinion that the trial court in ordering a severance exceeded its discretionary power. At common law the prosecution might demand separate trials of those jointly indicted, and under the statute any defendant in a felony case may demand that a separate trial be awarded him; and it was held by this court in *Bates v. State*, 8 Okl. Cr. 436, 128 Pac. 163, that under the statute (section 5878, Rev. Laws) providing that, "when two or more defendants are jointly prosecuted for a felony, any defendant requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly, in the discretion of the court"—where the state asks it, a separate trial may be granted, in the discretion of the court. As to whether or not the state shall ask for a severance is a matter entirely within the discretion of the county attorney; he has complete control in conducting public prosecutions, subject only to the supervision of the court upon the trial. The record here shows that the trial court ordered the severance without the state asking for it.

[4] Numerous errors in the rulings of the court in the admission and rejection of testimony are alleged; the principal questions raised thereby being as to the admission of evidence of statements of his codefendants made in the absence of the defendant, and evidence of conversations had by the defendant with third persons prior to the difficulty, in no way connected therewith. Over the objection of the defendant, the court permitted Jesse Sloan to testify that he had a conversation with Edgar Payne and Floyd Tindle; that Tindle asked him if he felt like he could stand up under about 500 that night; that John Chaney is going to try to take Alonzo Payne's girl away from him, and we are going to see that he don't do it; that this was about an hour and a half before the shooting; that he did not see the defendant until after the shooting. Clearly this testimony was incompetent. The defendant was not present, and no connection was shown, or evidence introduced, to show that the defendant knew anything about such a statement or that he had any reason to know that his codefendants intended to assault John Chaney if he attempted to take Alonzo Payne's girl away from him. The

record shows other instances where the court admitted testimony of the declarations of his codefendants, made in the absence of the defendant, that we think was inadmissible and prejudicial to this defendant.

[5, 6] The record shows that defendant was asked on cross-examination if on the evening that he had a difficulty with one Alexander at the schoolhouse about 15 days before this shooting, if he did not ask Jesse Sloan to lend him a six-shooter on that occasion, and if he did not say "If a lot of those boys up there don't walk straight, I am going to kill some of the sons of b——s." He was also asked, referring to a conversation had with Miss Cassie Fisher: "Q. About 15 days before the difficulty at Deese, did you see her in the field near there and make this remark to her in substance or effect: 'That you were not afraid to kill anybody, because you could take a little money and come down here before this court and get out of it'?" Also the following question: "Q. About 15 days before you had the difficulty at Deese, at their home, did you say in the presence of Mr. Hammett and his wife that you could kill any man and with a couple of hundred dollars beat it in this court, in substance or effect?" These questions were asked, and numerous others of a similar nature, and over the defendant's objection permitted to be answered. He denied having made any such statements, and afterwards each of the parties referred to were called to the stand and over the defendant's objections permitted to be asked if the defendant so stated, and all answered in the affirmative. All this testimony was irrelevant on the question of the guilt or innocence of the defendant of the particular offense charged, as no connection whatever is shown between the declarations of the defendant as testified to by these witnesses and the offense charged. It is elementary that a witness cannot be impeached upon collateral matters, and it is error to permit the defendant as a witness in his own behalf to be cross-examined as to any distinct collateral fact not brought out in the examination in chief, with the view of impeaching his testimony by introducing other witnesses to contradict him. Whether the matter inquired of on cross-examination of the defendant and proved by the state in attempting to impeach him was collateral to the issue or not must be determined by this inquiry: Would the prosecuting attorney have been permitted to introduce it in evidence as part of the state's case? If he would not, it was collateral. If it was collateral, it was not competent to contradict it. *Welch v. State*, 104 Ind. 347, 3 N. E. 850; *State v. Townsend*, 66 Iowa, 741, 24 N. W. 535; *Moore v. People*, 108 Ill. 484.

In *Wharton on Evidence*, par. 559, the rule is stated thus: "In order to avoid an interminable multiplication of issues, it is

a settled rule of practice that, when a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question." In our opinion the testimony of the impeaching witness should have been excluded for the reason it related to collateral matters.

We do not deem it necessary to discuss the remaining assignments of error. A careful examination of the whole case leads to the conclusion that the defendant has not had that fair and impartial trial to which he is entitled.

For the reasons herein stated, the judgment of conviction is reversed and the cause remanded.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

CONNOLLY et al. v. PROBATE COURT IN
AND FOR KOOTENAI COUNTY
et al.

(Supreme Court of Idaho. Oct. 25, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 315*)—
DECREE OF DISTRIBUTION—JURISDICTION TO
SET ASIDE.

Held, that the probate court was without jurisdiction to sustain a motion or application for the setting aside of the decree of distribution in the Corbett estate matter, under the facts presented by the petition or motion.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

2. EXECUTORS AND ADMINISTRATORS (§ 315*)—
DECREE OF DISTRIBUTION—CONCLUSIVENESS.

Held, that it appears from the record that the probate court had jurisdiction to probate the estate of said Corbett and to enter a decree of distribution thereof, and that, such decree not having been appealed from within the time provided by law, said decree of distribution became conclusive as to the rights of all heirs and claimants to said estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

3. EXECUTORS AND ADMINISTRATORS (§ 315*)—
DECREE OF DISTRIBUTION—CONCLUSIVENESS.

In the probate and distribution of said estate, the notices required by statute having been given, said probate court acquired jurisdiction over all persons for the purpose of determining their rights to any portion of said estate; and every person who claimed any right or interest therein was required to appear and present his claim to said court for determination.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

4. EXECUTORS AND ADMINISTRATORS (§ 315*)—
DECREE PROBATING ESTATE—CONCLUSIVENESS.

The action of the court in probating an estate is equally conclusive (subject to reversal or modification on appeal) upon all parties, whether they appear and present their claims or not, and as conclusive as if they had pre-

sented their claims and the court had disallowed them.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

5. EXECUTORS AND ADMINISTRATORS (§ 314*)—
PROBATE PROCEEDINGS—NOTICE.

Probate proceedings in the settlement of estates are in the nature of proceedings in rem, and, upon the statutory notices being given, all the world is charged with notice.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.*]

6. COURTS (§ 202*)—DECISIONS APPEALABLE—
PROBATE DECREE.

Under the provisions of section 4831, Rev. Codes, the decree of a probate court in probate matters is made appealable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 408-486; Dec. Dig. § 202.*]

7. EXECUTORS AND ADMINISTRATORS (§ 315*)—
DECREE OF DISTRIBUTION—JURISDICTION TO
SET ASIDE.

The probate court is not given jurisdiction under the laws of this state to set aside its decree of distribution on application made years after the entry of such decree.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

8. COURTS (§ 202*)—JURISDICTION—PROBATE
MATTERS.

Under the provisions of section 20, art. 5, of the state Constitution, district courts are given original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law, and, if the probate court errs in deciding probate matters, an appeal is provided to the district court to correct such errors.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

9. COURTS (§ 202*)—VACATION—PROBATE DE-
CREE.

After the expiration of the term at which a judgment is entered by the probate court, the court loses jurisdiction thereof and it becomes final, and the court no longer has the power to vacate, modify, or set aside such judgment except under the provisions of section 4229, Rev. Codes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

10. ALIENS (§ 10*)—SUCCESSION—NONRESI-
DENT ALIEN.

Under the provisions of section 5715, Rev. Codes, resident aliens may take equally with citizens in all cases, by succession, but no non-resident alien can take by succession unless he appear and claim such succession within five years of the death of decedent to whom he claims succession.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 30, 31; Dec. Dig. § 10.*]

11. ESCHEAT (§ 3*)—PROPERTY SUBJECT.

Under the provisions of section 5716, Rev. Codes, when succession is not claimed as provided by said section 5715, the property of the deceased, except real estate, may be reduced to the possession of the state to be disposed of as provided by section 5718.

[Ed. Note.—For other cases, see Escheat, Dec. Dig. § 3.*]

12. ESCHEAT (§ 3*)—SUCCESSION—NONRESI-
DENT ALIEN.

A nonresident alien cannot, by failure to make application to succeed to an estate as

provided by law, deprive the resident heirs of the right to succeed thereto.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 3-5; Dec. Dig. § 3.*]

13. DESCENT AND DISTRIBUTION (§ 1*)—"SUCCESSION."

Under the provisions of section 5700, Rev. Codes, "succession" is the coming in of another to take the property of one who dies without disposing of it by will.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6745, 6746.]

14. ALIENS (§ 9*)—ESCHEAT (§ 3*)—SUCCESSION—RESIDENT HEIRS.

Section 5701, Rev. Codes, provides that property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate subject to the control of the probate court, and section 5702 provides the order of succession.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 21-29; Dec. Dig. § 9.* Escheat, Cent. Dig. §§ 3-5; Dec. Dig. § 3.*]

15. ALIENS (§ 9*)—ESCHEAT (§ 3*)—SUCCESSION—RESIDENT HEIRS.

Held, that the Connollys and Udell, being first cousins of the said deceased and resident citizens of the United States, are heirs of the deceased.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 21-29; Dec. Dig. § 9.* Escheat, Cent. Dig. §§ 3-5; Dec. Dig. § 3.*]

16. ESCHATE (§ 3*)—GROUNDS.

When there are no heirs who claim the estate, then, and then only, does such property escheat to the state.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 3-5; Dec. Dig. § 3.*]

Original application by Lawrence F. Connolly and others for a writ of prohibition, directed to the Probate Court of the County of Kootenai and Bert A. Reed, Probate Judge of such county, to restrain the consideration of the petition of the State of Idaho filed in the matter of the estate of John Corbett, deceased. Alternative writ issued, and, after hearing, the peremptory writ was granted and the court or judge prohibited from proceeding further in said matter.

C. W. Beale, of Wallace, and C. L. Heltman, of Spirit Lake, for plaintiffs. J. H. Peterson, Atty. Gen., R. L. Black, Asst. Atty. Gen., and Elder & Elder and Whitla & Nelson, all of Cœur d'Alene, for defendants.

SULLIVAN, J. This is an original application to this court for a writ of prohibition directed to the probate judge of Kootenai county to restrain and prevent him from considering the petition of the state of Idaho filed in the matter of the estate of John Corbett, deceased, wherein it is claimed that the estate of said Corbett is of the value of \$75,000 and was wrongfully and fraudulently appropriated by Lawrence F., John J., and William Connolly and Ellen F. Udell, first cousins of said deceased. Said estate was administered on and distributed under and by virtue of the orders and decree of said probate court. Upon application to this

court, the alternative writ was issued, and the probate judge made his return, and the case was thereafter presented to this court upon oral arguments and typewritten briefs.

The facts of the case are substantially as follows.

John Corbett, deceased, was a resident of Kootenai county, leaving an estate in said county worth at least \$20,000. Thereafter on or about the 20th day of February, 1907, Lawrence F. Connolly, upon application, was appointed administrator of said estate by the probate court of said county, and letters of administration were duly issued to him. At the time said Connolly was appointed administrator as aforesaid, he was a citizen of the United States and a resident of Kootenai county and is a brother of the other two Connollys and of Ellen F. Udell. Appraisers were duly appointed by said court, who filed their inventory and appraisement of said estate. Thereafter on the 23d day of August, 1909, said administrator filed his final account in said court, which final account was approved and settled, and a decree of distribution was made by said court and recorded in the records of said court. No appeal was ever taken from said order settling said final account or said decree of distribution.

It appears that one Bridget Madden, a non-resident foreigner living at Galway, Ireland, was a half-sister of said deceased, but did not appear in said probate court in the matter of the settlement of said estate and did not claim in said court any part of said estate prior to the 28th day of February, 1912, more than five years after the death of said deceased, and more than two years and six months after the date and entry of said decree of distribution. On the 28th of February, 1912, Bridget Madden filed in said probate court a certain petition, whereby she sought to have all of the probate proceedings theretofore had in said matter set aside and annulled. Thereafter on March 14, 1912, said Lawrence F. and John J. Connolly filed in the probate court in the matter of said estate their notice of motion and motion to quash and set aside the service of said petition of Bridget Madden and asked to have the same dismissed. Thereafter and upon the hearing of said motion, said probate court on March 23, 1912, entered a judgment therein sustaining said motion of the applicants to dismiss the petition. No application was made in said court for Bridget Madden, or by any one on her behalf, to amend said petition at any time prior to the signing and entering of judgment or at any time prior to the 6th day of April, 1912. On said 6th day of April, Bridget Madden filed in said court her motion to set aside and vacate the judgment dismissing her petition and sought to file an amended petition. No affidavit or showing of merit or affidavit or showing of any mistake, inadvertence, surprise, or excus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

able neglect accompanied or was filed with said motion or was presented to the court in support of the application. Thereafter said probate court on the 18th day of April, 1912, made an order granting said motion, vacating and setting aside the judgment, dismissing said petition, and granting leave for Bridget Madden to file an amended petition in the matter of said estate. Thereupon Lawrence F. Connolly and John J. Connolly applied to this court for a writ of prohibition, to which application William Connolly and Ellen Udell became parties, and after a hearing upon said application the same was granted and a writ of prohibition issued by this court on May 23, 1912, stopping such proceeding. See *Connolly v. Reed*, 22 Idaho, 29, 125 Pac. 213.

On August 13, 1912, the said probate court made an order and decree in said matter finally discharging and releasing said Lawrence F. Connolly as administrator of said estate, and releasing and discharging from all liability his sureties as such administrator. On May 3, 1913, the state of Idaho, on the relation of the Attorney General of the state, filed in said probate court in said matter of the estate of Corbett, deceased, a petition setting forth certain facts concerning the death of said deceased, that he owned certain stock in the Empire Mill Company worth \$60,000, and also possessed at the time of his death certain other property, and that said Bridget Madden was the half-sister of said deceased, and that she was a nonresident foreigner, and that she was next of kin and heir at law of said deceased, and had failed for a period of five years after the death of said deceased to claim his said property by right of succession, and alleged that said property had now become by virtue of the law of this state, and especially of section 5715, Rev. Codes, of the state, escheated to the state of Idaho and had become the property of the state, and prayed that all proceedings in said probate matter wherein Lawrence F. Connolly was administrator be canceled and held for naught, and that all proceedings taken and done by said probate court in the distribution of said property by the said probate court be canceled and held void, and that the said Connollys and Udell be required to turn all of said property over to the state of Idaho, and that on a final hearing in the matter an order be made holding that said Bridget Madden is the sole surviving heir of John Corbett, deceased, and that all of the property belonging to said estate be decreed to the state of Idaho for the use and benefit of said Bridget Madden, provided she made application therefor within five years after such deposit is made with the State Treasurer.

It appears that Bridget Madden by her attorneys brought a proceeding in the district court of the Eighth judicial district, and the prayer of her petition in that matter is

as follows: "Wherefore, the petitioner prays for an order of this court, directing the Attorney General to reduce the property of said estate to his or the possession of the state or to direct the same to be sold and the sum of the proceeds thereof to be deposited in the state treasury for the benefit of such nonresident foreigner or her legal representatives to be paid to her, whenever, within five years after such deposit proof, to the satisfaction of the State Auditor and Treasurer, is produced showing that she is entitled to succeed thereto." After the hearing of said matter, the court made the following order: "Wherefore, the court having considered said information and being fully advised, hereby directs Joseph H. Peterson, Attorney General of the state of Idaho, to reduce the property of said estate to his or the possession of the state of Idaho, or to cause the same to be sold, and the same or the proceeds thereof to be deposited in the state treasury for the benefit of such nonresident foreigner, or her legal representative, to be paid to her, whenever, within five years after such deposit proof, to the satisfaction of the State Auditor or Treasurer, is produced that she is entitled to succeed thereto. Dated this 8th day of April, A. D. 1913. R. N. Dunn, Judge of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai."

It thus appears that the state is prosecuting this matter on the relation of the Attorney General for the benefit of Bridget Madden at the expense of the taxpayers of the state, and not for the purpose of having said estate, or the proceeds thereof, turned in to the state treasury for the benefit of the public schools of the state, for which purpose the law provides such funds shall be used.

With the exception of certain formal allegations to the effect that the property of the Corbett estate had escheated to the state of Idaho and that this proceeding was commenced in the probate court by the Attorney General in pursuance of said order of the judge of the district court of the Eighth judicial district, which order of the district court, or judge, was made upon a proceeding instituted by Bridget Madden, there is nothing different set forth in the petition upon which the probate court and the defendant judge assumed to exercise jurisdiction than was set forth in the petition and amended petition of Bridget Madden, and this court, in the case of *Connolly v. Reed*, Judge, 22 Idaho, 29, 125 Pac. 213, specifically held that the allegations of such petition and the amended petition did not give the probate court or the judge thereof jurisdiction of said matter. It was there held that Bridget Madden having failed to appear and claim her right to succession within the five-year period granted by the statute bars her right and claim, and that the probate court has no jurisdiction to grant her any relief. It was also there held

that an allegation by a nonresident alien who seeks to establish her right to the estate of a decedent within this state, to the effect that an heir by fraudulent misrepresentation procured the distribution of the Corbett estate to himself and others, is not a sufficient allegation to show any wrong or injury to the alien claimant who failed and neglected to appear and claim the right of succession within the five-year period granted to such claimants, where it is not alleged and does not appear that the fraud had anything to do with, or resulted in, preventing or depriving the nonresident alien claimant from setting up or asserting her claim to the property within the statutory time.

[2, 3] Said probate court having had jurisdiction of the probating of said estate with the power to determine who were the heirs of said Corbett, deceased, and who were entitled to succeed to his estate, and what their respective interests were, and having determined these matters, and having entered its decree of distribution therein, and the decree not having been appealed from within the time provided by law for an appeal, the decree becomes conclusive as to the rights of all heirs and claimants to said estate.

In *Miller v. Mitcham*, 21 Idaho, 741, 123 Pac. 941, this court, after citing certain decisions sustaining that proposition, said: "The foregoing authorities clearly and fully establish the proposition that the probate courts have exclusive original jurisdiction in the settlement of estates of deceased persons, and it is within the jurisdiction of those courts to determine who are the heirs of a deceased person and who is entitled to succeed to the estate, and their respective shares and interests therein. The decrees of probate courts are conclusive in such matters."

[4, 6] Since the decrees of probate courts are conclusive in such matters, unless reversed on appeal, the state of Idaho on the relation of its Attorney General cannot have such decree set aside in the interest of a foreign and nonresident heir. As fully supporting this rule, see *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323. The Supreme Court of California in that case, after stating that the proceeding for the distribution of an estate is in the nature of a proceeding in rem, which is in the hands of an administrator or executor for distribution, says: "By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim as if his claim

after presentation had been disallowed by the court." In *Goodrich v. Ferris*, 214 U. S. 71, 29 Sup. Ct. 580, 58 L. Ed. 914, in which case the court approved the decision of the Supreme Court of California in the last cited case, the court says: "It is elementary that probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding in rem, and is therefore one as to which all the world is charged with notice." The same doctrine is affirmed in *Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 585, 68 Am. St. Rep. 27; *Williams v. Marx*, 124 Cal. 22, 56 Pac. 603; *Mulcahey v. Dow*, 181 Cal. 73, 63 Pac. 158; *State v. O'Day*, 41 Or. 495, 69 Pac. 542. In *Clark v. Rossier*, 10 Idaho, 349, 78 Pac. 358, 3 Ann. Cas. 231, this court held to the same doctrine. There is no question but that the proper notices were given in the administration of said estate and that all the world was notified of the proceedings in said matter, and that Bridget Madden made no appearance in said matter whatever, and did not bring these proceedings until more than two years, after the decree of distribution had been made and entered by said probate court.

It is contended by counsel for defendant that, under the allegations of the petition of the state of Idaho, fraud and fraudulent proceedings were charged against Connolly in procuring said order and decree of distribution to be entered by the probate court, and that, when said fraudulent proceedings were called to the attention of the probate court, it was the absolute duty of that court to review the matter, and, if it concluded that said judgment was fraudulently obtained, to set it aside.

The allegations of the Attorney General in the petition of the state in regard to the fraud practiced by the Connollys are quite similar to the allegations of fraud set up in the petition which the court had under consideration in the case of *Connolly v. Reed*, supra, and the allegations in that petition and the amended petition in that case this court held did not constitute fraud, and we do not think the allegations of the petitions of the Attorney General charge fraud on the part of the Connollys, since it nowhere appears that through fraud or otherwise the defendants the Connollys kept Bridget Madden from appearing and asserting her rights, as it is not alleged that they made any misrepresentations or deceived her as to the facts of the case.

[6, 7] In the case of *Donovan v. Miller*, 12 Idaho, 600, 88 Pac. 82, 9 L. R. A. (N. S.) 524, 10 Ann. Cas. 444, the court held that the remedy of appellants in that matter was in the probate court either by appeal or otherwise from its order or judgment. The judgment of the probate court in probate matters is made appealable by the provisions of section 4831, Rev. Codes.

[1] The probate court is not given jurisdiction, under the laws of this state, to set aside the decree of distribution entered upon a full hearing of which the entire world had legal notice. That proposition was fully considered in *Donovan v. Miller*, supra. While the probate court under the provisions of section 21, art. 5, of the Constitution, is made a court of record and is given original jurisdiction in all matters of probate, settlement of estates of deceased persons, and the appointment of guardians, its orders and judgments in regard to those matters cannot be attacked collaterally but may be corrected on appeal. The Constitution does not make probate courts courts of equity in which equitable relief may be granted long after the time for appeal has passed.

[8] The district courts of this state, under the provisions of section 20, art. 5, of the Constitution, have original jurisdiction in all cases both at law and in equity, and such appellate jurisdiction as may be conferred by law, and, if a probate court makes a mistake in passing upon probate matters, an appeal is provided to the district court to correct such mistake; and, if mistakes are not so corrected, that ends the jurisdiction of the probate court in such matters. If through fraud or perjury an heir has been deprived of property, without any laches or fault on his part, he has his remedy in a court of equity; but the probate court that passed upon such matter and settled and determined the same as provided by law has no equitable or other jurisdiction to open the matter after the time for appeal has passed. There must be an end to the settlement and distribution of estates of decedents—an end to such litigation.

[9] That part of section 5664, Rev. Codes, which refers to the conduct of proceedings in the probate court, is as follows: "Except as otherwise provided in this title, the provisions of part 2 of this Code are applicable to, and constitute the rules of practice in, the proceedings mentioned in this title." Referring to part 2 of the Code, we find that section 4229 is included therein, the provisions of which extend to the right to move against a judgment for a period of six months after the adjournment of court at which it was entered; and, conceding for the purposes of this case that said provisions apply to a probate court, there is no provision that would authorize said court to entertain a motion to set aside said decree after the expiration of the August, 1906, term of said court, that being the term of court at which said decree was entered, and in that view of the matter the petition in this case was presented much too late. Section 3843, Rev. Codes, provides that terms of probate courts must be held on the fourth Monday of each month, which section was in force at the time of the settlement of the Corbett es-

tate, but has since been amended. See L. 1911, p. 340. Mr. Black, in his work on Judgments (volume 1, § 306), says: "It was the rule of the common law—and it is still adhered to with more or less consistency in most of the states—that after the expiration of the term the court loses control of its judgments rendered during that term; they become final, and the court has no longer the power to vacate or modify them or to set them aside." And the author quotes from a decision of the Supreme Court of the United States (*Bronson v. Schulten*, 104 U. S. 410, 28 L. Ed. 797) as follows: "But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision." *The Estate of Hudson*, 63 Cal. 454. In 23 Cyc. 902, the rule is stated as follows: "As a general rule, in the absence of statutory provisions to the contrary, no court possesses authority to vacate or set aside its final judgment after the expiration of the term."

Numerous authorities hold that the power of the court over its judgments absolutely ceases upon the expiration of the time authorized by statute to make application to vacate or set aside the same. In *Bunnell & Eno, etc., Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767, this court held that, if a judgment were erroneous, the remedy of the defendants was by appeal or motion for a new trial and not by motion to set aside the judgment after the lapse of more than six months from the rendition of the judgment. See, also, *Vane v. Jones*, 13 Idaho, 21, 88 Pac. 1058. In the latter case, in referring to section 4229, Rev. Codes, the court said: "It seems from this section that the court may exercise its discretion to a limited extent in granting relief to an aggrieved party, and relieve him from a judgment taken against him under prescribed conditions; but there is no discretion or power in the court to lend its aid after the expiration of six months after the adjournment of the term." See, also, *Holzeman v. Henneberry*, 11 Idaho, 428, 83 Pac. 497, and *Hall v. Whittier*, 20 Idaho, 120, 116 Pac. 1031.

The probate court or the judge thereof did not have jurisdiction to grant said petition and open up or set aside its decree of distribution of the Corbett estate.

[10, 11] Then, under the facts of this case, did the said estate escheat to the state of Idaho under the provisions of sections 5715 and 5716, Rev. Codes? Said sections are as follows:

"Sec. 5715. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provi-

sions of this title is precluded from such succession by reason of the alienage of any relative; but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

"Sec. 5716. When succession is not claimed as provided in the preceding section, the district court, on information, must direct the Attorney General to reduce the property to his or the possession of the state, or to cause the same to be sold, and the same, or the proceeds thereof, to be deposited in the state treasury for the benefit of such nonresident foreigner, or his legal representative, to be paid to him whenever, within five years after such deposit, proof, to the satisfaction of the State Auditor and Treasurer, is produced that he is entitled to succeed thereto."

It is contended under the provisions of said sections that since Bridget Madden was next of kin and entitled to succeed to the said estate, that if she neglected or failed to appear and claim said estate (which consisted of money and stock in a lumber corporation), it escheated to the state regardless of whether there were other heirs residing in the United States who would have been entitled to succeed to said estate provided Bridget Madden had not been alive at the date of the death of said deceased. In other words, it is contended that since Bridget Madden was the next of kin and entitled to succeed to said estate, if she made no claim thereto, the other heirs of the deceased or next of kin after Bridget Madden could not succeed to said estate but that it absolutely escheated to the state.

We cannot agree with that contention. It was not the intent of said provisions of the statute that the property of the deceased person should escheat to the state if he had any heirs who were entitled to succeed thereto. The fact that the nonresident heir failed to appear and claim title to the estate would not deprive the resident heirs who were next in succession from succeeding thereto. The clear intention of said escheat statute is that, if there are no heirs entitled to succeed to said estate, then and in that case only does such estate escheat to the state, and when the statute declares that no person capable of succeeding under the provisions of said title is precluded from such succession by reason of the alienage of any relative, and that nonresident foreigners cannot take by succession unless they appear and claim such succession within five years after the death of the decedent to whom he claims succession, it was not intended to preclude from succeeding to said estate the heir next in the line of succession to the nonresident foreigner who fails and refuses to make application to succeed to said estate. The statute intended that the

estate of a deceased person should escheat to the state only when there were no heirs whatever, resident or nonresident, to succeed to such estate.

[12] A nonresident foreigner cannot by failure or neglect to make application to succeed to such estate deprive resident heirs of the right to succeed thereto.

[13] "Succession" is the coming in of another to take the property of one who dies without disposing of it by will. Section 5700, Rev. Codes.

[14] Section 5701 provides that property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate subject to the control of the probate court, etc. Section 5702 provides that "when any person, having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to, and must be distributed, unless otherwise expressly provided in this code, subject to the payment of his debts, in the following manner." Then follow nine subdivisions to said section, and the latter part of the eighth subdivision is as follows: "If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse, by right of representation." And subdivision 9 is as follows: "If the decedent leave no husband, wife or kindred, and there be no heirs to take his estate, or any portion thereof, under subdivision eight of this section, the same shall be paid into the state treasury for the support of common schools."

[15] It is clear from the provisions of those subdivisions that the Connollys and Ellen Udell, being first cousins of Corbett and resident citizens of the United States, were heirs of said deceased and could succeed to his property provided there were no other parties who were entitled to succeed thereto by reason of closer relationship or kinship; and, even if there be another heir of closer kinship and he failed to make claim thereto as provided by law, those next in order of succession may come in and inherit the property.

[16] And the state comes in by way of succession or escheat only in the event of the absence of any heir who is entitled to such property by succession. When there are no heirs, then and only then does such property escheat to the state. In *re Miner's Estate*, 143 Cal. 194, 76 Pac. 968. This court held, in *State v. Stevenson*, 6 Idaho, 371, 55 Pac. 886, that in this country the general rule is that, when the title to land falls for the want of heirs, it escheats to the state and only then.

The cases of *In re Pendergast's Estate*, 143 Cal. 962, 76 Pac. 962, and *Lyons v. State*, 67 Cal. 380, 7 Pac. 763, are cited by

respondent. In those cases the heirs referred to were nonresident foreigners and had not asserted their right to the property of the estates involved in those cases within the period prescribed by section 672 of the Civil Code of California, which section provides as follows: "If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred"—which section we do not have in this state. That section is an absolute prohibition upon the assertion of a claim by a foreigner to an estate in California not made within the statutory period mentioned in that section. In neither of those cases were there any resident heirs to said estates, and those cases have no application whatever to the facts in the case at bar. Under the facts in the case as shown by the record and under the law said estate never escheated to the state.

It must be remembered that the record herein discloses that both the state of Idaho and Bridget Madden at all times had due and legal notice of the administration of the Corbett estate by the probate court of Kootenai county, with Lawrence F. Connolly as administrator; that as early as May, 1910, Bridget Madden had actual notice of those proceedings; and that one of her attorneys, in her amended petition verified by him, alleged her actual notice of the value of the Corbett property on the 9th day of April, 1911, which date was the day preceding the execution of her deed and bill of sale of all her interest in said estate to Lawrence F. Connolly. Thus it appears that Bridget Madden had actual knowledge of the decree of distribution and of the value of said estate. She did not take any action in the probate court of Kootenai until the 28th day of February, 1912—about two years and six months after the date of said decree of distribution, and more than a year after she had actual knowledge of the distribution of said estate. If the contentions of the respondent's counsel in this case prevail, a decree of distribution of the probate court would never become final and would have no final, binding force and effect. Such uncertainty in decrees of probate courts was not intended by the Legislature in the enactment of the probate laws of this state.

Other questions are raised that are not necessary for us to pass upon in the determination of this case; but it is clear that the probate court, or the judge thereof, was without jurisdiction in the matter here involved, and that the peremptory writ must issue prohibiting said judge or the court from proceeding further in said matter. Costs are awarded to the plaintiffs.

* AILSHIE, C. J., and STEWART, J., concur.

BOBBITT et al., School Trustees, v. BLAKE et al., Board of County Com'rs.

(Supreme Court of Idaho. Oct. 30, 1913.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 36*)—CREATION OF NEW DISTRICTS—POWER OF COMMISSIONERS.

Under the provisions of the school laws of the state (Laws 1911, c. 159), the board of county commissioners has the authority and power to create new districts out of any territory within the county or change the boundaries of existing districts, as provided by said act.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 85-91; Dec. Dig. § 86.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—DECISIONS APPEALABLE—ORDER OF COUNTY COMMISSIONERS.

Under the provisions of section 1950, Rev. Codes, every act, order, or proceeding of the board of county commissioners is appealable, except an order made by such board while sitting as a board of equalization.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 42, 45, 47-49; Dec. Dig. § 24.*]

3. CERTIORARI (§ 5*)—WRIT OF REVIEW—REMEDY BY APPEAL—ORDER OF COUNTY COMMISSIONERS.

Under the provisions of section 4962, Rev. Codes, the writ of review cannot be granted where there is an appeal or, in the judgment of the court, a plain, speedy, and adequate remedy.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

4. CERTIORARI (§ 5*)—WRIT OF REVIEW—ORDER OF COUNTY COMMISSIONERS.

A writ of review does not lie to review the action of a board of county commissioners in the creation of a school district, as every action of the board of county commissioners may be reviewed on appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

Appeal from District Court, Clearwater County; Edgar C. Stelle, Judge.

Action by A. J. Bobbitt and others, trustees of Joint School District No. 18, against Patrick H. Blake and others, Board of County Commissioners of Clearwater County. From a judgment for defendants, plaintiffs appeal. Affirmed.

Geo. W. Tannahill, of Lewiston, for appellants. A. A. Holsclaw, of Orofino, for respondents.

SULLIVAN, J. This action was brought in the district court of the Second judicial district in and for the county of Clearwater for a writ of review, requiring the board of county commissioners of Clearwater county to certify fully to the court a transcript of the record and proceedings of said board, whereby said board organized School District No. 34 of Clearwater county out of that portion of Joint School District No. 18 lying within the county of Clearwater, and other territory, and segregating therefrom all the territory lying and being within the boundaries of Nez Perce county, in order that the action of the board might be reviewed by

said district court. Upon said complaint the district court issued the alternative writ of review, and the defendants, the board of county commissioners of Clearwater county, appeared and demurred to said complaint, and the demurrer was sustained, and the plaintiffs refused to amend their complaint, and judgment of dismissal was entered. This appeal is from the judgment.

The following facts appear from the record: In the creation of Clearwater county out of a portion of Nez Perce county, the boundary line separating the two counties divided School District No. 118, which was at the time of the creation of Clearwater county a school district within Nez Perce county. Thereafter by mutual agreement of the school superintendents of the two counties, the name and number of said school district was changed from School District No. 118 to Joint School District No. 18 in Nez Perce and Clearwater counties, but no change in the boundaries of said district was made. Thereafter on May 31, 1912, there was filed with the defendant board a petition for the creation of a common school district out of that portion of Joint School District No. 18 then lying within the boundaries of Clearwater county, entirely segregating therefrom all that portion of said Joint School District No. 18 then lying within the boundaries of Nez Perce county. Thereafter further proceedings were had, and a petition and a remonstrance were filed with the board of county commissioners for and against the creation of said district, and at a regular meeting of said board held on July 12, 1912, the petition was granted, and School District No. 34 in Clearwater county was created by said board out of the portion of said Joint School District No. 18 lying within Clearwater county and other territory. No appeal was taken from said order, and this action was brought in the district court on the 23d day of December, 1912, nearly six months after the county commissioners made the order creating said school district. The defendant board of Clearwater county appeared and demurred to the complaint and the demurrer was sustained.

[1] The main question presented for determination in this case is whether the board of county commissioners of Clearwater county had jurisdiction or authority to create said school district. If the county commissioners had authority to act in the matter, then the judgment of the district court must be affirmed.

[2] The board clearly has the authority and power to create new districts or change the boundaries of existing districts. Laws 1911, p. 500. Section 1950, Rev. Codes, provides that: "Any time within twenty days after the first publication or posting of the statement [of the proceedings of the board of county commissioners], as required by para-

graph 19 of section 1917, an appeal may be taken from any act, order or proceeding of the board, by any person aggrieved thereby, or by any taxpayer of the county," etc. By said provision an appeal may be taken from any order or proceeding of the board of county commissioners, and this court has held that every act, order, or proceeding of the board of county commissioners is appealable except an order of such board made while sitting as a board of equalization. *General Custer Mining Co. v. Van Camp*, 2 Idaho (Hasb.) 40, 3 Pac. 22; *Feltham v. Board of Com'rs*, 10 Idaho, 182, 77 Pac. 332; *Humbird Lumber Co. v. Morgan*, Judge, 10 Idaho, 327, 77 Pac. 433; *School Dist. No. 25 v. Rice*, 11 Idaho, 99, 81 Pac. 155.

[3, 4] A person aggrieved by an order of the board of county commissioners establishing a school district should appeal from such order and cannot attack the order for want of jurisdiction of the commissioners to make the same in a collateral proceeding. Under the provisions of section 4962, Rev. Codes, the writ of review cannot be granted where there is an appeal or in the judgment of the court any plain, speedy, or adequate remedy. Writs of review do not lie from the action of a board of county commissioners creating a new school district, since the statute has provided a plain, speedy, and adequate remedy by appeal. *Rogers v. Hays*, 3 Idaho, 597, 32 Pac. 259; *Canadian Bank of Commerce v. Fremont Wood*, Judge, 13 Idaho, 794, 93 Pac. 257; *Coeur d'Alene Mining Co. v. Woods*, Judge, 15 Idaho, 26, 96 Pac. 210.

Since the appellants had a plain, speedy, and adequate remedy at law, they were not entitled to a writ of review, and the judgment of the district court must therefore be affirmed, and it is so ordered, with costs of this appeal in favor of the respondents.

AILSHIE, C. J., and STEWART, J., concur.

HAILEY v. HUSTON, State Auditor.

(Supreme Court of Idaho. Nov. 15, 1913.)

1. STATES (§ 60*)—OFFICERS—COMPENSATION. Under the provisions of section 851, Rev. Codes, as amended by Sess. Laws 1911, p. 117, the salary of the librarian of the State Historical Society is fixed at \$1,200 per annum, to be paid in monthly payments.

[Ed. Note.—For other cases, see *States*, Cent. Dig. §§ 43, 61, 63; Dec. Dig. § 60.*]

2. STATES (§ 46*)—LIBRARIAN OF STATE HISTORICAL SOCIETY.

The librarian of the State Historical Society is an appointive officer, and not a constitutional officer.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 51; Dec. Dig. § 46.*]

3. STATES (§ 59*)—OFFICERS—SALARIES—APPROPRIATION ACT.

Where the Legislature, in a general biennial appropriation act, makes a larger appropriation for salaries for certain officers than

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the statute fixing the salary of such office provides, the salary of such officer is governed by the statute fixing the salary.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 37, 62; Dec. Dig. § 59.*]

4. STATUTES (§ 11*)—ENACTMENT—CONSTITUTIONAL REQUIREMENTS.

Under the provisions of section 15, art. 3, of the Constitution, no law shall be passed except by bill.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 8; Dec. Dig. § 11.*]

5. STATUTES (§ 107*)—TITLE AND SUBJECT-MATTER—APPROPRIATION ACT—SALARY OF STATE OFFICER.

Section 16 of article 3 of the Constitution provides that every act passed by the Legislature shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

6. STATUTES (§ 141*)—AMENDMENT.

Section 18 of article 3 of the Constitution provides that no act shall be revised or amended by mere reference to its title; but the section as amended shall be set forth and published at full length.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.*]

7. STATUTES (§ 119*)—TITLE AND SUBJECT-MATTER—APPROPRIATION ACT—SALARY OF STATE OFFICER.

The title to the general appropriation act for the biennial period beginning on the first Monday in January, 1913 (Sess. Laws 1913, p. 637), is as follows: "An act making appropriation for the payment of salaries and compensation of officers and employes of the state of Idaho and the general expenses of state government and the supporting and maintaining of the state institutions for the period commencing on the first Monday of January, 1913, and ending on the first Monday of January, 1915, and appropriating certain sums specified for the relief of persons enumerated herein; and declaring an emergency"—and in no manner states that the salary of any person or persons is intended to be increased by said act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 164-167; Dec. Dig. § 119.*]

8. STATES (§ 60*)—LIBRARIAN OF STATE HISTORICAL SOCIETY—SALARY.

Held, that the salary referred to was not increased by the general appropriation act, and that the statute fixing the said salary was not amended or suspended by said appropriation act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 43, 61, 63; Dec. Dig. § 60.*]

Original application for mandamus by John Hailey, Librarian of the State Historical Society, against Fred L. Huston, State Auditor. Alternative writ quashed, and peremptory writ denied.

E. G. Davis, of Boise, for plaintiff. J. H. Peterson, Atty. Gen., and J. J. Guheen and T. O. Coffin, Asst. Attys. Gen., for defendant.

SULLIVAN, J. This is an application for a writ of mandate to the State Auditor, directing him forthwith to issue his warrant in favor of petitioner for the sum of \$153; the same being the amount of salary claimed to be due petitioner for the period beginning

January 1, 1913, and ending September 30, 1913. It is alleged in the petition that the plaintiff or petitioner is the duly appointed, authorized, and acting librarian of the State Historical Society, and has served as such from the 1st day of January, 1913, to and including the 30th day of September, 1913; that the defendant is the qualified and acting State Auditor of the state of Idaho; and that he refuses to draw his warrant as above stated. A demurrer was filed to the petition, and the case was heard upon said demurrer and the petition.

[1] The salary of the librarian of the State Historical Society is fixed by section 851, Rev. Codes, as amended by Sess. Laws 1911, p. 117, which section is as follows:

"Sec. 851. For such services the librarian shall be paid a salary of twelve hundred dollars (\$1,200) per annum, in monthly payments, and shall receive such actual and necessary expenses incurred while performing the duties prescribed in this act; provided: The aggregate sum shall not exceed eleven hundred dollars (\$1,100) in two years; and, provided, further, that the librarian may appoint an assistant whose salary shall be six hundred dollars (\$600) per annum, payable monthly."

[2] Said office of librarian of the Historical Society is an appointive office, and not a constitutional office.

[3] It will be observed that it would require an appropriation of \$1,800 per year to pay the salaries of said librarian and his assistant, or \$3,600 for the biennial term. Without enacting any legislation amending said section 851, as amended, the Legislature in 1913, in the general appropriation bill (see Laws 1913, p. 643), appropriated the following sums:

| | |
|---------------------------------------|------------|
| State Historical Society, salaries... | \$4,250 00 |
| Traveling, purchasing and express... | 750 00 |
| Total | \$5,000 00 |

It appears that the Legislature desired to increase the salaries of said librarian and his assistant as indicated by said general appropriation act or bill, and the board of trustees of the State Historical Society divided the excess of said appropriation over the salaries fixed by section 851, as follows: Librarian, per month, \$17; assistant librarian, per month, \$10—and, upon application to the State Auditor for the warrants in said amounts, he declined to draw such warrants, but drew them for the amount of the salaries fixed by said section 851, and this proceeding is brought to compel him to draw his warrant for the balance due on the salary of the librarian as fixed by said board.

The question, then, is directly presented whether the Legislature can amend a salary statute or suspend its operation by a general appropriation bill appropriating a larger sum

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the salaries for such office than is fixed by the salary statute.

[4-7] Section 15 of article 3 of the Constitution provides, among other things, that no law shall be passed except by bill. Section 16 provides that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; and section 18 provides that no act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length. The subject of the increase of any salary is not expressed in the title of the appropriation act, and, as that subject is not expressed in the title of the act, an increase of salary cannot be included in such act. And if it were included in the title to said act, the act would be obnoxious to the Constitution under another provision of section 16, which declares that every act shall embrace but one subject and matters properly connected therewith. A general appropriation act includes one subject, and an increase in the salary of an officer is another and distinct subject, and, being two separate and distinct subjects, they are prohibited from being combined in one act by the provisions of said section. Under the provisions of said section 18, when a section of the statute is amended, it must be set forth and published at length, and, as the said salary statute (section 851, Rev. Codes) was not set forth and published at full length, it was not amended by said general appropriation act. Here we have a specific statute fixing said salary, and it was not contemplated by the framers of the Constitution that such a statute should be amended in any other manner than by specific enactment as provided by the Constitution. It certainly was not contemplated that an amendment to a salary statute could be tucked away in a general appropriation bill, and no reference made to it in the title of the bill. The title to said appropriation bill would not give to any member of the Legislature or to any other person any inkling of a purpose to increase a salary. That section of the Constitution which provides that every act shall embrace but one subject and matters properly connected therewith, and that such subject shall be expressed in the title, was for the purpose of giving the members of the Legislature, as well as citizens generally, notice of the purpose and object of the bill, and provides for titles to all bills, as well as for a unity of title and subject-matter. Said appropriation in the general appropriation bill would not and could not amend the statute fixing the salary of the officer referred to.

[8] By making said appropriation, the Leg-

islature evidently desired to increase the salary of said officer, and this court is of the opinion that said desire was a laudable one, and recognizes that under present conditions it would be only fair and right to increase the salary of said officer to the full amount of said appropriation intended for such purpose; but the court cannot disregard the provisions of the Constitution in regard to the enactment and amendment of laws, and is compelled to hold that the appropriation made by the Legislature for said office does not increase the salary of said officer nor suspend or amend the provisions of said section 851, Rev. Codes, as amended, fixing said salary.

If this matter were properly called to the attention of the next Legislature, it no doubt will amend said statute, and make an appropriation sufficient to pay the present officers the amount intended by said appropriation.

Under the law we hold that the alternative writ of mandate heretofore issued must be quashed, and the peremptory writ denied. No costs are awarded in this proceeding.

AILSHIE, C. J., and STEWART, J., concur.

WHITE v. HUSTON, State Auditor.

(Supreme Court of Idaho. Nov. 15, 1913.)

Original proceedings in mandamus by Willard White, Commandant of the Soldiers' Home, against Fred L. Huston, State Auditor. Writ denied.

S. L. Tipton, of Boise, for plaintiff. J. H. Peterson, Atty. Gen., J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., for defendant.

SULLIVAN, J. This is an original proceeding in this court by Willard White, commandant of the Soldiers' Home, praying that a writ of mandate be issued commanding the State Auditor to draw his warrant for a balance claimed to be due the plaintiff on his salary as commandant of the Soldiers' Home.

In consideration of the fact that said commandant's salary was fixed by a statute, and that the Legislature, in the general appropriation act for the biennial term beginning the first Monday in January, 1913, made an appropriation of a greater sum for the commandant's salary than was fixed by statute, the same rule of decision would apply in this case that would apply in the case of John Hailey v. Fred L. Huston, State Auditor, decided by this court at the November, 1913, term, 136 Pac. 212, and on the authority of that case the alternative writ of mandate heretofore issued must be quashed, and the peremptory writ denied, and it is so ordered. No costs are awarded in this case.

AILSHIE, C. J., and STEWART, J., concur.

STATE v. WALLER.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 303*)—NONSUPPORT—REMEDIAL STATUTE.

The Desertion Act (Laws 1911, c. 163), which provides for the punishment of a husband who, without just cause, neglects or refuses to provide for the support and maintenance of his wife in destitute or necessitous circumstances, is not a mere poor law, and was not designed merely to redress the public grievance flowing from the conduct denounced. It was intended to supplement other means and remedies for enforcing the moral and social duty of a husband to support his wife, is remedial in purpose, although it provides for the infliction of a severe penalty, and is to be liberally interpreted to accomplish the legislative intention.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1101; Dec. Dig. § 303.*]

2. HUSBAND AND WIFE (§ 303*)—NONSUPPORT—"DESTITUTE" OR "NECESSITOUS" CIRCUMSTANCES—"NECESSARIES OF LIFE."

The words "in destitute or necessitous circumstances" mean needing the necessities of life, which cover not only primitive physical needs, things absolutely indispensable to human existence and decency, but those things, also, which are in fact necessary to the particular person left without support.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1101; Dec. Dig. § 303.*]

For other definitions, see Words and Phrases, vol. 3, p. 2030; vol. 5, p. 4726; vol. 5, pp. 4693-4703.]

3. HUSBAND AND WIFE (§ 314*)—PROSECUTION FOR NONSUPPORT—QUESTION FOR JURY.

Should a wife having an estate of her own be neglected by her husband, the character and extent of her resources and their availability to meet her needs may be taken into consideration in determining whether or not she is in necessitous circumstances; the question in all cases being one of fact for the jury to determine under proper instructions from the court.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1111; Dec. Dig. § 314.*]

4. HUSBAND AND WIFE (§ 304*)—PROSECUTION FOR NONSUPPORT.

Whenever a husband, without just cause, neglects or refuses to provide for the support and maintenance of his wife, and thereby places her in such a situation that she stands in need of the necessities of life, it is not material that they are supplied by her own labor or by sympathizing relatives, friends, or strangers, so that she does not in fact suffer from the privation. He is guilty if he leaves her in such circumstances that, without her own efforts or outside help, she would lack the necessities of life.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1102; Dec. Dig. § 304.*]

5. PARENT AND CHILD (§ 17*)—DUTY TO SUPPORT—PROSECUTION.

The foregoing rules applicable to the relation of husband and wife also govern the relation of parent and child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

Appeal from District Court, McPherson County.

Jay G. Waller was convicted of nonsupport of his wife and child, and appeals. Affirmed.

David Ritchie, of Salina, and D. P. Lindsay, of McPherson, for appellant. J. M. Grattan and P. J. Galle, both of McPherson, for the State.

BURCH, J. The defendant was convicted of nonsupport of his wife and child under section 1 of chapter 163 of the Laws of 1911, known as the "Desertion Act," which reads as follows: "Section 1. That any husband who shall, without just cause, desert or neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any parent who shall, without lawful excuse, desert or neglect or refuse to provide for the support and maintenance of his or her child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime and, on conviction thereof, shall be punished by imprisonment in the reformatory, or penitentiary, at hard labor, not exceeding two years."

Succeeding sections of the act give the neglected wife or child the right to institute the proceeding and provide for temporary orders upon a defendant for support and maintenance pending his prosecution, for his release from custody before or at the trial, on plea of guilty, or after conviction, upon his securing by recognizance compliance with such order of support and maintenance as the court may make in lieu of the penalty prescribed in section 1, and for the payment of the wages of a convict to his wife and children in case of confinement in the penitentiary or reformatory.

The defendant and his wife were married in 1904, and resided in McPherson county. In 1905 he deserted her and a child which had been born to them, and has not since provided for the support or maintenance of either his wife or child. When he disappeared he had some horses which were appropriated through a proceeding for alimony. Of the money realized in this way the wife has saved \$50, which, together with \$50 more earned by working out, she has at interest. She answered a puzzle in a newspaper, and received credit on a piano. Her father took one of the horses mentioned, and gave her the piano. She has no other money or property, and supports herself and child part of the time by working out. She makes her home with her parents, and stays with them when not working out. When with them she assists her mother in the housework. Her parents live on a good farm in a well-furnished house of eight rooms, one of which she occupies with her child. Her parents live well, and besides contributing to the support of her and her child share their comforts with her. The child attends school regularly. On the day the defendant was arrested he had a conversation with his wife in which he asked what she would take to settle the matter.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

She replied that she would take \$2,000. He said he could not get that much money. He did not offer to take her to any other place or ask her to go to any other place where he would support her.

The information charged nonsupport of the wife and of the child in June, 1912, and that each one was then in necessitous circumstances. At that time the defendant, who was a resident of Colorado, was in McPherson county for the purpose of attending the funeral of a relative. The facts narrated having been proved at the trial, a motion was made to discharge the defendant, which was overruled. The defendant then requested the court to instruct the jury as follows: "The words 'in destitute or necessitous circumstances' as used in the statute, defining the offense charged in this case, mean that the wife or child must be in a position of extreme poverty or destitution of the means of living, that is to say, in pressing want, and, unless you find and believe from the evidence, beyond a reasonable doubt, that the wife or child of the defendant in this case was in such situation within two years before the filing of the complaint in this case, you cannot convict but must acquit the defendant." The request was denied, and the jury were instructed as follows:

"(6) The jury are instructed that the word 'necessitous' means needy, needing the necessities of life, and if you find that the defendant, without just cause, did neglect to provide for the support of his wife and child, or either of them, and that at the time of any of said neglect within two years next prior to the 1st day of June, 1912, they were in necessitous circumstances, as herein defined, then the fact, if it be a fact, found from the evidence that they were furnished the necessities of life by relatives, or that the wife aided in furnishing herself with the necessities of life by her own physical labor away from her home, this would not change the liability of the defendant for neglecting to provide for said wife and child, or either of them.

"(7) The jury are instructed that the chief object of the law is to compel the husband, when able, to support his family, and if the husband separates from his wife, leaving her in destitute or necessitous circumstances, it is his duty to provide for her where she is left, unless some reason be shown why she should follow him elsewhere."

A verdict of guilty followed, upon which sentence was pronounced, and the defendant appeals.

[1, 2] The propriety of the judgment depends primarily upon the meaning of the phrase "in necessitous circumstances" translated from the statute to the information. The expression must be regarded as relative to the subject of the statute in which it is used. When the same or equivalent words are used in statutes relating to the poor, they usually refer to the physical necessities of

food, clothing, and shelter. When used in a statute relating to the marital portion to be taken from the succession of a deceased spouse, the fortune of the deceased and the habits of life which such fortune engendered in the family are taken into consideration, since property which would make a person in one condition of life wealthy would be inadequate to supply the legitimate wants of one differently situated. *Dupuy v. Dupuy, Administrator, et al.*, 52 La. Ann. 869, 27 South. 287. The obligation of a husband to support his wife, and children in her custody, is frequently enforced by awarding her alimony during the pendency of a suit for divorce. Such an award is limited to temporary needs, and the common statement is that the application therefor is made on the ground of necessity, so that the wife may not be either defenseless or destitute. Discussing this subject, the New Jersey Court of Errors and Appeals said: "The necessity that is the criterion of validity is not mere physical necessity, but rather social and moral propriety, having regard to the situation of the parties and the fitness of things. Food, shelter, and clothing are physical necessities. In an enlightened community the common education of a child is a moral and social necessity." *Streitwolf v. Streitwolf*, 58 N. J. Eq. 570, 576, 43 Atl. 904, 907 (45 L. R. A. 842). These illustrations are sufficient to indicate the range of meaning which the words in question take when employed in reference to different subjects.

The purpose of the desertion statute was stated by the trial court in instruction No. 6 in the language used by this court in the case of *State v. Gillmore*, 88 Kan. 835, 129 Pac. 1123. It is concerned with the marital duty of a husband to support his family. It is perfectly well understood that this duty is not discharged except by support and maintenance in the moral and legal sense of those terms, having regard to the situation, mode of life, estate, and social rank and condition of the persons concerned. A man is not permitted to degrade his wife to the level of the brutes. Sustenance which barely meets animal needs, which does no more than relieve the pangs of hunger, cover nakedness, and afford shelter from the elements, is not support or maintenance. He is obliged to provide such a place of abode, such furniture, such articles of food, wearing apparel, and use, such medicines, medical attention, and nursing, such means for the education of children, and such social protection and opportunity as comport with health, comfort, welfare, and normal living of human beings according to present standards of civilization, considering his own means, earning capacity, and station in life. These notions are rooted in the common conscience of the people, and are reflected by section 4 of the statute, which gives the court authority to fix the amount which the defendant must pay to his wife according to his financial ability

or earning power, and according to the circumstances of the case.

[3] The same notions animate the words "destitute" and "necessitous." As applied to the circumstances of a wife whose husband neglects or refuses, without just cause, to support and maintain her, they mean the same thing. They mean needing the necessities of life, and the necessities of life cover not only primitive physical needs, things absolutely indispensable to human existence and decency, but those things, also, which are in fact necessary to the particular person having the right to demand support and maintenance. The law is not a mere poor law. It is a domestic duty law, and was intended to cover the case of a woman who is left destitute according to any just and humane estimate of her situation, although in the eyes of paupers she might appear to be rich. It often occurs that a husband is impecunious, while his wife is possessed of ample means. It often occurs that they have equal fortunes. Should a wife having an estate of her own be neglected by her husband, the character and extent of her resources and their availability to meet her needs may be taken into consideration in determining whether or not she is in necessitous circumstances; the question in all cases being one of fact for the jury to determine under proper instructions from the court.

[4] The duty of a husband to maintain his wife is independent of the means or want of means which she possesses and of her ability or want of ability to support herself and her children. It is likewise independent of the native disposition to generosity on the part of relatives, friends, and even strangers, which may be confidently relied on to protect a neglected woman from suffering and want. If a husband fail to provide his wife with the necessities of life, she is authorized to procure them on his credit, if she can. Civil remedies exist whereby support may be compelled. But the duty is too often evaded in such a way that these measures are wholly inefficient. In view of this fact the Legislature undertook to provide a method and a sanction adequate to secure performance. The essence of the act is that a man shall not be allowed to shift the burden of supporting his wife and children upon others under no obligation to bear it and possibly upon the state itself. Therefore, whenever a husband, without just cause, neglects or refuses to provide for the support and maintenance of his wife, and thereby places her in such a situation that she stands in need of the necessities of life, it is not material that they are supplied by her own labor or by sympathizing relatives, friends, or strangers, so that she does not in fact suffer from the

privation. He is guilty if he leaves her in such circumstances that, without her own efforts or outside help, she would lack the necessities of life.

[5] All that has been said concerning the relation of husband and wife applies, of course, to the relation of parent and child.

The defendant relies upon a number of decisions rendered by the Supreme Court of Georgia. That state has a statute making it a misdemeanor for a father to abandon his child, leaving it in a dependent and destitute condition. In quashing an indictment which omitted the words "and destitute," the court expressed its idea of destitution as follows: "So to leave a child dependent does not convey the idea of absolute destitution. The child may be cared for and comfortable, and yet dependent on some charity; but left destitute it has no protector, friend, or other author of benevolent kindness feeding and clothing it." *McDaniel, Governor, v. Campbell*, 78 Ga. 188, 189.

This definition has been adhered to in subsequent decisions rendered in supposed obedience to the rule that penal statutes must be strictly construed. Cases from other states may be found holding that an abandoned wife or child must actually be in extreme want or be a public burden before a conviction of the husband or parent can be sustained. On the other hand, it is held, under the desertion and nonsupport acts of various states, that it is immaterial that the neglected wife has means of her own (*Poole v. People*, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245), and that a delinquent husband may be punished, although his wife by her own exertions or by the aid of friends avoids pauperism (*People v. Malsch*, 119 Mich. 112, 77 N. W. 638, 75 Am. St. Rep. 381). There is no conflict between these two classes of cases. In one the statutes construed contemplated nothing but redress of the public grievance. In the other they were designed to aid civil remedies for the enforcement of the liability for support and maintenance. The Kansas statute is of the latter kind, as the provisions subsequent to section 1 clearly show. Its object is to insure the observance of a high moral and social duty. It is remedial in purpose, although it provides for the infliction of a severe penalty, and it must be liberally construed in order that the legislative intent may be accomplished.

From what has been said it is clear that the motion to discharge was not well founded; that the court was right in submitting the cause to the jury; that the instruction asked was improper; and that the instruction given correctly stated the law.

Therefore the judgment of the district court is affirmed; all the Justices concurring.

COMMERCIAL STATE BANK v. BOATMAN et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

FRAUDULENT CONVEYANCES (§ 300*)—TRANSACTIONS—EVIDENCE.

In a suit to set aside deeds by a husband to his wife as in fraud of creditors, evidence held to warrant a finding that during the years the wife gave her husband money she was doing so to aid him in his business and that the relation of debtor and creditor did not exist.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 896-903; Dec. Dig. § 300.*]

Appeal from District Court, Woodson County.

Action by the Commercial State Bank against Annis Boatman and another. From a judgment for plaintiff, defendants appeal. Affirmed.

G. R. Stephenson and Lamb & Hogneland, all of Yates Center, for appellants. J. C. Culver, of Yates Center, and Ewing, Gard & Gard, of Iola, for appellee.

PER CURIAM. This action was brought by the appellee to set aside two deeds to properties in Yates Center which were caused by appellant's husband to be made to her for the purpose, as alleged, of enabling him to defraud his creditors, and especially the appellee. There was evidence that for years the husband had been given credit by appellee as the owner of properties, the title to which appeared to be in him on the records of the register of deeds; that he had borrowed from the appellee a part of the purchase price of one of the properties in question, and that the borrowed money was used in such purchase; also that he had traded a farm which he held in his own name for city property in Iola, and that the appellant had traded that property for the other property involved in this action; also that, after these conveyances to the appellant, her husband had no property left. Thereafter the indebtedness of the husband to the appellee was converted into a judgment, execution issued thereon, delivered to the sheriff, and the sheriff returned thereon that no property of the husband's could be found upon which to levy. It also appeared that some years before the transfer the appellant had let her husband have money at different times, aggregating about \$2,000, but that she had taken no note for the same and made no contract for its repayment but, as she testified, she just let him have it. As to one or two of the smaller items she testified she loaned it to him. No account of the husband's alleged indebtedness to the appellant is shown to have been taken between them at the time of the transfer, and no intelligible showing that the amount of the alleged indebtedness to the wife was equal to or approximated the value of the

property transferred was made at the time of the trial.

The court was justified in believing from appellee's own testimony that during the years she was giving him sums of her money she was doing so to aid him in his business and that the relation of debtor and creditor did not then exist. If such was the fact, he should not be permitted, as against his creditor, to give it back to her when insolvent nor to cause his property to be conveyed to her thereafter. *Bailey v. Kansas Mfg. Co.*, 32 Kan. 73, 3 Pac. 756.

In *Dresher v. Corson*, 23 Kan. 313, it is said: "We have repeatedly affirmed the right of the wife to purchase and hold separate property, real and personal, and whenever such right is exercised in good faith it is entitled to protection. But when property which is in the possession of and apparently belongs to the husband, and upon the faith of which he may properly have received credit, is at the time of his financial embarrassment claimed to have been purchased by and belong to the wife, courts may well require clear and convincing proof, not merely of the fact, but also of the good faith of the purchase. Communications between husband and wife being privileged, the opportunity for fraud, if fraud is desired, is great, and searching inquiry is proper. When, pending a suit against him, a man of means transfers all his property, save that which is exempt, to his wife and hires out to her for his 'board, clothing, and lodging,' the transaction, to say the least, affords ground for suspicion and calls for satisfactory proof of good faith and fair consideration. Unless care is taken and courts are watchful, those laws which were designed for the protection of married women will become repulsive to the moral sense as mere covers for fraud."

The judgment is affirmed.

ECKHARDT v. TAYLOR et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§§ 229, 260*)—AFFIDAVIT—SUFFICIENCY—AMENDMENT.

An affidavit for attachment which omits the amount claimed as rent, although made under a statute requiring that to be stated, is not void, where it gives the total amount of the plaintiff's demand, and a pleading on file shows how much of it is for rent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 948-974, 1045; Dec. Dig. §§ 229, 260.*]

2. LANDLORD AND TENANT (§§ 229, 260*) — PROPERTY SUBJECT.

The Landlord and Tenant Act (Gen. St. 1909, §§ 4713, 4717), gives a lien for rent, which may be enforced by attachment, to be levied only on the crop. But it also authorizes a general attachment for rent whenever certain acts are done by the tenant (Gen. St. 1909, § 4716),

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and this may be levied upon any nonexempt property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 948-974, 1045; Dec. Dig. §§ 229, 269.*]

3. CUSTOMS AND USAGES (§ 17*) — PAROL — LEASE.

An agreement in a lease that the tenant is to keep in repair the fences surrounding the premises is not subject to modification by evidence of a local custom for persons handling cattle to make repairs in the fences inclosing them.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.*]

Appeal from District Court, Cowley County.

Action by L. Eckhardt against F. M. Taylor and others. From judgment for defendants, plaintiff appeals. Modified.

Buckman & Bloss, of Winfield, for appellant. C. T. Atkinson, of Arkansas City, Kan., Jackson & Noble, of Winfield, and Emil H. Koehl, of Arkansas City, Kan., for appellees.

MASON, J. L. Eckhardt executed to F. M. and J. N. Taylor a lease on farming land containing various agreements on each side. One of them was that the Taylors could use an adjacent pasture, not included in the lease, for a reasonable rent. Eckhardt sued them before a justice of the peace for the rent of the pasture, which he placed at \$125, and also for the balance due on an account and for damages resulting from their failure to perform the agreements of the lease. An attachment was issued and levied upon a quantity of hay and upon some live stock. The case was taken to the district court, where the attachment was held to be void. Upon a trial the defendants recovered. The plaintiff appeals.

[1] The plaintiff proceeded under the statute giving the landlord a lien on the crop, for the rent of farming land, to be enforced by attachment (Gen. St. 1909, §§ 4713, 4717), and also under that authorizing an attachment for rent where the tenant has removed or is about to remove his property from the leased premises (Gen. St. 1909, § 4716). Each of these statutes requires the attachment affidavit to state the amount of rent owing. Here the affidavit gave the total amount claimed by the plaintiff (\$204.41) and stated that a part of it was for rent, but did not indicate the proportion. The bill of particulars set out the various items of debit and credit, showing the demand for rent to be \$125. Under the liberal provisions of our Code with respect to amendments (section 140, Code Civ. Proc. [Gen. St. 1909, § 5733]), we do not think this affidavit should be regarded as a nullity. It did not show the exact amount claimed as rent, but this was ascertainable from the bill of particulars on file in the case. The plaintiff asked leave to file an amended affidavit stating that the entire amount claimed was owing as rent. We think the affidavit was sufficient to confer jurisdiction and that

it was error to set the attachment aside. The inclusion of improper items, unless in bad faith, would not vitiate the affidavit. *Lumber Co. v. McCurley*, 84 Kan. 751, 115 Pac. 590. There is a difference of judicial opinion as to what defects in an attachment affidavit may be cured by amendment. Note, 31 L. R. A. 425. In *Vollmer v. Spencer*, 5 Idaho, 557, 51 Pac. 609, leave to amend was denied by a divided court in a case similar to this one. Corrections in the amount, however, have been allowed. 4 Cyc. 524. The Kansas cases on the general subject are collected in *Wire Co. v. Kingman*, 44 Kan. 270, 24 Pac. 476.

[2] It is suggested that in any event the levy could be made only on the crops grown on the premises for the rent of which the action was brought. The Landlord and Tenant Act gives a lien for rent which may be enforced by attachment, to be levied only on the crop. Gen. St. 1909, §§ 4713, 4717. But it also authorizes a general attachment for rent whenever certain acts are done by the tenant (Gen. St. 1909, § 4716), and this may be levied upon any nonexempt property (*Tootle, Wheeler & Motter Co. v. Floyd*, 28 Okl. 308, 114 Pac. 259).

The jury returned a general verdict for the defendant for \$1. They also found the amount due to each party upon each of several claims. Their findings are unchallenged, except as to one matter to be referred to later. They found the defendant to be indebted for the rent of the pasture in the sum of \$62.95, which is thus established as the amount due plaintiff on that account. Therefore, if the plaintiff shall finally prevail, he will be shown to have been entitled to a lien of that amount upon the hay, if grown upon the pasture, and upon all the property seized by the sheriff, if the other grounds of attachment existed.

[3] The jury found that the defendants were entitled to damages in the sum of \$119 on account of injury to their crops by the defendant's cattle. This finding is assailed as having been influenced by an erroneous instruction. The lease contained an agreement on the part of the defendants to "keep in good repair all fences surrounding said farm lands and all buildings except the general wear and damage by elements." There was evidence of a local custom for those handling cattle to "ride the fences," carrying "staples and a hammer and the necessary tools for repairing a fence." The instruction complained of, after quoting this clause of the lease, contained this language: "If you should find from the preponderance of the evidence that at the time the original lease was executed there was a general custom or usage in that community whereby those handling cattle, when the same were kept in an inclosure, to ride the fences, and the custom was of such notoriety and had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

existed so long that you believe the parties to the lease must have known of such general custom or usage and contracted with reference to it, and that they did so contract in reference to such general custom or usage, then it would be the duty of the plaintiff, in the management of his cattle, to observe such custom or usage unless otherwise understood and agreed by and between the parties."

The provision of the lease regarding the keeping up of the fence was not ambiguous and, within the authority of a case recently decided by this court, could not be affected by evidence of a local custom. *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579. The same instruction defined the defendants' duty as being to exercise ordinary care in repairing the fence. We think their obligation is to be measured by the terms of the lease rather than by the rule of ordinary diligence.

The judgment is modified to this extent: The order discharging the attachment is set aside; a new trial is granted upon the issue raised by the defendants' claim of damages on account of injury done by the plaintiff's cattle; subject to change in accordance with the decision of that issue, the general verdict is to stand as a settlement of the matters in litigation between the parties. All the Justices concurring.

HULSMAN v. DEAL.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

EJECTMENT (§ 9*)—RIGHT OF ACTION—GRANTOR IN DEED GIVEN AS SECURITY.

Land in possession of a tax lien holder was deeded to a third party by the fee owner for the purpose of securing a debt. *Held*, that the grantor could thereafter maintain ejectment against the one thus in possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

Appeal from District Court, Finney County.

Action by Charles B. Hulsman against Jennie Deal. From judgment for plaintiff, defendant appeals. Affirmed.

Hoskinson & Hoskinson, of Garden City, for appellant. Foster & Foster, of Garden City, for appellee.

WEST, J. Action in ejectment. The plaintiff recovered subject to a lien for taxes and improvements. The defendant appeals, and insists that the plaintiff, having parted with his title, was not the real party in interest.

The quarter section in controversy was in possession of a tax-deed holder, but was owned by the plaintiff, who had, within one year from his majority, made sufficient tender to redeem, which tender was refused. *Hulsman v. Deal*, 82 Kan. 518, 108 Pac. 849. He traded this and another quarter for certain personal property valued at \$1,600. There was testimony tending to show that the trade was

made on condition that the plaintiff should perfect the title or pay back \$800 of the consideration; that, being unable to effect a settlement with the one in possession, he took a reconveyance from his grantees in order to bring ejectment; that he then deeded to a company of which such grantees were officers, for the purpose of securing the payment of the \$800 in case he should not make good his title to the land; that the deed was mutually intended as security. It is true, as suggested, that the plaintiff's own testimony in chief would apparently leave him without title, but from his cross-examination, and from other evidence introduced, the trial court could have justly reached the conclusion that the title of the plaintiff was sufficient to enable him to maintain the action.

It is familiar law that a deed intended merely for the purpose of securing a debt leaves the grantor the real owner. *Stratton v. Rotrock*, 84 Kan. 198, 114 Pac. 224, and cases cited. His ownership, thus remaining, is sufficient for him to maintain ejectment against a stranger to the deed in possession under a redeemable tax lien.

The question of title, the only one presented by the appeal, depends on the proper deductions to be drawn from the evidence of act and intention, and these, we think, justify the result reached below.

The judgment is therefore affirmed. All the Justices concurring.

BAKER v. MISSOURI, K. & T. RY. CO.†

(Supreme Court of Kansas. Nov. 8, 1913.)

RAILROADS (§ 305*)—INJURIES TO PERSONS NEAR TRACKS—CARE.

The servants of a railroad company are bound on approaching a crossing to keep a lookout for travelers, and a railroad company is liable where its servant, observing the fright of a horse and able to have stopped in time to avoid injury, recklessly failed to stop his railroad tricycle, thus causing an injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 968-971; Dec. Dig. § 305.*]

Appeal from District Court, Bourbon County.

Action by David Baker against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John Madden and W. W. Brown, both of Parsons, and John H. Crider, of Ft. Scott, for appellant. Keene & Gates, of Ft. Scott, for appellee.

PER CURIAM. Action to recover for injury and loss sustained by appellee, whose horse was frightened by the negligent operation of a railroad tricycle at a public crossing. Some of the conditions existing at the crossing and the circumstances of the acci-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied December 13, 1913.

dent were stated on the former appeal. *Baker v. Railway Co.*, 85 Kan. 263, 116 Pac. 816, 35 L. R. A. (N. S.) 822, Ann. Cas. 1912D, 1042. In effect the jury found that Knight, who was operating the tricycle, saw and appreciated that the horse had become frightened and unmanageable and yet he recklessly ran the machine down towards the horse, and that if he had stopped when he observed the fright and danger the casualty would have been avoided. Some of the witnesses said that Knight could have stopped the tricycle in a distance of 5 feet, and the jury found that he could have stopped it without injury to himself in from 12 to 15 feet. Although the sufficiency of the evidence is challenged, it appears to adequately uphold the verdict. It tends to show that Knight was culpably negligent in failing to stop the machine after he saw the peril of appellee and also that the fright of the horse increased as Knight approached the crossing. His recklessness is shown by his remark to a witness after the accident that "he didn't have to stop." The railway company is not liable for the result of a horse taking fright at cars where they are operated in the usual way and at the customary rate of speed and with due regard to the rights of others. However, in approaching a crossing used by the public, it was the duty of Knight to keep a lookout for travelers on and approaching the crossing so as not negligently to injure them. He was bound to use care commensurate with the danger involved under the circumstances existing at the time and place. Seeing that the horse was frightened at the machine and that the fright and danger was increased by his nearer approach, and having it in his power to stop and avert the peril, he recklessly endangered the safety of appellee by running on towards the horse and thus rendered the company liable for the resulting injury. Under the circumstances, it was his duty to have used all reasonable, available means consistent with his own safety to stop the machine. In view of the testimony as to the situation there and of the willows and weeds along the track, it cannot be held that appellee was guilty of contributory negligence in driving so close to the track before observing the coming tricycle. The slight inconsistencies in the answers to special questions in regard to measurements of space and time did not require the setting aside of the findings and verdict or the granting of a new trial, nor can it be said that the findings are without support in the evidence. The charge of the court fairly presented the issues arising on the evidence to the jury, and the theory that there could be no recovery if Knight honestly erred in his judgment, provided he did what he deemed to be best under the situation as he saw it at the time, was fairly presented in the instructions given.

Judgment affirmed.

WETHERLA v. MISSOURI PAC. RY. CO.
(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 337*)—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A passenger on a railroad train, who leaves the train at an intermediate station for a temporary purpose, is, in the exercise of ordinary care in crossing the station platform, bound to look upon the platform to avoid collision with any object, usually or necessarily thereon, which may impede his progress and do him injury; if without any sufficient reason he neglects so to do and he receives injury by coming in contact with an obstruction, he is guilty of contributory negligence and cannot recover damages from the railroad company for the injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1887; Dec. Dig. § 337.*]

Appeal from District Court, Wyandotte County.

Action by John A. Wetherla against the Missouri Pacific Railway Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. P. Waggener and J. M. Challiss, both of Atchison, and J. N. Baird, of Kansas City, for appellant. Angevine, Cubbison & Holt, of Kansas City, for appellee.

SMITH, J. In this case 46 special questions were prepared to be submitted to the jury; to 31 of the questions the counsel for the parties, by agreement, appended answers, and 15 questions were submitted to be answered by the jury, the foreman affixing his signature to each question so answered. This, although novel, is regarded as good practice, as it relieves the jury from forming answers to questions of fact not really in dispute.

The undisputed and agreed facts are that appellee became a passenger upon appellant's passenger train at Kansas City, Kan., about 4:30 p. m., November 9, 1909, with a ticket entitling him to ride to Horaniff, a station in Wyandotte county. The train arrived at the intermediate station of Bethel at from 5 to 5:08 p. m., at which place appellee desired to inquire of the station agent about a shipment of potatoes. He spoke to the conductor about this, and the conductor said, "All right." The train stopped at Bethel from 30 seconds to one minute. There was a station platform at Bethel, extending from the railroad track to the station building about 18 feet wide and about 150 feet long. A mail sack was unloaded from the mail car of the train about six feet east of the west end of this platform, and lay thereon three or four feet from the train. The train was running in a westerly direction. When appellee stepped off the train he walked toward the agent, who was standing on the platform 10 or 12 feet from the train, asked the agent if the shipment of potatoes was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there, and was told there was nothing there for him. In attempting to again board the train the appellee stumbled and fell towards the train and on the rail, and his thumb and parts of two fingers were cut, and had to be amputated. The appellee was 64 years old, 6 feet and 2 inches tall, weighed 225 pounds, and was receiving a salary of \$65 per month. The jury returned a general verdict in favor of appellee, and assessed his damages at \$2,500. Judgment was rendered for that amount and costs.

The jury, in answer to special questions, found that appellee alighted from the train immediately after it stopped; that darkness was approaching at the time; that appellant was from 8 to 10 feet from the train when it started to go on and that he moved rapidly towards it for the purpose of again boarding it; that there was nothing to prevent him from seeing the mail sack if he had looked for it; that the train had moved 30 feet from where it had stopped, and was moving four miles per hour when appellee attempted to board it; that appellee attempted to board the train at the front end of the rear passenger car; that appellee had hold of the handrail of the car when he fell, but stumbling caused him to get an insecure hold; that appellee stumbled over the mail sack when he started for the train; that the conductor knew appellee was attempting to board the train when he fell, and knew this when he heard footsteps behind him; that when appellee was talking to the station agent the agent was standing east of the mail sack; that appellee took hold of the handrails of the car in attempting to board the train immediately south of the west end of the depot.

Two questions were involved in the case: First, was the railroad company guilty of negligence which caused or contributed to the injury to the appellee. Second, was the appellee guilty of contributory negligence? The general verdict in favor of appellee is, in effect, a decision in his favor upon both of these questions, if such verdict is supported by competent evidence. Each is a question of fact for the jury, and compels an affirmation of the judgment if, as aforesaid, the evidence is sufficient, and unless the jury has made a special finding of fact inconsistent with the general verdict, which special finding is supported by competent evidence.

Numerous objections are made to the instructions given by the court, and especially to instructions Nos. 7 and 15. Instruction No. 7, although requiring a high degree of diligence, is practically in accord with the decisions of this and many other courts as to the duty of the railroad company in safeguarding its passengers, and the rule should not be relaxed as to passengers while on trains.

Instruction 7 reads: "The jury are instructed, as a matter of law, that it is the duty

of a railroad company to use the highest degree of care and caution consistent with the practical operation of the road to provide for the safety and security of the passenger while being transported, and by the 'highest degree of care,' as used in this instruction, is meant that the railroad company, as a common carrier of passengers, is required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, and this rule of law is applicable to all cases where the relation of passenger and carrier exists."

A passenger on a moving train is in the custody of the railroad company and its employees. He is helpless to avert any of the many dangers to which he is exposed. His utmost effort in safeguarding himself is to refrain from any act that increases his peril. On a platform, however, he has full control of his own movements; he is generally free to observe his surroundings, and may generally avoid coming in collision with any object which may cause him injury. We think instruction No. 15 correctly instructed the jury that at the time of the accident appellee was a passenger, and entitled to the care of a passenger.

It is claimed in the petition that it was dark at the depot platform at the time of the accident, yet the evidence indicates and the jury found in its special findings Nos. 25 and 28, as follows:

"Q. 25. Was it light at the time plaintiff was injured? A. Approaching darkness."

"Q. 28. What was there to have prevented him from seeing said mail sack if he had looked? A. Nothing if he had looked for it."

It was the duty of the appellee to exercise reasonable care for his own protection, as well as it was the duty of the railroad company to protect him from injury. From the two findings of the jury it is evident that if he had looked where he was going he would have seen the mail sack, and it is a fair presumption that if he had seen the mail sack he would not have stumbled over it. He did stumble over it, and it follows as a reasonable presumption that he did not look, did not see it, and did not exercise reasonable care to avoid injury to himself. On the cross-examination of the appellee as a witness, numerous questions were asked of him as to whether he looked on the platform in going to take the train, to each of which he gave evasive answers, evidently to avoid saying whether he did or did not see the mail sack. Finally the question was asked him, "You weren't paying any attention to anything that was on the ground?" (Evidently meaning the platform, as he was being interrogated about going on the platform.) He answered, "I did not look to see what was there."

The answer to special question No. 28, by the jury, indicates that appellee did not

look, and did not see the mail sack on the platform. If he did not, he was guilty of contributory negligence. It was his duty to take all reasonable precautions to avoid any obstructions that might be upon the platform. It is a matter of common knowledge that baggage trucks, mail sacks, and sometimes other obstacles are necessarily for a time upon depot platforms, and it is the duty of the passenger having to pass thereupon to use his senses, specially his sense of sight, to prevent contact therewith and to save himself from injury. The special finding of the jury, in effect, finds the appellee guilty of contributory negligence, and such special finding controls the general verdict which should have been in favor of the appellant.

The judgment is reversed, and the case is remanded, with instructions to render judgment for the defendant.

BURCH, MASON, PORTER, BENSON, and WEST, JJ., concurring.

JOHNSTON, C. J. I concur in the judgment on the ground that no negligence of the railroad company was shown.

ZIEGLER et al. v. JUNCTION CITY et al.
(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

STATUTES (§ 39*)—ENACTMENT—INVALIDITY—EVIDENCE.

An enrolled bill, signed by the Governor and published as a statute, may be held not to be a valid enactment, where words which it contains, and which are essential to its operation, are shown by the journal of one of the branches of the Legislature to have been stricken out by amendment before the bill passed that body, and where other record evidence confirms the correctness of the entry on the journal, and accounts for the discrepancy between it and the enrolled bill.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 42; Dec. Dig. § 39*.]

Johnston, C. J., dissenting.

Application of Walter Ziegler and others for a writ of mandamus against the City of Junction City and others. Writ denied.

W. S. Roark, of Topeka, for plaintiffs in error. I. M. Platt, Thos. Dever, and Jas. V. Humphrey, all of Junction City, for defendants in error.

MASON, J. Prior to 1913 the statute relating to cities of the second class provided that the improved property should bear the cost of paving streets, except at the intersections, which were paved at the expense of the city. Gen Stat. 1909, § 1374, amended by Laws 1911, c. 102, § 1. The statute book of that year contains what purports to be an act changing this rule by requiring the city to bear also one-third of the cost of paving in front of private property. Laws 1913, c.

111, § 1. A doubt has arisen whether this act, as enrolled, approved by the Governor, and published, ever passed the Senate. To settle this question a writ of mandamus has been asked of this court by a firm of contractors against the city of Junction City to require a paving tax to be levied in accordance with the provisions of the new law. The issuance of the writ is resisted on the ground that the journal of the Senate shows explicitly and beyond all substantial doubt that the act in its present form did not receive the approval of that body.

It is a familiar fact that there is a difference of judicial opinion upon the question whether an enrolled bill, certified as correct by the presiding officer of each house, approved by the executive, and published, is absolutely conclusive evidence of its passage by both houses. In the first edition of Sutherland's Statutory Construction it was stated in effect that a majority of the state courts had returned a negative answer to this question. In the second edition (Lewis' Sutherland's Statutory Construction 1904) it is said: "It is no longer true that 'in a large majority of the states' the courts have held that the enrolled act may be impeached by a resort to the journals. A comparison will show that the courts are now about equally divided on the question. The current of judicial decision in the last ten years has been strongly against the right of the courts to go back of the enrolled act. Undoubtedly the decision of the Supreme Court of the United States in *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, has had much to do in creating and augmenting this current; but it may also be due to greater simplicity, certainty, and reasonableness of the doctrine which holds the enrolled act to be conclusive." 1 Lewis' Sutherland's Statutory Construction (2d Ed.) § 44.

In a very recent note the cases on all phases of the question are collected and classified. Of the particular situation here presented it is there said: "The weight of authority sustains the rule that an enrolled bill may be impeached by an affirmative showing from the journals to the effect that the bill, as enrolled and approved by the Governor, materially differed from that passed." Note, 40 L. R. A. (N. S.) 24.

In this state it is settled that the enrolled bill may be impeached, but only when "the journals of the Legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally." *State ex rel. v. Francis, Treas.*, 26 Kan. 724, 731; *Railway Co. v. Simons*, 75 Kan. 130, 88 Pac. 551. The question now before us is whether this condition arises in the present case. The original bill (House Bill No. 498) undertook to accomplish the purpose already stated by making two additions to the language of the existing statute, the effect of which is shown

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the following extracts; the added words being italicized:

"For all paving and improvements of the squares and areas formed by the crossing of streets, avenues and alleys *and for paying one-third of the cost of paving those portions of the streets not included in said squares and areas*, the assessment should be made upon all the taxable property of the city."

"For *paving two-thirds of the cost of paving*, macadamizing, curbing and guttering all streets, avenues and alleys, for doing all excavating and grading necessary for the same, except the squares and areas formed by the streets, avenues and alleys after said streets, avenues and alleys have been brought to grade as provided in the first subdivision of this section relating to the opening, widening and bringing to grade all streets, avenues and alleys, the assessments shall be made for each block separately, on all lots and pieces of ground to the center of the block on either side of such street or avenue."

On February 27th the bill passed the House in this form; merely verbal amendments being made upon another matter, as is shown by the House Journal and the original document preserved in the office of the secretary of state. In the Senate it was referred to the committee on cities of the second class, which recommended that it be passed with two amendments (Senate Journal 1913, p. 666), neither of which, however, was ever adopted or even moved. The Senate Journal, under the date March 10th, contains these entries concerning it:

"House Bill No. 498. An act amending section 1 of chapter 102, Session Laws of 1911, relating to power of cities of the second class, was read the third time.

"Senator Paulen moved to amend section 1 by striking out in lines 26, 27, and 28 the following words: 'And for paying one-third of the cost of paving those portions of the streets not included in said squares and areas.' The amendment was adopted.

"Senator Bowman moved to amend section 1, line 51, by striking out the words 'two-thirds of.' The amendment was adopted.

"Senator Wolf moved to amend section 1, line 37, by striking out the word 'six' and inserting in lieu thereof the word 'five.' The amendment was adopted.

"Senator Paulen moved to amend section 1, line 37, by striking out the word 'thirty' and inserting in lieu thereof the word 'ten.' The amendment was adopted.

"The question being, Shall the bill pass as amended? the roll was called, with the following result: Yeas, 27; nays, 3; absent or not voting, 10. (Names stated.)

"A constitutional majority having voted in favor of the passage of the bill, the bill passed, and the title was agreed to." Senate Journal 1913, pp. 760, 761.

The House Journal recites that the Senate amendments were agreed to (House Journal

1913, p. 1086), and that the committee on enrolled bills reported the bill as properly enrolled (House Journal 1913, p. 1148). The original bill shows changes made with pen and ink corresponding to three of the amendments described in the Senate Journal; each being accompanied by the initials "S. A.," doubtless meaning "Senate amendment." No change whatever was indicated with respect to the first amendment proposed by Senator Paulen—that striking out the provision making the city liable for one-third of the cost of paving the streets abutting on private property. The two amendments proposed by Senator Paulen and that proposed by Senator Bowman had the effect to make the law substantially the same in all respects as under the act of 1911. The amendment proposed by Senator Wolf reduced the rate of interest on improvement bonds from 6 per cent. under the old law and the original House bill to 5 per cent. The second amendment proposed by Senator Paulen related to the maximum maturity of such bonds, which was fixed at 10 years by the old law, lengthened to 30 years by the original House bill, and restored to 10 years by this amendment. The House bill attempted no substantial changes in the existing law except as already stated. The amendment proposed by Senator Bowman, striking out the words "two-thirds of," was necessary to give full effect to the amendment of Senator Paulen, which the journal recites had just been adopted. The provision that the city was to pay for one-third of the paving having been stricken out, it was necessary to change also the provision making the improved property liable for only two-thirds of the cost.

The recital of the Senate Journal is positive and explicit that the words expressly making the city liable for one-third of the paving cost were stricken out of the bill before it was voted upon. There is nothing in any part of the Senate Journal that in any way tends to impeach or contradict this entry. It is, however, in direct conflict with the enrolled bill. Even to support the published statute it cannot be presumed that this Paulen amendment was in fact lost, and that the entry stating that it was carried was a mistake, because, if this amendment had been voted down, there could have been no possible occasion for, or purpose in, the Bowman amendment, striking out the words "two-thirds of." This second amendment was unquestionably carried, as is shown not only by the journal but by the enrolled bill. And it cannot be presumed that the Paulen amendment was reconsidered and voted down before the roll call, and that through error the journal fails to show the action, because, if the Senate had changed its mind in this respect, it would necessarily have changed it also with regard to the Bowman amendment. That it did not do so is shown by the enrolled bill. The two amendments are substantially one. They are but parts of a

single change in the policy of the measure. The old law required the improved property to pay all the expense of paving, except at street intersections. The original bill undertook to make the city liable for one-third and the property for two-thirds by inserting additional words in two provisions; the one defining the liability of the city, the other that of the property owners. All parts of the record agree in showing that one of these was stricken out, and the conclusion is irresistible that this was done in order to defeat the essential purpose of the bill. True, if nothing were before us excepting the published statute, we might perhaps supply by interpretation the words "two-thirds of," which were stricken out by the Bowman amendment. But the fact that these words were once in the bill, and were deliberately taken out by the action of the Senate, makes it clear that no assent was ever given by that body to the proposed change in legislative policy.

What actually happened seems too obvious to admit of a substantial doubt. The Paulen amendment was adopted by the Senate, and was never reconsidered. The Bowman amendment followed as a natural sequence. An entry of each was made on the journal. When the attempt was made to mark the original bill so as to show the several Senate amendments, there was an inadvertent omission to show the striking out of the words covered by Senator Paulen's motion. It thus happened that the House of Representatives was not informed of the adoption of this amendment. It voted to concur in the Senate amendments, having no notice of the first and most important of them. The committee on enrolled bills, in reporting that the bill was properly enrolled, were correct so far as could be ascertained from the information afforded by the papers in their hands.

Upon these grounds we think the conditions which must exist in order to impeach a published statute are fully met. The journal of the Senate states positively that the bill in the form shown by the enrollment did not pass that body; an examination of the entire record not only fails to discredit the entry on the journal—it confirms it, and explains how the discrepancy between it and the enrolled bill was occasioned. Therefore it is shown clearly, conclusively, and beyond all doubt that the act as published did not receive the approval of the Senate, and is not a valid law. Cases in which the rule has been applied under similar circumstances, but upon less convincing proof, are found in the note already referred to. Note, 40 L. R. A. (N. S.) 25.

The suggestion has been made that by an act which took effect at a later date than that under consideration the entire cost of paving (except at intersections) was laid upon the property benefited. Laws 1913, c. 112,

§ 1. That act, however, so far as relates to liability for the cost of paving, is an old statute, which was re-enacted in 1913 as an incident to amendments having no bearing upon that matter. Its provisions on this subject would therefore not control new legislation of 1913. Gen. Stat. 1909, § 9087, sub-div. 1.

An argument has also been made to the effect that the statute as published does not require the payment by the city of one-third the paving cost. The adoption of the Bowman amendment gives a substantial basis for this contention; but the view taken of the matters already discussed renders a decision upon this point unnecessary.

The writ of mandamus is denied.

BURCH, SMITH, PORTER, BENSON, and WEST, JJ., concurring.

JOHNSTON, C. J., dissenting, on the ground that, in his opinion, the enrolled statute is not impeached by the journals of the Legislature; that, while one entry in the journals conflicts with the enrolled bill, another entry in the journals is to the effect that the bill was correctly enrolled; that the enrolled bill is better evidence of legislative action and more reliable than conflicting entries in the journals even when supplemented, as here, by papers outside of the journals; and that within former decisions of this court the journals do not show clearly, conclusively, and beyond all doubt that the act was not passed as enrolled and published.

STATE v. CHILES.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER (§ 155*)—CRIMINAL PROSECUTION—EVIDENCE OF MALICE.

In a prosecution for libel against a publisher, who charged in his newspaper that a certain fraternal beneficiary society was a "fake order" and had been proven a "skin game," it appeared that the defendant had been defeated in a civil suit against the society, and had then declared that he would break it up and put it out of business. These declarations were followed by a series of articles reflecting on the society. *Held*, they were all admissible in evidence to prove malice, and that the entire article in which the defamatory matter occurred was also admissible.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.*]

2. LIBEL AND SLANDER (§ 155*)—CRIMINAL PROSECUTION—EVIDENCE OF FALSITY.

The report, to the superintendent of insurance of a special examiner duly appointed to investigate and report upon the affairs of the society, was admissible in evidence to prove the lawful character of the society and of its business, and to prove the falsity of the publication complained of.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.*]

3. LIBEL AND SLANDER (§ 155*)—CRIMINAL PROSECUTION—LIMITING THE EVIDENCE.

The trial court had the right to confine the investigation of the affairs of the society within reasonable limits of time. The libel spoke as of May 5, 1911, and a ruling that the parties should not go back of November 30, 1909, the date of the defendant's defeat in the civil suit, did not constitute an abuse of discretion.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.*]

4. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The state of the society's finances from January 1, 1908, to October 31, 1910, was shown. Its reports to the superintendent of insurance for the years 1910 and 1911 were offered in evidence by the defendant. They disclosed no important change in the society's condition. *Held*, the reports were proper evidence, but that their rejection was error without prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

5. CRIMINAL LAW (§ 1186*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Evidence was rejected which the defendant claimed justified him in publishing, concerning the society, that it was unable to conduct its business and meet its obligations under its plan of insurance. *Held*, the wisdom of the society's plan of insurance and its ability to meet its obligations according to that plan were beside the issue, the defamatory charge being that the society was a fake order and a skin game; that is, was not what it purported to be, but was a confidence game, operated for the purpose of cheating, fleecing, and swindling. *Held*, further, the evidence was not important because the issue of whether or not the society did in fact fleece people was fully tried.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

6. CRIMINAL LAW (§ 829*)—TRIAL—REFUSAL OF INSTRUCTIONS COVERED.

It was not error to refuse a requested instruction relating to privilege, when the law on that subject was correctly stated to the jury with sufficient fullness in instructions framed by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from District Court, Wyandotte County.

Nick Chiles was convicted of libel, and appeals. Affirmed.

L. S. Harvey and Dorsey Green, both of Kansas City, for appellant. J. S. Dawson, Atty. Gen., and J. M. Meek, Joseph Taggart, and C. C. Glandon, all of Kansas City, for the State.

BURCH, J. The defendant was convicted of libel, and appeals.

The defamatory matter was published in the defendant's newspaper, the Topeka Plaindealer, on May 5, 1911, and consisted in statements that the Knights and Ladies of Protection, a fraternal beneficiary society, had been "proven a skin game," had the

brand of "fake" placed on it, and was a "fake order" of which the people should beware. In November, 1909, a judgment was rendered against the defendant in an action which he had brought against the society to recover the sum of \$200. Soon afterward he made the declaration that he would compel the society to pay him that money or break it up and put it out of business. This declaration was made, in substance, to different persons, and was later followed by a series of articles savagely attacking the society, which appeared in the Plaindealer on October 7, 1910, October 21, 1910, April 8, 1911, and May 5, 1911. The last article contained much intemperate matter of the same character as that upon which the information was based. The principal errors assigned relate to rulings concerning the introduction of evidence.

[1] All the newspaper articles referred to, and all of the article in which the defamatory matter appeared, were introduced. This was clearly proper. The animus of the defendant was an issue, and whatever threw light on that subject was admissible. The verbal declaration that he would break up the society was, of course, relevant, and his subsequent conduct, including the printing of statements consistent with his expressed intent, tended to establish guilt. The true meaning and character of the newspaper excerpts embodied in the information were elucidated by presenting to the jury the setting in which they occurred. The purpose of this evidence and the extent to which the jury might consider it were properly stated in an instruction which the court gave.

[2] The superintendent of insurance, under authority vested in him by law, appointed a special examiner to investigate whether or not the affairs of the society were in an unsound condition, and whether or not it was transacting business contrary to the insurance laws of the state. The examiner's report was admitted in evidence on behalf of the state. It was dated January 12, 1911, and gave the results of his investigation of the transactions and finances of the society from January 1, 1908, to October 31, 1910. It was followed by the issuance of a certificate to the society dated March 1, 1911, reciting that it had complied with the requirements of the law and was authorized to carry on its business until the last day of February, 1912. It was an official document of the insurance department of the state, and tended to establish the lawful character of the society and of its business, and the falsity of the defendant's charge that the society was a fake and a skin game. No reason for excluding this evidence accompanies the assignment of error relating to it, and none is apparent.

[3] One Dennis Hope claimed that the society owed him \$50 on a note, and his testimony concerning it was stricken out. It

was an old claim originating long prior to the time the managers of the society, during the years 1909, 1910, and 1911, took office. The witness admitted that their refusal to pay the note was based on the fact that it was not an obligation of the society, and there was nothing whatever to indicate that it was repudiated through dishonesty. But besides this, the transaction out of which it arose so far antedated the publication of the libel, and the conduct and management of the society's business about that time, that it fell outside the limits to the investigation which the court was necessarily compelled to fix. The libel spoke as of May 5, 1911. The court ruled that the parties might go back as far as the judgment against the defendant in November, 1906. The period thus defined afforded ample opportunity for justification of the defendant's statements, if there were any, and consequently the court's discretionary power was not abused. The same considerations dispose of an assignment of error relating to the rejection of testimony offered by the defendant as a witness in his own behalf.

[4] The defendant offered in evidence the reports made by the society to the superintendent of insurance, showing the condition of its business for the years 1910 and 1911. The evidence was rejected. The state of the finances of the society to October 31, 1910, had been shown, but the court might well have allowed the defendant to complete the proof, at least to the date the article complained of was published. The defendant did not take the trouble to abstract these reports, and the transcript is not in the files. Consequently the assignment of error relating to the ruling in question might well be ignored. The court, however, has examined the documents as they appear in the published reports of the superintendent of insurance, and is unable to say that they would have strengthened the defendant's case. They disclose no important change in the affairs of the society, and the defendant had abundant basis for all legitimate inferences which he might wish to draw respecting its finances in the evidence already before the jury.

[5] The defendant also offered to show that the rates set out in the constitution and by-laws of the society were not sufficient to pay its death losses, or to mature its policies and pay its operating expenses, and that under the reports of the society only about one-third of the rate levied is used or can be used or made available for the purpose of paying death losses. This offer was accompanied by a statement that it was made for the purpose of justifying the defendant in publishing of and concerning the society that it was practically unable to meet its obligations and conduct its business under the law

or under its plan of insurance. This evidence was rejected. The only law which the defendant claims the society violated is section 4311 of the General Statutes of 1909. This statute limits the right of a fraternal beneficiary society to begin issuing certificates until certain conditions are complied with, and has no bearing on the present status of the society. The defendant was not prosecuted for publishing that the plan of the society was unwise and could not be fulfilled and that it would not be able to meet its obligations. He was prosecuted for imputing to it dishonesty of purpose and depravity in conduct. What he said was that the society was a fake order and a skin game, that is, that it was not what it pretended to be, but was a confidence game operated for the purpose of cheating, fleecing, and swindling. The only benefit therefore the defendant could have derived from the evidence would have been to argue to the jury that the plan of the society was so impractical and unsound that for its managers to operate it at all was to trick, deceive, cheat, and swindle. Such an inference would have been quite fanciful, but beyond this, the square issue of whether or not the society was fleecing the people was fully tried. The defendant undertook to name specific instances and transactions, and the society undertook to explain them. The real merits of the controversy were in fact fully investigated, and the remote and indirect evidence rejected would not have changed the result.

"On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." Gen. Stat. 1909, § 6867.

[6] There was no evidence to support the statement that the society had been proven a skin game. The defendant had been tried for libel, and the jury disagreed. He claimed that this amounted to an acquittal for him and proof of the disreputable character of the society. The libelous matter appeared in the defendant's published account of that trial. On this state of facts the defendant requested an instruction relating to the privilege of the press concerning reports of judicial proceedings. While the requested instruction was not given in terms, the court did instruct the jury fully in accordance with the doctrines announced by this court in the cases of *State v. Balch*, 31 Kan. 465, 2 Pac. 609, *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236, and *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390. Finding no error in the record which prejudicially affected the defendant's substantial rights, the judgment of the district court is affirmed. All the Justices concurring.

FLEMMING v. TAYLOR FUEL, LIGHT & POWER CO. et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

*(Syllabus by the Court.)***1. GAS (§ 8*)—MORTGAGEE IN POSSESSION—OBLIGATIONS ASSUMED—PRESUMPTION.**

Where a mortgagee of a gas-distributing company took possession of the mortgaged plant and franchises, together with its records, books, and business, and carried on the same business with the same property under the same franchise, it will be presumed, in the absence of evidence to the contrary, that the mortgagee intended to respond to corresponding obligations imposed by the franchise, or incidental to the rates it collected.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 8.*]

2. GAS (§ 8*)—PURCHASE BY MORTGAGEE'S AGENT—OBLIGATIONS ASSUMED.

Where a corporation, organized by the officers of an investment company for the purpose of purchasing property and franchises of a gas-distributing company mortgaged to the investment company, purchased the property at a mortgage sale without consideration except the interest its incorporators might own in the mortgage as shareholders in the investment company, and thereafter the new company carried on the business first conducted by the mortgagor, and afterwards by the mortgagee, it is held that the new company should be considered as an agent of the parent company in the purchase and operation of the plant.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 8.*]

3. GAS (§ 8*)—DISCONTINUANCE OF SERVICE—CONDITIONS.

While in possession and carrying on the business, the investment company and the new company enjoyed the franchises and privileges granted by ordinance of the city to the mortgagor, collected rates, and settled outstanding accounts with customers upon the books, and otherwise continued the business as their predecessor, the mortgagor, had done. The new company desired to discontinue the business and remove the property. The district court permitted this to be done, but required that it should first give 30 days' notice of its intended withdrawal, and repay to consumers deposits which had been made with the mortgagor as security for the payment of gas bills. It is held that these conditions are reasonable, in view of the nature of the service and the conduct of the companies so taking possession of the property, continuing the business, and receiving the benefits.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 8.*]

Appeal from District Court, Allen County.

Action by S. K. Flemming against the Taylor Fuel, Light & Power Company, the Natural Gas Company, and others. From judgment for plaintiff, the Natural Gas Company appeals. Affirmed.

Campbell & Goshorn, of Iola, and Curtis M. Oakes, of Oswego, for appellant. Baxter D. McClain and Ewing, Gard & Gard, all of Iola, for appellee.

BENSON, J. This appeal was taken by the Natural Gas Company from a judgment against it for an injunction.

On November 22, 1904, an ordinance was adopted by Gas City, a city of the second class, granting to the Taylor Fuel, Light & Power Company the right for 20 years to furnish natural gas to its inhabitants, and to the use of its streets for that purpose. Among other conditions a rate of 15 cents per thousand cubic feet of gas was allowed. The Taylor company accepted the terms of the ordinance and established its gas plant and furnished gas to consumers, at first at flat rates, but in November, 1910, it purchased and installed meters, requiring, however, of each consumer as a condition for placing a meter in his premises the payment of 90 cents cost of installation and a deposit of \$5, giving a receipt in the following form:

"Oct. —, 1910. Received of — (here name of customer) deposit of five dollars, \$5.00, to guarantee the payment of gas bill and to care for Ironclad Meter No. — (here insert No. of meter), at his premises. E. K. Taylor, President T. F., L. & P. Co. [Seal.]

"This receipt must be returned when deposit is taken up."

Because of a diminution in the flow of gas the meter rate was increased to 25 cents per thousand feet by consent or agreement between all interested parties, and the service was continued at that rate by the Taylor company while it remained in possession of the plant.

On March 1, 1905, while carrying on its business under the ordinance the Taylor company mortgaged the property to the Deming Investment Company to secure a loan. Following a description in the mortgage of certain lots, leases, and gas wells is the following: "All and singular the pipes, mains, branches, branch castings, connections, service boxes, fittings, meters, lamps, lamp posts, regulators, valves, casings, drips, drilling machinery and tools, derricks and all appurtenances and appliances of every description connected with wells, leases, lines, and gas plant, of said company, and all and singular the rights, franchises, leases, contracts, benefits, privileges, and property, both real and personal, now owned or which may hereafter be acquired by said party of the first part, at any time. The mentioning or not mentioning of any particular property, or giving or not giving a description thereof, shall not be taken as excluding or releasing from the obligation of this mortgage, other property or rights not mentioned or described, but owned or enjoyed by said mortgagor."

This mortgage was foreclosed in an action commenced by the investment company in the district court, and a judgment was rendered October 11, 1911, against the Taylor company for over \$10,000, and for a sale of the mortgaged property (except certain real property) in accordance with the law governing the sales of mortgaged personal prop-

erty. The judgment directed that possession of the property be given to the mortgagee, and possession was taken accordingly, together with the books, records, blanks, franchises, and business of the Taylor company. After due notice the mortgagee sold the property on January 4, 1912, to the Natural Gas Company, a Kansas corporation organized on January 3, 1912, by officers and employees of the investment company. The investment company, mortgagee, operated the gas plant from the 4th of December, 1911, to the 5th of January, 1912, when it delivered possession to the gas company. On January 2, 1912, before the mortgage sale, the gas company, or some of its officers, applied to the city for a franchise allowing a rate of 30 cents per thousand cubic feet, and allowing it to require a meter deposit from each consumer of \$5 as a condition of furnishing gas. The city took no action upon the proposed franchise. On January 30, 1912, the gas company, while carrying on the business, notified the pipe-line company from which it obtained the greater part of its supply at a rate of 15 cents per thousand feet, that it would not, after January 22d, pay in excess of 8 cents per thousand feet. On January 25, 1912, the gas company filed in this action (which was commenced on January 17th) an affidavit, stating that it claimed no right under the franchise of the Taylor company; that it had, in anticipation of acquiring the plant, applied to the city for a franchise, which had been refused; that it had operated the plant temporarily without any franchise; that the Taylor franchise had expired because the gas supply mentioned in it had been exhausted; and that the plant could not be operated at a profit on account of the necessity of purchasing gas at prevailing prices. On February 28, 1912, while this action was still pending, the gas company notified the city and the consumers of gas that it would, in 30 days, shut down the plant, retire from the business, and remove its pipes, connections, and other property from the streets. The service, however, was not discontinued.

The business of supplying gas was carried on by the investment company after it took possession, and by the gas company after making the purchase, in the same manner in which it had been done by the Taylor company. The books and records of the Taylor company were continued by the investment company while it held possession and by the gas company afterwards. The investment company while so in possession received meter deposits from customers, and gave credit for and refunded deposits in settling outstanding bills. The gas company also continued to receive such deposits while operating the plant.

All the stockholders of the gas company are officers of the investment company, including the president, vice president, secretary, treasurer, and auditor of the latter com-

pany, all of whom, except the president, are also officers of the gas company.

Neither of the defendant companies has returned, or offered to return, the deposits made with the Taylor company. In applying for a franchise containing a provision providing for such deposits, it was not contemplated by the gas company that the deposits theretofore paid to the Taylor company should be returned or accounted for. The value of the material acquired by the gas company was \$5,100. The meters were of the value of \$7.50 each.

The ordinance under which the Taylor company operated provided that it should supply gas so long as it could be obtained from certain specified sources, or from any other source sufficient for the purpose. The Portland Gas & Pipe Line Company, from which gas was being obtained, was still able and willing to continue the supply at 15 cents per thousand feet, although the supply in the field was being depleted at the time of the trial. After the increase in rates before referred to, the supply from the particular sources named in the ordinance was exhausted, leaving only the Portland Gas & Pipe Line supply. As a result of this diminution, factories were shut down, houses were vacated, and people moved away, until at the time of the hearing there were approximately 150 consumers of gas in the city.

Findings were made of the length and condition of mains and pipes, cost of laying pipe lines, installing meters, regulators, etc., also of entries of receipts and expenses upon the books of the gas company from December 19, 1911 to March 18, 1912, showing a loss in operation. The court did not, however, make any specific finding that the business could, or could not, be continued at a profit.

This action was brought by a consumer who had made a deposit with the Taylor company of \$5, for the benefit of all others similarly situated, against the Taylor company, the investment company, and the gas company, alleging the grant to the Taylor company; that the other companies had assumed charge of the plant as successors of the Taylor company, and were about to cease operations without returning the meter deposits, and praying for an injunction forbidding discontinuance of supply without returning the deposits, and until the expiration of a reasonable time after notice. The city intervened, pleaded the contract embraced in the ordinance, averred acceptance, operation, and the enjoyment of benefits under it, and prayed for an injunction forbidding discontinuance of the service, for a receiver to continue operations if necessary, and for general relief.

The gas company answered, pleading its purchase of the property, but averring that it had not assumed any obligation for the debts of the Taylor company, or for the me-

ter deposits, and disclaimed any rights under the Taylor franchise. It also alleged that the supply had failed so far that gas could not be furnished to consumers at a profit at rates fixed in the ordinance. The trial was concluded, and judgment entered June 24, 1912, based upon an agreed statement of some of the facts and findings of others. So far as deemed material to this decision these facts and findings are embraced in this statement. The action was dismissed as to the Taylor company, upon which service was not obtained, and the investment company. Judgment was rendered against the Natural Gas Company as follows: "It is therefore considered, ordered, adjudged, and decreed that a permanent injunction be granted herein, ordering and directing the defendant the Natural Gas Company, a corporation, or any one acting by, through, or under it, to continue to furnish natural gas to the city of Gas and its inhabitants (among whom is plaintiff in this action), and keep and maintain such service as is provided by ordinance No. 82 of said city of Gas, at the rate of charge of 25 cents per 1,000 cubic feet, as by consent and agreement has heretofore been done, and said defendant the Natural Gas Company, a corporation, refrain from shutting off or discontinuing the furnishing of natural gas to said city of Gas and its inhabitants." (Here follows a proviso permitting gas to be shut off for failure to pay bills or violation of regulations.) The judgment further provides that the gas company may discontinue operations and remove its plant upon 30 days' notice, if done before October 1st, if done later, upon 60 days' notice, but that before commencing such removal it should return the deposits which had been made as security for gas bills to the Taylor company. The application of the plaintiff and the city for a receiver was reserved for future consideration to enforce the judgment should occasion arise, and judgment was rendered against the gas company and the city for costs.

Many errors are assigned, which, in view of the judgment allowing discontinuance of the service upon the two conditions only, need not now be considered. As the gas company desires to discontinue operations, and the city did not appeal, the only question to be decided is whether the service must be continued by the gas company until it gives the notice and pays back the deposits.

[1] Objection was made to oral evidence of a conversation accompanying a receipt by the Taylor company for such a deposit, tending to prove a promise to return it upon payment of arrearages. This evidence, while competent, proved nothing not shown by the receipt and the circumstances. The obvious purpose of these deposits was to protect the company from risk of losses and expenses in collecting many small amounts from defaulting customers. It follows that upon discontinuance of the service for any reason other than the default of the customer his deposit

should be returned to him, or applied upon any balance against him. It is his money, held only as security. If the deposits had been delivered over to the successors of the Taylor company, no serious question would arise, for the liability to account to the contributors would follow the fund. It was not, however, so delivered, and the gas company contends that the deposits constitute debts of the Taylor company only. On the other hand, it is insisted that the gas company, succeeding as it did to all the property and the franchises, privileges, records, books, and business and collecting whatever was due, is also charged with the corresponding liability to account for the deposits, and that to enforce this liability the condition imposed in the decree was equitable.

It must be remembered that the investment company, as mortgagee of the Taylor company, took possession of the property mortgaged, including the corporate franchise, books, and business before referred to, and continued the business as it had been before conducted by the mortgagor, and that the gas company continued the business in the same manner, using the same property, records, and books during its possession, receiving and giving credit for meter deposits on bills collected. These companies collected outstanding accounts due to the Taylor company, accounts in which these deposits appeared. We need not inquire whether these accounts passed by the mortgage. They were taken, held, and appropriated with the consent of the Taylor company. It should also be observed that the investment company, and afterwards the gas company, enjoyed all the privileges granted by the ordinance to the Taylor company to furnish gas, use the streets, and collect rates. While a corporation cannot sell or mortgage its primary franchise to exist, owned by the incorporators, it may alienate or incumber the secondary franchises belonging to the corporation, including privileges granted by a city, such as the right to operate its plant, supply gas or water, and collect rates. *State v. Water Co.*, 61 Kan. 547, 560, 60 Pac. 387; *Joyce on Franchises*, § 38.

It has been held that a purchaser at a foreclosure sale embracing such a franchise succeeds to the right to collect rates granted in a franchise to the mortgagor. *Omaha Water Co. v. Omaha*, 77 C. C. A. 287, 147 Fed. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614. In this instance the privilege was exercised without hindrance, and the right is not questioned by the plaintiff. The question here is, Shall the mortgagee, or the gas company, succeeding to its rights, using the privileges granted by the city, and receiving the benefit of the accounts with and patronage of consumers, bear the incidental burdens? May it receive the rates without incurring any liability in respect to the deposits which were made to facilitate the collection of rates? Having elected, presumably in order to conserve the value of the plant as a going con-

cern, to continue its operation, enjoying without hindrance all the rights and privileges of the mortgagor, it must be presumed that it intended to respond to the corresponding obligations. An agreement to do so may fairly be implied from its conduct.

"He who derives the advantage ought to sustain the burthen." *Broom's Legal Maxims* (7th Ed.) 537.

"If a person accepts anything which he knows to be subject to a duty or charge, it is rational to conclude that he means to take such duty or charge upon himself; and the law may very well imply a promise to perform what he so takes upon himself." *Abbott on Shipping* (13th Ed.) 566; *Lucas v. Nockells*, 1 Cl. & Fin. 457; *Pfeifer v. Sheb. & F. Du L. R. R. Co.*, 18 Wis. 164, 86 Am. Dec. 751.

In arriving at this conclusion the nature of the service contemplated in the grant to the Taylor company is considered. That company was a public service corporation. Citizens were entitled to the service on compliance with reasonable conditions, and the service could not be arbitrarily abandoned. *Joyce on Franchises*, § 63. In the ordinary course of the business deposits were demanded and made as a condition of obtaining the supply. To cut off the supply without any default of the consumers, and without returning their money, is plainly unjust. A resort to the Taylor company, even if solvent, might involve expenditures by each depositor greater than the amount due him. But it is said that the mortgage is a fixed lien, that the mortgaged property taken did not satisfy the debt, and that the mortgagee is not liable for the debts of the Taylor company. This argument might prevail if the investment company and its agency, the gas company, had not enjoyed privileges and secured benefits under the franchise, and in the collection of rates, from which incidental and corresponding burdens cannot equitably be divorced.

[2] It seems to be insisted that the gas company should be immune from liability for these deposits as an innocent purchaser, whatever may be the liability of the investment company. It is apparent, however, that the gas company is a mere agency, created by the investment company for its convenience. Nothing was paid at the mortgage sale. The consideration, claimed to be the individual interest in the mortgage debt of shareholders of the investment company who were the incorporators of the gas company, is vague and unsubstantial. The same persons acted as officers and agents in the same capacities in the operation of the plant for both companies. These reasons might be amplified, but it is unnecessary, for, even if insufficient, the gas company, supposing it to be an independent concern, was nevertheless a successor enjoying the privileges granted first to the Taylor company, including the right to collect

rates, and is subject to the same incidental burdens.

[3] It is argued that, as the court found that the books showed the receipts were less than the expenses for three months, the business could not be carried on, and therefore the order to do so, even for a limited period, was unjust. Two answers to this claim are readily suggested. The evidence shows that claims not incidental to the operation of the plant were included in the expense account, and that there was a large excess in gas purchased of the pipe-line company, not shown in receipts from customers, after allowing for the usual shrinkage in distribution. What the court may have found, had a finding been requested upon the question whether the service, efficiently conducted, could be made profitable, is not known. Conceding, however, that the business would not pay, it does not follow that it should be summarily discontinued, without the imposition of equitable conditions. It is well settled that a reasonable notice, in order to afford customers an opportunity to obtain service from another source and for adjustment to the new situation, should be required. 1 *Wyman on Public Service Corporations*, §§ 316, 317. This rule has been held to apply even when the customer who invoked it was being supplied under an illegal contract. *Seattle Elec. Co. v. Snoqualmie Falls P. Co.*, 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032. The other condition of repayment of deposits is equally equitable, resting upon the nature of the service wherein the customer had no practical choice to make or refuse to make the deposit, and upon the ground already considered of an implied obligation to assume the burdens incident to the enjoyment of the privileges and the collection of the rates. The notice given during the pendency of the suit might have been sufficient if the defendant had also offered to return the deposits. Being still compelled to prosecute the suit in order to enforce this condition, the court required a further notice, which in the circumstances was just.

By the decision of the district court the company is left free to withdraw from the service if it chooses; the court only fixed the time and conditions of such withdrawal which appear to be reasonable in view of the nature of the service and conduct of the successors of the mortgagor concerning it.

Questions analogous to those considered in this opinion are discussed in *Altoona v. Richardson*, 81 Kan. 717, 106 Pac. 1025, 26 L. R. A. (N. S.) 651; *Williams v. Commercial Nat. Bank*, 49 Or. 492, 90 Pac. 1012, 91 Pac. 443, 11 L. R. A. (N. S.) 857; *Northern Pacific Ry. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; and 33 Cyc. 597.

The judgment is affirmed. All the Justices concurring.

JOYCE v. MIAMI COUNTY NAT. BANK.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 148*)—COMPENSATION FOR SERVICES—RIGHT—AMOUNT.

A bank delivered notes, which had long been charged to profit and loss, to an attorney, under an agreement that if they could be collected or secured the bank would pay him a "lively fee," since whatever the bank received would be clear gain. The attorney expended time, labor, skill, and judgment in a diligent effort to realize on the notes, and then in an effort to secure judgment on them without publicity and with little expense. After securing judgment by default he discussed with the bank on different occasions the best course to pursue, and prompted the issuance of an execution. After that the bank ceased to consult him, kept the judgment alive itself, and, 11 years after the date of rendition, compromised it and satisfied it of record. *Held*, the attorney was entitled to compensation for his services, and that a verdict, supported by substantial testimony, for 50 per cent. of the proceeds of the collection is not unconscionable.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 352, 353; Dec. Dig. § 148.*]

2. LIMITATION OF ACTIONS (§ 46*)—ACQUAINTANCE—ATTORNEY AND CLIENT.

The right of the attorney to compensation being contingent on collection, no cause of action arose in his favor until the collection was made, and the statute of limitations did not begin to run against his claim for fees until that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

Burch and Benson, JJ., dissenting.

Appeal from District Court; Bourbon County.

Action by W. L. Joyce against the Miami County National Bank. From judgment for plaintiff, defendant appeals. Affirmed.

Keene & Gates, of Ft. Scott, and Sheldon & Shively, of Paola, for appellant. W. L. Joyce and B. T. Riley, both of Paola, for appellee.

BURCH, J. The plaintiff sued to recover attorney's fees for professional services rendered the defendant. Judgment was entered in his favor, and the defendant appeals.

The employment originated with the following letter from the defendant to the plaintiff, dated June 26, 1893: "Inclosed I send you three notes given by Hanways to this bank. Please don't mention to any one in Franklin Co., Kansas, what we are trying to do in Texas. Don't mention to Texas what we are trying to do in Kansas, not now at least. These notes were charged to P. & Loss long ago, and if they can be secured or collected we are ready to pay a *lively* fee. What the bank gets is clear gain." The notes referred to were executed by B. Hanway, who resided in Cowley county, J. S. Hanway, who resided in Franklin county,

and S. B. Hanway, who resided in Texas. The plaintiff and the defendant were residents of Miami county. On January 20, 1894, the defendant wrote the plaintiff as follows: "If we can do anything to avoid publication in the Hanway case, do so. The less cost is made and less publicity the more we would pay you for the work. But get confession if possible, that cuts off a fight. We make it a point to pay for *not getting into court*." On April 8, 1894, judgment was taken on the notes in the district court of Franklin county against B. Hanway and J. S. Hanway for the sum of \$1,535.10, with interest at the rate of 10 per cent. per annum. On January 29, 1905, the defendant accepted the sum of \$1,650 in satisfaction of the judgment, which then amounted to \$3,197. The plaintiff learned of the satisfaction of the judgment in February, 1906, and commenced his action on January 18, 1908. The jury awarded him \$878.62, or 50 per cent. of the amount collected, with interest.

The defendant took the position at the trial that placing the notes in judgment was a matter separate and apart from the employment to collect or secure the claim, and, starting from this premise, deduces several important conclusions in its brief. This interpretation of the relations of the parties is precluded by the testimony of the defendant's cashier: "Q. 253. In other words, whatever compensation Mr. Joyce got was to be paid out of the amount collected? A. The ratio would be out of that; yes sir. Q. 254. If Joyce didn't collect anything, the bank didn't owe him anything? A. The bank didn't owe him anything except for work that he might have done; then when he put them into judgment, that was a separate arrangement entirely; that was done, no doubt, at our advice, and then we ordered it put into judgment. Q. 255. Did you make any different arrangement with Mr. Joyce with reference to reducing these notes to judgment? A. Why, no; certainly not. Q. 256. With reference to the collection of the Hanway notes, how many agreements did you have with Mr. Joyce? A. Only one agreement. Q. 257. That was when it was first placed in his hands? A. Yes, sir. Q. 258. You had no separate arrangement with Joyce after that about reducing it to judgment? A. Not that I know anything about."

The evidence was that putting the notes in judgment represented only a portion of the plaintiff's work. He carefully investigated the financial responsibility of the debtors, both in Kansas and in Texas, at the expense of considerable time and labor. Some difficulty was experienced in determining whether or not B. Hanway had property subject to appropriation, which required the plaintiff to go to Franklin county. He personally secured from B. Hanway a power of attorney to an attorney at law to enter appearance

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and confess judgment, and the judgment was obtained by default.

On December 2, 1894, the plaintiff rendered to the defendant an account of the court costs and of his personal expenses in the Hanway and some other matters, which the defendant paid. In the letter transmitting the accounts the plaintiff said: "I don't think there should be much charges in actions where no money is realized. The Hanway judgment is for \$1,535.10, dated April 3, 1894, interest at 10 per cent. from rendition." After the judgment was taken the plaintiff conferred several times with the defendant respecting the best course to pursue, the advisability of issuing execution, and the advisability of bringing suit in Texas. In 1897, the plaintiff suggested to the defendant that it was about time execution should be issued on the judgment, and was told that another attorney, who was looking after some business for the defendant, and who then had its profit and loss book, would issue an execution. An execution was issued immediately after this conversation. All the plaintiff's conversations and correspondence were with J. W. Sponable, who was the defendant's president. Sponable died in 1899. His son became president of the bank, and the plaintiff was no longer consulted in reference to its business. Some executions subsequent to the first were issued without the plaintiff's intervention.

[1] Without undertaking to prescribe a measure of conduct applicable generally to cases of this character, the court is of the opinion that the plaintiff was entitled to compensation for his services. The debt belonged to a well-known class, and the plaintiff gave it the time, effort, skill, and judgment which such debts demand and which business men expect. Other expedients being of no avail, the legal obligation was not only preserved, but its character was improved by raising it from simple contract to judgment. By this means the debt was rendered vastly more secure, even if it were not secured in the sense of Sponable's letter. Nothing then remained to be done to effect collection except to keep the judgment alive until property came into the hands of the judgment debtors which the judgment would threaten, and the plaintiff did protect it against dormancy until the defendant severed business relations with him. Of course it made no difference whether the money were paid directly to him or to the defendant. The amount of the plaintiff's compensation was determined by the jury from the proof. The debt was apparently hopelessly bad. Whatever the bank realized was clear gain. If nothing were realized, the plaintiff lost all his work. Under these circumstances the court is not prepared to say that an equal division of the proceeds is unconscionable.

[2] The action was based on contract.

Nothing was due the plaintiff until collection was made. No cause of action accrued until that time, and consequently recovery was not barred by the statute of limitations.

The foregoing disposes of the merits of the controversy and the principal contentions of the defendant. The plaintiff was a competent witness in his own behalf. He was probably entitled to give his interpretation of the ambiguous expression "a lively fee," but in any event it is not likely, in view of all the evidence in the case, that the verdict was rested on his statement that he was entitled to a certain sum. Evidence of fees paid the plaintiff by the defendant in other bad debt cases threw light on what the parties understood by "a lively fee." A special finding of the jury that the plaintiff did secure the Hanway notes "by judgment" does not indicate passion or prejudice. According to the abstract, the defendant is mistaken in its brief in regard to the character of special finding No. 7.

The judgment of the district court is affirmed.

JOHNSTON, C. J., and MASON, SMITH, PORTER, and WEST, JJ., concurring.

BURCH, J. (dissenting). I regard the judgment as excessive, and think it should be reduced to \$500. Mr. Justice BENSON concurs in this dissent.

STATE v. MOORE.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. INSANE PERSONS (§ 63*)—COMPENSATION FOR SUPPORT IN ASYLUM—FEEBLE-MINDED.

The act creating an asylum for feeble-minded is held not to contemplate a charge for maintenance against the estates of inmates, upon the grounds: (1) That it contains no provisions authorizing such charges similar to those of the statutes regarding the care of the insane; (2) that it provides in terms for such charges in the case of nonresidents, the inference being that if a charge to residents had been intended an express provision therefor would have been made; and (3) that it treats the institution as a school, and a purpose to exact such a charge at an educational institution is not readily to be implied.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 89, 106; Dec. Dig. § 63.*]

2. INSANE PERSONS (§ 63*)—COMPENSATION FOR SUPPORT IN ASYLUMS—EDUCATIONAL PURPOSE.

The purpose of the Legislature with respect to making a charge for maintenance is to be determined by the educational character of the institution, as defined by the statute, notwithstanding that only a small number of its inmates are in fact capable of receiving instruction.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 89, 106; Dec. Dig. § 63.*]

3. INSANE PERSONS (§ 63*)—COMPENSATION FOR SUPPORT IN ASYLUM—COMMITMENT.

Where a person of unsound mind, who has been an inmate of a public institution for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

care of imbeciles, is transferred to a state asylum for the insane, a liability for maintenance at the latter place may attach, notwithstanding the requirements of the law may not have been complied with in the commitment thereto.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 89, 106; Dec. Dig. § 63.*]

4. INSANE PERSONS (§ 63*)—COMPENSATION FOR SUPPORT IN ASYLUM—RETRANSFER.

In such a case, after a retransfer to an institution, the inmates of which are by law exempt from charges for maintenance, no liability will be incurred, notwithstanding any irregularity in the means by which such change was effected.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 89, 106; Dec. Dig. § 63.*]

5. LIMITATION OF ACTIONS (§ 11*)—OPERATION AGAINST STATE.

The statute of limitations does not run against the state with respect to a charge for the maintenance of an inmate of a public asylum for the insane.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

(Additional Syllabus by Editorial Staff.)

6. INSANE PERSONS (§ 63*)—COMPENSATION FOR SUPPORT IN ASYLUM—"AT ANY TIME."

Gen. St. 1909, §§ 8457, 8459, providing that the estate of an inmate of the State Home for Feeble-Minded shall be charged with the expense of his maintenance which may be recovered by the state "at any time," does not in the use of the phrase quoted authorize the state to demand reimbursement for expenses incurred by the state prior to its enactment; such phrase referring only to obligations subsequently arising under the operation of the statute.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 89, 106; Dec. Dig. § 63.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 602, 603.]

Appeal from District Court, Johnson County.

The State filed a claim against the estate of Belle Abbott for the expense of her maintenance while in state asylums. From an allowance of the claim by the District Court on appeal from the Probate Court, R. R. Moore, as administratrix, etc., appeals. Modified.

J. W. Parker, of Olathe, for appellant. John S. Dawson, Atty. Gen., H. C. Bowman, of Newton, and C. B. Little and R. C. Fay, both of Olathe, for the State.

MASON, J. In 1881 Belle Abbott, then about 11 years of age, was admitted to the Kansas State Asylum for Idiotic and Imbecile Youth, which was then situated at Lawrence but which was shortly thereafter removed to its permanent location at Winfield. She remained in this institution until October, 1897, when she was adjudged insane by the probate court of Cowley county and committed to the State Insane Asylum at Topeka. After being there two years she was by order of the State Board of Charities returned to the asylum at Winfield, where she remained until she died, on October 17, 1909. The records of the insane asylum con-

tain a recital that she was "discharged not insane." At the time of her death she was the owner of some property. An administrator was appointed. On December 24, 1910, a claim against her estate was filed in behalf of the state for the expense of her maintenance while at the Winfield and Topeka institutions. The claim was allowed in part by the probate court, and upon appeal to the district court was allowed in full. The administrator appeals.

There is a conflict of judicial opinion as to whether the estate of an insane person, in the absence of a statute, is chargeable with the expense of his maintenance at a public institution. *Kaiser v. State*, 80 Kan. 364, 371, 102 Pac. 454, 24 L. R. A. (N. S.) 295; note, Ann. Cas. 1913A, 577. In the Kansas case cited it was held in substance that whether a charge was to be exacted for the maintenance of an inmate of a public institution is a matter of policy, resting in the discretion of the Legislature. A payment was there required, upon the ground that the statutes on the subject, while not entirely explicit, showed a general purpose to exact reimbursement for the care of patients in the state insane asylums who had sufficient property to warrant it. The legislation there construed has no express application to the present case. The fact that such statutes were enacted with respect to the asylums for the insane and not extended to the institution here involved justifies an inference that a difference of policy was intended. The original act provided that nonresidents of the state might be received at the Winfield asylum but only upon payment of compensation to be fixed by the trustees. Gen. Stat. 1909, § 8450. Until 1909 this was the only provision of the statute regarding charges for maintenance there. The Legislature having its attention directed to the general subject would presumably have stated under what circumstances charges should be exacted from residents of the state, if any such exaction had been intended.

[1, 2] The reasonable conclusion seems to be that with respect to the establishment under consideration, as in the case of other educational institutions, such as those for the blind and for the deaf and dumb, the legislative purpose was that the benefits bestowed upon individuals should be paid for by the public. The force of this view is conceded if the institution in question is to be regarded as essentially of an educational character. But counsel for the plaintiff argue that it is more closely analogous to an asylum for the insane than to a public school, especially in the light of the actual conditions presented. It appears that, although the institution was founded in the belief that the unfortunates committed to its care would generally be capable of receiving instruction, experience has proved the contrary. The

trial court found that out of about 100 employees now engaged only two are teachers, who give instruction to a limited number in some of the primary branches; that instruction is also given in basket weaving and similar manual arts; and that Belle Abbott was never capable of receiving instruction in any school work. We think, however, that the character of the institution must be determined by the statute. The question before us is not whether the inmates of this institution ought to be required to pay for their maintenance but whether the Legislature intended that they should. There is no legislative sanction for maintaining at public expense those capable of profiting by instruction and requiring payment from all others or for making the liability turn upon the proportion of inmates at a given time who have capacity to learn. The language used throughout the act creating the institution characterizes it as distinctly educational. Its title reads: "An act to establish an asylum for the education of the feeble-minded and imbecile youth." Its first section provides for the establishment of "an institution for the education of idiotic and imbecile children, to be denominated the Kansas State Asylum for Idiotic and Imbecile Youth." Gen. Stat. 1909, § 8444. It speaks of the inmates as "pupils." Gen. Stat. 1909, §§ 8449, 8450. It thus defines the purpose of the asylum: "The object of this institution is to train and educate those received so as to render them more comfortable, happy, and better fitted to care for and support themselves." Gen. Stat. 1909, § 8451. We think that, so long as these statutes stood without express or implied amendment, they amounted to a declaration of legislative policy to exempt such inmates of the Winfield institution as were residents of the state from any charge for maintenance, and that this declaration is binding on the court, notwithstanding any change of methods in the actual administration of its affairs.

[8] In 1909 an act was passed, effective March 30th, containing these provisions: "The name of the Kansas State Asylum for Idiotic and Imbecile Youth, sometimes designated as the Kansas School for Feeble-Minded Youth, is hereby changed to the State Home for Feeble-Minded. The expense of the maintenance, care and treatment of any inmate shall be paid by the guardian out of his estate, or by any person who by law is bound to provide for and support such person, or the same shall be paid out of the state treasury. The state may at any time recover the per capita cost of the maintenance, care and treatment of the inmates of said institution and for any clothing furnished by the state, and funeral expenses, from the estate of such inmate or from any person who by law is bound to provide for and support such inmate." Gen. Stat. 1909, §§ 8457, 8459.

It is clear that from the passage of this act until the death of Belle Abbott, a period of about seven months, her estate was liable for the cost of her maintenance. In behalf of the plaintiff it is contended that the statute is retroactive and by its terms enables the state to demand reimbursement for expenditures already made. Whether it would be competent for the Legislature to impose such a liability where no legal obligation had previously existed need not be considered. An act is to be deemed to operate only prospectively unless the contrary clearly appears. 36 Cyc. 1205. Here the only phrase employed that could be regarded as suggesting a purpose to demand reimbursement for expenses incurred by the state prior to the new enactment is that authorizing a recovery "at any time" for the cost of maintenance. As we have interpreted the law, the new statute does not merely provide a procedure for enforcing an obligation already existing. It creates a liability from conditions which previously imposed none and also provides for its enforcement. The phrase "at any time" relates to the latter aspect. It is given sufficient field of operation by construing it to mean that, after an obligation shall have arisen under the operation of this statute, a recovery may be had "at any time." If the intention had been to impose a liability on account of conditions already existing, language would naturally have been selected making that purpose plain.

[3, 4] It remains to consider the effect of the commitment of Belle Abbott to the asylum for the insane and of her retransfer to the Winfield institution. The defendant maintains that the order of the probate court of Cowley county declaring her insane was void for want of jurisdiction, she being a resident of Johnson county, and that therefore no liability should attach to her estate by reason of her having been cared for at the Topeka asylum. The plaintiff contends that she was properly adjudged insane; that thereafter no real change in her condition took place, and that none was declared by competent authority in a regular way; that she was placed in the asylum at Winfield to receive treatment suited to one suffering from that insanity; and that her estate was liable under the statute relating to the care of the insane, not only while she was at Topeka, but to the same extent after she had been returned to Winfield. In some situations the validity of an order of commitment to a hospital for the insane may well have a bearing upon the question of the patient's liability for the expense of maintenance. But here the subject of inquiry was beyond doubt of unsound mind, whatever term may best be employed to express the character of her affliction. She was properly a ward of the state. During the time she was maintained at the Topeka asylum we think her

estate should be liable for the outlay in her behalf, notwithstanding the requirements for her commitment there may not have been complied with. And by similar reasoning we conclude that, while actually an inmate of the Winfield institution, her estate should be exempt from liability notwithstanding any irregularity in her retransfer. We believe this view best enforces the legislative policy as here interpreted.

[6] The defendant seeks to invoke the statute of limitations. The function of maintaining an asylum for the insane is governmental, and the statute does not run against the state with respect to a claim in connection therewith. *Eastern State Hospital v. Graves*, 105 Va. 151, 52 S. E. 837, 3 L. R. A. (N. S.) 746, 8 Ann. Cas. 701.

A modification of the judgment is therefore directed so as to exempt the estate of the decedent from liability during the time that she was cared for at Winfield, except for the period subsequent to the amendment of 1909. All the Justices concurring.

WORK v. WORK.

(Supreme Court of Kansas. Nov. 8, 1913.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1011*)—JUDGMENT—EVIDENCE.

The title to a tract of land appeared of record in the name of George Z. Work at the time of his death. He left a will devising his entire estate to his widow. In the envelope inclosing the will was found a paper stating that his brother, A. S. Work, owned a half interest in the farm "after he pays for what money I have spent on same as shown by my checks and books." In an action of ejectment brought by A. S. Work against the devisee, the plaintiff was defeated upon the following claims of legal and equitable ownership:

(a) That at the time of George Z. Work's death the farm was a part of the assets of a partnership composed of the plaintiff and George Z. Work, in which they shared equally.

(b) That the widow was estopped to dispute the plaintiff's claimed interest in the farm because of certain conduct of hers upon which he had relied.

The testimony took a wide range and covered the subject of compliance with the terms of the writing found with the will. *Held*, the rule applies that so far as a judgment depends upon conclusions of fact drawn from conflicting evidence, a material part of which consists of oral testimony, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. RULINGS ON EVIDENCE.

Claims of error based upon the refusal of the court to admit evidence offered by the plaintiff considered, and *held*, the evidence was improper, or inconsequential, or covered by other proof, or not properly presented to the trial court at the hearing of the motion for a new trial.

3. EJECTMENT (§ 89*)—DOCUMENTARY EVIDENCE—DESCRIPTION OF LAND.

Under the circumstances stated in the opinion, a description of real estate as "476

acres of land near Humboldt, Kan., that Work Bros. & Co. got from Z. Miller" is sufficiently definite to identify the land in controversy.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 249-253; Dec. Dig. § 89.*]

Porter, Benson, and West, JJ., dissenting.

(*Additional Syllabus by Editorial Staff.*)

4. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS.

In an ejectment case, a question whether the witness had ever parted with his interest in the land in controversy was properly excluded as calling for a conclusion which the court alone has the right to draw.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

5. TRIAL (§ 46*)—OFFER OF PROOF—SUFFICIENCY.

An offer by plaintiff in ejectment to testify that he had a writing relating to the title to the land in controversy, which writing had been lost, was properly rejected where neither the nature and contents of the writing nor its date or the circumstances connected with it were disclosed so that its materiality might be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 115-117; Dec. Dig. § 46.*]

Appeal from District Court, Allen County.

Action by A. S. Work against Dorothy Work. From judgment for defendant, plaintiff appeals. Affirmed.

Ewing, Gard & Gard, of Iola, for appellant. Lapham & Brewster, of Chanute, and Andrew L. Winters, of Chicago, Ill., for appellee.

BURCH, J. The action in the district court was one of ejectment involving a tract of land consisting of 476 acres lying near Humboldt, in Allen county, and known to the interested parties as the Humboldt farm. George Z. Work died July 27, 1905, leaving a will in which he devised his entire estate to his widow, Dorothy Work. The title to the farm appeared of record in the name of her husband, and she claimed it under the will. Andrew S. Work, a brother of the deceased, claimed to be the legal and equitable owner of an undivided one-half interest in the farm and on March 2, 1909, instituted the action to enforce his rights. The court held that the plaintiff failed to sustain the allegations of his petition by sufficient proof and rendered judgment for the defendant. The plaintiff appeals.

The second amended petition on which the case was tried presented the following theory of the plaintiff's rights: About the year 1876 the plaintiff and his brother, George Z. Work, formed a partnership for the purpose, among other things, of dealing in real estate, and this partnership existed until the death of George Z. Work in 1905. The partnership did business under the name of Work Bros. & Co., George Z. Work and A. S. Work, and bought and traded for real estate which was taken for convenience in any one of the partnership names. On October 7, 1893, "the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said partnership firm" traded merchandise belonging to it and taken from a store then owned and operated by the firm to Zachariah Miller for the Humboldt farm. The title was taken in the name of George Z. Work, one of the partnership names, with the understanding and agreement that each partner owned an undivided half interest. On October 30, 1903, the plaintiff and his brother settled all their partnership affairs except as to this land, the rents and profits which George Z. Work had derived from it, and some oil and gas holdings and stock. On October 30, 1903, at the time all other partnership business was settled and adjusted, George Z. Work, as evidence of such settlement and adjustment, and as evidence of the plaintiff's ownership of the land in controversy, executed and delivered to the plaintiff a certain writing which reads as follows: "Humboldt, Oct. 30, 1903. This is to certify that my Bro. A. S. Work owns one-half interest in all the Humboldt Oil & Gas stock I hold in my name and that I owe him on my one-half \$750. Also that he owns one-half interest in the farm known as the Humboldt Farm and Oil & Gas thereon after he pays for what money I have spent on same and as shown by my checks and books. Geo. Z. Work." After George Z. Work's death this paper was found in an envelope containing his will in a private tin box which he kept in the vault of A. S. Work's office in Chicago. A copy was attached to the petition marked Exhibit A.

The facts were that in 1893 the firm of Work Bros. & Co. was composed of George Z. Work, A. S. Work, and Frank C. Taylor, whose interest was one-fourth. This firm traded merchandise to Miller for the Humboldt farm. The title was taken in the name of George Z. Work, who on October 25, 1893, executed to his partners the following instrument: "Work Brothers & Company, Chicago, Oct. 25, 1893. This is to certify that I hold title to 476 acres of land near Humboldt, Kansas, that Work Brothers & Co. got from Z. Miller in exchange for clothing, simply for convenience. Geo. Z. Work."

On August 5, 1895, the following writing executed by Taylor and by the plaintiff was placed on the same sheet of paper: "The above-described land transferred, sold and set over to George Z. Work for and in consideration of nine thousand ninety 92/100 dollars. He is hereby authorized to deed same to anyone he may choose. Done this fifth day of August, A. D. 1895. Andrew S. Work. Frank C. Taylor."

In a private account book kept at the time by George Z. Work appear certain entries in his handwriting. At the top of one of the pages is the legal description of the Humboldt farm and the following entry: "Humboldt, Allen Co., Kansas, land, 1895. Aug. 5. Bought of Work Bros. & Co. the above-described farm and agreement from W. B. & Co. in vault for 476 acres, 9,090.92." Below this en-

try is an account of subsequent expenditures on the farm.

Taylor left the firm of Work Bros. & Co. in 1895, and George Z. Work left it in 1901. Thereafter the firm consisted of the plaintiff and Charles L. Shattuck, who subsequently incorporated or formed a joint-stock company under the name of Work Bros. Company. Bankruptcy proceedings were later instituted against this company, which were still pending at the time of George Z. Work's death.

George Z. Work's will was executed in October, 1903. The plaintiff testified that he drew it in Chicago and sent it to his brother at Humboldt, who executed it and returned it to him. The widow relates the circumstances to this effect: A draft of the will was prepared in the bedroom of herself and her husband in the Ganz hotel in Humboldt, Kan.; she and her husband being present. This draft was taken to the office of an attorney in Humboldt where it was put in form and typewritten. The typewritten document was then brought back to the hotel where it was approved by her, executed by her husband, and witnessed by two young men living at Humboldt. After it had been executed, the will was placed in the tin box at Chicago, which has been referred to.

On November 1, 1903, George Z. Work wrote to A. S. Work the following letter: "Humboldt, November 1, 1903. I have just inclosed and sent with this the shares you asked for, and also have put paper with my will in box stating what I told you. [Signed] Your fond Bro. G. Z. Work."

After the burial of George Z. Work the tin box was opened in the presence of the widow, her son, George R. Work, and A. S. Work. The testimony of the widow and her son was that George R. Work unlocked the box, took out an unsealed envelope containing the will, and handed it to his mother. The plaintiff then said: "Before you open this will, I want to say that you will find a paper in it giving me half of the Humboldt farm." The widow's testimony continued as follows: "When my son George, as I told you, handed me this envelope containing the will, and Mr. Work interrupted by saying I would find this paper, Mr. Work also added that he did not wish me to speak of it, mention it to any one in any way as he had not settled with his creditors, and he didn't wish them to know he had other property than that he had scheduled, and I said: 'If I am asked any questions about this paper, I shall tell the truth.' With that he took the envelope out of my hand, turned his back to me, in a moment turned again and gave me the envelope; I opened it; there was my husband's will just as I had seen it last; nothing added to it; nothing taken from it." Afterwards she was informed of the contents of the paper and signed an instrument to be referred to later containing a copy of it, but she never

saw the original until it was presented to her while she was giving her testimony at the trial.

The account books and business papers of the deceased were produced at the trial. Many thousands of dollars spent on the Humboldt farm were accounted for. On a tract of 76 acres six oil wells were drilled at a cost of more than \$11,000, tank houses were built, pumps were put in, and oil was pumped and marketed. Other tracts were leased to operating companies. George Z. Work spent a considerable part of his time there for a number of years, and many pages of his books show revenues received. Yet only five items on those books were selected by the plaintiff as tending to show that he was an equal partner in this very large financial undertaking. Three of these indicated that checks of Work Bros. & Co., amounting all together to \$412, were used in paying taxes, and the other two simply credited the plaintiff with items of \$62.50 and \$750, respectively.

There was evidence of statements by George Z. Work indicating that the plaintiff owned an interest in the farm, and there was evidence of statements by the plaintiff that it belonged to George Z. Work. The plaintiff testified that he had somewhat to do with the farm and the development of its oil and gas resources, while persons in charge of the farm and the work done upon it testified that he had nothing to do with either. In the ten years which elapsed between the time when George Z. Work took from Taylor and the plaintiff the writing of August 5, 1895, and the time of his death, his wife received no information that the plaintiff was an equal partner in the farm and in the extensive operations connected with it. Other oral evidence was introduced by both sides in proof and disproof of the opposing claims and to assist the court in placing itself in the position of the two brothers in order that it might properly interpret their relations and conduct. It is not necessary to review this testimony. The trial court has passed upon its credibility and weight. Conflicts have been resolved in favor of the defendant, and in this appeal the judgment is regarded as resting upon the evidence favorable to her and upon the inferences favorable to her which may be drawn from the evidence.

It will be observed from the allegations of the petition summarized above that the paper represented by Exhibit A was not relied on as the source of the plaintiff's title. The petition was twice amended, and in choosing his ground the plaintiff committed himself to the proposition that his title originated in 1893 when goods belonging to himself and George Z. Work, as partners sharing equally, were traded for land which they shared equally. Dealing in land was a part of the partnership business, and this land was partnership property from the time it was ac-

quired. The partnership continued until George Z. Work's death, but before his death he executed and delivered to the plaintiff Exhibit A, not as a deed or will of the land or as a declaration of trust, but as a piece of evidence of a long standing ownership.

The position thus taken became insecure when it appeared that Taylor was a member of the firm of Work Bros. & Co. when the Humboldt farm was acquired; that George Z. Work in fact severed his connection with that firm; and that its successor became involved in bankruptcy proceedings in which the plaintiff scheduled his property but which did not affect George Z. Work. The position became untenable when it was proved that the Humboldt farm became the individual property of George Z. Work in August, 1895.

The very important sheet of paper evidencing the purchase of his partners' interest in the farm by George Z. Work was found with other business papers in a trunk belonging to him about a year and a half after his death. It was evidently overlooked when the petition was framed, and the plaintiff expressed surprise at its production at the trial. Many objections to its reception in evidence were interposed, but the signatures upon it were not disputed. All the business ventures of the two brothers were not joint. George Z. Work was not interested in the company formed by the plaintiff and Shattuck. Consequently it was possible for George Z. Work to own a tract of land by himself. On August 5, 1895, the title to the Humboldt farm stood of record in his name, and the instrument signed that day by the plaintiff and by Taylor was all that was necessary to establish his individual right to the property. Taylor went out of the firm about this time, but the firm of Work Bros. & Co., consisting of the two brothers, continued in existence for some six years and kept books of account. The plaintiff was still solvent, and there was no occasion for covering property under the name of another. Yet George Z. Work transferred this farm to a private account upon his personal books which opens with a full memorandum of the purchase, giving the description of the farm, the name of the firm from which it was purchased, and the price, and referring to the agreement which made it his individual property.

George Z. Work's letter of November 1, 1903, is inconsistent with the charge in the petition that Exhibit A was executed at the time of a settlement of partnership affairs between the plaintiff and his brother and was delivered to the plaintiff at that time as his evidence of such a settlement and as his evidence of ownership of an existing interest in the farm. It makes no reference to a general settlement of partnership affairs. The language is, "What I told you." There was no evidence of any kind that such a settlement took place. If there had been such a

settlement, no doubt it would have been evidenced, as the petition contemplates, by a definite writing made at the time showing the fact. Exhibit A was not inclosed with this letter to the plaintiff and was not delivered to him. It was kept by George Z. Work among his own private papers, and the plaintiff admitted on the witness stand that he never saw it until the tin box was opened after his brother's death. While it is not to be taken too literally, the statement of the plaintiff to the widow at the time the box was opened indicates that he then regarded Exhibit A as expressing a gift to him of the farm and not as evidence of a property right he had enjoyed for many years.

The petition charged that the rents and profits which George Z. Work had received from the land were not accounted for in the settlement. There is no doubt that George Z. Work received rents and profits for many years. Yet Exhibit A conditions the plaintiff's right to an undivided half interest in the farm, not upon a partnership accounting as to revenues and disbursements, not upon payment of a partner's proportion of George Z. Work's advances, but upon the plaintiff's paying a sum equal to all the money which George Z. Work had spent on the farm.

No contention was made in the district court and none is made in the plaintiff's brief that Exhibit A was conclusive evidence of the plaintiff's claim which precluded further inquiry. It was properly regarded as the last one of a series of evidential facts, whose strength and meaning depended upon those antecedent to it.

Besides asserting title to the farm, the plaintiff sought to recover on the ground that the defendant was estopped to dispute his assertion of title. He pleaded that he had a large claim against his brother at the time of his brother's death, amounting to \$9,000; that the widow was the executrix of her husband's will; that this claim was presented to her with the intention of proving it against the estate; that before the estate was finally closed, and in order to prevent the filing and proving of the claim against it, the widow agreed in writing that she would carry out the terms of Exhibit A; and that in consideration of this agreement the plaintiff relinquished presentation and proof of his \$9,000 claim, allowed the estate to be closed and the executrix to be discharged, and afterwards acted upon the widow's agreement to his great detriment and loss.

The widow was the executrix of the will, and just before she was discharged by the probate court she gave the plaintiff a writing which reads as follows: "Oct. 8th, 1906. Mr. A. S. Work, Chicago—Dear Sir: I do hereby agree to carry out the provisions of a certain declaration of trust, signed by George Z. Work, as follows, viz.: [Here follows a copy of Exhibit A]—upon proper proof of the authenticity of said declaration and the

performance of its condition. Dorothy Work."

Aside from the plaintiff's own testimony that he had a claim against his brother's estate amounting to between \$7,900 and \$9,000 (he had forgotten the exact amount), there is no evidence whatever to support the existence of such a claim or the good faith of its assertion. The widow testified that no such claim had ever been presented to her while she was executrix and that she never heard of it until she read about it in the plaintiff's amended petition.

Apparently the widow considered Exhibit A, if such a paper existed, as a part of the will. She testified as follows: "Mr. A. S. Work seemed to think I wouldn't carry out the provisions of the will without some memorandum on my part signifying my willingness to do it, so I signed his paper with that understanding that he, on his part, was to establish the authenticity of the signature, and further that he was to pay me all the money that my husband had spent on his expenses since he had the farm in his possession."

Referring to this condition upon the acquisition of title by the defendant contained both in Exhibit A and in the widow's recognition of it, the trial court, in an opinion rendered when the decision was announced, said: "This was recognized by plaintiff herein upon the trial of this cause; and hence proof was offered and introduced on such trial on his part tending, as claimed by him, to show a performance by him of such conditions precedent. This was and is controverted by defendant, and she introduced evidence on the trial, on her part, tending, as claimed by her, to negative such contention of plaintiff; and hence the testimony was permitted to and did take a wide range on such vital questions."

The final conclusion of the court is stated in the opinion as follows: "Considering such conclusions of fact, they being either admitted by the parties or fully established by the evidence in the cause, in connection with a careful examination and consideration of the pleadings, together with all the evidence in the cause, both oral and documentary, aided by the able and exhaustive briefs furnished me by respective counsel, I am irresistibly led to the conclusion that, under all the facts and circumstances as are disclosed from all the evidence in the cause, the plaintiff has failed to establish his contention by that measure of proof required by law in cases of the character as the one at bar, has failed to show that at the time of the commencement of this action he had any right, title, interest, property, claim, or demand in or to or was legally or equitably entitled to the possession of said land or any part thereof." Manifestly it is impossible for this court to declare that the trial court erred in its decision.

[2] It is claimed that the court erred in

excluding evidence offered on behalf of the plaintiff. In view of the clear prominence of the essential facts of the case and the thoroughness with which they were investigated at the trial, most of the items of evidence referred to seem quite inconsequential. Some of them, as, for example, the participation of the plaintiff in paying the cost of the first oil well, and the relation of the farm to the assets of Work Bros. & Co. after Taylor retired from the firm, were covered by other testimony.

[4] Some of them, as, for example, "Did you ever part with your interest in the Humboldt farm?" called for inferences which the court alone had the right to draw.

[5] After the defendant had introduced the writing of August 5, 1895, signed by the plaintiff and by Taylor, the plaintiff offered to testify in rebuttal that he had a writing from his brother subsequent to that date which related to the Humboldt farm but which had been lost. The plaintiff did not put his offer in a form which satisfied the court that he was not seeking to testify to a personal transaction with his deceased brother. But, besides this, neither the nature and contents of the writing, nor its date, nor the circumstances connected with it were disclosed so that its materiality might be considered, and the plaintiff refrained from pressing the subject at the hearing of the motion for a new trial. Code Civ. Proc. § 307; Gen. Stat. 1909, § 5901. The last observation applies to all the testimony which was rejected at the trial.

[3] Error is also assigned on the admission in evidence of the writing of August 5, 1895. The argument is confined to the single proposition that it is too vague and indefinite to identify the property in controversy. It refers to the description contained in the writing just above it on the same sheet of paper. Construing the two instruments together, the description of the land is quite as definite as that contained in Exhibit A.

The judgment of the district court is affirmed.

JOHNSTON, C. J., and MASON and SMITH, JJ., concurring.

PORTER, J. (dissenting). The instrument chiefly relied upon by the plaintiff to establish his ownership to a one-half interest in the lands in controversy reads as follows: "Humboldt, Oct. 30, 1903. This is to certify that my Bro. A. S. Work owns one-half interest in all the Humboldt Oil & Gas stock I hold in my name, and that I owe him on my one-half \$750. Also that he owns one-half interest in the farm known as the Humboldt Farm and Oil & Gas thereon after he pays for what money I have spent on same and as shown by my checks and books. Geo. Z. Work." This paper was executed by Geo. Z. Work less than two years before his death. It was found with his last will and testament

where he had agreed with his brother to leave it. His death occurred in July, 1905. In October, 1906, his widow, the defendant in this case, agreed with the plaintiff in writing that she would carry out the provisions of this declaration of trust signed by her husband, "upon proper proof of the authenticity of said declaration and the performance of its conditions." Plaintiff in his petition relied not only upon the declaration of trust but upon her agreement to be bound thereby, and also alleged and sought to prove estoppel on her part. Conceding that there was no consideration for her agreement to carry out the provisions of the declaration of trust, and that no estoppel was shown, the finding of the trial court is in favor of the authenticity of this declaration of trust. The trial court, however, construed it in effect as granting nothing more than a mere option to plaintiff to acquire a half interest in the real estate upon the payment of the moneys advanced by Geo. Z. Work. I think there can be no question that it is a declaration that the legal title to the land was held by Geo. Z. Work in trust for himself and the plaintiff. It is just the same as if he had said, "My brother owns a half interest in the farm, but owes me for certain moneys I have spent on the same as shown by my checks and books." Just as in the preceding paragraph he had stated that they were equally interested in certain oil and gas stock held in his name, but that he owed on his half to the plaintiff certain moneys. This construction is borne out by all the facts and circumstances in evidence as to the course of business and dealings between the brothers. The evidence shows, and the court finds, that the relations between the brothers were at all times friendly and affectionate. The trial court, I think, erred in holding that there was any burden upon the plaintiff to show such acts and conduct on the part of his brother as would operate to vest an undivided one-half interest in the lands of the plaintiff. The declaration of trust and the evidence shows that Geo. Z. Work held the legal title in trust, and that the plaintiff in fact owned a half interest in the land. It was therefore not necessary for the plaintiff to show acts and conduct on the part of Geo. Z. Work alone, or in conjunction with Dorothy Work during the lifetime of her husband, or since, operating to vest a half interest in the plaintiff. The evidence satisfies me that the plaintiff owned, and his brother recognized, his ownership to a half interest in these lands from the time that the former partner's interest was eliminated. If that is true, Dorothy Work never acquired a wife's interest in the undivided half belonging to the plaintiff.

The question before us is not whether the plaintiff acted in good faith in threatening to file a claim against his brother's estate arising out of other transactions, nor whether he waived any such claim in considera-

tion of the agreement of Dorothy Work to be bound by the declaration of trust, nor whether he alleged estoppel and failed to establish it. We are called upon to construe a written instrument, which to my mind is not at all ambiguous but the meaning of which, if there were any ambiguity, the evidence makes clear. The plaintiff should not be deprived of his interest in the real estate on any such considerations as that all his claims in the lower court were not established.

BENSON and WEST, JJ., concur.

KANSAS CITY v. STEWART, County Treasurer.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 913*)—COUNTY FUND—REBATES.

The provision of the act in relation to the collection of taxes that "all penalties shall be credited to the county fund and all rebates charged to that fund" means that the rebates shall be charged to the county fund; and an amendment by implication which requires penalties on city taxes to be paid to the city does not prevent the rebates on the same tax being charged to the county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1746-1750; Dec. Dig. § 913.*]

2. TAXATION (§ 908*)—VALIDITY—REBATES.

The Legislature has power to require that rebates granted on taxes laid by cities, townships, and school districts shall be charged to the county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1740; Dec. Dig. § 908.*]

3. TAXATION (§ 38*)—VALIDITY—OBJECT.

A statute requiring all rebates to be charged to the county fund and all penalties to be credited to that fund, except those accruing to the taxes of cities of the first class, which shall be paid to the city, does not violate the provision of the state Constitution that a tax shall be applied only to the object in pursuance of which it is levied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 67; Dec. Dig. § 38.*]

4. CONSTITUTIONAL LAW (§ 229*)—TAXATION (§ 908*)—DUE PROCESS.

Such a statute does not violate the fourteenth amendment to the federal Constitution by depriving any person of property without due process of law or by denying to any person the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229.* Taxation, Cent. Dig. § 1740; Dec. Dig. § 908.*]

Johnston, C. J., and Benson, J., dissenting.

(Additional Syllabus by Editorial Staff.)

5. MANDAMUS (§ 121*)—GROUNDS—TAXATION.

Mandamus will lie to require a county treasurer to pay money over to a city in accordance with the statute providing that rebates granted on taxes laid by cities shall be charged to the county, where the purpose of the proceeding is not to ascertain what sum is due but to ascertain to what funds the rebate should be charged and to determine the treasurer's duty in the premises.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 255; Dec. Dig. § 121.*]

6. MANDAMUS (§ 151*)—PARTIES.

In a mandamus proceeding by a city against a county treasurer to require him to pay over money to the city in accordance with the terms of statutes requiring that rebates granted on taxes laid by cities be charged to the county, the county was a proper but not a necessary party.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 291, 292; Dec. Dig. § 151.*]

Appeal from District Court, Wyandotte County.

Application for mandamus by the City of Kansas City against Samuel Stewart, as County Treasurer, etc. From a judgment for plaintiff, defendant appeals. Affirmed.

Keplinger & Trickett, of Kansas City, for appellant. R. J. Higgins and James F. Getty, both of Kansas City, for appellee.

MASON, J. The city of Kansas City, Kan., brought mandamus against the treasurer of Wyandotte county to require him to pay money over to the city in accordance with the terms of certain statutes. Judgment was rendered for the plaintiff, and the defendant appeals.

The question in dispute concerns the disposition of the penalties imposed by law for delinquency in the payment of taxes levied by and for the city. In substance it is this: Is the county required to reimburse a city of the first class for the amount by which the taxes collected for the city are reduced by rebates granted for prompt payment and at the same time to pay over to the city the amount collected as penalties for delay in the payment of taxes levied by the city, while in the case of taxes levied by cities of the second and third classes, and by townships and school districts, the rebates are charged to the county and the penalties credited to it?

[1] In 1874 a system of tax collection was adopted (Laws 1874, c. 131, § 1) by which one-half of a tax was made nominally due on December 20th and the other six months later. If the whole tax was paid by December 20th a rebate of 5 per cent. was allowed on the half due in June. If none of the tax was paid until after December 20th, the whole amount became due and a penalty of 5 per cent. was added. A like penalty was added in March, and again in June, if the delinquency was continued. This system remains in force; the March penalty, however, having been eliminated. Gen. St. 1909, § 9428. This proviso of the present statute was added in 1876 (Laws 1876, c. 34): "Provided, all penalties shall be credited to the county fund, and all rebates charged to the same fund." In 1895 the Legislature amended a section of the statute, which fixed the time of settlement and the method of keeping accounts, between the county treasurer and a city of the first class, by adding to the clause requiring the treasurer to pay to the city, at certain dates, all moneys collected for

it, these words, "its proportion of penalties and interest." Laws 1895, c. 260, § 1. This was elaborated in 1903 into: "And the city's proportion on all penalties and interest collected on all taxes and special assessments." Laws 1903, c. 122, § 136. In this form it is a part of the present statute. Gen. St. 1909, § 1000. The interpolation in its original form was held to mean that the county treasurer shall pay to cities of the first class all penalties collected for delinquencies in the payment of taxes levied by the city, while in the case of school districts (and presumably in the case of cities of the second and third classes and townships) the penalties were still to be turned into the county fund. *Sedgwick County v. Wichita*, 62 Kan. 704, 64 Pac. 621. Upon the strength of that ruling the city of Kansas City demands the penalties accruing from delay in the payment of its taxes. The county treasurer resists the demand upon various grounds.

It is suggested that in the sentence, "All penalties shall be credited to the county fund, and all rebates charged to the same fund," the second clause originally meant that rebates should be charged to the same fund that was credited with the penalties; and that when a change was made in the beneficiary of the penalties accruing on city taxes, crediting them to the city instead of to the county, a like change was effected in the fund to which city rebates should be charged. This interpretation might seem to reach a more equitable result, but we are of the opinion that the language quoted was intended to mean that the penalties are to be credited to the county fund and the rebates charged to that fund—the same fund—the county fund. This intention seems too obvious to permit of a different reading.

[3] The defendant maintains that under this construction the statutes violate the provision of the state Constitution requiring a tax to be applied only to the object in pursuance of which it was levied (Const. art. 11, § 4), and also violates the first paragraph of the fourteenth amendment to the federal Constitution in that it deprives taxpayers of the county, who reside outside of the city, of property, without due process of law, and denies to them the equal protection of the law. The question with regard to the state Constitution was raised and passed upon in the *Sedgwick County Case* already cited. It was there argued, and the argument was approved in a dissenting opinion, that the penalty was a part of the tax and could be applied to no other purpose than that for which the tax was levied. The court held, however, that, while the penalty was to be regarded as a part of the tax for certain purposes and would ordinarily attach to the original tax and be disposed of in the same way, the Legislature may direct a different disposition. The court now adheres to that view, which finds some support in the text and the cases cited in 37 Cyc. 1594, and which

is thus elaborated, although with regard to a different constitutional provision, in *New Whatcom v. Roeder*, 22 Wash. 570, 61 Pac. 767: "It will be observed that the Legislature, and not the municipality, fixes the date of the delinquency and the interest charge; in other words, creates the delinquent fund arising from this source. In tax laws penalties proper and interest charges are imposed for mere delinquencies in order to hasten payment. The general law of the state imposes this charge as a penalty for neglect to pay the tax in due season. The fund arising from this source is created by the legislative act of the sovereign state, and it follows that the Legislature has a right to dispose of this fund to the same extent as other fines and penalties arising from the violation of other laws of the state."

[2] The contention is made that to charge the county with the rebates granted with respect to the taxes of cities of the first class is in effect to levy taxes upon one public body for the benefit of another. To this we cannot agree. The allowance of a rebate is in substance a reward or inducement for the prompt payment of taxes. We think the Legislature may cast this incidental expense upon the county just as it might create a county office, the occupant of which should receive a salary for visiting those liable for taxes and endeavoring to hasten their payments. The plan adopted is not different in principle from the requirement that county officers, who are paid wholly from the county treasury, shall collect city, township, and school district taxes.

"Counties are purely the creation of state authority. They are political organizations, whose powers and duties are within the control of the Legislature. That body defines the limits of their powers and prescribes what they must and what they must not do. It may prescribe the amount of taxes which each shall levy and to what public purpose each shall devote the moneys thus obtained." *State v. County of Shawnee*, 28 Kan. 434.

[4] The argument that the federal Constitution is violated is founded upon the theory that the statute discriminates between the residents of a city and the residents of the county outside of the city, to the disadvantage of the latter, and that there is no reasonable basis for such a classification in this connection. The statute in effect requires the county to pay all rebates which, as already said, are rewards for the prompt payment of taxes. The penalties for delay in the payment of taxes levied by a city of the first class go to the city, and its taxpayers alone are thereby benefited. The penalties for delay in the payment of other taxes go to the county, and the taxpayers of the city share the benefit with the taxpayers of the county. This does result in a measure of discrimination between the taxpayers of the city and those of the rest of the county, to

the disadvantage of the latter. In *State v. Mayo*, 15 N. D. 327, 108 N. W. 36, such a discrimination was held to violate a provision of the state Constitution forbidding the granting of any privilege or immunity to one citizen or class of citizens which is not granted on the same terms to all. Incidentally it may be mentioned that that case approves the decision of this court that the Legislature may control the disposition of penalties imposed for delinquency in respect to the payment of taxes.

We do not think the arrangement in question amounts to a classification which is so clearly without any reasonable basis that it must be held to be beyond the power of the Legislature. It may not be easy to say just why one rule should be applied with respect to penalties for delay in the payment of taxes levied by a city of the first class and another with respect to those for delay in the payment of the taxes levied by a city of the second or third class or by a township or a school district.

To uphold the law, however, it is not necessary that the court should be able to find the reason for the distinction. The statute must stand unless the court can say it is clear that no sufficient reason can possibly be found. Many differences exist in the methods of governing cities of the various classes, for which it would be difficult to find a specific reason having relation to the number of inhabitants, the sole basis of their classification. The discretion of the Legislature in the matter of taxation is especially broad. 4 Encyc. of U. S. Sup. Ct. Rep. 403. And its control of municipalities of its own creation is subject to few restrictions.

"Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the state, created to carry out its will. When they are authorized or directed to levy a tax or to appropriate its proceeds, the state, through them, is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the Legislature has undoubted power to apportion a public burden among all the taxpayers of the state or among those of a particular section." *Railroad Co. v. County of Otoe*, 83 U. S. (16 Wall.) 667, 21 L. Ed. 375.

"Very wide discretion is left with the law-making power in this particular. The Legislature may change the political subdivisions of the commonwealth by creating, changing, or abolishing particular cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways." *Attorney General v. Williams*, 174 Mass. 476, 481, 55 N. E. 77, 79, approved in *Williams v. Parker*, 188 U. S. 491, 503, 504, 23 Sup. Ct. 440, 442, 47 L. Ed. 559.

It is difficult to suggest a reason why a poll tax for road purposes should be exacted from residents of a city if it is of the second class but not if it is of the first class. Yet this discrimination is upheld even where the court is unable to find that the persons exempted are under any specific compensating burden. *Shane v. City of Hutchinson*, 88 Kan. 188, 192, 127 Pac. 606. A basis for favoring the taxpayers of a city of the first class by giving the city the benefit of the penalties accruing to city taxes, while other penalties are retained by the county, may perhaps be found in this consideration. The county clerk and county treasurer receive, for the benefit of the county, fees for taking various steps in connection with the sale of real estate for delinquent taxes, such as for making out notices and for issuing tax sale certificates and tax deeds. These become in effect charges against the owners of the property. They are uniform for each tract, irrespective of value. In the larger cities there will naturally be many lots of relatively small value that will become liable for such payments. It is possible that the Legislature estimated that the county would from this source derive a larger revenue, in proportion to the value, from property in cities of the first class than from that outside and decided to give such cities the benefit of the penalties on its taxes as a means of compensating in a rough way the resulting inequality.

Various minor questions regarding procedure are raised. It is suggested that mandamus will not lie because, even if the plaintiff's theory of the law is correct, it had an adequate remedy at law by action on the defendant's official bond. Early decisions of this court support that view. *State v. Bridgman*, 8 Kan. 458. But the rule has been changed by statute. Laws 1901, c. 284, § 1; Civ. Code, § 715 (Gen. St. 1909, § 6311).

[5] The contention is also made that a motion to quash the alternative writ should have been sustained because the amount demanded was disputed, because the defendant was entitled to a jury trial, because an accounting was necessary, and because a judicial question was presented which had not been determined in any action between the parties. In *Board of Education v. Spencer*, 52 Kan. 574, 35 Pac. 221, it was said that mandamus was not an appropriate proceeding in which to determine an amount which depended upon the result of a long and complicated accounting, covering transactions extending over 17 years. Here, however, the court did not undertake to settle any disputed amount. The purpose of the proceeding was not to ascertain what sum was due on a settlement but to decide to what funds the rebates and penalties should be charged and credited, to determine the treasurer's duty in that regard. The treasurer was ordered to pay to the city the sums due under

the statute as interpreted by the court, including the penalties on city taxes for 1912 and 1913, and a specified amount which by order of the county commissioners had been charged to the city upon a different interpretation. The only substantial controversy between the parties was with regard to the effect of the statute, and this question could be determined as well in mandamus as in any other proceeding. *Riley v. Garfield Township*, 54 Kan. 463, 38 Pac. 560.

[8] It is contended that an adjudication should not have been had without the board of county commissioners having been made a party. "Technically in mandamus the only necessary parties are the plaintiff, who asserts the right to have an act done, and the defendant, upon whom the public duty rests to perform it. The practice is common and commendable to bring in other persons who are likely to be injuriously affected by the judgment, in order that they may have an opportunity to be heard in their own behalf, and in a proper case the court will suspend proceedings until this is done. *Livingston v. McCarthy*, 41 Kan. 20; *State v. Railway Co.*, 81 Kan. 430, 435 [105 Pac. 704, 28 L. R. A. (N. S.) 1082]." *State v. Dolley*, 82 Kan. 533, 535, 108 Pac. 846.

Here the county might well have been made a party. No request for such action, however, was made by the county or by the defendant, although the answer to the alternative writ alleged the absence of the county as a reason why a peremptory writ should not issue. In the name of the treasurer, a defense upon the merits has been made, in which the interests of the county have been vigorously and ably presented. The omission formally to make the county a party is not regarded as a ground for reversing the judgment.

The judgment is affirmed.

BURCH, SMITH, PORTER, and WEST, JJ., concur.

BENSON, J. (dissenting). To require the taxpayers of the county outside of the city to make good to the city the rebates allowed to its taxpayers while allowing the city all penalties thereon is so manifestly unjust as to challenge a careful examination of the statutes invoked as authority and if necessary a re-examination of the decision of this court cited to uphold the contention of the city. That a penalty is a part of the tax appears to the writer to be entirely clear. It was so held in the early cases cited in the dissent of Justice Johnston in *Sedgwick County v. Wichita*, 62 Kan. 704, 64 Pac. 621. By our statutes rebates are taken from and penalties added, depending upon the time of payment. Thus the tax is diminished or augmented as the case may be, but the amounts subtracted or added are still parts of the

tax. Here is an illustration. An assessment of \$1,000 is charged upon property in a city of the first class. By payment before December 20th, \$975 discharges the obligation. If not paid at the prescribed date, \$25 is added and the obligation becomes \$1,025. If the city suffered the reduction in the one case and gained the addition in the other, the loss would be compensated by the gain, but, this writ being allowed, the loss will be made up by the county at large while the city alone enjoys the gain. Thus property outside of the city contributes for street and other improvements made by special assessments, and a part of the taxes assessed and collected for the outside municipalities upon property therein is directed from the purposes for which they were levied and applied to the payment of expenses of the city in violation of section 4 of article 11 of the Constitution.

To my mind the dissent in the *Wichita* Case is based upon reasons that have not been successfully assailed, and the decision in that case ought to be reconsidered, especially in view of the increasing injustice resulting from the act of 1903, extending the operation of the act of 1895 to special assessments.

In the opinion of the majority it is well said that it may not be easy to say why the distinction referred to should be made with respect to penalties upon taxes levied by cities of the first class and upon those levied by other municipalities. It appears to the writer of this dissent to be not only difficult but impossible to find a reason founded upon a just classification or upon any classification that is not arbitrary or fictitious. *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915. I dissent for the reasons already stated.

JOHNSTON, C. J., joins in this dissent.

CARDWELL v. UNION PAC. R. CO.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 46*)—RIGHT OF APPEAL—AMOUNT INVOLVED.

The Supreme Court has jurisdiction of an appeal notwithstanding the amount in controversy directly affected by the error relied upon for reversal is less than \$100, if there is a fair basis for the contention that the error affects the entire verdict, or that it indicates that the complaining party has not had a fair trial upon a claim involving in the aggregate more than \$100.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 198-201; Dec. Dig. § 46.*]

2. CARRIERS (§ 136*)—GOODS LOST IN TRANSIT—SUFFICIENCY OF EVIDENCE.

The verdict in the present case is not shown to be so at variance with the evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as to require a new trial, and the judgment is affirmed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 478, 596-598; Dec. Dig. § 136.*]

3. EVIDENCE (§ 18*) — JUDICIAL NOTICE — SHRINKAGE OF GRAIN.

The courts will take judicial notice of the natural shrinkage of grain in transit; and, the Legislature having recognized the fact that wheat in transit will naturally shrink as much as one-fourth of one per cent. of its total weight, no proof is required of this well-known fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 22; Dec. Dig. § 18.*]

Appeal from District Court, Jefferson County.

Action by M. W. Cardwell against the Union Pacific Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

George T. McDermott, Allen & Allen, and Robert Stone, all of Topeka, for appellant. R. W. Blair, C. A. Magaw, and T. M. Lillard, all of Topeka, for appellee.

PORTER, J. The plaintiff owns an elevator at the town of Perry and shipped at different dates six cars of grain over the defendant's railway. Alleging that some of the grain was lost in transportation, he sued to recover its value. The jury found generally for the defendant. The court approved the verdict and gave judgment against the plaintiff for costs. The sole question here is whether the verdict and judgment are sustained by the evidence. Counsel for plaintiff admit there was no error in the rulings of the trial court; that the jury were fairly and correctly instructed as to the law; that there was no passion or prejudice injected into the case by either side; that, "as jurors go, they were a pretty fair group of men"; and that there is not the slightest doubt that the verdict was honestly rendered. But it is said that the verdict resulted in such a shock to plaintiff and his counsel that they have not yet completely recovered therefrom.

[1, 2] The evidence we are asked to review has to do with only four of the six cars. The plaintiff concedes a conflict in the testimony respecting each of the other shipments. It appears that the value of the grain alleged to have been lost from these four cars amounts to less than \$100, and the defendant moves to dismiss the appeal. The plaintiff resists the motion and contends that the verdict as to these specific cars is so wholly at variance with the testimony as to render it clear and convincing that the entire verdict is infected by the same error which it is insisted must have arisen through some misapprehension of the jury. He asks therefore that a new trial be granted as to all of the shipments.

If it can be said that the record discloses a fair basis for the claim, we have jurisdiction of the appeal even though plaintiff fails to convince us that his contention is sound.

Manifestly, if the jury are shown to have disregarded undisputed evidence of material facts, so that there is reason to believe that the party complaining has not had a fair trial, it is the duty of the court to set the verdict aside and order another trial. *Sundgren v. Stevens*, 86 Kan. 154, 119 Pac. 322, 39 L. R. A. (N. S.) 487. While the plaintiff's contention appears to be made in good faith, we are far from being convinced that the verdict is not sustained by evidence. The burden was on plaintiff to show a loss of grain from the cars while in the possession of the defendant.

The cars in question will be referred to as Nos. 1, 2, 3, and 4. Nos. 1, 2, and 3 were first weighed on the scales of the plaintiff at Perry, again on the scales of the defendant at Armstrong, and again by inspectors of the Board of Trade of Kansas City, Mo. The plaintiff makes another concession, which is that the evidence introduced by the defendant was sufficient to support a finding that the scales of the plaintiff at Perry were inaccurate, and it is admitted that the weights at Perry must be wholly disregarded. As to these three cars the plaintiff's whole case must rest upon the variance between the weights at Armstrong and the Board of Trade weights at Kansas City. The evidence shows that the net weights at Armstrong were arrived at by subtracting from the gross weight the marked or stenciled weight of the cars, while at Kansas City, the wheat was all elevated from the cars before it was weighed and then returned to the cars, so that the weight of the empty cars was not considered. There was evidence that the actual weight of a car often varies from the marked or stenciled weight on account of the weather and other conditions.

[3] It is said to be a generally recognized fact in this country that wheat will shrink as much as one-fourth of one per cent. in transit, and our attention is called to the recognition of the same fact by section 7103 of the General Statutes of 1909, which requires bills of lading to state the exact number of bushels or pounds of grain delivered to the railway company, and which provides that if the shrinkage does not exceed one-fourth of one per cent. the railway company shall be deemed to have delivered the whole amount of the grain in the car.

The discrepancy between the two weights on car No. 1 was 370 pounds. Allowing for a shrinkage of one-fourth of one per cent. of the total weight of the grain would reduce this to 200 pounds. In car No. 2 the discrepancy was 360 pounds, but allowing for the same percentage of shrinkage on the total weight of grain reduces it to 197 pounds; and by the same process the discrepancy on the third car would appear to be but 120 pounds. There was evidence of a number of the employés of the defendant that these

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cars were inspected and that none of them were found in a leaking condition. There was some conflict in the evidence respecting the condition of the cars, but the jury have resolved that conflict against the plaintiff. An argument is made by plaintiff that the evidence introduced by the defendant as to the condition of the cars was largely negative and that this character of evidence is not entitled to as much weight as some affirmative testimony offered by the plaintiff. But this requires us to weigh the testimony, which it is not our province to do. The plaintiff claims also that there was no evidence offered as to the natural shrinkage of wheat in transit, and that, had there been, he was prepared to offer evidence of a specific shipment of wheat to New Orleans in which there was not so much as a pound of shrinkage. We think it was not necessary that evidence be offered of this fact which seems to be so well known that the courts will take judicial notice of it. As observed, the Legislature has recognized it as an established fact. Nor would the evidence which plaintiff claims to have been prepared to offer have been sufficient, in our judgment, to disprove the fact that there is a natural shrinkage in grain of that kind. Whether any such shrinkage occurred during a specific shipment could hardly be determined without assuming the absolute accuracy of the initial and receiving weights. The season of the year and other conditions when the shipment was made might become material. Besides, judicial notice dispenses with proof. *Insurance Office v. Woolen-Mill Co.*, 72 Kan. 41, 82 Pac. 513. In the present case it appears that the grain was shipped in July, soon after it was threshed, and the jury may have drawn to their aid their general information of the conditions at that particular time and may have made even a larger allowance for natural shrinkage.

The fourth car of grain was shipped from Kansas City to the plaintiff at Perry. It was weighed at Kansas City, November 26, 1909, and, according to the evidence, weighed 59,970 pounds. It was weighed December 5th, ten days later, at Armstrong, when the contents were found to be 3,970 pounds less than when weighed on November 26th. There is a dispute in the evidence as to when this car came into possession of the defendant, or in whose possession it was for the ten days that intervened between November 26th and December 5th. The net weight of this car on the track scales of the company at Armstrong was determined according to the marked or stenciled tare of the car, while the net weight at Kansas City was determined by the actual weight of the grain. In the brief of the defendant it is claimed that there was no evidence tending to show that the defendant received the car before December 5th, or that the defendant

was responsible for its contents during the ten days. It is also claimed by the defendant that the evidence showed that this car was received by the U. P. Elevator on November 26, 1909, and it is admitted that the defendant has no interest in that elevator. While the discrepancy in this instance was very large, amounting to 68 bushels, we cannot say that there was no evidence to sustain the finding of the jury that there was no loss while the car was in the possession of the defendant. We are unable to say from the evidence abstracted by the parties that there was no evidence to sustain the verdict or that the plaintiff was denied a fair trial.

It follows that the judgment will be affirmed. All the Justices concurring.

HOLMES et al. v. HOLT.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT (§ 19*)—EQUITY (§ 39*)—RIGHT TO DISMISS—PROCEEDINGS IN EQUITY—ACCOUNTING.

When a court of equity acquires jurisdiction of an action brought to determine whether certain conveyances are, in fact, mortgages, although purporting to be deeds, it will retain jurisdiction for the purpose of adjudicating all differences between the parties growing out of the transaction.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 33-36; Dec. Dig. § 19; **Equity*, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

2. MORTGAGES (§ 199*)—HOLDING UNDER DEEDS GIVEN AS MORTGAGES—MEASURE OF DAMAGES.

Where in such case the party, purporting to be the grantee, acquires peaceable possession of the premises in question believing that he is the owner thereof, the damages to be awarded therefor in a judgment in favor of the adverse party is the ordinary rental value for the time such possession is retained, less the value of the permanent improvements made thereon by such party in possession.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 513-525; Dec. Dig. § 199.*]

3. INTEREST (§ 33*)—CONTRACTS—ENFORCEMENT.

Rates of interest, not exceeding 10 per cent. per annum, agreed upon by the parties to a transaction, will be allowed by the courts.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 68-70; Dec. Dig. § 33.*]

Appeal from District Court, Shawnee County.

Action by W. H. Holmes and others against F. H. Holt. Judgment for defendant, and plaintiffs appeal. Affirmed.

W. R. Hazen, of Topeka, for appellants. Wheeler & Switzer, of Topeka, for appellee.

SMITH, J. [1] This action was brought by appellants in equity to have two deeds adjudged mortgages and for an accounting. The appellee answered that he was the owner of the land and asked that his title thereto

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be quieted. A trial was had in the district court and a judgment was entered that the deeds were, in fact, mortgages given to secure loans of money. By consent of the parties the hearing as to the accounting was continued. Thereafter appellants moved to dismiss their action for an accounting. The motion was overruled, and this ruling is vigorously urged as error. It is even urged that upon the filing of such motion the court lost jurisdiction of the case. The following authorities are cited in support of the contention: *Banking Co. v. Ball*, 59 Kan. 55, 51 Pac. 899; *Osborne v. Davies*, 60 Kan. 695, 57 Pac. 941; *Pugsley v. Railway Co.*, 69 Kan. 599, 77 Pac. 579. These cases are in accordance with section 395 of the Code of Civil Procedure (Gen. St. 1909, § 5990). No part of the controversy between the parties in any of the cases had been finally submitted for the determination of the court. This case is very different. The principal claim asserted by appellants and denied by appellee was that the instruments purporting to be deeds of absolute conveyance were given by appellants and received by appellee only as security for the repayment of money loaned by appellee to appellants. This issue had been tried and determined in favor of appellants and a judgment had been formally entered that the instruments were in effect mortgages. The appellee had joined issue on that question, but the appellants in their so-called second cause of action had prayed for an accounting. Also, by consent of both parties, an accounting had been ordered and the case was continued for further hearing before the court. Thereupon the appellants filed a motion "to dismiss the pending part of said suit pertaining to an accounting between plaintiff and defendant herein without prejudice to the rights of either party." At least, after the order for an accounting had been made the right to have such an order made did not subsist as a cause of action.

By the petition, however, it appeared that the appellee had rights accruing to him in the transactions which in equity should be determined in the same action in which his deeds were declared to be mortgages. When a court of equity acquires jurisdiction of an action brought to determine whether certain conveyances are, in fact, mortgages, although purporting to be deeds, it will retain jurisdiction for the purposes of adjudicating all differences between the parties growing out of the transaction. *Lane v. Beitz*, 99 Ill. App. 342; *Trammell v. Craddock*, 100 Ala. 266, 13 South. 911; 1 Cyc. 418. Thereafter the appellee on his motion was allowed to answer, setting forth his claims to and liens upon the property, and did so in accordance with the decision of the court that his deeds to the property did not constitute a full conveyance thereof but were given to secure the payment of indebtedness. The

appellees do not appear to have filed any reply thereto. Thereafter the court appointed a referee to take the evidence and report to the court the law and facts of the case. The referee heard the evidence and gave all parties a fair opportunity to be heard and made his report to the court. On consideration thereof it appeared to the court that justice required that other facts should be determined than those reported upon and re-referred the matter to the same referee and a second report was made. Numerous objections are made to the findings of fact and conclusions of law made, but we think the record shows that the investigation was conducted with great thoroughness and that the referee's conclusions of law, approved by the court, are correct.

[2] It is especially contended by appellants that the appellee wrongfully took possession of one of the tracts of land upon which alfalfa was growing, and that he derived therefrom crops of alfalfa of much greater value than the ordinary rental value of the land for the time, and that he should be charged with the value of what he actually received therefrom and should not be credited for improvements made on the land. The evidence, however, justified the finding which was made, in substance, that both the appellants and the appellee during that time treated the land as the property of the appellee and contracted with reference thereto as such, and that appellee believed that it was his property. Under such circumstances, it was correctly reported by the referee and decided by the court that the ordinary rental value was the true measure of value to which the appellants were entitled. If, under these circumstances, the appellee had derived no real benefit from the use of the land, the appellants would have been entitled to recover the ordinary rental value thereof. To hold otherwise would make the measure of damages purely speculative, depending upon results.

[3] Numerous other objections are made to the judgment finally rendered, including the rate of interest charged on certain sums under varying conditions. We have examined all these objections and have considered all the arguments made thereon and find that a fair solution of the numerous questions involved was reached and that the judgment is equitable to both parties.

The judgment is affirmed. All the Justices concurring.

HINTHORN v. BENFER.†

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 164*)—INJURIES FROM DEFECT—LIABILITY OF LANDLORD.
A narrow porch or landing of an outside stairway used and intended for the use of dif-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 13, 1913.

ferent tenants of a building, and connected with a common hallway, is part of the stairway itself, and necessarily in the possession and control of the landlord, and he is bound to exercise reasonable care to render it safe for the use which he invites others to make of it.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630-637, 639, 641; Dec. Dig. § 164.*]

2. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECTS—QUESTION FOR JURY.

Whether the landlord in this case was guilty of negligence in failing to discover the defective condition of the landing was a question of fact for the jury, and it was error to sustain a demurrer to the evidence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 169.*]

Appeal from District Court, Brown County.

Action by Jesse B. Hinthorn against Hugh H. Benfer. From judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

S. M. Brewster, of Topeka, and Sample F. Newlon, of Hiawatha, for appellant. C. F. Reavis, of Falls City, Neb., and Means & Archer, of Hiawatha, for appellee.

PORTER, J. To recover damages for the death of his wife, a tenant sued his landlord, alleging that her death was caused by the carelessness and negligence of the defendant in the construction and maintenance of the railing of a porch on the demised premises. The court sustained a demurrer to the plaintiff's evidence, and rendered judgment against him for costs, from which he appeals.

The defendant owned a two-story stone building in the city of Hiawatha. The lower part was occupied for store purposes; the upper part was divided into two tenements, separated by a hall running north and south, the house fronting north. The plaintiff rented the east side, and the other side was occupied by another tenant of the defendant. The only way to enter the premises was by two stairways, one on the north, and one on the south; both leading to the hall which ran the whole length of the building. At the south and rear end of the hall a door opened upon a porch or landing place, from which a stairway led to the ground. The hall and both stairways were used by the tenants in common. The rear porch was five feet wide north and south, and nine feet long east and west. The railing on the west side of this landing consisted of a 2x4 nailed to two uprights, one of which was fastened to the wall of the building. There was testimony tending to show that the end of the rail which rested upon the upright next to the building had become rotted and to some extent decayed, and that the nails by which it was fastened were rusted. The plaintiff and his family had occupied the premises as tenants of the defendant for more than ten years. On the night of the accident the plaintiff's wife took a broom, and went out

to sweep the snow from this porch. The evidence tended to show that she fell against or in some way came in contact with the railing, that, it gave way, and she fell to the ground, and was killed.

[1] The defendant claims that for two reasons the demurrer was rightly sustained. First, it is claimed the evidence shows conclusively that the porch or landing place was not in the common use of both tenants, but that each tenant had the use and possession of one-half thereof; and that, since the landlord is under no obligations to repair premises in the possession and control of the tenant, he cannot be held liable in this case. There was some evidence by the plaintiff that it was customary for his family to make use of that portion of the porch on their side of the doorway for the purpose of storing wood and household utensils, and that the other side was used in the same way by the other tenant. It is conceded that, if the place was used as a common porch by both tenants, then it was in the possession and control of the landlord, and he was bound to exercise reasonable care to keep it in a safe condition. We have no hesitation in holding that this narrow porch or landing was as much in the common use of both tenants as was either the hall or the stairway itself. The mere fact that the tenants divided the use of the floor of the porch for the purpose of keeping some of their household effects separated was not, in our opinion, sufficient to show that half of the porch was in the possession of one tenant and half in the other. The stairway, which appears from the photograph in evidence to have been about four feet wide, led from the center of the landing, leaving a space on either side of about 2½ feet. The hall and stairway are conceded to have been for the common use of both tenants, and it seems unreasonable to hold that the narrow space on either side of the passageway leading from the hall to the stairway was not as much in the possession and control of the landlord as were the stairs and hallway themselves. Where a portion of the building is let, and the tenant has rights of passageway over stairs and entries in common with the landlord and other tenants, the landlord is bound to exercise reasonable care to render the halls and stairways safe for the uses which he invites others to make of them. *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Readman v. Conway*, 126 Mass. 374. The facts speak for themselves; the law is so well settled that it is unnecessary to cite other authorities.

[2] The other ground upon which it is said the demurrer was sustained is that the alleged defect conclusively appears from the evidence to have been a latent one, and therefore no negligence of the defendant was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shown. Some stress is laid upon the fact that the plaintiff in his petition, possibly for the purpose of avoiding the imputation of contributory negligence, alleged that the defective condition of the railing was unknown to himself or his wife, and that it was not apparent from an examination of the railing. In addition to this statement in the petition, the plaintiff testified that he thought the railing was safe; that there was nothing to indicate to him that it was unsafe; and that he presumed it would have been necessary to remove the rail before its decayed condition could have been discovered. He testified, however, that he never had made any examination of its condition before the accident. He was asked by the court this question: "Looking at it, would you say there was anything that night from mere observation that would enable anybody to determine the actual condition it was in? A. I think not." The direct question was asked him: "Could that have been discovered, in your judgment, without removing the rail from the post? A. I don't believe it could have been."

It is altogether probable that this was the principal ground upon which the court sustained the demurrer. We think it was error, and that the question of whether the defendant was guilty of negligence in not discovering the defective condition of the railing was one which should have been submitted to the jury. If this were a question of pleading, and the old rule was literally enforced that the averments of the pleading are always to be construed against the pleader, possibly a different question would arise (*Losch v. Pickett*, 36 Kan. 216, 222, 12 Pac. 822; 31 Cyc. 81); but we think the language of the pleading means, giving it a liberal construction, that the defect could not have been discovered by a casual examination. The petition does allege that defendant could have discovered it by the exercise of reasonable care on his part. It is very clear that there was no such obligation resting on the plaintiff or his wife to inspect the railing for the purpose of discovering whether it needed repair as rested upon the defendant. They were under no obligations to repair and were warranted in using the premises, unless the defect was one which was so apparent that it was negligence to continue such use. There was no obligation on their part to look further. On the other hand, as to that part of the building used in common by both tenants, the landlord was necessarily in control, for the reason that he maintained it for the common use of both tenants, and was bound to see that reasonable care and skill were exercised to render it reasonably fit for the uses for which it was intended. The evidence tends to show that no alteration or repairs had been made in the railing from the time the porch was constructed ten or twelve

years before; that about three months previous to the accident plaintiff told the defendant the stairway needed fixing. Defendant said he knew that it ought to be fixed, and he would attend to it. There was nothing said about the railing or the porch. Some time thereafter the defendant made some repairs to the stairway and to the floor of the porch. Conceding that plaintiff is bound by his unequivocal statements that the defect could only be discovered by such an examination as required that the railing be lifted up, he was at least entitled to have the question submitted to the jury whether defendant was not guilty of negligence in failing to make such an inspection and examination as would have disclosed the defective condition of the railing.

The judgment will be reversed, and a new trial ordered. All the Justices concurring.

LASLEY v. STOUT et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 54*)—TITLE OF VENDOR.

The title of a vendee of real estate who has fully performed the contract of purchase and taken and held possession for many years, and paid all taxes upon the property, is a complete equitable title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 85; Dec. Dig. § 54.*]

2. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE OF OUTSTANDING TITLE.

One who takes a quitclaim deed from the vendor of real estate many years after the vendee has performed the contract, without inquiry or examination concerning outstanding equities, is in no better position respecting the title than his grantor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. § 231.*]

3. VENDOR AND PURCHASER (§ 224*)—BONA FIDE PURCHASER—NOTICE OF OUTSTANDING EQUITIES.

The fact that a party pays taxes upon real estate is evidence that he claims some interest in the property, which should lead one taking a quitclaim deed therefor to inquire concerning his rights.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 469-473; Dec. Dig. § 224.*]

Appeal from District Court, Scott County.

Action by A. R. Lasley against L. M. Stout and others. From a judgment for defendants, plaintiff appeals. Reversed.

J. S. Simmons and Ray H. Tinder, both of Hutchinson, for appellant. E. P. Rochester, of Scott City, and W. H. Russell, of La Crosse, for appellees.

BENSON, J. In this action to quiet title to a lot in Scott City, it appeared that the Scott City Town Company entered into a contract with Cornelia C. Orr, in March, 1886, to convey to her the lot in question in con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sideration of her building a dwelling thereon of the kind and dimensions described in the agreement. It was agreed that the building should be commenced within 30 days and completed within 60 days and that the conveyance should be made within two years from the date of the contract. If the building should be removed within two years the title was to revert to the town company. The plaintiff is the grantee of Cornelia C. Orr. The answer contained a general denial, allegation of title in the defendants, and a counterclaim to quiet that title. The court made the following findings: "First. That the contract of gift or sale was made by the Scott City Town Company to Cornelia C. Orr to the lot in controversy as claimed by the plaintiff, and that Cornelia C. Orr erected a building on said lot within the time and substantially in accordance to the terms of the contract. Second. That such building remained upon the lot for more than two years and until about the year 1896 or 1897, when it was removed therefrom and the lot became unoccupied and so remained for a period of ten years or more, and was so vacant and unoccupied in January, 1906. Third. That Cornelia C. Orr paid the taxes on the land from the time of the erection of the building until 1906, inclusive. Fourth. That in January, 1906, D. F. Hall, as president, and F. A. Parsons, as secretary, of the Scott City Town Company, executed a quitclaim deed to the defendant Myrtle M. Welfey to the lot in controversy, and that such deed was for a consideration of \$10. Fifth. That at the time of receiving such deed and paying therefor, Myrtle M. Welfey had no notice of the equity or rights of Cornelia C. Orr to the property in question. Sixth. That at the time of such purchase said Myrtle M. Welfey had neither actual nor constructive notice of the interests of Cornelia C. Orr, nor was there in the condition of the lot in controversy anything to suggest an adverse claim. Seventh. That said Myrtle Welfey purchased without direct inquiry as to the condition of the lot or outstanding equities. Eighth. That the Scott City Town Company had been for a period of 17 years prior thereto a dormant corporation and had supposedly wound up its affairs and distributed its assets among its stockholders; and the deed to Myrtle M. Welfey was made without specific authority by the board of directors, or so far as the evidence discloses was not pursuant to any theretofore given authority. Ninth. That Cornelia C. Orr, by her conveyance to the plaintiff, A. R. Lasley, transferred to him all of her rights to the property under the contract with the Scott City Town Company. Pertinent to the foregoing findings of fact, the court concludes as a matter of law: First. That on and after seven years from the date of the contract of Cornelia C. Orr and the Scott City Town Company, the right to enforce the same lapsed by reason of the

statute of limitations, and that such right did not thereafter exist in her or pass to plaintiff herein under his contract of assignment." Error is predicated upon the conclusion of law, and judgment for the plaintiff is sought upon the findings.

[1] The pleadings did not present the question of limitations; nor does it appear that the right of the plaintiff to the relief sought is barred by lapse of time. The vendee of the town company complied with her agreement, erected the building, and held the possession for over ten years until the building was removed. Her right was that of a vendee under a contract fully performed on her part. She was the equitable owner and the town company was only the trustee of the legal title. *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115; *Gordon v. Munn*, 87 Kan. 624, 633, 125 Pac. 1.

[2, 3] The defendant Myrtle M. Welfey, as the findings show, took a quitclaim deed for a consideration of \$10 without inquiry concerning the condition of the lot or equities affecting the title. A grantee under such a deed is not a bona fide purchaser with respect to outstanding equities shown by the records, or which are discoverable by reasonable diligence in making proper inquiries and examination. *Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243; *Merrill v. Hutchinson*, 45 Kan. 59, 25 Pac. 215, 23 Am. St. Rep. 713. Notice must be taken of the claims of persons ostensibly interested. *Eger v. Brown*, 77 Kan. 510, 513, 94 Pac. 803, 15 L. R. A. (N. S.) 459. Thus notice must be taken of the payment of taxes or redemption therefrom shown by the public records which are evidence that the party making such payments claims some interest in the property which should lead to inquiry concerning his rights. *Smith v. Rudd*, 48 Kan. 296, 29 Pac. 310; *Hudson v. Herman*, 81 Kan. 627, 107 Pac. 35.

It will be observed that the taxes were paid upon this lot by Mrs. Orr, the vendee of the town company, from the time she erected the building to and including the year 1905, a period of 17 years. As the quitclaim deed to Myrtle M. Welfey was made in January, 1906, the last payment must have been made within three months preceding its date, leaving no taxes delinquent. Considering the payment of taxes by Mrs. Orr, her previous open and adverse possession, and all the circumstances disclosed by the findings, it must be held that the defendant Myrtle M. Welfey, claiming under the quitclaim deed, is in no better position respecting the title than her grantor, the town company, conceding that the conveyance was properly executed by its officers or former officers in the circumstances stated in the eighth finding. The conclusion of the district court that the contract for conveyance made by the town company could not be enforced after seven years is not pertinent to the issue.

Specific performance was not sought. The plaintiff as grantee of a complete equitable title sought only to quiet that title as against the claims of the defendants. Upon the facts found by the court he was entitled to that relief.

The defendants seek to impeach the equitable title of the plaintiff by evidence taken since this appeal was filed tending to show that a contract between the town company and Mrs. Orr upon which an attorney was requested to obtain a deed related to another lot. Upon this evidence the defendants ask that in the event of a reversal of the judgment a new trial be awarded. The new evidence tends to show a mistake merely. There is no question but the lot in controversy was the one upon which the building was erected. The town company made no objection to the improvement, or the use of the lot by Mrs. Orr for many years. Probably a mistake was made by the representative of the vendee in sending the wrong instrument to the attorney who was asked to obtain the deed. In any event, no sufficient cause is shown for a retrial of the issues.

The judgment is reversed, with directions to render judgment for the plaintiff quieting title as prayed for. All the Justices concurring.

STATE v. HECHT.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 576*)—RIGHT TO DISCHARGE FOR DELAY—"TIME TO TRY THE CAUSE."

The statute providing for the discharge of a defendant who is not brought to trial before the end of the third term of court after the information is filed is qualified by exceptions therein, excluding from its operation a delay happening upon his application or occasioned by want of time to try the cause at such third term. Gen. St. 1909, § 6800. The latter clause refers to the time that can be reasonably given for the trial, consistent with an orderly assignment of causes and diligent dispatch of business.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.*]

2. CRIMINAL LAW (§ 576*)—DISCHARGE FOR DELAY—HEARING ON MOTION—AFFIDAVITS.

A continuance was ordered at the third term held after the information had been filed. The entry recited that the continuance was ordered because of the illness of the county attorney which prevented him from trying the cause at that term. Notwithstanding this finding, the district court did not err in considering affidavits at the next term upon a motion to discharge the defendant to determine the fact whether the illness of the county attorney at the third term left sufficient time to try the cause within the rules above stated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297-1304; Dec. Dig. § 576.*]

Johnston, C. J., and Benson and Burch, JJ., dissenting.

Appeal from District Court, Shawnee County.

Charles Hecht was discharged from prosecution for robbery, and the state appeals. Affirmed.

J. S. Dawson, Atty. Gen., and W. F. Atchison and E. R. Simon, both of Topeka, for the State. J. S. Ensminger and P. C. Wilson, both of Topeka, for appellee.

BENSON, J. [1] This appeal is from an order discharging the defendant from prosecution for robbery, because he had not been brought to trial before the end of the third term of the court held after the information was filed. The statute provides for such discharge unless the delay happen on the defendant's application, or be occasioned by the want of time to try the cause at such third term. Gen. Stat. 1909, § 6800. The reason for the failure to try this cause at the third term is stated in the order of continuance entered at that term, which recites: "And the court finds that this case had not been tried at this term because of the illness of the county attorney, which prevented him from trying this case." The motion for discharge was presented at the term to which the case was continued, and affidavits of the county attorney, his assistant, and the defendant's attorney were presented. These affidavits give, in substance, the history of the case and its progress through the three terms, from which it appears that the third term was that of September, 1912, beginning September 3d. At that term the presiding judge assigned civil causes for trial first, the criminal cases to follow, beginning on November 11th. It was then believed by the judge and county attorney that there would be sufficient time between that date and the close of the term to dispose of the criminal cases. On December 1st, and before this cause was reached, the county attorney became ill and was unable to attend court. A prosecution for murder was thereupon reassigned for December 16th, upon the belief that the county attorney would then be able to attend the trial, and later that trial was postponed to the 22d of the same month, but, the county attorney being still ill, his assistant, who was familiar with the facts, attended to the prosecution.

The only reasons stated in the statute for continuing a prosecution beyond the third term are delays which happen on the defendant's application, and want of time to try the cause. It has been held, however, that when a jury fails to agree, the term at which the mistrial occurs is eliminated from the computation. *State v. Morgan*, 84 Kan. 625, 627, 114 Pac. 846. It has also been held that terms intervening while an appeal is pending should not be counted. *State v. Campbell*, 73 Kan. 688, 95 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203.

It was said in *State v. Dewey*, 73 Kan. 735, 742, 85 Pac. 796, 88 Pac. 881, 882, that: "Many courts have said that the enumeration of some causes for delay does not exclude all other causes, and have held that where the delay at the third term is occasioned by the illness or death of the trial judge or prosecuting attorney, or the occurrence of some unforeseen accident, the accused is not entitled to his discharge. *People v. Camilo*, 69 Cal. 540 [11 Pac. 128]; *State v. Huting*, 21 Mo. 464. Without passing on that question, it is, we think, obvious that no cause for delay such as contemplated by the statute occurred in the present cases." Illness of the presiding judge was held to be an exception under a similar statutory provision in California. *People v. Camilo*, 69 Cal. 540, 11 Pac. 128. The same ruling was made in Missouri, under a statute containing the same exceptions as our own. *State v. Huting*, 21 Mo. 464.

In *Commonwealth v. Adcock*, 8 Grat. (Va.) 661, it appears to have been held that the exceptions enumerated in the Virginia statute did not exclude consideration of others of a similar nature to be implied from the reason and spirit of the law. The court said: "It might be inquired what would be done in a case where the prisoner was too sick to be tried within the three terms, or were to ask for a continuance, or did not choose to do so if he could. * * * The truth is the statute never meant, by its enumeration of exceptions, or excuses for failure to try, to exclude others of a similar nature or in pari ratione. * * *" 8 Grat. (Va.) 681. Similar rulings were made in *Stewart v. State*, 13 Ark. 720, and *State v. Mollineaux*, 149 Mo. 646, 51 S. W. 462.

It was said in *State v. Dewey*, 73 Kan. 739, 85 Pac. 797, that: "Before a defendant is entitled to such an order he must bring himself clearly within the spirit and intention of the statute. Its purpose was not to enable the guilty to escape upon technicalities, but to shield the innocent by preventing unnecessary and unreasonable delays." Guided by this just rule of interpretation we must inquire what is fairly comprehended in that clause of the statute excepting delays occasioned for want of time to try the cause. Circumstances may arise where the postponement of other and perhaps more important cases would leave sufficient time, although such postponements might be attended with great expense and possible failures of justice. The illness of the judge, referred to in cases reported, already cited, may leave insufficient time. Illness of a juror might leave the time too short to finish a trial. These and like contingencies suggest that "the time to try the cause" means such time as should reasonably be given for that purpose consistent with the orderly assignment of causes and the diligent dispatch of business. The right of the defendant is not to be frittered

away by an arbitrary assignment of the business of a term, so as to leave too short a time. Neither is it required that an orderly assignment of cases shall be set aside, in order to try a particular defendant, even at the third term after the information is filed. The rights of a defendant to a speedy trial, as well as his other rights, should be carefully guarded, but the interests of the public and rights of other defendants must also be protected. The business of a court should be conducted in due time and regular order, safeguarding so far as possible the rights of all concerned.

[2] This case was assigned for trial in the first division of the district court at the September term. At the following January term it was assigned in the second division. Presuming that the judge presiding in that division interpreted the statute as this court does, it must have been found from the affidavits presented that the previous finding that the case had not been tried because of the illness of the county attorney was, upon further consideration, found incorrect in fact, or that the finding only meant that the continuance, although caused by the illness of that officer, might have been avoided if his assistants had been diligent in the discharge of their duties.

It is the opinion of this court that the affidavits presented a question of fact upon which such a conclusion could be reached; and, the facts having been so finally determined, the judgment must be affirmed.

MASON, SMITH, PORTER, and WEST, JJ., concurring.

BENSON, J. (dissenting). I construe the finding made at the September term to mean that the illness of the county attorney prevented the trial at that term, because it left insufficient time. No judicial reason is otherwise apparent for the recital. The illness of the prosecuting officer required no recital in the entry, unless it was the cause of the continuance, and it could not be a good cause unless the time left was insufficient for the trial. That finding should govern unless the court afterwards found that it was based upon a mistake, or unless some other sufficient reason appeared for availing it. It was made by direction of the judge upon personal observation of the business of the term with adequate information of the physical condition of the county attorney and the work done by his assistants. After carefully reading the affidavits presented at the hearing of the motion at the January term no sufficient grounds appear for questioning the facts stated in the former order. In my opinion that order should prevail and the judgment discharging the defendant should be reversed.

JOHNSTON, C. J., and BURCH, J., join in this dissent.

SMITH v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 145*)—CONDEMNATION—COMPENSATION—RIGHT OF WAY.

When the right of way for a railroad has been previously appropriated and paid for by the corporation, and thereafter additional lands are appropriated by the corporation for shop grounds and terminal facilities, the provision of section 4, art. 12, of the Constitution of Kansas that compensation shall be made "irrespective of any benefit from any improvement proposed by such corporation" does not apply to the compensation to be paid for such additional grounds.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. § 145.*]

2. EMINENT DOMAIN (§ 90*)—CONDEMNATION—DAMAGES TO LAND NOT TAKEN.

In such case no allowance should be made as damages to adjacent lands not taken, unless such lands are reduced in value by the taking of the land appropriated, or the use to be made thereof.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 233; Dec. Dig. § 90.*]

3. EMINENT DOMAIN (§ 148*)—CONDEMNATION FOR RIGHT OF WAY—AWARD—INTEREST.

In such case, where an appeal is taken from the award of damages to the district court and the case therein is tried to a jury, the jury should compute and allow interest, at the rate of 6 per cent. on the amount determined upon as damages, from the time of the appropriation of the land, and include the same in their verdict.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 397-399½; Dec. Dig. § 148.*]

4. EMINENT DOMAIN (§ 263*)—AWARD—REVIEW—VERDICT—DETERMINATION ON APPEAL.

When in such case it clearly appears from the findings of the jury that no interest has been included in their verdict, and it also clearly appears from such findings, from the admission of the party to be charged or other incontrovertible evidence, from what date interest should be allowed, the court may compute the interest and include it in the judgment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 687; Dec. Dig. § 263.*]

(Additional Syllabus by Editorial Staff.)

5. EMINENT DOMAIN (§ 59*)—CONDEMNATION FOR RAILROAD PURPOSES—CONTINUING RIGHT.

The right given railroad companies under Gen. St. 1909, § 1800, to condemn land for shop grounds and terminal facilities, is a continuing one, and may be exercised whenever the business of the railroad company renders such further acquirement necessary.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 143-145; Dec. Dig. § 59.*]

6. EMINENT DOMAIN (§ 145*)—COMPENSATION—"RIGHT OF WAY."

The term "right of way" as used in Const. art. 12, § 4, providing that no right of way shall be appropriated until compensation be made or secured, means the strip of land ordinarily condemned or acquired by railroad companies for the building and maintaining of grades, and the ties and rails thereon constituting the railroad track, and not exceeding 100 feet in width, as provided by Gen. St. 1909, §

1800, and does not include additional lands appropriated for shop grounds and terminal facilities; and hence the additional provision of such section that compensation shall be made irrespective of any benefit from any improvement proposed" does not apply to compensation to be paid for such additional grounds.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6230-6234; vol. 8, pp. 7790, 7791.]

Appeal from District Court, Barbour County.

Action by W. R. Smith against the Missouri Pacific Railway Company. From judgment for plaintiff, defendant appeals. Modified.

W. P. Waggener and J. M. Challiss, both of Atchison, and Clyde Alphin, of Great Bend, for appellant. Osmond & Cole, of Great Bend, for appellee.

SMITH, J. The appellant railway company in May, 1910, secured the condemnation of a tract of land, containing 4½ acres, belonging to the appellee, and situate near the town of Holsington, Barton county. The land was taken for shop grounds and terminal facilities. In July following, the appellant also secured for the same purpose the condemnation of two additional tracts, in one proceeding, the two aggregating 1.61 acres, belonging to the appellee. The appellee, being dissatisfied with the award of damages in such condemnation proceedings, appealed from both awards to the district court. When the cases came on for trial therein they were consolidated and tried as one, the jury being required to return separate verdicts. On March 13, 1912, the jury returned the verdicts and answers to special questions submitted. The first verdict awarded the appellee as damages \$2,531.25 for the land first condemned. The second verdict awarded appellee damages in the sum of \$700 by reason of the second condemnation. In answer to special questions the jury found that each of the three tracts of land condemned was of the value of \$225 per acre at the time of the condemnation, making \$2,531.25 for the large tract, and \$362.25 for the two smaller ones. They also found that the value of appellee's land that was not taken was more valuable after the taking of the condemned land than it was before such taking. The jury, however, allowed the appellee as damages to his land not taken the sum of \$337.75. The appellant filed a motion for a new trial, and also a motion to conform the general verdict to accord with the special findings by reducing the general verdict in the sum of \$337.75, being the amount allowed in the general verdict as damages to the land not taken. The motion to reduce the general verdict was overruled by the court, and thereupon the appel-

lant, by leave of court, withdrew its motion for new trial. Thereafter, during the same term of court, the matter came on for further consideration upon the demand of appellee that the damages awarded should bear interest from the time of the taking of the land in controversy. The appellant objected thereto, and the court took the matter under advisement until April 26, 1912, during the same term, when the court awarded judgment in favor of the appellee in the sum of \$2,893.50 as damages to the land taken, and \$337.75 as damages to the land not taken, together with interest on the aggregate judgment at the rate of 6 per cent. from July 9, 1910, the date upon which the appellant made deposit with the county treasurer under the award of the commissioners, to the date of the rendition of the judgment, the interest amounting to \$367.36, and for the costs of the action. In its appeal here the appellant assigns two grounds of error, viz., the allowing of damages to the land not taken and the allowance of interest.

[1, 6] Section 4, art. 12, of the Constitution of Kansas, reads: "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation." The term "right of way," as used in this section of the Constitution, means the strip of land ordinarily condemned or acquired by railroad companies for the building and maintaining of grades, and the ties and rails thereon constituting the railroad track. Section 1800, General Statutes of 1909, may be said to be the legislative definition of the term, and is, in substance, a route for a proposed railroad along the line of such proposed railroad, as located by the company, not exceeding 100 feet in width, except (when) for the purposes of cuttings and embankments it shall be necessary to take more for the proper construction and security of the road.

[5] The provision in this section for the condemnation of such other land as may be deemed necessary for side tracks, depots, workshops, water stations, etc., seems to be a separate provision. The power to acquire rights under the latter provision is a continuing one, and may be exercised whenever the business of the railroad company renders such further acquirement necessary. *C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co.*, 28 Kan. 669.

[2] We conclude, therefore, that lands acquired by eminent domain proceedings for side tracks, depots, workshops, etc., unless included in the 100-foot strip provided for, are no part of the right of way of the railroad company as that term is used in the constitutional provision. It follows that damages assessed for the condemnation of land for workshops and terminal facilities are to

be paid for as lands condemned for mill sites and other semipublic purposes, to wit, the value of the land taken and actual damages to lands not taken, resulting from the taking of the land condemned, or the use to be made thereof. For instance, if a part of a building lot in a city or town should be taken in such a way as to leave the portion remaining of no practical value, the value of the lot before taken may be the proper measure of damage. If, however, as the jury find in this case, land not taken was of greater value after than immediately before the taking of the adjacent portion, no recovery for damages to the land not taken should be allowed. The court erred in rendering judgment for the damages to the land not taken. *Harding v. Funk*, 8 Kan. 315.

In *Toble v. Com'rs of Brown Co.*, 20 Kan. 14, the increased value of lands not taken in a proceeding condemning land for a public highway, being the direct and special result of the laying out of the road, is held to be a proper set-off to reduce the damages of the landowner. See, also, *Com'rs of Pottawatomie County v. O'Sullivan*, 17 Kan. 58, and *Roberts v. County of Brown*, 21 Kan. 247.

[3, 4] The second alleged ground of error is that the court erred in awarding appellee interest from the date of the deposit of money to pay for the land condemned to the date of the judgment. It is conceded by appellant that if appellee had asked for interest, and the evidence made it definite for what time the interest should be computed, the appellee was entitled to interest at the rate of 6 per cent. for such time. It is insisted, however, that if appellee was entitled to interest, the jury should have computed the interest and included the amount thereof in its verdict as part of the damages; or, if the jury had found the dates between which interest was recoverable and the court had nothing to do but compute the amount, the court might properly have made the computation and included the amount in the pleading. There were no pleadings in this case, and hence the trial was rather informal; but it is urged that the attorney for appellee, if interest was desired, should have so stated in his opening statement to the jury, and it is asserted that no claim for interest was made in the opening statement or during the trial. The appellant's abstract of the proceedings does not affirmatively show that any opening statement was made, or that any argument was made to the jury by appellee's attorneys. Opening statements are usually confined to the facts the attorney expects to prove, and, after the introduction of the evidence and giving of instructions, the arguments of counsel are intended to assist the jury in arriving at a proper verdict in accordance therewith. It is also said there was no request for an instruction regarding interest, and no mention of the subject in the instructions given. The verdicts

returned by the jury, with the answers to the special questions, affirmatively show that the jury did not include any interest in either verdict. The appellee was clearly entitled to interest, and the deposit made by the appellant fixed the date of the appropriation of the land. From that date interest should have been computed. The date was fixed by the record, and was not in dispute. Although the manner of determining the amount of interest recoverable was irregular, it is clear that appellant was not prejudiced thereby, and the case will not be remanded by reason of the irregularity.

It is therefore ordered that the judgment be modified as follows: The amount allowed by the jury, viz., \$337.75, for damages to the land not taken is to be deducted from the sum of the two verdicts; interest is to be computed on the remainder thus obtained at the rate of 6 per cent. from the date of the deposit to the date of the rendition of the judgment, and the interest added to such remainder, and judgment is to be rendered for such sum as of the date of the judgment appealed from, and this judgment should bear interest. Judgment should also be rendered against the appellant for the costs of the action. The costs in this court will be equally divided. All the Justices concurring

a creditor appealed to the district court, and on reversal of that order the executrix appeals. Reversed.

Bishop & Cobbs, of St. Louis, Mo., and Kimball & Osgood, of Parsons, for appellant. Glasse & Burton, of Parsons, for appellee.

JOHNSTON, C. J. Involved in this appeal is the question whether an administrator can be appointed in Kansas in a case where the deceased owned no property in Kansas but did own certain shares of stock in a corporation organized under the laws of Kansas and having its general offices in the state, and is there an appeal from a decision by the probate court refusing to appoint an administrator on the application of one of the creditors of the estate? Alfred I. Miller, a resident of St. Louis, Mo., died in 1911, owning stock in a Kansas corporation called the Tishomingo Electric Light & Power Company, which had its principal place of business in Parsons, Kan. P. T. Foley, who alleged that Miller was indebted to him in the sum of \$43,858.40, and that no will had been filed in any other probate court of the state, and no administration had been commenced in any other county of the state, applied to the probate court of Labette county for the appointment of an administrator, representing that Miller owned stock in the Kansas corporation named, that an executor of the estate had since been appointed in Missouri, and that the claim of Foley had been filed in the court appointing the executor. The probate court refused to appoint an administrator, and dismissed the application, holding that it had no jurisdiction or power to make such an appointment. An appeal from that decision was taken to the district court, where it was held first, that the decision was appealable, and, second, that the probate court had erred in holding that it had no power to appoint an administrator of the estate, and that it was the duty of that court to exercise the power and make the appointment. From that ruling, an appeal was taken to this court.

[1] We have, first, the question, Is there an appeal from a decision of the probate court refusing to appoint an administrator? That court is vested with the power and charged with the duty of caring for the estates of deceased persons and of granting letters of administration. In the executors and administrators act it is provided that an appeal may be taken from certain decisions, and also from "a final decision of any matter arising under the jurisdiction of the probate court, except in cases of habeas corpus and injunction." Gen. Stat. 1909, § 3624.

Whether there shall be administration of the Miller estate is probate jurisdiction, and the decision holding that administration could not be had, and that no administrator of the estate could be appointed in Kansas, was a final decision of the whole merits of the application. The case of Grimes v. Barratt,

MILLER'S ESTATE v. EXECUTRIX OF MILLER'S ESTATE.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 3*)—REFUSAL TO APPOINT ADMINISTRATOR—APPEAL.

An appeal may be had from a decision of a probate court refusing to appoint an administrator and grant administration of the estate of a nonresident intestate, where the decision is based upon the ground that such intestate left no property in the state to be administered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1, 3-14½, 1782; Dec. Dig. § 3.*]

2. EXECUTORS AND ADMINISTRATORS (§ 12*)—SITUS FOR ADMINISTRATION—CORPORATE STOCK.

The situs of shares of capital stock in a Kansas corporation owned by one who was a resident of another state at the time of his death, for purposes of administration, is at the domicile of the decedent, rather than in the state in which the corporation is organized and has its place of business.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 24; Dec. Dig. § 12.*]

Johnston, C. J., and Mason and Smith, JJ., dissenting.

Appeal from District Court, Labette County.

Application for the appointment of an administrator of the estate of Alfred I. Miller, deceased. From denial of the application,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

60 Kan. 259, 56 Pac. 472, is cited as an authority against the right of an appeal from such decision. That case did not determine that there could be no review of a final decision of the probate court refusing administration of an estate; but it did determine that the Legislature had vested large discretion in the probate court in the selection of administrators, and that the exercise of that discretion was not the subject of review or appeal. The statute designates a number of persons who are entitled to administration of an estate in a certain order, and from whom the probate court may make a selection. The competency and suitability of the widow, next of kin, or creditors to discharge the trust is left to the discretion of the probate court, and it was held that such discretion was not reviewable unless it was oppressively and arbitrarily exercised. It was suggested that outside of this discretion a review might be had, and that under the then existing statutes a final order of that kind was open to review in a proceeding in error. Under the new Code proceedings in error had been abolished, and a review of judgments and of final orders of probate courts may now be had by appeal. Civ. Code, §§ 564, 567, 571 (Gen. St. 1909, §§ 6159, 6162, 6166); *In re Pettit*, 84 Kan. 637, 114 Pac. 1071; *Kroenert v. Sawyer*, 87 Kan. 374, 124 Pac. 418.

The decision in the present case did not involve a matter of discretion; but it was a final determination of the case, and left nothing further for the consideration of the probate court. As it effectually terminated the litigation of the question in that court, it was a final order or decision, from which an appeal lies.

[2] Was it the duty of the probate court to appoint an administrator on the application of a creditor of the decedent? Miller was a nonresident of Kansas, and the question is, Did he leave anything here on which to found administration? It has been held that: "Where a person dies intestate, who was not a resident or inhabitant of the state at the time of his death, and who left no estate within the state to be administered, a probate court of the state has no jurisdiction to issue letters of administration on the estate of such intestate, and, where letters are issued, the acts of the court in doing so are utterly null and void." *Estate of Mallory v. B. & M. Rld. Co.*, 53 Kan. 557, syl. par. 1, 36 Pac. 1059; *Perry, Adm'r, v. St. J. & W. Rld. Co.*, 29 Kan. 420; *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299.

There was no property in Kansas on which to found administration, unless Miller's ownership of shares of stock in a Kansas corporation furnished a basis. Under the common law and as a general rule the situs of personal property is the residence of the owner, and the title to personalty is in the domiciliary executor or administrator. This

rule may be modified by statute, and it frequently is for taxation and some other purposes. If the general rule applies that the situs of personal property follows the domicile of the owner, and there is nothing in the character of the property to except it from the operation of this rule, then it would seem that the probate court was without jurisdiction to make the appointment. The statute, in terms, provides that: "The stock of any corporation created under this act shall be deemed personal estate." Gen. Stat. 1909, § 1743.

It is contended, however, that shares of stock are unlike ordinary personalty, and that the right under which an owner holds stock is incident to the ownership of the property, and therefore that the situs of his right or interest is the situs of the corporation. The answer to this contention is that, corporate stock having been declared by the Legislature to be personal estate, it necessarily falls into the classification with ordinary personal property, unless the statute expressly gives it a situs elsewhere for purposes of administration. In *Cook on Corporations* it is said: "It is a well-established principle of law that shares of stock may, for certain purposes, have a situs at two separate places at the same time. For the purposes of suits concerning rights to its title, for taxation, and for a few other purposes, shares of stock follow the domicile of the stockholder." 2 *Cook on Corporations* (7th Ed.) § 363.

In *Griffith v. Watson*, 19 Kan. 23, a question arose whether capital stock of a corporation should be taxed at the residence of the owner or in a city in the same county where the corporation was located and engaged in business, and it was held that the stock was taxable at the residence of the owner. This ruling was made upon the theory that stock was personal property, and came within the common-law rule that the domicile of the owner draws to it all his personal estate, and, besides, this rule was reinforced by the statute which provides that personal property shall be listed and taxed at the place in which the person charged with the tax resides. For purposes of taxation, capital stock may have a situs at more than once place at the same time, and it has been held to be competent for the Legislature to provide that shares of stock may be separated from their owner and given a situs of their own. *Tappan v. Merchants' National Bank*, 86 U. S. (19 Wall.) 490, 22 L. Ed. 189.

In *Covington v. First Nat. Bank*, 198 U. S. 100, 111, 25 Sup. Ct. 562, 565 (49 L. Ed. 963), it was ruled that: "The situs of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to return the stock within the state as the agent of the owner, is at the domicile of the owner."

In *Luce v. Railroad*, 63 N. H. 588, 3 Atl.

618, it was held that: "In the absence of ancillary administration or statutory prohibition, the domiciliary administrator appointed in another state has authority to sell and assign stock of the decedent in a corporation in this state, and the corporation may voluntarily consent to its transfer by accepting the outstanding certificate and issuing a new one to the purchaser" (Syllabus).

In Ohio it was held that shares of stock in a foreign corporation had a situs in Ohio for purposes of taxation, although the corporation was located in another state, and its capital invested in real property in that state. *Bradley v. Bander*, 36 Ohio St. 28, 38 Am. Rep. 547. The same view was taken as to the situs of capital stock for taxation purposes in New Jersey. *State v. Branin*, 23 N. J. Law, 484; *Newark City Bank v. Assessor*, 30 N. J. Law, 13.

While shares of capital stock give no title to the tangible property of the corporation, they do give the owner the right to share in the earnings or profits of the corporation while it is a going concern, and entitle him to receive his proportion of the assets in case they are sold, or that the corporation is finally dissolved. Although such shares only represent the interest of the shareholder in the corporation, they are generally held to be property, and our statute declares that they shall be treated as personal property. It is the view of the court that, in the absence of legislation fixing the situs of such property for purposes of administration elsewhere, it must be regarded as at the domicile of the stockholder, and hence there was nothing in Kansas upon which to found administration of the estate of Miller, and the probate court of Labette county rightly refused to appoint an administrator. A different view was taken by the Supreme Court of Missouri in *Richardson v. Busch*, 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472, where it was, in effect, held that the situs of shares of stock in a New York corporation was in New York, and not in Missouri, where they were held. In answer, it is argued that the shares were only temporarily in Missouri, that they really belonged in New York, which was the location of the corporation, and therefore the statements in the decision as to the situs of stock being in the state in which the corporation is organized and doing business must be regarded as dictum and not controlling. Another authority cited by appellee is *Grayson, Adm'r*, v. *Robertson, Adm'r*, 122 Ala. 330, 25 South. 229, 82 Am. St. Rep. 80, where it was, in effect, held that, for the purposes of administration, the situs of a certificate of stock of a corporation owned by a decedent is in the state where the corporation was organized and has its principal place of business, since it is the situs of the corporation, and not the domicile of the holder of the certificate that determines. It is argued, however, that this authority rests to some extent on a local

statute, and is therefore not entitled to much weight, since it is directly opposed to the general rule which fixes the situs of personal property at the domicile of the owner.

It follows that the judgment of the district court must be reversed.

BURCH, PORTER, BENSON, and WEST, JJ., concurring.

JOHNSTON, C. J. (dissenting). In my view the situs of the shares of stock owned by Miller was in Labette county, Kan., the home and principal place of business of the corporation. While the authorities on the subject are not in harmony, it is generally recognized that certificates of stock are not debts, credits, securities, or chattels, but are simply evidences that the holder is a member of and has an interest in a corporation which itself owns all of its property. In a sense shares of stock are treated as property; but it is of a peculiar kind, which gives the owner no right or title to the tangible property of the corporation. It is such an exceptional property right that it can only be enforced where the corporation is organized and has its place of business, and within the intention of the Legislature the situs of the property for administration purposes is at the home of the corporation. In *Thompson on Corporations* it is said: "The general rule is that shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. It is true that for purposes of taxation and some other similar purposes stock follows the domicile of its owner; but, considered as property separated from its owner, stock is in existence only in the state of the corporation. On this point the Supreme Court of the United States has said: 'The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner.' " 4 *Thompson on Corporations* (2d Ed.) § 3471.

Counsel for appellee quote from and rely upon *Cook on Corporations*; but, while that authority says that for purposes of taxation and a few other purposes shares of stock follow the domicile of the stockholder, this is upon the theory that such property may have a situs at more than one place at the same time, and it then adds: "On the other hand, it has at the same time a situs where the corporation exists, and this situs may be for the purposes of suits concerning the title to the stock, for attachment and execution, and for various other similar purposes." 2 *Cook on Corporations* (7th Ed.) § 368.

In *Grayson, Adm'r, v. Robertson, Adm'r*, 122 Ala. 330, 25 South. 229, 82 Am. St. Rep. 80, this question was directly involved, and it was expressly decided not on a local statute that for purposes of administration the situs of shares of stock of a corporation was in the state where the corporation was created, and not at the domicile of the owner. In a still later case the Supreme Court of Alabama reaffirmed this holding, and declared that: "A certificate of corporate stock is merely evidence of ownership, and the situs of the interest which it represents must for the purposes of administration be in the state in which the corporation is organized and has its place of business." *Warrior Coal & Coke Co. v. National Bank of August* (Ala.) 53 South. 997, headnote, par. 3.

In *Richardson v. Busch*, 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472, the subject was discussed at considerable length, and cogent reasons are given why the situs of such property is necessarily in the state of the corporation. In *Murphy v. Crouse*, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90, it is held that ordinarily choses in action adhere to the person of the owner; but that for purposes of administration this is not true as to certificates of stock. In a question affecting the title to shares of stock the Supreme Court of the United States decided that the habitation or domicile of the corporation is in the state that creates it, and that the property represented by the certificates of stock is deemed to be within the state and to be held by the corporation for the benefit of the owner. *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647. In *Andrews v. Guayaquil & Quito Railway Co.*, 69 N. J. Eq. 211, 60 Atl. 568, it was ruled that the situs of stock in a New Jersey corporation was in New Jersey, and that any question relating to it might be determined there. In *Fahrig v. Milwaukee & Chicago Breweries*, 113 Ill. App. 525, it was declared that: "The general rule is that shares of stock in a corporation are personal property whose location is in the state where the corporation is created" (Syllabus par. 3). *Matter of Arnold*, 114 App. Div. 244, 99 N. Y. Supp. 740; *Matter of Fitch*, 160 N. Y. 87, 54 N. E. 701; note, 25 Ann. Cas. 954. In *State ex rel. v. Davis*, 88 Kan. 849, at page 850, 129 Pac. 1197, where the inheritance tax law was under consideration, it was said that: "Shares of stock are regarded as situated in the state of incorporation." Being property situated in the state, it should not be withdrawn from the state until the claims of resident creditors are satisfied. As said in *Denny v. Faulkner*, 22 Kan. 89, 95: "A state always has the right to protect home creditors by administration of the decedent's property within its borders."

Our statute provides that, if a person of another state dies intestate, leaving property

in Kansas to be administered, the probate court of the county where the property is situated may grant administration. Gen. Stat. 1909, § 3436. In my view the Legislature intended that property such as shares of stock situated in Kansas should be administered in Kansas, and that it was never the legislative intention that property of a decedent should be removed from the state until the debts due to its own citizens had been paid. The officers of the corporation are really the agents and representatives of the owners of the shares wherever they may be, and their claims must be presented in Kansas in order to obtain either the profits in the enterprise or a share of the assets in case of final dissolution and distribution. The property being situated in Kansas, the administrator appointed in Missouri did not acquire any title to the shares, and has no authority to dispose of them.

I am authorized to state that Mr. Justice MASON and Mr. Justice SMITH concur in this dissent.

PETERSON v. HOLLIS et al†

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. DIVIDING LINE—STATUTE OF FRAUDS.

Adjoining landowners orally agreed that one was to assist in resetting and maintaining a hedge on the land of the other, near and parallel to their boundary, and that in return therefor it was to become their dividing line. The work was done and possession was taken and held accordingly. The question whether the contract was thereby taken out of the statute of frauds is suggested, but not decided.

2. ADVERSE POSSESSION (§ 31*)—WHAT CONSTITUTES—ADJOINING OWNERS.

Where a landowner holds up to a fence, with the purpose of claiming it as his boundary irrespective of whether or not it corresponds with the true line, and does nothing inconsistent with this intention, his occupancy is adverse, even although the adjoining owner supposes he intends to claim only what he originally owned.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 128-133; Dec. Dig. § 31.*]

3. BOUNDARIES (§ 54*)—ACQUISITION OF TITLE—ADJOINING OWNERS.

The title to the land up to a fence, which has been gained by adverse possession for 15 years, cannot be devested by a survey called to establish the original surveyor's boundary line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 263, 268-277; Dec. Dig. § 54.*]

Appeal from District Court, Saline County.

Action by John Peterson against William Hollis and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Burch & Litowich, of Salina, for appellant. Thomas L. Bond, of Salina, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 12, 1913.

MASON, J. This case grows out of a controversy between adjoining landowners concerning the title to a strip of land five feet wide, lying between a quarter section line and a line marked by a hedge. Stated in another form, the disputed question is whether the quarter section line or the hedge constitutes the present boundary between their lands. The trial court made detailed findings, which are not challenged, and are therefore to be regarded as settling the facts of the case. The plaintiff, John Peterson, has owned and occupied the east half of the southwest quarter of a section of land since 1872. The defendants, William Hollis and Hattie D. Hollis, are the owners of the southeast quarter of the section, subject to the controversy regarding the strip referred to, which is the west five feet of this southeast quarter section, and is claimed by both parties. The plaintiff undertook to build a fence along the east line of this strip, and brought the present action to enjoin the defendants from interfering with it, thus raising the question already stated. The court gave judgment for the defendants, and the plaintiff appeals.

In 1872 the then owner of the Hollis quarter, one Goodspeed, set out the hedge referred to, purposely placing it five feet east of, and parallel to, the west line of his land, which had recently been surveyed and was marked by monuments. In 1874 parts of this hedge had died out. Goodspeed told the plaintiff that if he would aid in resetting and cultivating the hedge, he could have one-half of it, and it should be the line between their lands. The plaintiff accepted the proposition and complied with its conditions. Goodspeed knew where the hedgerow was located with respect to the quarter section line, but the plaintiff did not know, and took no trouble to ascertain whether it corresponded with that line or not. He, however, thereafter treated the hedge as a line fence, remaining in the occupancy of the strip now in dispute for more than 15 years, and practically up to the time of the present action. The defendants derive title from Goodspeed through a series of warranty deeds, each purporting to convey the entire quarter section. Some of the earlier owners knew of the arrangement between the plaintiff and Goodspeed with regard to the hedge, but the later ones, including the Hollises, did not. In 1907 William Hollis called for a survey of the southeast quarter section, which was made, establishing the west line of said quarter five feet west of the hedge. The plaintiff was notified of the survey, but did not participate in it. He stated to the surveyor and to William Hollis in effect that he claimed to the hedgerow in virtue of an agreement with Goodspeed, irrespective of the location of the quarter section line, and that for this reason he would not be bound by the survey.

[1] Oral agreements between the owners of adjoining lands that a specified line shall constitute their boundary, where the true location is uncertain or disputed, are universally upheld. The statute of frauds is said not to apply because the contract is not one for the conveyance of real property—it does not involve any transfer of title. It is regarded as a binding acknowledgment on each side that the designated line is in fact the real boundary. That principle cannot control the present case, because here an actual change of ownership was intended. Goodspeed knew just how much land he was undertaking to give. The plaintiff did not know just how much he was to acquire, but he understood that in return for his work upon it the hedge was to become the dividing line of the two farms; that he was to own up to the hedge, no matter where the quarter section line might run. The authorities are practically uniform that such a contract is unenforceable, although followed by occupation under it, because of the statute of frauds, and because it is an attempt to pass the title to real estate without a writing. Note, 10 L. R. A. (N. S.) 610; Note, Ann. Cas. 1912B, 662; 20 Cyc. 225. The two recent Kansas cases relating to the oral settlement of a boundary dispute are consistent with this doctrine. They recognize the distinction between an agreement that a specific line shall be deemed to constitute the existing boundary and a contract for the change of the dividing line. In one of them it was said: "The agreement is not viewed as one passing title." *Steinhilber v. Holmes*, 68 Kan. 607, 611, 75 Pac. 1019, 1021. And in the other: "The lot lines * * * were still uncertain. * * * The location of this particular boundary * * * was unknown to both parties." *Parks v. Baker*, 81 Kan. 351, 356, 105 Pac. 439, 441.

[2] The present case differs from most—perhaps from all—of those in which the rule referred to has been applied, in this: Here there was an independent consideration to support the agreement to cede a part of Goodspeed's land to the plaintiff—the helping to reset and maintain the hedge. This consideration involved a permanent improvement of the premises, and was fully performed. There is at least room for a plausible argument that these facts render the contract enforceable. The question suggested need not be decided, for we are of the opinion that in any event the plaintiff has acquired title to the strip in controversy by adverse possession for the period of prescription. For more than 15 years he occupied all the land west of the fence. His purpose was not merely to claim to the quarter section line, or to the hedge, upon the assumption that it coincided therewith. He claimed title up to the hedge, irrespective of the position of the surveyor's line. True, the Hollis tract was not occupied for 15 years by owners who rec-

ognized the plaintiff's claim. For most of the time its occupants doubtless supposed the hedge to mark the quarter section line. Their belief in this respect, however, does not affect the matter. The plaintiff's occupancy was characterized by his own mental attitude, not by theirs, unless it was induced by some conduct on his part inconsistent with his claim.

"Where adjoining landowners agree as to the boundary line between their lands, and each occupies to such agreed line, the occupancy of one who encroaches on the land of the other is under a claim of right or ownership so as to render it adverse. * * * When one of two adjoining landowners without actual knowledge of the true boundary line takes possession beyond the true boundary line, with the intention to claim the line to which he takes possession as the boundary line, his possession is under a claim of title or ownership, so as to render his possession of the encroachment adverse." 2 Enc. L. & P. 400, 401.

"Where the occupation of the land is by a mere mistake, and with no intention on the part of the occupant to claim as his own land which does not belong to him, but he intends to claim only to the true line wherever it may be, the holding is not adverse. In cases of mistake as to the true line between adjoining lands the real test as to whether or not a title will be acquired by a holding for the period prescribed by the statute of limitations is the intention of the party holding beyond the true line. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title, that fixes the character of the entry and determines the question of disseisin." 1 Cyc. 1037, 1038.

The rule that the holding of land up to a fence or other physical barrier is not deemed adverse, where the purpose is to claim only to the true property line, has usually been applied where both the adjoining owners supposed the two lines to coincide. In cases where the effect of possession taken and held up to a barrier has been made to turn upon intent, the contending parties have usually had the same understanding—if there has been a mistake they have shared it. It does not follow that in order for the holding to be adverse each owner must, in fact, understand that a claim is made to the barrier, irrespective of whether it corresponds with the original boundary. In order to make his possession adverse, an occupant who openly holds possession up to a fence need not add to this act any affirmative declaration that he renounces the surveyed line. The fact that he has the actual possession puts the adjoining occupant on inquiry as to the extent of his right, and so long as he does nothing inconsistent with an assertion of absolute ownership, his neighbor can derive no

advantage from assuming that he claims only the land to which he has a paper title. The view that the plaintiff's possession was adverse deprives purchasers subsequent to the running of the statute of the protection of the recording act. His occupancy gave notice of his title.

[3] The plaintiff having acquired title to all the land west of the hedge, irrespective of the location of the quarter section line, could not be divested of it by a survey called to fix the location of that line. The surveyor's province was to determine, in case of dispute, the location of the line between the southwest and the southeast quarters of the section. He had no jurisdiction to decide whether the plaintiff had purchased or otherwise acquired any part of the southeast quarter. *Edwards v. Fleming*, 83 Kan. 653, 112 Pac. 836, 33 L. R. A. (N. S.) 923.

The suggestion is made that the remedy of injunction was not available to the plaintiff. The situation is unusual. The controversy was within the jurisdiction of a court of equity. The facts have been fully found, and it remains only to apply the law to them. The precise form of the action cannot now be important.

The judgment is reversed and the cause remanded, with directions to render judgment for the plaintiff. All the Justices concurring.

STATE v. SOFFIETTI et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 145*)—VACATING DEFAULT—PETITION—SUFFICIENCY.

An application to set aside a judgment and grant a new trial, presented after the term at which the judgment was rendered, and based upon the ground that it had been taken when there was a previous agreement between counsel for the parties that no further proceedings in the case would be had, cannot be granted unless the application sets forth the judgment against the defendant and also facts showing that he has a valid and meritorious defense to the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295; Dec. Dig. § 145.*]

(Additional Syllabus by Editorial Staff.)

2. JUDGMENT (§ 155*)—SETTING ASIDE DEFAULT—SUMMONS—NECESSITY.

Since a proceeding to vacate a judgment on petition for new trial, under Code Civ. Proc. § 600 (Gen. St. 1909, § 6195), is in effect a new action, it is essential, not only that a petition be filed, but that "a summons shall be issued and served as in the commencement of an action," as provided by such section.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 806, 807; Dec. Dig. § 155.*]

Appeal from District Court, Cherokee County.

Action by the State against Louis Soffietti and others. From an order vacating judgment, and granting new trial, the State appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

John S. Dawson, Atty. Gen., and T. T. Burr, of Galena, for the State. Frank W. Boes and A. L. Majors, both of Columbus, for appellees.

JOHNSTON, C. J. This is an appeal from an order granting a new trial. On December 8, 1911, an action was begun by the state to enjoin the maintenance of a common nuisance by Louis and Mary Soffietti on certain premises in Mineral City owned by Lorenzo Perello, and it was alleged that Perello had knowingly permitted the premises to be used for the illegal sale of liquors. In the petition an allowance of \$100 as attorney's fees was asked, and also that this amount, together with the costs, be adjudged a lien upon the premises. On April 1, 1912, judgment was rendered against all the defendants by default, the temporary injunction which had been granted was made permanent, and the attorney's fees and costs were adjudged to be a lien on the premises. Execution was issued thereon, and the property advertised for sale by the sheriff. On June 12, 1912, and at a succeeding term of the court, Perello filed his motion asking for a new trial, on the ground that he had been informed and believed that an agreement had been reached between his attorney and the attorney representing the state, whereby the injunction proceedings were to be dropped, and that he did not know of the existence of the judgment until he noticed that the sheriff was advertising the property for sale. In his motion, which was sworn to before his own attorney, Perello alleged that he had a defense to the merits of the action; but he did not state the nature or character of his defense. On June 15, 1912, and in absence of any one representing the state, the court heard and sustained Perello's motion, setting aside the judgment, and granting a new trial. The state appeals, and insists that the court had no basis for its action, that the application which was verified by appellees' own attorney was insufficient in several respects, and particularly that it did not set forth the judgment nor any defense to the merits of the action.

The application for a new trial was not made within three days after the decision of the court, nor during the term of court at which the decision was rendered. It appears to be based upon the ground of fraud, and falls within one of the grounds provided for in section 600 of the Code of Civil Procedure. Gen. St. 1909, § 6195. Under that section it is provided that the proceeding "shall be by petition verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying

was defendant. On such petition a summons shall issue and be served as in the commencement of an action."

The application failed in most of the essential requirements. It was not in the form of a petition, neither was it properly verified; but the mere form is of itself not a vital matter. The application did not set forth the judgment sought to be set aside, nor did it set out the defense upon which Perello relied. It does not appear that any summons was issued and served, as the Code requires. One of the most essential requirements in a proceeding to set aside a judgment upon the ground of fraud is absent here; that is, a statement as to what Perello's answer would be, or that he had and has a meritorious defense to the original action. In *Mulvaney v. Lovejoy*, 37 Kan. 305, 308, 15 Pac. 181, 182, this omission was held to be a fatal defect. It was there said that: "If the defendant has no valid defense, and the result of a second trial must be the same as the first, no actual injustice has been done, and it would be idle to disturb the judgment. The facts constituting the defense should be fully stated, and from them it must appear that the defendant has an existing, legal, and meritorious defense. In this respect the petition in the present action is fatally defective, as well as in failing to set forth the judgment complained of." Although not of so much importance, the setting out of the judgment sought to be vacated is essential to a sufficient petition or to an order vacating one. *Daniel Hill v. Elias Williams*, 6 Kan. 17; *Cole v. Walker*, 7 Kan. 139; *Sanford v. Weeks*, 50 Kan. 339, 31 Pac. 1068.

[2] The proceeding to vacate, while incidental to the original action, is, in effect, a new action, equitable in character, and the initiatory steps are therefore very material. The Code requires that not only a petition shall be filed, but that "a summons shall be issued and served as in the commencement of an action." Code Civ. Proc. § 600 (Gen. St. 1909, § 6195).

Although the record does not show that a summons was ever issued or served in this proceeding, counsel for appellant concede, in their argument, that a copy of the motion was served on counsel about the time the motion was filed; but no notice was given to appellant of the time when the motion would be heard. It may well be doubted whether this notice can be regarded as the equivalent of a summons and a sufficient basis for an order vacating a judgment; but this we need not decide. The motion itself was fatally defective in the particulars mentioned, and afforded no ground for the order of vacation.

It will therefore be reversed. All the Justices concurring.

BENFIELD v. CROSON et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

*(Syllabus by the Court.)***1. DAMAGES (§ 81*)—FORFEITURE CLAUSE—VALIDITY.**

A stock of merchandise, to be valued at the cost price of each article at wholesale, was traded for a tract of land, to which a certain value was assigned. The contract provided that the merchandise should be invoiced, and if it amounted to less than the price placed upon the land the vendor should pay the difference in cash. If it amounted to more, the vendee should pay the difference in cash. The contract further provided that each party should stake as a forfeit the sum of \$500, to be placed in the hands of a third person, and, should either one fail to keep all and singular the terms of the agreement, the deposit should be forfeited to the other. *Held*, the language of the contract providing for a forfeiture and not for stipulated damages should control, in the absence of circumstances indicating a different intention; that actual damages resulting from a breach of the contract were readily provable without entering into the realm of speculation and conjecture; that the amount of the stake was fixed without reference to compensation for loss in case of a breach; and that upon default by one party the other could not enforce the forfeit.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 177; Dec. Dig. § 81.*]

2. PLEADING (§ 236*)—AMENDMENT—DISCRETION.

In an action by the vendee to recover the vendor's forfeit from the stakeholder, the vendor was interpleaded in a county other than that of his residence. After the petition had been once amended, and after a great lapse of time, the action came on for trial, and a demurrer was sustained to the plaintiff's evidence. The plaintiff then asked leave to amend by changing the cause of action to one for actual damages for breach of contract. *Held*, it was not an abuse of discretion to deny the request.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

3. APPEAL AND ERROR (§ 1171*)—HARMLESS ERROR—NOMINAL DAMAGES.

A judgment will not be reversed and the cause remanded merely for the purpose of allowing the defeated party to recover nominal damages.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

Appeal from District Court, Saline County.

Action by R. W. Benfield, executor, etc., against O. E. Croson and another. From a judgment for defendants, plaintiff appeals. *Affirmed*.

J. O. Wilson and F. T. Knittle, both of Salina, for appellant. T. L. Bond, of Salina, for appellees.

BURCH, J. Houser and Benfield entered into the following contract: "This indenture made and entered into this 3rd day of July, A. D. 1907, at Grainfield, Gove County, Kansas. Between J. O. Houser of Grainfield, Gove Co., Kansas, party of the first part, and G. W. Benfield (unmarried man), of Salina, Saline Co., Kansas, of the second part. Witnesseth: That for the stipulations and con-

siderations hereinafter written, first party has and does this day sell to second party his stock of merchandise, now contained in building situated on lot 25 in block 31 in the city of Grainfield, Kansas, at the cost price of each article contained in said stock as per invoices for purchase of such goods at wholesale; in case invoices cannot be produced to ascertain price for any article, such price on such article, is hereby agreed shall be fixed by O. E. Croson, who is qualified by first-class information to fix the market price of goods of every description. In payment from 2nd party, first party buys and is to receive good and sufficient warranty deed from 2nd party to the west half (½) of the northeast quarter (¼) of section fifteen (15) in township fourteen (14) south of range two (2) west of the 6th P. M. Kansas, containing 80 acres more or less according to U. S. survey. 2nd party furnishing abstract showing good commercial title to such land: The price for the land being \$4,800.00 and it is hereby agreed that if such stock of goods shall invoice in total more than \$4,800.00, 2nd party is to pay to first party in cash, the remainder and vice versa should the stock of goods invoice in total less than \$4,800.00, first party shall pay to 2nd party the remainder in cash. In either case this trade is to be concluded and closed with cash at completion of inventory of first party's stock of merchandise. First party by these presents binds himself and agrees to furnish to 2nd party a genuine bill of sale releasing said goods from any charge, claims, or rights of any other person or persons, whomsoever. In earnest of these engagements. Both parties hereto, stake as a forfeit the sum of \$500 which sum of money to be in checks payable to O. E. Croson to be by him deposited in bank. Either party hereto failing to keep all and singular these agreements, shall forfeit to the other such earnest money so deposited with O. E. Croson."

Checks were deposited with Croson, the agent who effected the trade, as contemplated by the contract. Afterwards an invoice of the merchandise was taken, which amounted to the sum of \$3,333.39. As soon as the computation was made Houser asserted that all his goods were not included in the invoice, and insisted on rechecking the items. This Croson and Benfield declined to do at once, because it was then near midnight of Saturday night, and they were very tired, and because they had business in Salina which required them to leave Grainfield the next morning. Houser's claim of error in the invoice was not investigated, and he refused to accept a subsequent tender of a deed of the Benfield land and to surrender possession of the stock of goods. Afterwards Benfield sued Croson in Saline county to recover the proceeds of the Houser check. The petition simply alleged that the deposit was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made with Croson to be paid to Benfield in case Houser failed to comply with the terms of a contract in writing, and that he had so failed. Croson interpleaded Houser, who resided in Gove county. He answered, setting up his version of the transaction with Croson and Benfield at the time the invoice was taken, and praying for a return of his money. At the trial the court sustained a demurrer to the plaintiff's evidence and judgment was rendered in favor of Houser. The plaintiff having died pending the proceedings, the action was revived in the name of his administrator, who appeals.

[1] The solution of the controversy depends upon the interpretation to be given the last paragraph of the contract. The plaintiff contends that it provides for stipulated damages. The argument is that neither party cared to proceed with the trade on the bare responsibility of the other; that in case of a breach of the contract the damages would be speculative to a degree rendering certain assessment impossible; that as a result the parties agreed upon a stipulated sum to be paid regardless of the true damages; and that the true intent ascertained in this way should control rather than the words "stake as a forfeit" and "shall forfeit."

The court agrees that the parties were not disposed to rely upon each other's credit, and that they made no effort to provide for compensation for the true damages which might be sustained should either one fail to perform. It does not agree, however, that the value of a stock of merchandise in Grainfield and the value of a tract of land in Saline county are matters of such uncertainty that an attempt to fix them would necessitate an excursion into the realm of conjecture and speculation. The contract itself declared that Croson was qualified to fix the market price of goods of every description, and the plaintiff produced at the trial witnesses who agreed remarkably well on the value of the real estate involved. It is perfectly well known that stocks of merchandise and tracts of land are common subjects of sale and trade whose values can be determined with as much precision, by those who deal in them, as values in any branch of commerce. Consequently, when the contracting parties put aside the notion of compensation, they evidently adopted the notion expressed by the words of the agreement.

The principles of law governing the subject were stated by Mr. Justice Valentine in the case of *Condon v. Kemper*, 47 Kan. 126, at page 130, 27 Pac. 829, at page 830 (13 L. R. A. 671), as follows: "Of course, the

words of the parties with respect to damages, losses, penalties, forfeitures, or any sum of money to be paid, received or recovered, must be given due consideration; and, in the absence of anything to the contrary, must be held to have controlling force; but when it may be seen from the entire contract, and the circumstances under which the contract was made, that the parties did not have in contemplation actual damages or actual compensation, and did not attempt to stipulate with reference to the payment or recovery of actual damages or actual compensation, then the amount stipulated to be paid on the one side, or to be received or recovered on the other side, cannot be considered as liquidated damages, but must be considered in the nature of a penalty, and this even if the parties should name such amount 'liquidated damages.'"

Here the land was given a trading value, \$4,800, and the stock of merchandise was given a trading value, the cost price of each article at wholesale when new. Doubtless each party had his notion of the value of what he was giving, but neither one knew on which side the balance would fall when struck, or whether the amount would be large or small. Therefore each one staked \$500 as a forfeit, and agreed that if he failed to keep any part of the agreement the stakeholder should deliver the stakes to the other, however great or however inconsequential the actual damages might be.

[2] The action was instituted on July 12, 1907. On November 19, 1908, the plaintiff filed the amended petition upon which the case was tried. The demurrer to the evidence was sustained on December 7, 1910. The plaintiff then asked leave to amend the petition by substituting for the cause of action stated one for actual damages for breach of the contract. Permission to do this was denied. The plaintiff could not, as a matter of right, bring Houser to Saline county to litigate one kind of a case, and then after defeat manipulate the proceeding in such way as to hold him there and compel him to litigate another kind of a case, the proper venue of which was Gove county. If, however, Houser were properly suable in Saline county, the court still had discretion over the subject of amendments to the pleadings, and under all the circumstances stated this discretion was clearly not abused.

[3] It is said that the plaintiff should have been awarded nominal damages at least. If so, the refusal to render judgment for nominal damages is not good ground for reversal. *State v. Kelly*, 78 Kan. 42, 44, 96 Pac. 40.

The judgment of the district court is affirmed. All the Justices concurring.

STATE v. HARRIS.†

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 65*)—MANSLAUGHTER—ATTEMPTED ABORTION.

An information, alleging the use of a certain instrument to procure the abortion or miscarriage of a woman pregnant with a vitalized embryo, not necessary or medically advised to be necessary to preserve her life, resulting in her death, charges a crime which would be murder at the common law and which is manslaughter in the first degree under section 12 of the Crimes Act (Gen. St. 1909, § 2500).

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 89; Dec. Dig. § 65.*]

2. HOMICIDE (§ 138*)—MANSLAUGHTER—ATTEMPTED ABORTION—INFORMATION—SUFFICIENCY.

The averment that such instrument was used with the intent to procure such abortion or miscarriage renders it unnecessary to allege that it was without a design to effect death; the presumption in favor of the defendant being sufficient to negative an intent more malevolent and criminal than the one expressly charged.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 231; Dec. Dig. § 138.*]

3. HOMICIDE (§ 18*)—MANSLAUGHTER—ATTEMPTED ABORTION—ELEMENTS OF OFFENSE.

Although such instrument was used with the assent of the woman for the sole purpose of procuring an abortion or miscarriage, still such use and purpose being immoral, violative of the law of nature, deliberate in character, reckless of life, and necessarily attended with danger to the mother and likely seriously to injure her, if her death result the common law will imply malice and hold the person so using such instrument guilty of her murder, regardless of whether she was pregnant with a quick child or with a vitalized embryo.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. § 18.*]

(Additional Syllabus by Editorial Staff.)

4. ABORTION (§ 1*)—"MISCARRIAGE"—DEFINITION.

As used in Gen. St. 1909, § 2532, relative to the crime of abortion, the words "abortion" and "miscarriage" are practically synonymous in their use (citing Words and Phrases, vol. 1, pp. 20, 21; vol. 5, p. 4530).

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 1-5; Dec. Dig. § 1.*]

Appeal from District Court, Osage County. James Harris was convicted of manslaughter in the first degree, and appeals. Affirmed.

A. B. Crum, of Lyndon, and J. P. McLaughlin, of Osage City, for appellant. J. S. Dawson, Atty. Gen., C. T. Nelhart, of Carbondale, and A. E. Crane, of Holton, for the State.

WEST, J. [1, 3] This appeal presents the question whether the defendant was legally convicted of manslaughter in the first degree.

Section 44 of the Crimes Act (Gen. Stat. 1909, § 2532) makes it a misdemeanor willfully to administer to any pregnant woman any medicine, drug, or substance, or use any instrument or means, with intent thereby to procure abortion or the miscarriage of such woman, unless necessary or medically advised

to be necessary to preserve her life. Section 15 (Gen. Stat. 1909, § 2503) makes it manslaughter in the second degree to use any substance or means upon any woman pregnant with a quick child, with intent to destroy such child, unless necessary or advised to be necessary to preserve the life of the mother, if the death of such mother or child ensue. The defendant was charged, under section 12 (Gen. Stat. 1909, § 2500), with causing the death of a woman pregnant of a vitalized embryo by attempting to cause abortion by the use of a certain instrument. It is contended that by sections 12 and 15 it is a less serious offense thus to cause the death of a woman pregnant with a quick child than the death of one pregnant with a vitalized embryo. Conceding without deciding the truth of this contention, the responsibility is upon the Legislature and not upon the court, and the defendant can be given no judicial relief on the mere ground of inconsistency of penalties.

But the defendant maintains that, as section 12 requires that the killing would be murder at the common law, the conviction was wrongful for the reason that at common law such killing was manslaughter only, and that to perform upon a woman an operation with her consent for the purpose of procuring an abortion was no offense unless the woman was quick with child, which, he asserts, is the same as pregnant with a quick child. In support of his contention he cites *Commonwealth v. Bangs*, 9 Mass. 387, which simply held that an indictment for administering a potion with intent to procure an abortion must allege that an abortion ensued and that the woman was quick with child. Bangs was charged, not with the murder of the woman, but as indicated, and the point decided was that no offense was charged; the question of assault being out of the case, because the woman was not alleged to be quick with child. As no statute was cited, it must be presumed that the common law alone was considered. Our attention is also called to *United States v. Ross*, 1 Gall. 624, 629, Fed. Cas. No. 16,196, in which Story, J., sitting with the district judge at circuit, in considering a charge of murder on the high seas, said: "More especially will the death be murder, if it happen in the execution of an unlawful design, which, if not a felony, is of so desperate a character that it must ordinarily be attended with great hazard to life; and, a fortiori, if death be one of the events within the obvious expectation of the conspirators." However, the portion of the opinion which counsel had in mind is doubtless the following: "If the design be to commit a trespass, the death must ensue in prosecution of the original design, to make it murder in all who take part in the same transaction."

While this is referred to in *Smith v. State*, 33 Me. 48, page 59, 54 Am. Dec. 607, in sup-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 13, 1913.

port of the proposition that if an act intended merely to procure an abortion unintentionally result in the death of the mother it is not murder, because such death is collateral to the principal design, we are not impressed with the correctness of the application, or the soundness of the reasoning which endeavors to give such meaning to the sentence quoted. Looking beyond these authorities, we find that in *Commonwealth v. Parker*, 9 Metc. (50 Mass.) 263, 48 Am. Dec. 396, it was said by Chief Justice Shaw that "It is not a punishable offense, by the common law, to perform an operation upon a pregnant woman, with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child." In the opinion which somewhat reluctantly follows *Commonwealth v. Bangs*, it is held that an indictment for procuring an abortion by the means of instruments, the woman assenting, must charge that she was quick with child. The indictment did not, as here, expressly charge an assault, but the unlawful and inhuman forcing and thrusting of a sharp instrument, with a wicked intent to cause a miscarriage; and it was held that, while the acts set forth were in a high degree offensive to good morals and injurious to society, they were not punishable at common law. However, it was said (9 Metc. [Mass.] 265, 48 Am. Dec. 396) that care must be taken not to confound this case with others similar in fact but within another principle, and that the use of violence upon a woman with intent to procure her miscarriage would be indictable at common law. "So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in a case of a duel, where, in like manner, there is the consent of the parties." The common-law distinction between a mere embryo and one advanced to the state of quickness was referred to, but the degree of advancement essential to mark the distinction was left undecided. The Supreme Court of New Jersey, in *State v. Cooper*, 22 N. J. Law, 52, 51 Am. Dec. 248, held that at common law it was not an offense to procure an abortion before the child was quick, and not an assault to cause such abortion upon a woman with her consent. Numerous ancient common-law authorities were cited and considered, with the statement that in none of them can be found a reference to the mere procuring of an abortion by the destruction of a fetus unquickened, and that by unanimous concurrence of all the authorities the crime of homicide could not be committed unless the child had quickened; but it was pointed out that the statute 4 George III made it a capital offense to cause the mis-

carriage of a woman quick with child, and a felony of a mitigated character to cause a miscarriage before the quickening. The charge was an attempt to procure an abortion, not a murder. In *Smith v. State*, 83 Me. 48, 54 Am. Dec. 607, the charge was murder resulting from an abortion. It was held that at common law it was not an offense to procure an abortion of a woman pregnant but not with a quick child, with her consent, but by the statute of Maine it was a misdemeanor, and resulting death would be manslaughter and not murder. The opinion assumes to distinguish between destroying a child before its birth and causing a miscarriage. The indictment charged that the woman was quick with child, and that the instrument was used with intent to procure a miscarriage—not to kill the mother. The court concluded that the death was charged to have been caused in the pursuit of an unlawful design, without intending to kill, and hence not in the execution of that unlawful design, but collateral or beside the same—a conclusion not in accord with the announcement by many other courts.

In East's pleas of the Crown the rule is thus stated: "Hither also may be referred the case of one who gave medicine to a woman; and that of another who put skewers in her womb, with a view in each case to procure an abortion; whereby the women were killed. Such acts are clearly murder, though the original intent, had it succeeded, would not have been so, but only a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practiced." 1 East's P. C. 230.

In *Commonwealth v. Keeper of the Prison*, 2 Ashm. (Pa.) 227, it was held that to administer a potion to a pregnant woman, for the purpose of destroying the child, which causes the death of the mother, is murder in the second degree; the charge being that of causing the death of a mother by procuring an abortion. The court declared the offense bailable but said that by the common law it would have been murder. It does not appear from the opinion whether the woman was pregnant with a quick child or only with an unquickened embryo. In *Hale's Pleas of the Crown* (1 Hale, P. C. 429) it is stated: "But if a woman be with child, and anyone gives her a potion to destroy the child within her, and she takes it, and it works so strongly that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and therefore he that gives a potion to this end must take the hazard, and if it kill the mother, it is murder, and so ruled before me at the Assizes at Bury in the year 1670." From a foot note it appears that in the case referred to it was held that, if a woman takes poison with the intent to procure a miscarriage and dies of it, she is guilty of self-

murder, whether she was quick with child or not; and a person who furnishes her poison for that purpose will, if absent, be an accessory before the fact. Blackstone says: "So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman; this is murder in the person who gave it." 4 Bk. Comm. 201. Russell on Crimes lays down the same rule. 3 Russell on Crimes (6th Ed.) 122. Chief Justice Dillon, in *State v. Moore*, 25 Iowa, 128, 95 Am. Dec. 776, in disposing of counsel's contention there made that the use of medicines and instruments purposely to procure an abortion resulting in the unintended death of the woman is not murder, said that it was a case of implied malice, and that, "in cases of homicide, the settled doctrine of the common law is that malice may be implied from *unlawful acts dangerous to life*, committed without lawful justification." 25 Iowa, 134, 95 Am. Dec. 776. Again: "If death unexpectedly result from such an act, the crime we have seen was at common law murder, and under our statute is murder in the second degree." 25 Iowa, 137, 95 Am. Dec. 776. While in that case the woman was quick with child, no mention is made of that fact in the opinion. The Supreme Court of Michigan, in *People v. Sessions*, 58 Mich. 594, 596, 28 N. W. 291, 293, a case of causing the death of a woman advanced from three to four months in pregnancy by an attempt to procure an abortion, said: "At common law life is not only sacred but inalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother under advice of medical men, is an unlawful act and has always been regarded as fatal to the child and dangerous to the mother. To cause the death of the mother in procuring or attempting to procure an abortion is murder at common law."

The question of the degree to which pregnancy must have advanced was before the Supreme Court of Wisconsin in *State v. Dickinson*, 41 Wis. 299, 309, wherein this language was used: "But it is said that the procuring or attempting to procure a miscarriage or abortion was not an offense at common law, if the pregnant woman was not *quick* with child and consented to the act. There are respectable authorities in support of that view. See *Commonwealth v. Bangs*, 9 Mass. 387; *Smith v. State*, 33 Me. 48 [54 Am. Dec. 607]; *Commonwealth v. Parker*, 9 Metc. (Mass.) 263 [43 Am. Dec. 396]; *State v. Cooper*, 22 N. J. Law, 52 [51 Am. Dec. 248]; contra, *Mills v. Commonwealth*, 13 Pa. 631, Id., 634." Then after referring to the statute and quoting from *Commonwealth v. Parker*, Hale's Pleas of the Crown, 1 East P. C. 230, and Russell on Crimes, 540, the court continued: "These authorities show that the offense described in section 11, where the death of the mother

ensued from the unlawful act, was murder at the common law; and that the statute really reduced the grade of the offense to manslaughter in the second degree." 41 Wis. 310.

In *People v. Commonwealth*, 87 Ky. 487, 490, 493, 9 S. W. 509, 510, it was decided unnecessary to allege that the mother was quick with child. The court said: "The act was not only immoral, violative of the law of nature, and deliberate in character, but reckless of life, and wrongful per se. The death of the woman may not have been intended; there may have been no express malice against her. Neither is there in the case of one, who, knowing that people are passing upon a street, throws a stone from a housetop, resulting in death; but yet a killing under such circumstances is not involuntary manslaughter, or a killing per infortunium. * * * By at least the earlier common law it appears to have been nothing less than murder, although there may have been no intention to kill the woman. * * * Conceding it to be the common-law rule that one is not indictable for the commission of an abortion unless the child has quickened, yet all the authorities agree that if, from the means used, the death of the woman results, it is either murder or manslaughter." In considering a charge of soliciting and inciting a pregnant woman to take certain drugs to cause an abortion, it was said, in *Lamb v. State*, 67 Md. 524, 533, 10 Atl. 208, that by the ancient common law it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy, but, "A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by courts of high character that abortion is a crime at common law without regard to the stage of gestation." In a dissenting opinion, Alvey, C. J., said (67 Md. 537, 10 Atl. 299): "Even at common law, an attempt to produce an abortion is held to be a misdemeanor, and it is not necessary, as it seems to have been at one time supposed, to aver in the indictment that the woman was *quick* with child; but to aver that she was pregnant with child is quite sufficient." In *State v. Reed*, 45 Ark. 333, it was decided necessary in an indictment for abortion under the statute to charge that the act was done before the period of quickening, but not under the common law, as thereunder it was a misdemeanor to cause the miscarriage of a pregnant woman, and the mere unsuccessful attempt to produce it was also indictable. Also that the apparent absurdity of holding under the statute the mere unsuccessful attempt to procure an abortion, not followed by the death of the mother or child, to be a felony before the fifteenth or sixteenth week after her conception, and only a misdemeanor or if after that, was not as great as the

real absurdity of holding it to be no offense at all.

Bishop states the law to be that if in consequence of an attempt to procure an abortion the mother dies, or the child is prematurely born and dies from too early exposure to the world, it is murder, citing 1 East, P. C. 264; *Commonwealth v. Keeper of the Prison*, 2 Ashm. (Pa.) 227; and *Commonwealth v. Parker*, 9 Metc. 263, 265, 43 Am. Dec. 396. Bishop, Cr. Law (7th Ed.) § 692.

Wharton states that a miscarriage attempted in a way not to inflict serious injury on the mother, with no intent to kill or inflict serious injury and no likelihood of such result, resulting in death, is but manslaughter. "It is otherwise when the intent is to seriously injure the mother, or the act is likely seriously to injure her. In this case the killing is murder." 1 Wharton, Cr. Law (10th Ed.) § 225. See note to *State v. Power*, 63 L. R. A. 902. In *Serjeant Hawkin's Pleas of the Crown*, in discussing homicides which happen in the execution of an unlawful act, principally intended for some other purpose, and not to injure the one who happens to be slain, he says: "It is said that if a person happen to occasion the death of another, unadvisedly doing an idle wanton action, which cannot but be attended with the manifest danger of some other; as riding with a horse, known to be used to kick, among a multitude of people, by which he means no more than to divert himself by putting them into a fright, he is guilty of murder." 1 Hawk. P. C. 104. At another place he says: "It is to be observed that any formed design of doing mischief may be called malice; and therefore that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be malice prepense, and consequently murder." Page 95. This would seem to characterize fairly well the attitude of one who procured the operation to be performed upon a young woman whose ruin he had accomplished. In *Ann v. State*, 11 Humph. 159, the Supreme Court of Tennessee, in considering a charge of murdering an infant by administering laudanum, held that to constitute murder at the common law the killing must be with malice aforethought, which would be implied if the killing resulted from an action unlawful in itself, done deliberately and with intention of mischief, of mischief indiscriminately, and was beside the original intention of the party performing the act. This is the principle running through the decisions already referred to and was as familiar to the common law as it is to our modern thinking. Whether, therefore, it were any offense at common law to attempt or cause unnecessarily an abortion or miscarriage, by the use

of instruments, it was an act dangerous in itself, likely to cause death or great bodily harm, and one actuated by wicked motives, and while we find no specific case in the older authorities of a homicide resulting from the attempted miscarriage or abortion of one pregnant but not quick with child, the decisions we have cited show that the weight of the more modern decisions is against the contention of the defendant, and justify the words of Judge Dillon that: "The right to life and to personal safety is not only sacred in the estimation of the common law, but it is inalienable. It is no defense to the defendant that the abortion was procured with the consent of the deceased. The common law stands as a general guardian holding its segis to protect the life of all. Any theory which robs the law of this salutary power is not likely to meet with favor." *State v. Moore*, 25 Iowa, 135, 95 Am. Dec. 776.

The arbitrary refusal of the common law to regard the fetus as alive in such cases until quick was based on no sound physiological principle. Beck makes it plain that the movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the most disastrous consequences to the mother must have already been suffered. 1 Beck, Med. Jur. 464-467. See, also, *State v. Emerich*, 18 Mo. App. 492, 495; 7 Words and Phrases, Jud. Def. 5888, 5889; *Smith v. State*, 33 Me. 48, 59, 60, 54 Am. Dec. 607; *Bouvier's Law Dict.* vol. 2, p. 807.

For many purposes the law regards the infant as alive from its conception. 2 Wharton, Cr. Law (11th Ed.) § 781.

[4] The words "abortion" and "miscarriage" are or have become practically synonymous. 1 *Bouvier, Law Dict.* 52 (2d Ed.) 419; 1 Words and Phrases Jud. Def. 20, 21; 5 Words and Phrases Jud. Def. 4530, and both are used in our statute. Gen. Stat. 1909, § 2532. While the information charges a malicious and felonious assault and the willful murder of the victim, it seems to be conceded that the instrument was used only for the purpose of causing an abortion or miscarriage, with her consent. Proceeding upon that theory, the fact remains that the use of such an instrument for such purpose resulted in the death of the mother, and from the foregoing it satisfactorily appears that such a homicide would have been murder at the common law.

[2] It is suggested that the information is bad for failure to charge in the literal words of the statute that the killing was done without a design to effect death. But the averment of the real design to procure miscarriage or abortion may fairly be said to exclude one still more malevolent and criminal. *Brown v. State*, 110 Ind. 486, 11 N. E. 447.

The newness of the real question presented

and its importance to the defendant and to the public furnish an excuse, if not a justification, for the length of this opinion.

The judgment is affirmed. All the Justices concurring.

TREIBER v. McCORMACK et al.†
(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 56*) — COMPETENCY — HUSBAND AND WIFE.

The husband and wife are competent witnesses for or against each other concerning transactions in which one acted as the agent of the other, notwithstanding the fact that in the revision of Code Civ. Proc. § 321 (section 5915, Gen. St. 1909), there is no express provision to that effect.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 153-156; Dec. Dig. § 56.*]

2. NEW TRIAL (§ 140*)—HEARING—EVIDENCE.

Section 307, Code Civ. Proc. (Gen. St. 1909, § 5901), providing that, where the ground of a motion for a new trial is the exclusion of evidence, such evidence shall be produced at the hearing, is held not to apply where it appears from the testimony of the witnesses themselves given at the trial what the evidence would have been had it not been excluded.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 284-287, 289, 302, 306; Dec. Dig. § 140.*]

Johnston, C. J., dissenting from second paragraph of syllabus and corresponding portion of opinion.

Appeal from District Court, Pottawatomie County.

Action by Caroline Treiber against Margaret McCormack, administratrix, and others. Judgment for defendants, and plaintiff appeals. Reversed, and new trial granted.

E. C. Warfel, of Topeka, Challis & Brooks, of Westmoreland, and E. L. O'Neil of Topeka, for appellant. Maurice Murphy, of St. Marys, A. E. Crane and F. T. & E. D. Woodburn, all of Holton, for appellees.

PORTER, J. Practically the only question to be decided in this case is whether the husband and wife are competent witnesses for or against each other concerning transactions in which one acted as the agent of the other. The plaintiff brought suit to recover damages for the breach of an oral agreement with the defendants and three other landowners to build a dike to protect the land of all the parties from the overflow of Bourbony creek, in Shawnee county. She alleges that the levee or dike was to be built meandering along the west bank of the creek, and that each party was to build 17 rods; that all the parties except the defendants performed their part of the agreement, but the defendants, instead of building on top of the old levee as they had agreed, built on lower ground; that their portions of the levee were built of poor material, and not of the required height. Relying on the

agreement, she alleges that she planted a crop on her land, and that in the spring of 1907 it was destroyed by an overflow from the creek caused wholly by the neglect and failure of the defendants to perform their part of the agreement.

[1] The cause was tried before a jury. At the close of plaintiffs' evidence the court sustained a demurrer. The errors relate to the exclusion of testimony and the refusal to grant a new trial. The plaintiff sought to prove by her husband that he made the agreement with the other landowners, and that his wife authorized him to do this for her. The court refused to permit him to state that his wife owned the land; that he managed and looked after the planting of the crops and the building of the levee; that his wife authorized him to act for her with respect to the contract. The plaintiff herself was a witness; but the court refused to permit her to state that her husband was her agent in the transaction, or that she employed him to act in the making of the contract, or even that she knew that the work was being done and consented to it. The defendants, in their brief, claim that the demurrer was properly sustained, because the evidence did not disclose that the plaintiff had anything to do with building the dike, "nor did it show that any one acted for her." But the plaintiff's claim is that the court would not permit her to prove these facts. The precise question is ignored in the defendant's brief, or dismissed with the mere statement that the court properly sustained objections to communications had between the husband and wife. It is apparent, however, that the trial court sustained most of the objections to plaintiff's evidence upon the theory that, since the adoption of the new Code, the husband and wife are incompetent to testify for or against each other concerning transactions in which one acted as the agent of the other.

The third paragraph of section 321 of the Code of Civil Procedure (section 5915, Gen. St. 1909) provides that the following persons shall be incompetent to testify: "Third, husband and wife, for or against each other, concerning any communication made by one to the other during the marriage, whether called while that relation subsisted or afterward." The third clause of the same paragraph of the old law (section 4771, Gen. St. 1901) made the husband and wife incompetent to testify "for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterwards."

Before the change in the statute, it was a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied December 13, 1913.

settled law in this state that the wife may testify in her own behalf to the fact that she had authorized her husband to act as her agent, and that he had so acted in her behalf. *McAdow v. Hassard*, 58 Kan. 171, 48 Pac. 846; *Green v. McCracken*, 64 Kan. 335, 67 Pac. 857. It was likewise settled that, when the agency of the husband is thus established, he is a competent witness to testify to transactions between himself personally as her agent and third parties. *Douglass v. Hill*, 29 Kan. 527. In the opinion Justice Brewer, speaking for the court, said: "She testified that she had money of her own which she received from England; that she turned it over to her husband, who loaned and managed it as her agent. * * * Now, whether she could testify as to what she said to her husband, or to what her husband said to her, or as to any communications between them, here was enough and competent testimony to show prima facie that he was acting as her agent. Therefore he was a competent witness to testify as to all the dealings and transactions." In *W. & W. Rld. Co. v. Kuhn*, 38 Kan. 104, 16 Pac. 75, it was held that: "An agent may testify as to his authority to act for his principal, and this rule is not changed by the fact that the agent is the husband of the plaintiff" (*Syllabus*).

[3] The modern tendency of courts is to look with disfavor upon any attempt to extend by implication statutory prohibitions against the qualifications of witnesses. *Hess v. Hartwig*, 83 Kan. 592, 594, 112 Pac. 99. Such statutes are always construed strictly in favor of the competency of the witness. *Mendenhall v. School District*, 76 Kan. 173, 175, 90 Pac. 773. In view of these considerations, and especially keeping in mind the former decisions of this court, it will not be assumed that the Legislature intended by the change in the language of the third subdivision of section 321 to place further restrictions upon the competency of husband and wife to testify. On the other hand, the presumption is that, if in fact any substantial change in the law was contemplated, the authors of the new Code intended to broaden rather than to restrict the qualifications of witnesses. The prohibition against testimony as to communications between husband and wife was allowed to stand as it was. But this had been construed not to prevent testimony concerning transactions where one acted as the agent for the other, and it was probably deemed unnecessary to make an exception of something which had been repeatedly held not to fall within the rule. Besides, it seems obvious that, had the Legislature intended to make such a radical change in the law, it would, especially in view of the former decisions, have so declared in explicit terms. The language of the statute as it now reads must be held to mean exactly what the same language meant before the

revision. Moreover, the only way in which the prohibition can be construed so as to disqualify the witnesses in a case like the present is to extend by implication the language of the statute; this courts decline to do, and as a rule construe such statutory provisions strictly in favor of the competency of the witness.

[2] It is insisted that the failure of the plaintiff to comply with the statutory requirement that evidence ruled out by the trial court must be offered upon the hearing of the motion for a new trial prevents a consideration of the error. The statute (section 307 of the Code [Gen. St. 1909, § 5901]) was never intended to require a useless offer of evidence where the record informs the trial judge of the nature of the evidence as fully as affidavits or oral testimony of the witnesses themselves could possibly inform him. To insist upon a rigid compliance with the rule in the present case would work a plain miscarriage of justice. From the answers that were attempted to be made, and which in some instances were partly made by the witnesses, the trial court was obviously aware, as is this court, of exactly what the evidence would have shown had it not been excluded. Where the reason for the rule fails, the rule should not be applied. One purpose of the statute was to enable the trial court on the motion for a new trial to consider the excluded evidence, and, if satisfied that it should have been admitted, grant a new trial, or, where the cause was tried to the court or a referee, make such modifications or changes in the judgment as the facts require. Another purpose of the statute was to prevent the defeated party from seeking a reversal for error in the exclusion of evidence, which, had the ruling been in his favor, he might not have been able to produce.

It sufficiently appears by the testimony of the plaintiff and her husband what the evidence would have been had it been admitted. In a number of instances, the plaintiff testified to enough facts to show the character of her testimony. She said at different times that she gave her husband full power to act for her, and this was stricken out by the court upon objection.

Since there must be a new trial, it is proper to call attention to a number of rulings excluding evidence of both the husband and wife on the ground that the answer called for a conclusion. We are aware of no reason why the plaintiff should not have been permitted to testify where her farm was located, her ownership of it, who owned the crop that was destroyed, the necessity and occasion for building a levee, who constructed it, that she authorized her husband to attend the meeting of landowners and represent her as her agent, what portion of the levee was built by her, whether she ratified and approved the arrangements made by her

husband with the other landowners, that she knew the work was being done partly for her benefit. Many other answers should have been admitted which were ruled out on the ground that they called for a conclusion, or that they were irrelevant and immaterial.

It follows from what has been said that the judgment will be reversed, and a new trial ordered.

BURCH, MASON, SMITH, BENSON, and WEST, JJ., concurring.

JOHNSTON, C. J., dissents from that portion of the opinion which holds it to be unnecessary to produce excluded evidence on a motion for a new trial as required by section 307 of the Civil Code. *Clark v. Morris*, 88 Kan. 752, 129 Pac. 1195; *Caldwell v. Modern Woodmen*, 89 Kan. 11, 130 Pac. 642; *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617.

STATE v. EVANS.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 355*)—COMPETENCY — CHARACTER OF PROSECUTRIX.

In a prosecution for statutory rape, a witness was asked if he knew the general reputation of the complaining witness, a girl of about 14 years of age, for truth and veracity in the city of Lawrence. His answer, in substance, was that he knew only from what he had heard from several families with whom she had lived for a short time; that he had no knowledge of her general reputation among the neighbors where she lived. *Held*, that he was not competent to state what her general reputation for truthfulness was.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1154-1156; Dec. Dig. § 355.*]

2. CRIMINAL LAW (§§ 804, 1166½*)—APPEAL —INSTRUCTIONS—HARMLESS ERROR.

In a prosecution for statutory rape, the jury had been out for 30 hours, and before reaching a verdict sent an inquiry to the court to know if it would be proper to return a verdict with a recommendation for clemency. The judge, in the absence of the defendant, went to the door of the jury room and stated orally that there would be nothing improper in such a verdict, if the jury saw fit to make it, but that he would not say whether the recommendation would be considered, nor make any promise as to what he would do in such a case. Within 15 minutes thereafter a verdict of guilty was agreed upon and returned, with a recommendation for clemency. *Held*, that the instruction related only to the form of the verdict, and, if proper at all, was not required to be in writing; *held*, further, that since it does not appear that the jury were induced to render a verdict of guilty by an implied promise that leniency would be shown, the irregularity is not sufficient to justify a reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1948-1957, 3114-3123; Dec. Dig. §§ 804, 1166½.*]

3. CRIMINAL LAW (§ 925*) — NEW TRIAL — GROUNDS—MISCONDUCT OF JURY.

On a motion for a new trial affidavits of some of the jurors were offered, to the effect that

the failure of the wife of defendant to testify was talked of in the jury room and considered by the jury. The state offered affidavits to the contrary, which were sufficient to justify a finding that, while some reference was made to the matter, the jury gave no weight to it in arriving at their verdict. *Held*, that a new trial was properly denied.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2238-2247, 2250; Dec. Dig. § 925.*]

Porter and West, JJ., dissenting.

Appeal from District Court, Clark County.

William M. Evans was convicted of statutory rape, and appeals. Affirmed.

W. W. Harvey, of Ashland, for appellant. John S. Dawson, Atty. Gen., and H. R. Daigh, of Ashland, for the State.

PORTER, J. The defendant appeals from a conviction of statutory rape. The complaining witness, Hazel B. Evans, was less than 14 years old at the time of the alleged offense. Shortly before that she had been taken into defendant's home at Minneola and adopted by the defendant and his wife as their daughter. She had assisted in the general housework about the restaurant and the hotel which they conducted. She had attended school but little. Her father's death occurred when she was very young, and from that time she had lived with her mother and stepfather in various towns in Texas, Oklahoma, and Kansas, and before coming to Minneola she had been traveling about the country with them in a covered wagon, living in camps.

[1] The first error complained of relates to the exclusion of evidence. A witness, Rev. Barnhart, who was in the employ of a church society organized for the purpose of finding homes for children, was given charge of the complaining witness by the probate court of Clark county soon after the complaint in this case was filed. He placed her first in the home of a Mrs. Washington, in the country, near Baldwin in Douglas county, where she remained from the latter part of December, 1911, until the following April. He then found her a place in the Darling Hotel at Lawrence, where she stayed about four weeks, when the state board of control took charge of her, and left her with the family of the probation officer at Lawrence. She was kept for a while with the family of the sheriff of Douglas county, and was later given in charge of the Children's Home Society of Topeka. Mr. Barnhart was asked if he knew her general reputation in Lawrence for truth and veracity. He answered that he knew only from what he had heard from the families with whom he had placed her; that he had no knowledge of her general reputation among the neighbors of the people with whom she lived. The witness was not permitted to state what her reputation for truthfulness was. The testimony of the only corroborating witness at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the trial was somewhat weak and contradictory, so that the excluded testimony by which it was sought to impeach the veracity of the complaining witness was of considerable importance to the defendant. While the evidence might have been admitted, we cannot say that there was error in excluding it. The rule has always been that the inquiry must relate to the general character, and not to specific acts, and can be shown only by general reputation in the community where the person lives. *State v. Kirby*, 62 Kan. 436, 445, 63 Pac. 752; 40 Cyc. 2614.

[2] It is complained that while the jury were deliberating upon their verdict the court, in the absence of the defendant, gave an oral instruction, to the effect that it would be proper for the jury to return a verdict and to recommend clemency. It appears that the jury had been out for about 30 hours, and before reaching a verdict sent word to the court that they would like to ask a question. The judge, accompanied by the attorney for the defendant, went to the door of the jury room, when the foreman asked if it would be proper to return a verdict with such a recommendation. In answer the judge stated that there would be nothing improper in such a verdict, if the jury saw fit to make it; but he would not say whether the recommendation would be considered, nor would he make any promise as to what he would do in such a case. The foreman then requested the judge to wait for a few minutes, and within 15 minutes thereafter the jury returned a verdict of guilty, with an oral recommendation for clemency.

A quite similar situation arose in the case of *State v. Borchert*, 68 Kan. 360, at page 366, 74 Pac. 1108, at page 1109. In that case, while the jury were deliberating, and at a time when the balloting showed a disagreement on the question of defendant's guilt, they sent to the judge a written communication, asking whether a verdict of guilty with a recommendation for mercy would be received by the court. Without notifying the parties, the judge wrote upon the paper "Yes," and, signing it officially, returned it to them. The verdict of guilty was finally agreed upon, returned with a recommendation for clemency. In the opinion the court recognized as a wholesome rule that no communication whatever relative to the case should pass between the judge and the jury otherwise than in open court and in the presence of the defendant, but refused to grant a new trial because the prevailing party was chargeable with no wrong, and because it affirmatively appeared that no injury or prejudice resulted to the defendant. It was said in the opinion: "The jury merely inquired in advance whether a verdict with the extraneous matter would be received, and the judge, having authority to accept it or refuse it, chose to accept it, and notified the jury that he would do so." The communication was

held to relate only to the form of the verdict, not to any question as to the guilt or innocence of the defendant. It was also said in the opinion: "There is nothing in the record to justify the contention that the effect of the judge's conduct was to hold out to the jury as an inducement to a verdict of guilty an implied promise that leniency would be shown in fixing the punishment." 68 Kan. 366, 74 Pac. 1110. There is no room for distinguishing this case on the ground that the communication was oral. Exactly what transpired is shown as fully as though the communication had been in writing; and it was not an instruction upon the facts or the law of the case, which the statute requires shall be in writing. The punishment for the offense is fixed by statute; and, as the law stood at the time of the trial, there was no discretion in the judge of the court by which he could limit the term of imprisonment or extend leniency. Gen. St. 1909, § 2461. Under the provisions of chapter 172, Laws 1913, the court now has power to parole a person convicted of statutory rape. While the jury may have believed from what the judge told them that he had such power, or that he could limit the punishment, it cannot be said that there was any inducement held out to the jury that leniency would be shown. The irregularity in the proceedings is not sufficient, in our opinion, to justify a reversal of the judgment.

[3] On the motion for a new trial affidavits of some of the jurors were offered to the effect that the failure of the wife of the defendant to testify was talked of in the jury room and considered by the jury. The state offered the affidavits of other jurors which, in our opinion, were sufficient to justify the finding by the trial court that, while some reference was made to the matter, the jury gave no weight to it in arriving at the verdict of guilty.

In *State v. Brooks*, 74 Kan. 175, 85 Pac. 1013, it was held that before a new trial would be ordered because of a violation of this statutory rule, it must conclusively appear that the jury, or some one of them, in arriving at the verdict gave weight to the failure to testify. To the same effect, see *State v. Mosley*, 31 Kan. 355, 2 Pac. 782; *State v. Goff*, 62 Kan. 104, 61 Pac. 683.

In *State v. Rambo*, 69 Kan. 777, at page 781, 77 Pac. 563, at page 564, a conviction of murder was set aside because one juror in the hearing of other jurors commented upon the failure of the defendant to testify, for the reason that the statement of the juror showed a consideration by him of the circumstance, which was held to vitiate the verdict. In the opinion it was said: "A mere incidental mention, however, of the fact by a juror that a person on trial did not testify in his own behalf—a remark noting the circumstance, unaccompanied by an opinion that an explanation would be of service to

the accused—might fall short of showing a consideration of the matter by the speaker, and not violate the statutory injunction.”

In *State v. Brooks*, supra, 74 Kan. 179, 85 Pac. 1014, it was said: “The prohibition cannot reasonably be construed as absolutely forbidding the court and jury to take any thought whatever regarding such omission of the defendant—to deny it entrance to the mind in any aspect. Such a requirement would be impracticable.”

We find no error in the record and the judgment will be affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and BENSON, JJ., concurring.

PORTER, J. (dissenting). In my opinion the testimony of the witness Barnhart as to the reputation of the complaining witness for truthfulness should have been admitted. It appears to me that its exclusion can only be justified by a strained and technical construction of a rule of evidence. Technicalities, when urged by a defendant in a criminal action, no longer receive much consideration at the hands of courts; and there is far less reason why they should be relied upon by the state as a ground for excluding testimony which may throw light upon the question of the guilt or innocence of a defendant. Frequently prosecuting attorneys, and sometimes trial courts, appear to lose sight of the fact that the state can have no interest in securing the conviction of a defendant if there is a reasonable doubt as to his guilt under all the evidence.

The defendant was charged with a grave and serious crime. The complaining witness at first denied that anything improper had taken place, but afterwards swore to the complaint. She had resided but a short time in the community where the offense was charged to have been committed. She resided for a far longer period in Douglas

county. If the four or five families with whom she lived at Lawrence, covering a period of two or three months, had discovered that she was untruthful and could not be relied upon, and they had expressed their opinions to the witness Barnhart, the defendant should have been permitted to show that fact. Probably the neighbors of the people with whom she lived knew nothing about her one way or the other. But the witness Barnhart's testimony is that he knew her general reputation among the families and people with whom she lived. This I think was sufficiently general to make his testimony competent. For these reasons I dissent.

WEST, J. (dissenting). While in this class of cases, juries usually convict promptly when the evidence is sufficient, in this case the former trial resulted in a failure to agree, and upon a second trial, after the jury had been for 30 hours without reaching an agreement, the colloquy mentioned in the opinion occurred. It appears that at its close the judge was requested to wait a few minutes, and in about a quarter of an hour a verdict of guilty was reached. Men of practical experience in trying cases must shut out all natural inferences and presumptions not to be impressed with the fact that the answer of the judge really closed the matter and brought harmony to a discordant jury. The idea manifestly was that the court had some power over the sentence to be imposed in case of conviction which indeed the answer made by the judge implied, else he would have told them, as he should have done, that a recommendation for clemency could and would have no effect. The jury should have been instructed, not only that they had nothing to do with the matter of punishment, but that under the law at that time, the court likewise was powerless to minimize or modify the penalty imposed by statute. The whole thing smacks too much of a compromise verdict.

FLEMING (HEWINS, Intervener) v. BLACK WARRIOR COPPER CO. AMALGAMATED et al.

(Supreme Court of Arizona. Sept. 26, 1913. Rehearing Denied Nov. 17, 1913.)

1. CORPORATIONS (§ 206*)—ACTION BY STOCKHOLDERS—CONDITION PRECEDENT—DEMAND ON CORPORATION—FUTILITY.

A demand upon the corporation that it begin suit to avoid transfers of its property, made in fraud of the rights of the plaintiff stockholders, was not necessary as a condition precedent to bringing the suit themselves, where defendants, the officers of the corporation, had control thereof, and were hostile to plaintiffs, and had themselves caused the transfer to be made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791-796; Dec. Dig. § 206.*]

2. CORPORATIONS (§ 665*)—FOREIGN CORPORATIONS—ACTIONS AGAINST—JURISDICTION.

Where the defendant foreign corporation appeared and submitted itself to the court's jurisdiction, in a stockholders' action to set aside transfers of corporate property as fraudulent, and the property, title to which was involved, was within its jurisdiction, defendant cannot object to the court's assuming jurisdiction over it on the ground that it is a foreign corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.*]

3. CORPORATIONS (§ 665*)—FOREIGN CORPORATIONS—JURISDICTION.

A foreign corporation engaged in business in this state is estopped to deny its right to do so, in order to defeat the jurisdiction of the courts of this state when dealing with its property within their jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.*]

4. CORPORATIONS (§ 211*)—ACTION BY STOCKHOLDERS—FRAUDULENT TRANSFER OF PROPERTY.

The complaint, in an action by minority stockholders to set aside a transfer of the corporate property as in fraud of their rights, alleged facts showing a conspiracy by the corporate officers to cause the corporate stock to become worthless by so mismanaging the corporate affairs as to involve the corporation in debt and compel the creditors to resort to the corporate realty, the personalty having been dissipated, and that judgments were rendered against the corporation, and that the managing officers procured executions to be issued and levied on all of its property, which was sold and bought in by them for a nominal price, when they procured a judgment dissolving the corporation in order to prevent redemption of the property sold. *Held*, that the facts alleged sufficiently showed the fraud relied on.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. § 211.*]

5. LIMITATION OF ACTIONS (§ 74*)—FRAUD—RELIEF.

Under Rev. St. 1901, par. 2949, as amended by Laws 1903, No. 16, providing that a cause of action for fraud is not deemed to have accrued until the discovery of the facts constituting the fraud, and paragraph 2970, providing that the time of disability by unsoundness of mind shall not be a part of the time limited for the commencement of the action, an action by an executor to set aside as fraudulent a transfer of property of a corporation in which testator was a stockholder, brought in 1909, was not barred,

where decedent was of unsound mind when the fraudulent transactions were commenced, and continued so until his death in 1909, when the executor was appointed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 413, 414; Dec. Dig. § 74.*]

6. EQUITY (§ 87*)—LACHES—APPLICATION OF STATUTE OF LIMITATION.

Where the circumstances are particularly unconscionable, and the complaining party is also at fault, equity will refuse relief on the ground of laches, though the remedy invoked is not barred by the statute of limitations.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. § 87.*]

7. EQUITY (§ 87*)—LIMITATIONS—APPLICATION IN EQUITY.

As a rule a court of equity is bound by the statute of limitations equally with the courts of law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244, 395; Dec. Dig. § 87.*]

Appeal from Superior Court, Gila County; A. G. McAllister, Judge.

Action by James A. Fleming against the Black Warrior Copper Company Amalgamated and others, in which L. E. Hewins, as executor of E. B. Knox, intervened. From a judgment for defendants, plaintiff and intervenor separately appeal. Reversed and remanded.

Eugene S. Ives, of Tucson, for appellants. Alderman & Elliott, of Globe, for appellees.

CUNNINGHAM, J. This action was commenced March 25, 1909, by the appellants as minority stockholders in the Black Warrior Copper Company Amalgamated, a domestic corporation, against the said Black Warrior Copper Company Amalgamated, certain named members of its board of directors, certain of its stockholders, certain named persons comprising a reorganization board, the Warrior Copper Company, a foreign corporation, organized by said reorganization board, the incorporators, of the foreign corporation, Meredith Hanna, and the Fidelity Trust Company, a corporation, as trustee for certain purposes.

The purpose of the action is to have declared void transfers of all the property of the defendant Black Warrior Copper Company Amalgamated to the Warrior Copper Company, because such transfers are in fraud of the rights of the plaintiffs as stockholders of the Black Warrior Copper Company Amalgamated, a corporation, and in fraud of the rights of the holders of bonds issued by said corporation.

The defendant Warrior Copper Company defends alone. The other defendants make no appearance in the action. The said defendant demurred to the complaint upon the grounds that the facts stated do not constitute a cause of action, and because the court has no jurisdiction over a foreign corporation in this kind of action, because the matters and things alleged are shown to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pertain to the internal affairs of this corporation, because the alleged cause of action is barred by laches and the statute of limitations, and because the intervenor's complaint does not show capacity to sue, in the absence of a showing that the Black Warrior Copper Company Amalgamated and its managing board were requested to sue the cause of action. The court by a general order sustained the demurrers without a more specific designation of any particular grounds, and, the plaintiff and intervenor electing to stand upon their complaints, judgment was rendered for the defendants, and, from which judgment, this appeal is prosecuted.

Appellant James A. Fleming, the original plaintiff, and L. E. Hewins, as executor intervenor, only appeal, and assign error separately upon the orders of the court sustaining the demurrers general and special, viz.: Whether the complaint is sufficient to state a cause of action; whether the plaintiff and intervenor appellants are barred by laches and by the statute of limitations; and whether the complaints show equity.

In the most general manner we will observe that the plaintiffs show their rights as stockholders, and Fleming's additional interest as a bondholder, in the Amalgamated corporation. The complaint then shows that the defendants in furtherance of a conspiracy, and by the use of the courts and officers of the law, did, upon the face of the transaction, divest, on the 29th day of June, 1906, the Amalgamated corporation of all its property, and thereby caused the stock and bonds of the plaintiff and others similarly situated to become wholly worthless. The complaint shows that at the time of the transaction complained of the Amalgamated company was possessed of personal property consisting of its capital stock, then in the treasury undisposed of, and salable, of the reasonable value of \$60,000; also fuel oil worth \$2,500; also a stock of merchandise of great value; also timber and copper ready for market; also \$19,849.75 cash on hand—and this property, with other real property owned by the company, in the aggregate was of a reasonable value of \$2,000,000, and the company was indebted in the sum of about \$15,000. In furtherance of the said conspiracy, the money and personal property were dissipated, and the real property was allowed to be sold under execution to satisfy the small indebtedness, and about the time of the sale of the real property under execution the Amalgamated company was reincorporated in order to prevent a redemption of the property from the sale, and the defendants organized the Warrior Copper Company, and appointed trustees to, and they did purchase the property at the sale, and conveyed the property to the said Warrior Copper Company.

[1] The complaints show that the parties defendant had at all times complete control

of the affairs of the Amalgamated company, that they were hostile to the plaintiff and to the intervenor, and were acting upon a pre-concerted plan to accomplish the very results complained of, and for plaintiff and the intervenor to demand that the Black Warrior Copper Company Amalgamated commence and prosecute this action would be a futile thing which the law does not require. Nothing but a refusal could be reasonably expected to result from such demand.

[2] The defendant Warrior Copper Company has submitted itself to the jurisdiction of the court for all purposes of this action, and it cannot complain if the court exercise that jurisdiction.

[3] The property incidentally involved is within the jurisdiction of the court, and a decree of the court might affect the title to the property involved; therefore the court had jurisdiction to determine the matters, although the defendant Warrior Copper Company is a foreign corporation. This corporation is engaged in its business in Arizona, and is estopped to deny its right to so engage in business, in order to defeat the jurisdiction of the state courts when dealing with its property within that jurisdiction.

The facts and circumstances charged as amounting to fraud briefly summarized are as follows: The Amalgated company in December, 1903, was possessed of property of the aggregate value of \$2,000,000, and owed but a trifling amount of indebtedness, outside of the debenture bonds. Subsequent to December, 1903, the defendants permitted a judgment for \$14,000, and another judgment of \$1,100, to be recovered against the Amalgamated company, at the time having cash on hand in the sum of \$19,849.75, and other valuable, salable personal property. The directors procured the issuance of executions on the two judgments, and a levy of the executions on the property of the company at a time when the company's treasury contained 12,000 shares of the capital stock of the company worth on the market and readily salable for the sum of \$60,000, and permitted, on March 25, 1905, the sheriff to sell property of said corporation of the value of \$1,000,000 for a nominal sum of \$1,203.25, and other property worth nearly \$1,000,000, under execution issued on January 31, 1905, for the sum of \$4,877.77. When all the property of the corporation had been either sold by the sheriff or dissipated by defendants, on May 24, 1905, they commenced a proceeding, through a stockholder, having full notice of the facts mentioned, to dissolve the said Amalgamated corporation. On June 24, 1905, by consent of defendants, such dissolution proceedings culminated in a judgment of the court dissolving said Amalgamated company upon the grounds and for the reason "the said corporation has disposed of all its corporate property, real, personal, and mixed, said property having been sold at execution

sale, and that there is not at this time assets or property out of which money may be or could be secured for the purpose of exercising an equity of redemption." One of the members of said reorganization committee bid for, and bought, all the real property of the Amalgamated company, so sold by the sheriff, and on November 18, 1905, demanded of, and on February 7, 1906, the sheriff made his deed to the member of said committee, as trustee, conveying all the property of said Amalgamated company to such party as trustee for said committee. In due time conveyances were made by the members of the said committee to the defendant "the Warrior Copper Company." The result of these transactions was upon their face to divest the Amalgamated company of all its assets for the inadequate consideration of \$6,081.02. It further appears that, in pursuance of the said conspiracy, the plaintiff Fleming was ousted from the office of director and president of the Amalgamated company, because he was a large stockholder of said corporation, and a holder of substantially all the issued bonds. While holding those offices, he was in the position to protect the Amalgamated company and its stockholders.

[4] These facts show an injury to the intervener by reason of a loss of the property upon which the sole value of his stock depends. The circumstances or facts charged, which show fraud, consist of the alleged conspiracy entered into by the defendants having for its object the very purpose of causing the stock of the Amalgamated company to become worthless. The internal affairs were purposely so managed that the company became involved in debt, and, to force the creditors to resort to the real estate, the personal property of the company was sacrificed and dissipated. The judgments were rendered against the company, and the defendants, charged with the management of its affairs, procured executions to be issued and placed in the hands of the sheriff, and caused the sheriff to levy on all the property of the company, and sell the same; the defendants bought the property at the sale for a nominal sum, then procured a judgment of dissolution against the company to prevent a redemption of the property. These are certainly facts which show in what the fraud consists, and how the transaction has been affected by the fraud. Cochise County v. Copper Queen, 8 Ariz. 221, 71 Pac. 946.

[5] Appellee contends that the claims of Fleming are stale, and ought not be enforced for that reason. We may concede this contention as applicable to the rights of Fleming; but the rights of the intervener estate are controlled by a very different state of facts. On April 26, 1900, E. B. Knox became a stockholder of the Amalgamated company, owning 500 shares of stock until his death, during the year 1909, when the stock passed

to the executor of his estate, L. E. Hewins, the intervener. The complaint of intervener Hewins avers that at the time of the several transactions complained of and up to the time of his death said E. B. Knox was insane, and had no knowledge of the transactions complained of, and that intervener Hewins had no notice or knowledge of any of the facts concerning such several transactions until after the commencement of this action.

Actions for relief on the grounds of fraud or mistake must be commenced within one year after the cause of action shall have accrued, and not afterward; provided, the cause of action in such case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. Paragraph 2949, Rev. St. Ariz. 1901, as amended by Act No. 16 of the Session Laws 1903.

"If a person entitled to bring any action * * * be at the time the cause of action accrues * * * 2. Of unsound mind; * * * the time of such disability shall not be deemed a portion of the time limited for the commencement of the action. * * *"

Paragraph 2970, Rev. St. Ariz. 1901.

The complaint avers that the deceased was of unsound mind at the time of the several transactions constituting the fraud, and the disability continued until his death, in the year 1909. The intervener became executor of the estate in 1909. The original action was commenced March 25, 1909. By the provisions of paragraph 2970, supra, the statute never commenced to run against the deceased. The complaint avers that the executor did not discover the facts constituting the fraud until after this action was commenced, when the complaint in intervention was filed. The complaint is not subject to a demurrer presenting the statute of limitations. On its face the cause of action is not barred.

[6, 7] Equity will, under circumstances especially revolting to a sense of justice, refuse relief where the remedy invoked is not barred by the statute of limitations; but in such case the complaining party is not wholly free from fault, and the rule of laches is applied operating in the nature of an estoppel. No such rule can justly be applicable to the facts of this case. A court of equity is equally bound with a court of law by the statute of limitations.

The complaint of the intervener is not subject to the vices contended for, and the court erred in sustaining the several demurrers of the defendant.

The judgment is reversed, and the cause remanded, with instructions to the superior court of Gila county to overrule the demurrers, and proceed with the cause according to law.

Reversed and remanded.

FRANKLIN, C. J., and ROSS, J., concur.

BENNETT v. STATE.

(Supreme Court of Arizona. Nov. 4, 1913.)

1. HOMICIDE (§ 11*)—"MURDER"—"MALICE" AFORETHOUGHT.

Under Pen. Code 1901, § 172, defining "murder" as the unlawful killing of a human being with malice aforethought, which malice is express when there is a manifest and deliberate intention to unlawfully take the life of another, and implied where no considerable provocation appears, or when the circumstances show an abandoned and malignant heart, the term "malice" comprehends more than ill will, hatred, or revenge, and means the intent to kill a human being without legal justification or excuse, and under circumstances which do not mitigate the crime to manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 15, 16; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726, 7727; vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

2. HOMICIDE (§ 146*)—PRESUMPTIONS—MALICE.

Where a homicide is proved, and the evidence shows neither mitigation nor justification, malice will be presumed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 265-271; Dec. Dig. § 146.*]

3. HOMICIDE (§ 269*)—QUESTION FOR JURY—MALICE.

Where defendant, who was shown to have been hostile toward and to have made threats against deceased, provoked or invited an altercation with deceased while the latter was peaceably conversing with a friend on the sidewalk, and a struggle followed in which defendant was worsted, and defendant, when deceased was following him, picked up a gun, and told him to get out from behind the bar, and shot him, and while the latter was dying made a further expression of enmity against him, the evidence presented two conflicting inferences, one of malice, and the other of absence of malice, and the question of malice aforethought was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563; Dec. Dig. § 269.*]

4. CRIMINAL LAW (§ 1159*)—QUESTION FOR JURY—MALICE.

Where the question of malice aforethought was determined by the jury adversely to defendant, and there was sufficient competent evidence to support the verdict, the Supreme Court cannot interfere.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Superior Court, Cochise County; Fred Sutter, Judge.

M. A. Bennett was convicted of murder in the second degree, and he appeals. Affirmed.

Allen R. English and J. T. Kingsbury, both of Tombstone, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

FRANKLIN, C. J. Indictment for murder. The defendant was convicted of murder in the second degree. The appeal is from the judgment and order denying a motion for a new trial.

On the trial of the cause no evidence was

introduced by the defendant. A reversal of the judgment is urged because the evidence adduced by the state shows no element of murder. The point made is that the evidence discloses an absence of malice aforethought, and this is the only matter to be decided.

The homicide occurred in the town of Wilcox on the 26th day of June, 1912. The surgeon who examined the body of the deceased stated his death was caused by a bullet wound severing the main artery that supplies the brain, and which runs up by the side of the neck in the region where the bullet entered. It appears from the evidence that about six weeks previous to the time of the homicide the deceased had killed a dog belonging to the appellant, which occurrence had occasioned a feeling of hostility on the part of appellant towards Mr. Wiley, the deceased. This feeling of hostility was expressed by appellant on several occasions to different persons. These persons testified that appellant, upon being informed that Wiley had killed his dog, asserted to one that "he would get even with the ——— that killed the dog." And to another that "he would fix the man that killed her."

On the day of the homicide Wiley, the deceased, was walking down one of the streets of Wilcox, on which was located the Midway saloon, a place in which appellant was employed. The deceased was leisurely walking along stopping at different times to converse with some acquaintances. When he arrived in front of the Midway saloon he stopped and engaged in conversation with one C. C. McDuff. While so engaged the appellant opened the screen door of the saloon, and, putting his head out of the doorway in a very offensive manner, so the witnesses put it, "bleated like a sheep at Wiley." Thereupon appellant and deceased engaged in an altercation, followed by a physical struggle, were, the witnesses state it, scuffling about the saloon, and during which opprobrious epithets were bandied to and fro. During the struggle Wiley pressed the appellant's head against the jamb of the saloon door, and pushed him out on the sidewalk.

P. B. Clark, who was sitting in the saloon at the time, testified that appellant came back into the saloon, and went behind the bar, and the deceased proceeded to follow him behind the bar, and appellant said, "Don't come behind the bar," and picked up a gun, and said, "Get out from behind the bar," and the deceased kept going, and appellant shot him; that deceased threw his hand up, the witness observing blood streaming down his bosom, the deceased exclaiming, "Oh, my God!" as he walked out of the saloon onto the sidewalk, where he fell, and died a few minutes later.

Another witness testified that shortly after the shooting appellant characterized the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ceased by a vile epithet, and stated that the deceased came in the saloon, and caught appellant, and carried him to the door, and threw him out, and started to catch his gun, and he told him to stop. The evidence does not disclose that Wiley was armed in any way, and, while he was lying on the sidewalk in front of the saloon dying, the appellant was observed leaning with his elbows on the bar of the saloon looking out at Wiley.

Murder is the unlawful killing of a human being with malice aforethought. Such malice is express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied where no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Paragraph 172, Penal Code of Arizona 1901.

The statute separates the felonious homicides into the two degrees of murder and manslaughter. Malice must therefore always exist in murder; the two degrees of murder being distinguished from manslaughter by being committed of malice aforethought. To ascertain, therefore, whether a felonious killing is murder or manslaughter, we have simply to inquire whether it was committed of "malice aforethought" or not. Bishop's New Criminal Law, § 673.

Many attempts have been made in the books to generally define malice; but, however accurate we may regard the definition, it does not furnish much practical help in the concrete case. Recognizing the little practical help given by any general definition of the term, our statute has furnished the criteria for determining its presence in the given case. It is present when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is present where no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

The law excuses or justifies a homicide in some instances and under certain circumstances, and, when upon the trial the homicide appears to be justifiable or excusable within the terms of the statute, the person charged therewith must be fully acquitted and discharged.

The law also mitigates the unlawful killing of a human being from murder to manslaughter when such killing is done without malice. It is of two kinds: (1) Voluntary. In the commission of an unlawful act not amounting to a felony; or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection. Paragraph 176, Penal Code of Arizona 1901.

It is the wisdom of divine providence to deny men the philosopher's stone wherewith to solve the manifold complexities, and lay bare to view the mysteries of the mind and

heart. And so the law furnishes no psychological test by which to determine directly the state of the mind, for in a sense it is unknowable. But the law does give the criteria for ascertaining the presence or absence of malice in the concrete case.

So malice aforethought relates not merely to the state of the mind of the person who unlawfully kills another, but to the moral aspects of the case as indicated by all the conditions and circumstances attending and characterizing the act. The circumstances may in law justify or excuse the killing, or they may mitigate it to manslaughter. The law defines the circumstances under which the killing of one person by another is justified, or excused, or so far extenuated as to reduce the crime to manslaughter. Such a killing is without malice aforethought, and it must follow that any other unlawful killing of one person by another is a killing with malice aforethought.

Wharton says that: "Malice in law does not necessarily mean hate, ill will, or malevolence, but consists in any unlawful act, willfully done without just excuse or legal occasion, to the injury of another person. It may properly be said not to be a thing or entity, but rather a mental state or condition prompting the doing of an overt act without legal excuse or justification, from which act another suffers injury. Where the act is done with the deliberate intention of doing bodily harm to another, it is called express malice; otherwise the malice is inferred or presumed from the act. Evil intent is legal malice; so, also, is gross and culpable negligence whereby another suffers injury." Wharton, *Crim. Law* (11th Ed.) § 146. And the author says it is proper to tell the jury that from certain circumstances—e. g., the use of a deadly weapon, repeated and severe wounds, threats—intent and malice may be rightly inferred as inferences of fact. Wharton, *Crim. Ev.* (10th Ed.) § 738. Our only way of proving malice is by inferring it from circumstances. Wharton, *Crim. Law* (11th Ed.) § 145.

Mr. Bishop says, whether we regard the question of malice aforethought as of law or of fact, it relates to the condition of the prisoner's mind, into which the witnesses cannot look; therefore it can never be the subject of direct testimony, but either the court or the jury must infer it as a presumption from the tangible facts in evidence. Bishop's *New Criminal Law* (8th Ed.) § 673A.

[1] The legal import of the term "malice" extends beyond and is more comprehensive than ill will, hatred, or revenge. It includes all states of the mind under which the killing of a human being by another takes place without any cause which will, in law, justify or excuse it, or mitigate the homicide to manslaughter. And as malice, in connection with the crime of killing, is said to be but

another name for a certain condition of a man's heart or mind and as no one can look into the heart or mind of another, the only way to decide upon this condition at the time of the killing is for the jury to determine it from all the facts and circumstances surrounding the case. The killing being admitted or proved beyond a reasonable doubt to have been done by the accused, do the surrounding facts satisfactorily show any cause which in law will excuse or justify the killing, or which in law will mitigate the killing to manslaughter? If any such cause is present in the case, there is no malice; otherwise the jury would be justified in finding its presence in the case.

That the term "malice aforethought" in the definition of murder is confusing becomes obvious on an examination of the innumerable cases dealing with the matter and the great variety of opinion expressed on the subject. In early times by English statutory provision the benefit of clergy was denied those who committed murder, and the crime was practically limited to express malice existing prior to and inspiring the killing; in other words, to a willful, deliberate, and premeditated killing. Thus it was that the term acquired in the law of homicide a well-defined and technical meaning. But in view of its historical aspect, and in the light of its development by the interpretation of the courts and statutory enactment, and notwithstanding the approved definition of the crime of murder as the unlawful killing of a human being with malice aforethought still remains by statutory prescription, the crime is not limited to express malice, but includes implied malice also. If, as Mr. Bishop says, this malice aforethought relates to the condition of the prisoner's mind into which the witnesses cannot look, and therefore can never be the subject of direct testimony, the distinction between a justifiable or excusable homicide and the crimes of murder and manslaughter, and between an unlawful killing with malice aforethought and an unlawful killing without malice, ought to be sought not so much in the state of mind of the person who kills another but more logically in the circumstances attending and characterizing the act of killing. While in its essence "malice aforethought" was formerly a term having a technical meaning in the law, in the light of its modern development, and in its relation to the crime of homicide, the malice aforethought essential to the crime of murder has this broad general meaning—the intentional killing of one human being by another without legal justification or excuse, and under circumstances which in the law do not mitigate the crime to manslaughter. Such a killing is murder.

[2] "If the homicide is proved, and the evidence adduced to establish it shows neither mitigation nor justification, malice will be presumed from the proof of the homicide;

but the presumption is a rebuttable one, and may be overcome by evidence of alleviation or justification. If the evidence adduced to establish the homicide presents two conflicting inferences, one of malice, and the other an absence of malice, then it becomes a question of fact to be decided by the jury as to which aspect of the evidence is the real truth of the occurrence. As was remarked by Mr. Wharton, the question of proving malice is one of logic, and not one of formal law. 2 Wharton, Criminal Law, § 314. Text-writers generally deal with the presumption of malice arising from proof of the homicide as a rule of evidence, rather than a principle of substantive law. See Greenl. Ev. § 34." Mann v. State, 124 Ga. 760, 53 S. E. 324, 4 L. R. A. (N. S.) 934, note.

For a very extended and interesting review of "malice aforethought" in the definition of murder, see note to State v. McGuire, 84 Conn. 470, 80 Atl. 761, in 38 L. R. A. (N. S.) 1054.

[3] In the case before the court the killing was proved beyond a doubt to have been done by the appellant with a deadly weapon. It appears also that, while deceased was peaceably conversing with a friend on the sidewalk, the appellant provoked or invited the altercation and struggle occurring between himself and the deceased by his insulting conduct. Superadded is the evidence of hostile feelings and threats on the part of appellant towards the deceased, and an expression of enmity just after the shooting. Then the testimony photographs appellant calmly folding his arms across the bar of the saloon, and, as the stricken man staggered from the room with blood streaming down his bosom, watching unmoved his victim till he fell mortally wounded upon the sidewalk. Even with weak eyes one could discern the properties of malice here.

Whether the chastisement which deceased administered to appellant during the scuffle that took place in the saloon—occasioned as it was by appellant's reprehensible demeanor—furnished any considerable provocation for the killing, or that the killing was done in the heat of blood, or whether the evidence adduced shows excuse, justification, or mitigation, it was the province of the jury to determine under the facts as here presented.

The most that can be said for appellant is that the evidence presents two conflicting inferences, one of malice, and the other an absence of malice; but it was for the jury to say in which aspect of the evidence the real truth of the occurrence lay.

[4] No complaint is made that the jury were not fully advised by appropriate instructions as to the law governing their duty in respect to the presence or absence of malice aforethought in the case. The question of malice having been determined by the jury, whose solemn duty it was to ascertain its presence, or the want of it, and there being

sufficient competent evidence to support the verdict, we cannot interfere.

Affirmed.

CUNNINGHAM and ROSS, JJ., concur.

CROWELL v. STATE.

(Supreme Court of Arizona. Nov. 18, 1913.)

1. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY.

An indictment charging more than one offense is bad for duplicity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—EVIDENCE OF OTHER CRIMES—ADMISSIBILITY.

In a prosecution for homicide, accused not having himself killed decedent, that being by a third person, evidence that the third person shortly before had assaulted another man at the direction of accused was not admissible, where it did not appear that the killing was in any way connected with the assault in question; evidence of other crimes being admissible only to show motive, intent, absence of mistake, a common scheme, or the identity of the person charged with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 424*)—EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR.

While the declarations of one co-conspirator are admissible in evidence against another, when made in furtherance of the conspiracy, yet declarations made after the object of the conspiracy is accomplished are not admissible, especially in view of the fact that Pen. Code 1901, § 925, allows persons charged as principals in the same crime to have separate trials.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

4. CRIMINAL LAW (§ 424*)—EVIDENCE—ACTS OF CO-CONSPIRATOR.

The acts of one co-conspirator, performed after the object of the conspiracy has been effected, are inadmissible against another.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

5. CRIMINAL LAW (§ 448*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide, where it was claimed that accused had another kill deceased, evidence that accused's wife warned the wife of deceased to look out for her husband, and that there was going to be trouble, is inadmissible, being the conclusion of accused's wife, and not a statement of the facts on which the witness based her conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.*]

6. CRIMINAL LAW (§ 417*)—EVIDENCE—ADMISSIBILITY—DECLARATIONS.

In a prosecution for homicide, evidence of a warning given by accused's wife to the wife of deceased is inadmissible; the statement being made in the absence and out of the hearing of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. § 417.*]

7. WITNESSES (§ 398*)—CROSS-EXAMINATION—IMPEACHMENT.

In a prosecution for homicide, where the state asked accused's wife if she did not warn

the wife of deceased to look out for her husband, and that there was going to be trouble, the matter being a collateral one and not properly admissible, the state is bound by the witness' answer and cannot impeach it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1267, 1274, 1275; Dec. Dig. § 398.*]

8. CRIMINAL LAW (§ 308*)—PRESUMPTIONS.

The presumption of innocence extends to all persons accused of crime, and is not withdrawn during the trial, however strong the evidence against him may be.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. 808.*]

Appeal from Superior Court, Pinal County; J. E. O'Connor, Judge.

W. J. Crowell was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Baker & Baker and Benton Dick, all of Phoenix, for appellant. G. P. Bullard, Atty. Gen., Leslie C. Hardy, Asst. Atty. Gen., and Hayes & Laney, of Phoenix, for the State.

ROSS, J. The appellant and one Frank Nort were jointly indicted for the murder of William Dobson. Upon a separate trial appellant was convicted of second degree murder. From the judgment of conviction and order overruling his motion for a new trial he appeals.

Dobson came to his death from a gunshot wound inflicted by Nort. Appellant at the time the fatal shot was fired was not present, but was in his place of business some 75 or 80 feet away.

While the appellant and Nort were jointly indicted as principals, the case was tried by the prosecution on the theory that Nort inflicted the fatal wound upon the solicitation, command, and under the influence of the appellant. Our statutes have abrogated the distinction of principal and accessories before the fact in felony cases, and all persons concerned in the commission of a felony are now prosecuted, tried, and punished as principals (Penal Code, § 845; Trimble v. Territory, 8 Ariz. 281, 71 Pac. 934), yet Nort may be described as the principal and appellant as accessory, as those words were formerly used, to convey the relation, it is claimed, they sustain to each other. The case was defended upon the theory that appellant was not concerned in the commission of the offense charged.

The appellant's assignments of error all go to the admission of evidence over his objections. These assignments we group as follows and shall consider them in their order:

(1) The court erred in permitting a witness for the prosecution to testify on his chief examination to an assault made by Nort upon one Swearington two or three hours before he shot Dobson.

(2) The court erred in permitting witnesses Gouraud and Sinnott, for the prosecution, to testify in rebuttal that, after the fatal

shooting and while appellant was absent, Nort told them that appellant "pinned the badge on him, handed him the gun, and told him to go ahead." Assignments 4 and 5.

(3) The court erred in permitting witnesses to testify to statements and declarations of Nort after the shooting, in the absence of appellant, concerning his conduct in connection with the killing. Assignments 2, 3, 6, and 7.

(4) The court erred in permitting witnesses to testify to the actions and conduct of Nort after the shooting while on appellant's premises. Assignments 8, 9, 10, 11, and 12.

(5) The court erred in permitting defendant's witness Mrs. Crowell to be cross-examined, over objection, as to what she said to Mrs. Dobson about looking after her husband; that there was going to be trouble—and in permitting the prosecution to rebut Mrs. Crowell's testimony on this point. Assignments 13 and 14.

The first evidence offered by the prosecution was that, some two or three hours before Nort shot Dobson, one Swearington entered appellant's place of business and asked to purchase some hay from appellant. After parleying for a moment with appellant, the witness says: "Bert Swearington asked Mr. Crowell if he kept a fighting man around there, and Crowell says 'You bet your life I do,' and took this fellow Bert and pushed him away from the bar, * * * and he says to Frank Nort: 'Frank, go get on him; put him down'—and Frank Nort immediately turned around to Bert Swearington and punched him and knocked him down." This evidence was objected to as being incompetent and irrelevant, and as tending to prove a different issue from that presented in the indictment.

[1, 2] Under our system of criminal procedure an indictment charging more than one offense is bad for duplicity. The pleader is required to reduce the issue as to the guilt of accused to one offense and one only. It logically follows that the evidence should be confined to that issue. Indeed the "general rule is that evidence of offenses other than that for which the defendant is on trial cannot be introduced. *Kinchelow v. State*, 5 *Humph. (Tenn.)* 10. But there are well-established exceptions. *Peek v. State*, 2 *Humph. (Tenn.)* 78; *Defrese v. State*, 3 *Heisk. (Tenn.)* 53, 8 *Am. Rep. 1*; *Williams v. State*, 8 *Humph. (Tenn.)* 585; *Britt v. State*, 9 *Humph. (Tenn.)* 31; *Cole v. State*, 6 *Bart. (Tenn.)* 239; *Dobson v. State*, 5 *Lea (Tenn.)* 273; *Mynatt v. State*, 8 *Lea (Tenn.)* 47; *Murphy v. State*, 9 *Lea (Tenn.)* 377; *Links v. State*, 13 *Lea (Tenn.)* 710, 711; *Foute v. State*, 15 *Lea (Tenn.)* 712; *Rafferty v. State*, 91 *Tenn.* 655, 664, 16 *S. W.* 728. The principle is that no evidence is competent which is not of a character to throw light on the issue, and it is usually true that proof of other crimes committed will not reflect any light upon the special crime with which the

defendant stands charged." *Sykes v. State*, 112 *Tenn.* 572, 82 *S. W.* 185, 105 *Am. St. Rep.* 972.

As exceptions to the general rule, evidence of other crimes, it is said, is competent to prove the specific crime charged when it tends to establish: (1) Motive, e. g., the commission of one crime to suppress evidence of another crime. *State v. Kent*, 5 *N. D.* 516, 67 *N. W.* 1052, 35 *L. R. A.* 518. (2) Intent, e. g., in embezzlement cases. *Lang v. State*, 97 *Ala.* 41, 12 *South.* 183. *Forgery*. *People v. Bird*, 124 *Cal.* 32, 56 *Pac.* 639. (3) The absence of mistake or accident, e. g., passing counterfeit coin or bill. *Commonwealth v. Jackson*, 132 *Mass.* 16. *Receiving stolen property*. *Commonwealth v. Johnson*, 133 *Pa.* 293, 19 *Atl.* 402. (4) A common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, e. g., a general agreement to rob, and to shoot if resisted; other robberies committed in the general plan or scheme may be shown on a trial for murder committed in an attempt to rob. *State v. Lee*, 91 *Iowa*, 499, 60 *N. W.* 119. On a trial for murder as a result of a conspiracy, other crimes prior to the murder, if committed in carrying out the unlawful scheme, may be shown. *State v. McCabill*, 72 *Iowa*, 111, 30 *N. W.* 553, 33 *N. W.* 599. (5) The identity of the person charged with the commission of the crime on trial, e. g., that the defendant charged with murder used stolen tools to enter house and shot the victim with a pistol stolen from another house. *People v. Rogers*, 71 *Cal.* 565, 12 *Pac.* 679. See note to *Sykes v. State*, 105 *Am. St. Rep.* 976, for a full and comprehensive discussion of the questions.

Now, the trouble with Swearington does not tend to show or afford any cause or motive on the part of appellant to kill Dobson, nor intent or mistake, for it was not he who fired the fatal shot, nor could it be for identification as that was unquestioned. It is suggested by the prosecution that it was a part of a "common scheme or plan." The argument is that the evidence, showing as it does that Nort in committing the assault on Swearington by direction of appellant, would have a tendency to show that Nort was the tool or instrument of appellant, and, upon the hypothesis that Nort obeyed appellant in the one instance, he was acting under appellant's influence when he sought Dobson and shot him. In other words, the appellant, having been identified as participating with Nort in an assault upon Swearington, was likewise particeps criminis to the shooting of Dobson. However ingenious this argument may seem, we think it fails to show or tends to show a common scheme, plan, or system contemplating or embracing the commission of the two offenses of (1) assault on Swearington and (2) the killing of Dobson. If Dobson had taken up Swearington's trou-

ble and made it his, and the two offenses had been thus linked together, it might be the evidence would be admissible. But Dobson was in no way concerned in that trouble as a partisan or otherwise. The shooting of Dobson later in the day is not shown to be related to or connected with the Swearington trouble. The only effect of such evidence was to impress the minds of the jury that Nort was a quarrelsome, vicious person, and, being an employé of appellant, the latter was measurably responsible for his conduct, whatever it might be. The rule of agency in civil actions, involving property rights only, has its limitations. Surely the rule should be more strictly bounded when the life or liberty of the citizen is at stake.

In *Farris v. People*, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283, it is said: "The general rule that evidence of a distinct, substantive offense cannot be admitted in support of another offense is laid down by all the authorities. It is, in fact, but the reiteration of the still more general rule that in all cases, civil or criminal, the evidence must be confined to the point in issue, it being said, however, by authors on the criminal law, that in criminal cases the necessity is even stronger than in civil cases of strictly enforcing the rule; for where a prisoner is charged with an offense, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment and matters relating thereto, which alone he can be expected to come prepared to answer. 3 Russell, Crimes (5th Ed.) 368; 1 Roscoe, Crim. Ev. (8th Ed.) 92. 'No fact which, on principles of sound logic, does not sustain or impeach a pertinent hypothesis is relevant, and no such fact, therefore, unless otherwise provided by some positive prescription of law, should be admitted as evidence on a trial. The reason of this rule is obvious. To admit evidence of such collateral facts would be to oppress the party implicated, by trying him on a case for preparing which he has had no notice, and sometimes by prejudicing the jury against him. * * * To sustain the introduction of such facts, they must be in some way capable, as will presently be seen more fully, of being brought into a common system with that under trial.' Whart. Cr. Ev. § 29." *People v. Doty*, 175 N. Y. 164, 67 N. E. 303; *Shaffner v. Com.*, 72 Pa. 65, 13 Am. Rep. 649; *Towne v. People*, 89 Ill. App. 258. In the latter case it was said: " * * * Yet they are all in substantial accord upon the proposition that unless there be some apparent logical connection between the two offenses, either by reason of both being of the res gestæ, or both being part of one system, or the one tending to show a scienter in the other, the general rule governs, and the exception to it does not apply." We think the trouble with Swear-

ington was unrelated to offense laid in the indictment, and that the court erred in admitting evidence of it.

[3] The errors complained of in points 2 and 3 are of the same general nature, and will be treated of together. These assignments all pertain to statements and declarations made by the codefendant, Nort, in the absence of appellant, after the shooting of Dobson by Nort. Some of the statements made by Nort and admitted were: "He told me that he went over to Dobson's place to get a 'swatter' and met Dobson, and that Dobson reached over to pull off the badge, and that he shot Dobson, firing the first shot." "Nort said if we (the officers) would take off the handcuffs and give him a gun, he would do it yet" (meaning he would finish killing Dobson). "I wish I had killed the son of a bitch (Dobson). If you will take them (handcuffs) off I will finish the job. If I had my thirty-thirty over at the saloon I would get some of you fellows." In rebuttal: "Q. Mr. Gouraud, you heard statements testified on direct examination, statements made by Nort with regard to this shooting? A. Yes, sir. Q. While on the way from Red Rock to Florence? A. Yes, sir. Q. Did you hear any statements made by Nort or confessions by Nort on the way over as to where he got the star and revolver? A. Yes, sir; I did. Q. What did he say? A. Why, he made the remark that Mr. Crowell pinned the badge on him, and he said at the time he didn't want it, and threw it off, but Mr. Crowell repinned the badge upon his breast. Q. Did he make any statement as to the gun? A. He admitted that he received the gun from Mr. Crowell." Concerning the same conversation by Nort, Sinnott, a deputy sheriff, testified: "I asked him (Nort) how he got the badge and the gun, and he said that Crowell pinned the badge on him, and that he knocked it off once, and said he didn't want it, and Crowell pinned it on the second time, and also handed him the gun and told him to go ahead." It is the contention of the prosecution that, in the separate trial of appellant, all these statements and declarations of Nort were competent evidence against Crowell upon the theory of a conspiracy between appellant and Nort to murder Dobson. Granting that a conspiracy existed between them to take Dobson's life, and that it had been established by satisfactory evidence, still, since these admissions and declarations by Nort were made after the shooting of Dobson, in the absence of appellant, they were not competent evidence against the appellant.

"The principle on which the acts and declarations of one conspirator are admitted in evidence against the other conspirators is that, by the act of conspiring or confederating together, the conspirators have jointly assumed to themselves as a body the attribute of individuality so far as constitutes

the prosecution of the common design, thus rendering whatever is said or done by any one in furtherance of that design a part of the *res gestæ* and the act of all. And it is settled that when a conspiracy is once established, until the object is attained every act and declaration of one conspirator in pursuance of the original concerted plan, and in furtherance of the common object, even in the absence of the others, is in contemplation of law the act and declaration of all, and is therefore original evidence against each." *Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487; *Wharton, Cr. Ev.*, vol. 2 (10th Ed.) § 698.

The reason for the rule of evidence here enunciated ceases to exist after the consummation of the object of the conspiracy. That being accomplished, the confederating body is dissolved or ceases to have existence. Its purpose having been achieved, any statements or declarations of one of the members of past events or occurrences are admissible only against such member. *State v. Nist*, 66 Wash. 55, 60, 118 Pac. 920; *State v. Beebe*, 66 Wash. 463, 120 Pac. 122.

In *People v. Ayhens*, 16 Cal. App. 618, 117 Pac. 789, the police officer who made the arrest of a co-conspirator testified as to his declarations and the court said: "The fact that Miller was either a co-conspirator or an admitted accomplice does not take his declarations, made when the crime or alleged conspiracy was a thing of the past, out of the category of hearsay evidence, nor entitle them to any greater consideration than that accorded to the statements of an innocent and disinterested third person."

In *State v. English*, 14 Mont. 399, 36 Pac. 815, the trial court had permitted the prosecution to prove the statements of an accomplice, made after the crime charged had been committed, and the court said: "It is clear from the testimony that these confessions were not made in the presence of defendant, nor were they made during the pendency of the commission of the larceny, nor in its furtherance, nor were they part of the *res gestæ*. They were simply narrations by De Witt, after the larceny was completed, of the events which were past and accomplished. Under such circumstances the confessions of an accomplice, or of one of two persons charged with a crime, can be used as against the confessing person only. In the case at bar they were used as against the other person only. This was error. This is elementary, and ancient and modern law; and it is just."

Andrews, J., in *People v. McQuade*, 110 N. Y. 284, at page 307, 18 N. E. 156, at page 166 (1 L. R. A. 273), reading, said: " * * * Only the acts and declarations of a co-conspirator, done in furtherance and execution of the common design, are admissible against one of the conspirators on trial for the common offense, and that, when the conspiracy is at an end, and the purposes of the con-

spiracy have been fully accomplished, or the conspiracy has been abandoned, no subsequent act or declaration of one of the conspirators is admissible against another."

In *State v. Bogue*, 52 Kan. 79, 85, 34 Pac. 410, 411, the court said: "The admission of the declarations of Dr. Kidd before the coroner's jury, in the absence of the defendant, was error. Whatever might be said in favor of the admissibility of such testimony under the common-law practice, where one is indicted as principal and another as accessory, in this state, where accessories before the fact are charged and tried as principals, and where defendants are permitted to testify in their own behalf, we think the reason, if any there might be, for the admission of such testimony fails. We, of course, are not here considering declarations of co-conspirators, or of persons engaged in a common criminal enterprise before or during the perpetration of their crime, but declarations of one of two defendants, jointly charged as principals, made long after the offense, if any was consummated. We are clearly of the opinion that the testimony was inadmissible. 1 *Whar. Crim. Law* (8th Ed.) § 237; *Ogden v. State*, 12 Wis. 532 [78 Am. Dec. 754]." *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; 12 *Cyc.* 439; *Wharton, Crim. Ev.* (10th Ed.) 699, 700.

The respondent cites the case of *State v. Mann*, 39 Wash. 144, 81 Pac. 561, apparently holding a contrary view, but an examination of that case discloses that the court followed the common-law rule, with its distinctions of principal and accessory before the fact, and the cases cited in support of that view are from states in which the distinction has not been abrogated.

In *State v. Nist*, 66 Wash. 55, 118 Pac. 920, Ann. Cas. 1913C, 427, the *Mann* Case was distinguished, and among other things the court said: "In the case cited (*Mann Case*), the husband was charged as an accessory before the fact, and it was necessary for the state, in order to convict the accessory, to show the guilt of the principal. Hence, on that branch of the case, the state was at liberty to resort to any evidence that would have been admissible had the principal herself been on trial." See, also, *State v. Beebe*, 66 Wash. 463, 120 Pac. 122. In the *Nist* and *Beebe* Cases, as in the case at bar, the defendants were jointly indicted with others as principals. In the *Nist* Case the court said: "Declarations made after the conspiracy has ceased to exist, and which are thus but narratives of past events, are admissible only against those from whom they proceed; they are not receivable as evidence against a fellow conspirator."

Appellant and Nort were indicted jointly as principals. Under the law appellant was entitled as a matter of right to a separate trial. Penal Code of 1901, § 925. If the extrajudicial statements and declarations of

his codefendant are to be used as evidence against him, he would be shorn of the benefits of a separate trial.

[4] The court permitted several witnesses to testify that after Nort had shot Dobson he returned to appellant's house, and was seen on the upper porch of his premises, waving his pistol in a threatening manner and pointing at Dobson's place, walking to and fro the while. The acts of a codefendant or co-conspirator are in the same category as his declarations, and their competency is tested by the same rules of evidence. See authorities cited above.

The conduct of Nort was contemptible and brutal, and, so far as he is concerned, painted him as a remorseless and vicious criminal. We think it would be a dangerous rule of evidence to hold that the appellant was responsible for his sinister demonstrations, or that his conduct reflected the appellant's state of mind, or tended to show complicity in the crime.

[5] The wife of appellant testified for the defense. On her cross-examination the prosecution asked her the question, "Didn't you tell Mrs. Dobson, about 20 minutes before this shooting occurred, to look out for her husband; there was going to be trouble?" The witness answered, "No, sir." A motion was made to strike the answer on the ground that it was incompetent, irrelevant, and immaterial and not proper cross-examination. The prosecution admits that the question was not asked as a part of the cross-examination. The purpose of the question was therefore to lay the foundation for impeachment. The fact sought to be proved by the question, even if true, fails to disclose the parties contemplating trouble. There is no intimation that appellant was concerned in it. Even though the witness made the statement and trouble actually occurred according to her warning, the trouble was between Nort and Dobson. Such evidence would not have been competent in the trial of the case in chief as against appellant, because it was the conclusion of Mrs. Crowell, and not the statement of the facts from which the conclusion was drawn.

[6, 7] Again, the statement was made in the absence and out of the hearing of appellant and therefore was not binding upon him. The subject-matter of the question was collateral, and the prosecution was bound by the answer. Wharton, *Crim. Ev.* § 484; *People v. Webb*, 70 Cal. 120, 11 Pac. 509.

However, the prosecution, over objection, was permitted to contradict Mrs. Crowell. This was error. *People v. Webb*, *supra*; *People v. Dye*, 75 Cal. 108, 16 Pac. 537; *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221; *State v. Haynes*, 7 N. D. 70, 72 N. W. 923; Wharton, *Crim. Ev.* § 484.

It is deeply regrettable that prosecuting officers in their zeal to secure convictions so often insist upon the introduction of illegal

evidence, and that the courts in the hurry and heat of the trial permit such evidence, when such errors in most cases could be avoided upon reflection and investigation of the authorities.

[8] "We are quite clear that errors have been committed by the admission of evidence in this case, at war with the well-settled law on the subject. That law must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter, for the purpose of securing the conviction of one who may be called or regarded as a great criminal, and yet be invoked for the purpose of sheltering an innocent man. In the eye of the law all are innocent until convicted in accordance with the forms of law and by a close adherence to its rules." Opinion of Justice Peckham in *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851, 885.

The judgment of the trial court is reversed, and the case remanded for new trial.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. (concurring). I concur in the conclusion reached by the majority of the court. The evidence of the prosecution, considered alone, to my mind wholly disconnects the Swearington transaction from the Dobson transaction. Witness Gouraud was permitted to testify, over objections, that Crowell pushed Swearington away from the bar, and said to Frank Nort: "Frank, go get on him; put him down." This command was instantly obeyed. When Swearington was disposed of, and had left Crowell's place, the same witness was permitted to testify, over objection, that following the transaction "Mr. Crowell told Frank Nort that he intended to place him (Nort) in full charge of the bar, and he says: 'I expect you, Frank, to run things the way you see fit, and keep order around here. I have been looking for a man like you for a long time, Frank'—and he says: 'I am pretty well satisfied.'" It is contended by the state that the fact that Nort instantly obeyed the command of Crowell, and threw Swearington out, assaulted Swearington, and expelled him from the building is evidence of a common scheme existing between Crowell and Nort; that Nort and Crowell had formed a compact by which Nort had agreed to carry out the wishes of Crowell; and, the Dobson transaction following closely upon the Swearington incident, the two transactions became one in fact, and the Swearington incident became evidence throwing light upon the relation existing between Crowell and Nort, and tended to connect Crowell with the Dobson homicide. The evidence was offered and received for the purpose of showing the relation existing between Crowell and Nort, and any pertinent evidence tending to show

an illegal relation between these parties, by which the homicide was accomplished, would be relevant. The Swearington transaction alone would have no such tendency. The statements made by Crowell to Nort, above quoted, immediately following that incident, conclusively show that no prior understanding existed between Crowell and Nort for any purpose in connection with either transaction. Those statements clearly indicate that Nort was on trial as to his qualifications as a fighting man, and in the opinion of Crowell, he had satisfactorily stood the test as such fighting man, and, as Crowell wished to employ such a man about his business place, he was satisfied to employ Nort, and did employ him, giving him instructions as to the duties that he would be required to perform. The Swearington incident became closed, and wholly disconnected from anything which occurred afterwards.

The transaction in which Dobson lost his life began at the time Crowell requested Nort to go to Dobson's place for the "swatter" claimed by Crowell, and ended when the conflict between Dobson and Nort closed. All matters and things which transpired within that period of time, in any manner connected with that transaction, were a part of the transaction, and were relevant as evidence comprising the *res gestæ* (Irvine v. State, 104 Tenn. 145), and were admissible as such, all comprising one transaction. The Swearington transaction was closed before the Dobson transaction began, and neither can be considered any part of the other for any purpose. Evidence of the Swearington transaction was calculated to prejudice the rights of appellant when on trial for the killing of Dobson, and we must presume that his rights were prejudiced by the allowance of such evidence.

The remaining questions are fully considered in the principal opinion, in which I fully concur.

WESTERN PAC. RY. CO. v. GODFREY
et al. (S. F. 6534.)

(Supreme Court of California. Oct. 18, 1913.
Rehearing Denied Nov. 17, 1913.)

1. CORPORATIONS (§ 245*)—STOCKHOLDERS—LEGATEES.

A legatee who does not renounce a legacy of corporate stock, but upon distribution of the estate accepts the stock, is the owner thereof from the death of testator, and is liable as such for corporate debts contracted after the death of testator and before distribution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 978; Dec. Dig. § 245.*]

2. CONSTITUTIONAL LAW (§ 34*)—SELF-EXECUTING CONSTITUTIONAL PROVISIONS—STOCKHOLDERS' LIABILITY—"STOCKHOLDER."

Const. art. 12, § 3, providing that each stockholder of a corporation shall be individually liable for such proportion of all corporate debts, contracted while he was a stockholder,

as the amount of the shares owned by him bears to the whole capital stock, is self-executing, and applies to all who come within the definition of Civ. Code, § 298, providing that owners of stock in a corporation having a capital stock are called "stockholders," which is also the ordinary meaning of that term, and the effect of the provision cannot be limited by the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 34; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6667-6669; vol. 8, p. 7804.]

3. CORPORATIONS (§ 243*)—STOCKHOLDER'S LIABILITY—STATUTE.

That portion of Civ. Code, § 322, which provides that stock held as collateral, or in a representative capacity does not make the holder liable for the corporate debts, but the pledgor, or person, or estate, represented is deemed a stockholder, does not limit the effect of Const. art. 12, § 3, creating the stockholder's liability, but is simply a limitation on the broad language in the preceding portion of the Code section.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 943, 944, 946-950, 952-959, 974, 975, 979; Dec. Dig. § 243.*]

4. CORPORATIONS (§ 262*)—STOCKHOLDERS' LIABILITY—DEFENSES—RECEIVERSHIP.

The pendency of receivership proceedings against an insolvent corporation does not affect the right of a creditor to enforce the stockholders' liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1076-1083, 2273; Dec. Dig. § 262.*]

5. CORPORATIONS (§ 248*)—STOCKHOLDERS' LIABILITY—AMOUNT OF RECOVERY—DIVIDEND.

Where, after a creditor had instituted suit against the stockholders of an insolvent corporation, a dividend was paid to him by which the amount of the debt was reduced, such payment operates as a discharge of the stockholder's debt to that extent, notwithstanding the insolvency of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 998-1001; Dec. Dig. § 248.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the Western Pacific Railway Company against Carrie E. Godfrey and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Rehearing denied; Beatty, C. J., dissenting.

Frohman & Jacobs, Warren Olney, Jr., and Alexander R. Baldwin, all of San Francisco, for appellant. Page, McCutchen & Knight, Charles W. Slack, James M. Allen, and Cushing & Cushing, all of San Francisco, for respondents. William S. McKnight, of San Francisco, amici curiæ.

ANGELLOTTI, J. This appeal was originally heard and determined in the District Court of Appeal of the First District; the judgment of the lower court in favor of defendants being reversed, with direction for the entry of judgment in favor of the plaintiff. On application of the defendants an order was made herein, vacating the decision

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the District Court of Appeal and transferring the appeal to this court for hearing and determination.

The opinion of the District Court of Appeal, written by Mr. Justice Hall, was in part as follows:

"This is an appeal from a judgment entered against plaintiff. The action was brought to obtain several judgments against defendants as stockholders in the California Safe Deposit & Trust Company, a corporation, for their proportions of the indebtedness of that corporation to the plaintiff. The case was tried and submitted to the court upon an agreed statement of facts. The essential facts upon which depends the liability of the several defendants are the same. The sequence of events is the same in each case; the names, dates and amounts only being different. The facts relating to the claim against Carrie E. Godfrey may be taken as typical of all the claims. William B. Godfrey died January 20, 1907, and by his will bequeathed to Carrie E. Godfrey all his estate, including 120 shares of stock in the California Safe Deposit & Trust Company, of which he was the owner at the time of his death. In February, 1907, his will was admitted to probate, and the executors appointed and duly qualified, and took possession of all his estate, including said shares of stock. In October, 1907, the plaintiff deposited with the California Safe Deposit & Trust Company the sum of \$250,000, which has not been repaid. On October 30, 1907, said trust company failed, and in January, 1908, it was duly adjudged to be insolvent, and a receiver appointed, in an action brought by the Attorney General. The said action and the proceedings thereon are still pending. On March 2, 1908, the final decree of distribution in the estate of William B. Godfrey was duly made, and his entire estate was distributed to Carrie E. Godfrey, who received and accepted all of it, including the said shares of stock in said California Safe Deposit & Trust Company. The executors were thereupon discharged. This action was commenced October 28, 1908.

[1] "It is thus apparent that the principal and vital question to be answered upon this appeal may be thus stated: Is the legatee of shares of stock in a corporation who, upon distribution of the estate, accepts such legacy answerable to the creditors of the corporation upon a stockholder's liability for corporate debts contracted after the death of the decedent, but before distribution of the estate? We think that this question must be answered in the affirmative. If the legatee, under such circumstances, was a stockholder at the time of the contracting of the debt, such liability is imposed both by the Constitution and the statute. Const. Cal. art. 12, § 3; Civ. Code, § 322.

"That the estate of a decedent vests in his heirs or devisees and legatees immediate-

ly upon his death cannot be disputed. Civ. Code, §§ 1341, 1384; Beckett v. Selover, 7 Cal. 215 [68 Am. Dec. 237]; Farrell v. Enright, 12 Cal. 450; Estate of Woodworth, 31 Cal. 595; Brenham v. Story, 39 Cal. 179; Estate of Packer, 125 Cal. 396 [58 Pac. 59, 73 Am. St. Rep. 58]; Colton v. Onderdonk, 69 Cal. 155 [10 Pac. 395, 53 Am. Rep. 558]; Estate of Hite, 159 Cal. 392 [113 Pac. 1072, 32 L. R. A. (N. S.) 1167, Ann. Cas. 1912C, 1014]. Many other cases to the same effect might be cited.

"Pending the administration the personal representatives of the decedent are entitled to the possession of the estate for the purposes of administration, but the title vests in the heirs or devisees and legatees, subject only to the right of possession of the personal representatives of the decedent. * * *

"The legatee does not derive title from the decree of distribution, but from the will, which takes effect immediately upon the death of the testator. The decree of distribution does not create the title. It merely declares the title that accrued under and by the will. Chever v. Ching Hong Poy, 82 Cal. 68 [22 Pac. 1081]; Martinovich v. Marsicano, 137 Cal. 354 [70 Pac. 459]; Cooley v. Miller & Lux, 156 Cal. 510 [105 Pac. 981].

"Under the authorities above cited we see no escape from the conclusion that a legatee who does not renounce a legacy of shares of stock in a corporation, but upon distribution receives and accepts the same, must be held to have been the owner of said stock from the time of the death of the decedent, and, in consequence, liable as such for his proportion of the corporate debts contracted after the death of the decedent.

"This court decided nothing to the contrary of the views above expressed in Miller & Lux v. Katz, 10 Cal. App. 576 [102 Pac. 946]. It was there held that the executor could be sued, without joining the heirs or legatees, as representing the entire interest of the estate. Of course, until distribution it cannot be certainly known that any shares of stock would ever be distributed in kind to the heirs or legatees. The fact that such a suit may be maintained against the executor before distribution, does not prevent a suit against the legatee after distribution."

Upon further consideration we are satisfied that the views thus expressed are correct, and we adopt the portions of the District Court of Appeal opinion that we have quoted as a part of this opinion.

[2] It is not disputed that section 3 of article 12 of our present Constitution, creating stockholders' liability, is self-executing, and clearly it is. It in terms declares that "each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was stockholder, as the amount of stock or shares owned by him bears to the whole of the sub-

scribed capital stock or shares. * * *

At the time of the adoption of this provision section 298 of the Civil Code provided, as it had ever since its enactment in 1872, that "the owners of shares in a corporation which has a capital stock are called stockholders." This is the common-sense meaning of the term "stockholder." To the mind of the layman the term "owner" when used with reference to corporation stock and the word "stockholder" are synonymous. So the constitutional provision is perfectly plain and unambiguous, leaving no room for any ascertainment by the Legislature as to its meaning. This self-executing provision speaks for itself clearly and unequivocally, and any attempt by the Legislature to limit its effect would be beyond its constitutional power, and therefore void. In view of the well-settled meaning of the term "stockholder," the constitutional provision creates the liability therein defined on the part of every owner of corporate stock for his proportion of all debts and liabilities incurred during the time he is such owner. And the only material question remaining is whether such legatee of corporation stock as has been described, viz., one who has accepted such stock on distribution and has thus come into the full beneficial enjoyment thereof, was the owner thereof from the date of death of his testator. That he must be held to have been the owner from such date, in view of the well-settled law of this state, is so clearly shown in the quotations from the District Court of Appeal opinion, that nothing need be added in that regard. We are not concerned here with questions that would be presented under different circumstances, such as, for instance, if the executor or administrator was compelled to sell the stock, or some part thereof, to pay debts or expenses of administration, and the legatee, therefore, never came into the beneficial enjoyment of the stock so sold, or, if the legatee renounced all claim to the stock and refused to accept the same. It may be true that some interesting and perplexing problems as to where the liability rested would be presented if the circumstances were different from those here presented. We have here, however, the simple case of a legatee who does not renounce, but who received and accepted the stock given by the will, and as to such a legatee we cannot escape the conclusion that the legatee's ownership of the stock received and accepted must be held to have existed from the death of the testator, so as to burden such legatee with a stockholder's liability from such date.

[3] We have suggested that the Legislature is without any power to limit the effect of the clear and unequivocal provision which creates the liability. In so far as this case is concerned it is therefore unnecessary to consider section 322, Civil Code, which is much relied on by learned counsel for defendants as precluding any recovery. However,

we are of the opinion that the section referred to is not fairly open to the construction claimed for it by defendants. A careful consideration of the section affords no basis for a conclusion that it was the design of the Legislature to so restrict the meaning of the term "stockholder" as to exclude from liability any person who voluntarily accepts ownership thereof and is *sui juris*, but the idea appears to have been to *enlarge* the term so as to make it include persons who might not otherwise be held to be included therein. The portion thereof specially relied upon by defendants is as follows: "Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder, as respects such liability." Taken in connection with the remainder of the section, we read this as simply showing the intention of the Legislature to make it clear that, notwithstanding the very broad language in the preceding portion of the section, it was not intended to make one who simply holds stock as collateral security, or as a trustee or in any other representative capacity, personally liable as a stockholder, except as otherwise expressly specified.

[4] The District Court of Appeal also correctly said that the pendency of the receivership proceedings did not affect the right of plaintiff to proceed against a stockholder of the insolvent corporation (citing *Young v. Rosenbaum*, 39 Cal. 646).

[5] It appears that subsequent to the commencement of this action, and prior to trial, a dividend was duly declared and paid to creditors by the receiver of said California Safe Deposit & Trust Company, to the extent of 10 per centum of their claims, and that plaintiff thus received from the California Safe Deposit & Trust Company, through such receiver, 10 per cent. of the amount of the indebtedness on account of which this action was brought, said 10 per cent. being \$18,571.22. These matters were set up by supplemental answer. It seems to us very clear that, notwithstanding the insolvency of the corporation debtor, this payment should be held to have operated *pro tanto* as a discharge of the liability of the stockholders. It was, in fact, a payment to plaintiff by the insolvent debtor of a portion of the debt on account of which this action was brought, a satisfaction in part of that debt. The liability of the stockholder under our constitutional provision is only for his proportion of such part of a debt or liability as remains unpaid (see *The San Jose Sav. Bank v. Pharis*, 58 Cal. 380; *Young v. Rosenbaum*, *supra*), and we are unable to see how the fact of insolvency of the debtor in any way affects the

question. The case of *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36, relied on by plaintiff, did not involve or determine any such question. The question there was as to the right of the creditor in the matter of a dividend declared by an insolvent bank in process of liquidation, and it was held that its right in that regard was in no way affected by the fact that it had recovered a portion of its claim from stockholders, so long as it was not paid in the aggregate more than the amount of the allowed claim. This was a very different question from the one here presented. It is worthy of note that the opinion in that case shows that the recovery from the stockholders was only the stockholders' proportion of the amount remaining due the plaintiff creditor after it had received five prior dividends from the insolvent corporation, amounting to a quarter of its original claim.

It should be noted that according to the allegations of the complaint, of the \$250,000 deposited by plaintiff with the California Safe Deposit & Trust Company only \$185,712.22 was "either paid to third persons by the said bank or commingled with the other assets and property prior to its suspension of payment," and recovery was sought from defendant stockholders upon the basis of a claim for \$185,712.22 only. This amount should be still further reduced by the deduction of the 10 per cent. dividend since paid to plaintiff by the bank, viz., \$18,571.22.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment for plaintiff upon the pleadings and the agreed statement of facts in accordance with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

CRITTENDEN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN LUIS OBISPO COUNTY et al.
(S. F. 6,634.)

(Supreme Court of California. Oct. 18, 1913.)

1. STATUTES (§ 276*)—REPEAL—PENDING CAUSES—EFFECT.

Where a judgment, declaring a bank insolvent, and appointing a receiver, as authorized by Act March 24, 1903 (St. 1903, p. 365), was affirmed on appeal from the judgment, and thereafter, and pending a subsequent appeal from an order denying a new trial, the act was repealed by an act effective July 1, 1909 (St. 1909, p. 87), relating to the same subject, but containing no clause continuing the prior act in force as to pending proceedings, the repeal did not affect the judgment of dissolution and liquidation, nor did it abate a previous action, commenced by the bank commissioners to enforce a note belonging to the bank, in which the receiver was substituted as plaintiff.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 371, 372; Dec. Dig. § 276.*]

2. STATUTES (§ 276*)—REPEAL—PENDING PROCEEDINGS—ORDERS OF APPELLATE COURT—EFFECT.

Where, after affirmance of a judgment dissolving a bank, as provided by Act March 24, 1903 (St. 1903, p. 365), and pending a further appeal from an order denying a new trial, the act was repealed without a saving clause, such judgment of dissolution was not affected by orders entered by the Supreme Court during the pendency of the appeal from the order denying a new trial, temporarily staying proceedings by the receiver until further order of the court.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 371, 372; Dec. Dig. § 276.*]

3. PROHIBITION (§ 6*)—SCOPE OF WRIT—JURISDICTIONAL PROCEEDINGS.

Where bank commissioners, having secured a judgment dissolving a bank under Act March 24, 1903 (St. 1903, p. 365), instituted an action to recover on a note belonging to the bank, and thereafter the act was repealed without a saving clause, whether the commissioners, or the receiver succeeding them, had capacity to continue the action was not a jurisdictional question which could be determined on a writ of prohibition, but a legal question for determination in the action.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 31-33; Dec. Dig. § 6.*]

4. PARTIES (§ 76*)—CAPACITY TO SUE—MODE OF OBJECTION—WAIVER OF DEFECTS.

Legal incapacity of the plaintiff to sue is an objection to be presented by demurrer, if the fact appears on the face of the complaint, otherwise by answer, as provided by Code Civ. Proc. §§ 430, 433, and, if the objection is not taken advantage of by either method, it will be deemed waived, as provided by section 434.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 117-121; Dec. Dig. § 76.*]

In Bank. Application by James L. Crittenden for a writ of prohibition against the Superior Court of California for San Luis Obispo County and a judge thereof. Writ denied.

James L. Crittenden, of San Francisco, in pro. per. W. H. Spencer, of San Luis Obispo (Barclay Henley and Jacob M. Blake, both of San Francisco, of counsel), for respondents.

ANGELLOTTI, J. This is an application for a peremptory writ of prohibition to restrain defendants from proceeding further with a certain action pending in the superior court of San Luis Obispo county entitled "Neil Stewart, as Receiver of the Bank of San Luis Obispo, a corporation, Plaintiff, v. James L. Crittenden, Defendant," being action No. 4541 in said court, save and except to dismiss the same.

The action referred to is one instituted in said court on November 7, 1906, by Herman Silver et al., claiming to act as the bank commissioners of the state of California, against James L. Crittenden, plaintiff here, and others to obtain a judgment against said Crittenden for the use and benefit of the Bank of San Luis Obispo, for the amount due on a promissory note given by Crittenden to said bank, for \$22,268.13 and interest, executed on and dated November 8, 1901, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

maturing one year after date. The Bank of San Luis Obispo was named by the bank commissioners as a party plaintiff in the title of the action. At the time of the commencement of this action a proceeding was pending in said court, instituted therein on February 1, 1906, and numbered therein 4463, under section 10 of the banking act, approved March 24, 1903 (Stats. 1903, p. 365), being one brought by the people of the state by the Attorney General on the complaint of the bank commissioners to obtain a decree ordering said bank into involuntary liquidation, enjoining it from doing any further business, and appointing a receiver for purposes of liquidation. On December 12, 1906, judgment was given in said action 4463 by the said court, granting the relief sought, and appointing said Stewart as the receiver. Notice of motion for new trial was given by the defendants in such action, and thereafter, on or about December 15, 1906, defendants appealed to this court from the judgment therein, giving, it appears to be admitted, a bond in all respects sufficient to stay execution of all proceedings on the judgment, pending the appeal therefrom. On August 27, 1908, the judgment was affirmed by this court; such judgment becoming final September 26, 1908. See *People, etc., v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 306. In the meantime, namely, on June 19, 1908, an order was made by the superior court denying defendant's motion for a new trial in said action 4463, and an appeal had been taken to this court from such order. The usual bond for costs had been given on this appeal. While this appeal was pending, the banking act of 1909, approved March 1, 1909, and taking effect July 1, 1909 (Stats. 1909, p. 87), was adopted, and this act had the effect of repealing the act of 1903, under which said action 4463 was instituted and prosecuted, and made no provision for continuing in force any pending proceedings or litigation under the repealed act. Upon the application of defendants that such a stay be granted until the final decision on the appeal from the order denying a new trial, on November 2, 1909, an order was made by this court staying until December 6, 1909, "all proceedings under said judgment and by said Neil Stewart, as, or claiming to be, such receiver, save and excepting the entry of judgment in the action now pending and the commencement of actions where necessary," and on December 6, 1909, this temporary stay was ordered continued "until the further order of the court." On December 28, 1910, a motion of the defendants in said action 4463 to vacate and annul the judgment and dismiss the proceedings was denied by this court, and the order denying defendant's motion for a new trial was affirmed. This decision became final January 27, 1911. *People v. Bank of San Luis Obispo et al.*, 159 Cal. 65, 112 Pac. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148.

On November 16, 1912, notice was given of a motion in the lower court for the substitution of said Neil Stewart, as receiver, in place of the original plaintiffs in action 4541, being the action on the promissory note. This motion was granted by the lower court over the objection of defendant Crittenden. A motion of said defendant to dismiss said action was denied. The substituted plaintiff, by leave of the trial court, has filed an amended and supplemental complaint. Defendant's demurrer to this complaint has been overruled by the lower court, with leave to answer within 20 days. Unless prohibited by this court, the lower court will proceed to hear and entertain all proceedings preparatory to a trial, and will try and enter judgment in said action.

[1] Petitioner's contention that the lower court is without jurisdiction to entertain further the action here sought to be restrained is based largely on the claim made by defendants on the motion made in this court to vacate and set aside the judgment in action 4463, *People, etc., v. Bank of San Luis Obispo et al.* Substantially, that claim was that by reason of the repeal, pending the appeal from the order denying a new trial, of the banking act of 1903 by the banking act of 1909, without any provision for continuing in force any pending proceedings or litigation under the repealed act, said action 4463, claimed to be still a pending action by reason of the pendency of the appeal from the order denying a new trial therein, abated, with the result that the judgment rendered therein, ordering the bank into liquidation, and appointing said Stewart as receiver, was no longer effectual for any purpose, and should be set aside and vacated, notwithstanding the same had been affirmed by this court on the appeal therefrom. The result would be, of course, that the substituted plaintiff in action No. 4541, Neil Stewart, as receiver, would be without any authority to maintain this action. The claim of petitioner in that behalf was very carefully considered by this court and determined against his views on the motion to which we have referred, and the opinion filed contains a complete and exhaustive discussion of the questions presented thereby. We see no reason to doubt the correctness of the views there expressed, and adhere thereto. See *People v. Bank of San Luis Obispo et al.*, 159 Cal. 65, 112 Pac. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148.

[2] We are unable to see that the orders made by this court during the pendency of the appeal from the order denying a new trial, and several months after the repeal of the banking act of 1903, temporarily staying certain proceedings by the receiver appointed by the judgment until the further order of the court, in any way affect the question. The judgment was in no way stayed in law by virtue of the pending proceedings under the

motion for a new trial. The only possible effect of these orders was to prohibit the receiver from taking certain proceedings under the judgment until the further order of this court; he being expressly left at liberty to have judgments entered in an action then pending, and to commence such new actions as were necessary. The real reason for the orders was to prevent a multiplicity of actions by the receiver for moneys, etc., alleged to be due the insolvent bank, until it had been determined whether the judgment should be vacated and set aside in consequence of the repeal of the banking act, or whether it was to be vacated by a reversal of the order denying a new trial. Of course, all such orders staying proceedings were vacated by the judgment of this court denying the motion to vacate and annul the judgment and dismiss the proceedings, and affirming the order denying the motion for a new trial.

[3] The other points made in support of the application in the proceeding at bar clearly do not go to the question of jurisdiction. In fact, it may well be doubted whether the points already discussed go to that question. We have here an action on behalf of the Bank of San Luis Obispo against petitioner here on a promissory note alleged to have been given by him to such bank. Of course, the superior court of San Luis Obispo county has jurisdiction of the subject-matter of such an action. Such court acquired jurisdiction of the person of the defendant therein by reason of service of summons on him and his subsequent appearance. It is claimed that the bank commissioners had no authority under the provisions of the act of 1903 to institute and maintain such action on behalf of the bank. That is a matter in no way affecting the jurisdiction of the court, but presents a question to be determined in the action itself.

[4] Legal incapacity of the plaintiff in an action to sue is an objection to be presented by demurrer, if the fact appears on the face of the complaint, and by answer, if it does not so appear (sections 430 and 433, Code Civ. Proc.), and, if such an objection is not taken by either demurrer or answer, it must be deemed to have been waived (section 434, Code Civ. Proc.). It does not go to the jurisdiction of the court. Of course, prohibition lies only to restrain such proceedings as are in excess of jurisdiction, and we do not deem it proper to undertake in this proceeding to determine whether or not the bank commissioners had the authority to institute this action on behalf of the bank, if we have no right to prohibit further proceedings in the action in the event that we conclude that they had no such authority. If defendant properly makes his objection in this behalf in the court below, the action of that court may be reviewed on appeal. Of course, there is no force whatever in the claim that this

action on behalf of the Bank of San Luis Obispo abated by reason of the repeal of the banking act of 1903. The utmost that can be claimed in this regard is that the bank commissioners were thereby disabled from further maintaining the action, which was probably already the situation by reason of the judgment appointing a receiver, which had some time before become final. But the action on this note would not abate by reason of the disability of a party plaintiff if the cause of action survived or continued, and the court, on motion, could and should allow the action to be continued by the proper party.

We see no ground whatever for granting the application made.

The application for a peremptory writ of prohibition is denied.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

COLEN v. GLADDING, McBEAN & CO.

(S. F. 6191.)

(Supreme Court of California. Oct. 29, 1913.)

1. MASTER AND SERVANT (§ 121*)—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.

It was not actionable negligence for an employer, engaged in installing the terra cotta work in a building in course of construction, to fail to sheath or cover a temporary elevator employed merely for the hauling of material and not for the transportation of passengers; and hence it was not liable to an employé, injured while loading material in such elevator by a piece of wood precipitated into the elevator shaft by some unknown cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

2. PLEADING (§ 8*)—ALLEGATIONS OF FACT OR CONCLUSIONS.

In an employé's action for injuries sustained while loading material in an elevator in a building in course of construction by a piece of wood precipitated into the shaft by some unknown cause, an allegation that it was the employer's duty to construct the elevator in a particular manner was a conclusion of law, which the court would disregard and look rather to the allegation of facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

3. MASTER AND SERVANT (§ 129*)—LIABILITY FOR INJURIES—PROXIMATE CAUSE.

Where an employé, while loading material in a temporary freight elevator, not sheathed or covered, in a building in course of construction, was injured by a piece of wood thrown into the shaft by some unknown cause, the proximate cause of the injury was the careless dropping of the piece of wood.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

4. MASTER AND SERVANT (§§ 101, 102, 213*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

Employés working on buildings in course of construction assume the usual risks of their employment, and, while it is the duty of employers to take all reasonable precautions against

the careless dropping of tools or materials, they are not insurers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192, 559-564; Dec. Dig. §§ 101, 102, 213.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Frank J. Colen against Gladding, McBean & Co. From a judgment for defendant on demurrer, plaintiff appeals. Affirmed.

G. B. Benham and W. D. Cardwell, both of San Francisco, for appellant. Lllenthal, McKinstry & Raymond, of San Francisco, for respondent.

MELVIN, J. This is an appeal by plaintiff from a judgment entered after the court had sustained a demurrer to the third amended complaint.

The complaint which was last filed recited that the defendant corporation was erecting and installing the terra cotta work on a building belonging to defendant Phebe A. Hearst and located at the corner of Third and Market streets in the city and county of San Francisco; that on January 5, 1911, Gladding, McBean & Co., the said corporation, was engaged in said work "with the knowledge and consent" of Mrs. Hearst and under her direction, and at the same time other contractors and workmen were, with the knowledge of the defendant corporation and the "knowledge and consent" of Mrs. Hearst, engaged in other work on the building; that Gladding, McBean & Co. had caused a temporary elevator to be erected in a light well of the building; that this elevator was used for hoisting material; that there was no top provided for the elevator and no guards had been built around the light shaft in which it was operated; that on January 5, 1911, plaintiff, who was in the employ of Gladding, McBean & Co., was at work in the elevator, loading material therein, when he was struck by a piece of wood which from some cause unknown to him was precipitated into the shaft; and that "because of the uncovered condition of said elevator" the falling timber caused his serious injury for which he demanded damages.

There were three grounds of demurrer:

- (1) That the complaint did not state facts sufficient to constitute a cause of action;
- (2) that two causes of action had been improperly joined;
- (3) that there was a misjoinder of parties defendant.

Upon the general demurrer the corporation respondent contended that failure to inclose the roof of the elevator was not negligence; that the proximate cause of the injury was not the condition of the elevator but the throwing down of the timber, an act not imputed to the corporation; and that from the pleading itself it appears that the plaintiff assumed the risk of working in an

uncovered elevator. As we think that the general demurrer was properly sustained, we need not discuss the other grounds of demurrer.

[1] It is not actionable negligence to fail to sheath or cover a temporary elevator such as that described in the complaint before us. It was employed not for the transportation of passengers but merely for the hauling of material for use in the construction of the building. Webb in his work on Elevators says (section 38): "Proper care in the construction of freight elevators does not require that they be wholly inclosed or sheathed, and this may be considered a general rule, although there may be exceptions." The text is supported by *McDonough v. Lanpher*, 55 Minn. 508, 57 N. W. 152, 43 Am. St. Rep. 541, and *Hoehmann v. Moss Engraving Co.*, 4 Misc. Rep. 160, 23 N. Y. Supp. 788, which were both cases in which employes had been injured while riding in freight elevators owned and operated by their employers. If employers are not responsible for injuries occasioned because of the absence of such guards as are usually provided by those operating passenger elevators, surely the corporation respondent was not required to provide against accidents caused by the carelessness of some one, over whom it had no control, throwing a piece of lumber upon the plaintiff. The corporation was not required to insure its servants against every possible accident. Suppose that plaintiff, who is described in the complaint as a hod carrier, had been carrying material up a ladder and had been injured by a hammer dropped from above by the servant of some contractor not his employer, could he then demand damages because the ladder was not surmounted by a hammer-proof hood? Assuredly not. So here his injury had nothing to do with the structure of the elevator as a means of carrying freight. The duty of the employer to him was no greater than it would have been if the timber had fallen upon him before he stepped into the elevator, and it would be absurd to say that a contractor engaged in a part of the work of erecting a building must provide missile-proof guards above the heads of all of its workmen.

[2] The allegation in the complaint that it was the duty of plaintiff's employer to construct the elevator in a particular manner is but a conclusion of law, and the court properly disregarded it, looking rather to the allegation of facts.

[3] The proximate cause of the injury was unquestionably the careless dropping of the piece of wood from the upper part of the building upon plaintiff's arm. This is a proposition so plain that it needs no authority for its support, yet direct authority is not wanting. *Kevern v. Providence Gold & Silver Mining Co.*, 70 Cal. 392, 11 Pac. 740; *Vize-lich v. Southern Pacific Co.*, 126 Cal. 589, 59

Pac. 129; *Luman v. Golden Ancient Channel Mining Co.*, 140 Cal. 706, 74 Pac. 307; *Tre-watha v. Buchanan, etc., Co.*, 96 Cal. 500, 28 Pac. 571, 31 Pac. 561.

[4] Respondent's argument that, from the facts pleaded, the plaintiff must have been working in view of the usual risks of his employment and accepting those risks is perfectly sound, and we find no sufficient answer to it. It is a matter of common knowledge that sometimes tools or materials are carelessly dropped from high parts of buildings in course of construction. While it is the duty of all employers to take reasonable precautions against such happenings, they are not insurers, and those working in uncovered spaces about such a building assume the usual risk of their employment.

As the demurrer was properly sustained for want of facts, we need not discuss the issues of misjoinder of parties and of causes of action.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

PEOPLE v. FLEMING. (Cr. 1,779.)

(Supreme Court of California. Nov. 1, 1913.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—CREDIBILITY OF WITNESSES.

Where, although an appellate court might not be able to understand how the jury could have been satisfied beyond all reasonable doubt of the guilt of a person accused of homicide, there was testimony which, if believed, would support such a conclusion, the credibility of the witnesses giving such testimony was exclusively for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 1134*)—APPEAL—REVIEW—QUESTIONS OF FACT.

Notwithstanding Const. art. 6, § 4, restricting the jurisdiction of appellate courts to questions of law, such courts are required by the express provisions of section 4½ to consider the entire cause, including the evidence, for the purpose of determining whether any error or erroneous procedure has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

3. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted in any criminal case unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, evidence, although technically sufficient to sustain a finding of guilt, may be so unsatisfactory as to render what in a plain case would be an absolutely harmless error one of vital importance, justifying the conclusion that it has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

4. CRIMINAL LAW (§ 1186*)—APPEAL—HARMLESS ERROR.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted in any criminal case unless the court, after an examination of the entire cause, including the evidence, shall be of the opinion that the error complained of has resulted in a miscarriage of justice, appellate courts are necessarily vested with a large discretion in determining the effect of errors, and each case must depend upon its own circumstances, since it is the opinion of the court, upon a full consideration of the particular record, that is to control upon the question whether the error complained of has resulted in a miscarriage of justice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

5. CRIMINAL LAW (§ 1104*)—APPEAL—RECORD—STATUTORY PROVISIONS.

Under Pen. Code, § 1246, requiring the clerk of the court from which an appeal is taken to transmit to the clerk of the appellate court a typewritten copy of certain papers, including "a copy of other minutes of the action including the proceedings on motion for arrest of judgment or new trial," and sections 1247, 1247a, 1247b, 1247c, 1247d, providing for the transcription, certification by the reporter and by the trial judge, and forwarding of the phonographic reporter's notes, affidavits presented on a motion for a new trial were properly included in the transcript forwarded by the clerk and certified by him alone, where they were so referred to and identified as to show that they were the precise and only affidavits presented on the motion, whether or not they might have been included in the reporter's transcript certified by the trial judge, especially in view of the repeal of the statutory provisions relative to bills of exceptions in criminal cases.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2776, 2885, 2886; Dec. Dig. § 1104.*]

6. CRIMINAL LAW (§ 1037*)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF OBJECTIONS.

An appellate court will not consider a claim as to the misconduct of counsel in argument unless objection is made thereto at the time.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

7. CRIMINAL LAW (§ 1086*)—APPEAL—RECORD—MATTERS TO BE INCLUDED.

To properly present a question as to the misconduct of counsel in argument on an appeal in a criminal case, the phonographic reporter's transcript of his notes, showing the portion of the argument complained of, the objection thereto, and the action of the trial court thereon, should be brought to the appellate court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2769, 2770, 2772, 2794; Dec. Dig. § 1086.*]

8. CRIMINAL LAW (§ 855*)—TRIAL—PRESENCE AND CONDUCT OF BYSTANDERS.

It is the duty of the courts to see that public sentiment is not expressed to or in the presence of the jury in such a way as to be likely to influence their determination or to overawe the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2048-2053; Dec. Dig. § 855.*]

9. CRIMINAL LAW (§ 1134*)—APPEAL—HARMLESS ERROR—DETERMINATION OF PREJUDICIAL EFFECT.

In determining the prejudicial effect of errors on the trial of a railroad policeman for homicide, it was proper to consider affidavits on a motion for a new trial, showing that accused was tried in a community hostile to him and the railroad, that newspaper articles were published from time to time from the day of his arrest to the end of the trial which would materially direct and mold public sentiment so as to render difficult, if not impossible, a fair trial, and that the courtroom was packed with sympathizers of the prosecution, who, in the presence of at least two of the jurors, applauded the appearance of the prosecuting attorney until stopped by the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

10. CRIMINAL LAW (§ 706*)—MISCONDUCT OF COUNSEL.

On the trial of a railroad policeman for homicide, a question asked his superior officer as to his record with the company was objected to by the prosecuting attorney, who then asked whether, if such testimony was admitted, he would be allowed to prove acts concerning accused's record. Accused's counsel assented to this on condition that the matters must not be shown by hearsay evidence, to which the prosecuting attorney responded that it would be by eyewitnesses. On cross-examination of such witness, the prosecuting attorney asked if complaint had ever been made to the witness by the public about the manner that people had been beaten up and misused by train policemen. After an objection was overruled, he withdrew the question, as stated by him, so that there could possibly be no error in the record. He, however, did ask the witness if he ever heard about accused knocking a man off the train and breaking his leg, putting a man off, beating him up, and throwing him into a barbed wire fence, or knocking a man down off the train, abusing him, and standing over him with his feet placed on the other's legs or ankles, and upon objection to such questioning, unless the prosecuting attorney was prepared to back the questions with proof, he again stated that they would bring in eyewitnesses who would identify accused. No testimony as to any such acts of accused was introduced; but no disavowal was made by the prosecuting attorney as to his ability to produce such testimony. *Held*, that the whole altercation constituted misconduct on the part of the prosecuting attorney, calculated to suggest to the jury that acts discreditable to accused were known to the prosecution, but could not be proved under the rules of evidence, and, where, under the evidence, there was a grave doubt as to accused's guilt, such misconduct required a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

11. CRIMINAL LAW (§ 1137*)—MISCONDUCT OF COUNSEL.

Such conduct on the part of the prosecuting attorney was not invited by the question asked the witness by accused's counsel, nor by his consent to the introduction of proof of acts discreditable to accused; this probably being the most efficacious way of removing the impression that would otherwise have been caused by the making of the proposition by the prosecuting attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

12. WITNESSES (§ 277*)—CROSS-EXAMINATION OF ACCUSED IN CRIMINAL CASE.

On a trial for homicide, where there was no dispute as to accused's true name, it was

error to permit it to be shown by accused's cross-examination that he participated in boxing contests held by a club of which he was a member, and that he did so under an assumed name because he would have lost his position had his participation been known to his employer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.*]

13. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

On a trial for homicide, a witness for the prosecution acknowledged on cross-examination that he had an interest in the outcome of the case, and that a libel suit by accused against a newspaper of which the witness was one of the owners was pending. The court excluded questions as to why he had no financial interest in a conviction, and as to whether the article complained of in the libel suit was not substantially to the effect that accused had confessed his guilt, and if the article was not untrue in this respect, although accused's counsel offered to show that the witness' newspaper did publish such an article, and that it was false. *Held*, that the cross-examination was unduly curbed by the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.*]

14. CRIMINAL LAW (§ 719*)—TRIAL—MISCONDUCT OF COUNSEL.

On the trial of a railroad policeman for homicide, it was improper for the prosecuting attorney to state in his argument that a certain witness for the prosecution was the man that the sleuth hounds and special agents of the railroad company tried to bribe, as shown by the records in the case, and the same man that they offered his fare to Georgia or New York, where there was no basis therefor except hearsay evidence which had been stricken out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

In Bank. Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Daniel Fleming was convicted of manslaughter, and he appeals. Reversed.

Bush & Hall, of Redding, and H. C. Booth, A. A. Moore and Stanley Moore, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Orr M. Chenoweth, Dist. Atty., of Redding, for the People.

PER CURIAM. The appellant was charged with murder, and convicted of manslaughter. He appeals from the judgment pronounced upon such conviction, and from an order denying his motion for a new trial.

It is earnestly contended that the verdict is contrary to the evidence. It must be conceded by any fair-minded person who reads the voluminous record on appeal, consisting of over 4,000 pages, that, even if there be sufficient evidence to legally sustain the verdict, the guilt of appellant by no means satisfactorily appears therefrom.

The deceased, George F. Vallier, was a boy of about 16 years of age, who, with a companion named Henry Gobel, a boy of the same age, had run away from his home in Tacoma. They were "beating" their way south, with the intention of ultimately reaching San Francisco. Appellant, Daniel Flem-

ing, a man of 31 years of age, was a state railroad policeman in the employ of the Southern Pacific Company.

On August 25, 1910, at about 10:45 p. m., the first section of train 15 of the railroad company, bound south, arrived at the depot at Redding, Shasta county, on time. The train was one of twelve cars, consisting of mail, baggage, and dining cars, two tourist cars, and six standard Pullman sleepers. The seventh car from the engine was the Pullman "Edinburg"; it being the second Pullman, with the "Roquefort" in front, and the "Adriatic" immediately behind. As the train came to a stop at the depot, Vallier and Gobel were lying on the top of the "Edinburg," a little to the south of the center. They were taken from the top of the car by Fleming, with the assistance of others. Gobel was conscious; but he had an abrasion on the side of his face and a lump on the back of his neck. Vallier was unconscious, and clearly very seriously injured. After being looked over on the platform at the depot, he was taken to a hospital, but died within a very short time. An autopsy had the same night showed a number of wounds. In the opinion of the doctor officiating thereat, death was due to an oval contused wound on the forehead over the left eye, underneath which blood clots had formed on the brain. There were some other wounds, one near the right eye, one (a clean incised wound) on the top of the head to the left, scratches on the nose, and contused wounds on the top and back of the head. No marks were then apparent on either the body or the throat.

The theory of the prosecution was that Fleming inflicted these injuries upon these two boys, and that he was therefore guilty of the crime of murder.

Admittedly none of these injuries was inflicted after the train arrived at the depot in Redding. According to the testimony of both the witnesses for the prosecution and the defense, after the train stopped at Redding, Fleming went up on top of the car, and without any violence whatever assisted in removing the boys to the ground. Whatever injuries were suffered by the boys had been inflicted at some time prior to the stopping of the train at the depot in Redding.

According to the testimony of Gobel, the two boys had boarded the car "Edinburg" when the train passed through Delta at 8:45 p. m., at once climbing to the top. Fleming was on the train at the time, having boarded it at Ashland, Or., en route to Oakland. He had not been assigned to this train for active duty, but was on his way from Ashland, whither he had gone in the performance of his duties to join a north-bound train at Oakland. He was not apprised of the probability of there being any person on top of the train until it had left Kennett at 9:53 p. m. Thereafter, before stopping at the Redding depot, the train had

stopped only as follows: At Coram, 4.7 miles from Kennett, where it simply came to a stop, and then went on at 10:05 p. m.; at Motion, 3 miles from Coram, where it took water, and left at 10:15 p. m.; and at Keswick, 7.8 miles from Motion, which it left at 10:29 p. m. The distance from Keswick to Redding is 5.7 miles, and the time was 16 minutes, giving a rate of speed between these places of a trifle over a mile in 3 minutes. It is obvious that, if Fleming inflicted these injuries, he must have done so at one of these stops, or else have been on top of the "Edinburg" engaged in a brutal and wanton assault on the boys while the train was in motion. The latter is the theory adopted by the prosecution, which does not intimate that there was anything to lend support to the idea that Fleming went to the top of the car at any time before it left Keswick at 10:29 p. m., unless, from the testimony of certain of their witnesses to the effect that a man was standing on top of the car as it approached the Redding depot, it may be inferred that he went there when the train was at Keswick, and rode from Keswick to Redding on the top of the train. The testimony of the witnesses for the prosecution put the injuries as being inflicted while the train was very near to the Redding depot; Gobel testifying to the presence of the lights of what was apparently a large town, and the other witnesses claiming either to have witnessed an assault or to have seen a man standing on top of the train before it stopped, all being at most only a few hundred feet from the station. One of these claimed to have seen this man climb down from the top just before it stopped, and reach the ground, only to crawl under the train, and climb up again on the other side immediately after it stopped, while two of the other three who testified to the presence of a man on the top of the car before it stopped at Redding substantially said that he disappeared between two of the cars before the train stopped.

Enough has been said to show that a determination that Fleming inflicted these injuries necessarily involves the determination that he either made the trip from Keswick to Redding on the top of this train, or climbed to the top while it was running at the rate of 20 miles an hour, all at great peril to himself, and solely for the purpose of making a brutal assault upon some persons there whom he did not know, and against whom he could have no grievance other than that they were stealing a ride on a train of his employer. It is difficult to see what possible motive for such a proceeding on his part, full of serious discomfort and even deadly peril to himself, could have existed. The theory of learned special counsel for the prosecution to the effect, substantially, that it was a desire on his part to please his employer is, to say the least, hardly satisfactory. And,

moreover, a conclusion of his guilt further involves the conclusion that he put off his unlawful assault until within a few hundred yards of the Redding depot, where his presence on the top of the car and his part in the assault might be observed by those in the vicinity, seeking to escape observation in that position only when the train was just about to stop at the station, and immediately thereafter reascending to the top of the car to assist in taking the boys down. It goes without saying that such action on the part of a man possessing his senses is hardly conceivable.

In addition, we have testimony on the part of several persons who were on the train, which is absolutely incompatible with any idea of such action on the part of Fleming. As was said by the District Court of Appeal in deciding this case, the showing made by appellant "appears in the transcript to have been strong and persuasive." It is not suggested by anybody that he was on top of the train at any time before it left Keswick at 10:29 p. m., the last stop before Redding. After the train left Keswick he was seen in a car of the train by Bellus, a brakeman, and by a Mr. Mulhern, a passenger. When the train was coming into the Redding yard, and up to the time it stopped at the station, during the very time that he must have been on top of the car "Edinburg" if the theory of the prosecution be correct, his presence on the southerly platform of the car "Edinburg" or the northerly platform of the adjoining car "Roquefort" is testified to in the most positive way by a passenger, a Mr. Paul Compton, of Los Angeles, by the conductor, W. D. Gill, by James T. Horgan, a special agent of the Southern Pacific Company, and by R. W. Winn, the porter on the "Edinburg." According to Mr. Compton's testimony, his interest in the matter had been aroused by the fact that just before the train reached Kennett he had heard a loud noise on the top of the car "Edinburg," in which he and his wife had accommodations, and upon inquiry of the porter, who was engaged in making up berths, was informed substantially that probably some one stealing a ride on top of the car had been hurt in the tunnel (tunnel No. 2) through which they were passing. At Kennett, when the train stopped, he had climbed to an upper berth, which he had the porter let down for him, and, listening at the ventilator, had distinctly heard some one groaning or moaning on top of the car. When Fleming passed through the car shortly after the train left Kennett, Compton told him about the occurrence, and Fleming said he would investigate the matter when the train stopped. By reason of what he had heard, he was specially interested in the outcome, and went upon the platform as the train neared Redding for that reason. He saw Fleming step to the ground as the train came to a stop, go out

a few feet, and look up to the top of the car, and immediately thereafter climb up. Through some misunderstanding, the conductor was not apprised of there being anything wrong until after the train left Keswick, and the result was that the train was not held sufficiently long at any of the other places, according to Fleming, to enable him to go to the top of the train and find out what, if anything, was wrong. After leaving Keswick, Fleming met the conductor, and told him about the matter, and he, the conductor, and Horgan discussed the advisability of stopping the train and investigating. However, as they were very near Redding at the time, Horgan advised that they run on into that place, and then investigate, and this, according to Horgan and Gill, was done. Gill testified that he tried to see what, if anything, was on top of the car by attempting to climb up on the side of the car from the vestibule while the train was in motion, but that he could not get very far, and could not see anything. Both of them testified that Fleming was with them on the platform between the "Edinburg" and the "Roquefort" until the train stopped. The porter Winn, who had likewise heard the disturbance on top of the car, was also on the platform as the train came into the station, and testified to the presence of Fleming. Fleming himself testified to the same thing. He further testified that he had started to climb up at a previous stop, but that the train was starting before he got up to the top, and he was compelled to jump down and get back on the train. At Keswick, which was after he had reported the matter to Horgan, he got to the ground from near the front of the train, and ran to a little incline a few feet away from the car "Edinburg," where he could see the top of the car, and he saw what looked like two forms there. As the train was starting, he got back on the train, and shortly thereafter found the conductor, and told him about the matter, with the result already stated. According to the brakeman Bellus, he (Bellus) had been told by Horgan before they reached Keswick that they thought there was some one on the top of the train. The train stopped there to change mail, and he signaled the engineer to go ahead. Horgan complained to him afterwards because he had not held the train at Keswick, and he, Bellus, said he had no orders to do so. According to Horgan, there was something of a controversy between himself and Bellus because of the latter's failure to hold the train at Keswick, and a threat on his (Horgan's) part to report him. There is no question but that immediately upon the train stopping at Redding Bellus, with a lantern in his hand, jumped off the rear end of the first tourist car, ran forward, and immediately climbed to the top of the train, and ran back along the tops of the cars to the "Edinburg." Compton's testimony as to the noise on the top of the car just before the train

reached Kennett is fully corroborated by his wife, and also by the porter, and a passenger named Carroll. So far as the people on the train are concerned, there was nothing to contradict the testimony of those who did testify, as above stated, in any substantial way. The story told by them is reasonable, and unless it be utterly rejected, as the creation of wilful perjurers, it is impossible to understand how Fleming can be guilty of the crime charged against him, and of which he has been convicted. In addition to this, it is to be noted that witnesses of position and standing, among them being Father McNally, of St. Patrick's Church, Oakland, and Mr. F. Mullins, chairman of the board of supervisors of Alameda county, testified that Fleming's reputation for peace and quiet was excellent and of the highest standing, and no attempt was made to contradict the witnesses in any way.

The evidence relied upon as sufficiently showing the infliction by Fleming upon Vallier of the injuries causing his death is that of Gobel, his companion, that of four witnesses who testified to seeing a large man on top of the "Edinburg" as it came into Redding and before it stopped at the station, that of several persons as to Fleming's appearance and conduct at the station, and that of certain witnesses as to the nature of the injuries received by the deceased.

The testimony as to Fleming's appearance and conduct at the station may be dismissed from consideration with very slight notice. It throws very little, if any, light on the questions involved in this case. The witnesses giving this testimony substantially said that Fleming appeared nervous and excited, and that he expressed various views as to how the boys were injured, such as that they were drunk and fighting, and had been hurt in the tunnel. This was the sum and substance of this testimony. Assuming this testimony to be true, we do not see that, under the circumstances, it assists materially in determining the question of Fleming's guilt or innocence.

The only theory suggested by counsel for appellant on the trial as to the source of the injuries inflicted on deceased was that they were caused, in part at least, by contact with a timber in the tunnel just north of Kennett, or by something falling upon him from the top of the tunnel. The only basis for this theory appearing in the evidence is the testimony of Compton and others in the "Edinburg" as to the noise heard from the top of the car as it was passing through the tunnel and thereafter when the train stopped at Kennett. There is much in the testimony, as to the condition of deceased when seen upon the platform at Redding and the nature of the injuries, to indicate that some of the injuries at least were not so caused; but there is no contradiction of the testimony of the witnesses for the defense

that something did happen on the top of the car while it was passing through the tunnel, followed by the sounds indicating that some one there was seriously hurt. It is to be borne in mind, however, that it was not incumbent on defendant to show how these injuries were received, nor was it even at all essential to his innocence that deceased should have been mortally injured by coming into contact with a timber in the tunnel. In so far as anything disclosed by the testimony as to the condition of deceased and his companion and the nature of their injuries is concerned, if we concede that some of the injuries of deceased were inflicted by some person, it is just as reasonable, in view of the testimony of the defense, to assume that they were inflicted by another than defendant as it is to assume that defendant was the perpetrator. It cannot reasonably be argued that no one else had the opportunity. Assuming the testimony relied on by the prosecution in this regard to be entirely true, it is entirely possible that, as is said to have been suggested by Fleming at Redding, the two boys were scuffling and fighting as the train entered the tunnel, and that in the mêlée deceased might have been partly injured by something in the tunnel, and also suffered some of the other injuries shown. It was incumbent on the prosecution to show beyond a reasonable doubt that Fleming actually inflicted the injuries.

In the last analysis, the case of the people in this regard must rest upon the testimony of Gobel and the four witnesses who said they saw a big man on the top of the car before it stopped at the Redding depot.

It may safely be said that uncorroborated Gobel's testimony would not satisfy any reasonable man as to the participation of Fleming or any "big man" in any assault. He remained in Redding at a hospital from the night of August 25, 1910, until about September 3, 1910, when he returned to his home in Tacoma. But one witness testified to his saying anything during that time as to any assault, the matron of the hospital, who testified to a conversation had with him on August 26th. She testified that in the course of that conversation he said that a big man or a large man had hit him, and that he did not remember any more. No one else testified that Gobel gave any intimation after being taken to the hospital on August 25th, and before leaving Redding in September, that any one had assaulted either him or Vallier, although he was questioned several times as to the circumstances. He himself testified that he did not remember what occurred until some time in October. On August 26th, the day after the occurrence, he was interviewed in the hospital by Mr. Chenoweth, the present district attorney of Shasta county, who was then assistant district attorney, in the presence of a newspaper man. Gobel said substantially that he and Vallier got on the car at Delta, and finally went to sleep; that

he woke up feeling sick, and heard Vallier moaning, and asked him to keep quiet, as he was afraid the trainmen would hear him; that something hit him; and that he remembered no more. Chenoweth was examined as a witness on the part of defendant as to this interview, and fully and frankly corroborated the newspaper man's testimony in the matter. Certain marks on the throat of deceased which were found when the body was examined at Tacoma created a suspicion in the minds of his relatives that he had been assaulted by some one. On September 24th the body was exhumed and further examined in the presence of Gobel, and the next day the mother of deceased and his aunt, together with Gobel, started for Redding. In the meantime Gobel had remembered nothing about any assault or any big man. Shortly after their arrival in Redding the mother retained an attorney, the special counsel for the prosecution in this case, and commenced an action against the Southern Pacific Company for \$50,000 damages for the death of her son, alleging that he had been killed by employes of the company. During their stay in Redding Gobel was constantly with the mother and aunt, staying in the same house with them at their expense, trying, as he said, to remember just what occurred. Hooper, who will be referred to hereafter, gave him his version of the matter, and his associates at all times were those who had conceived and were maintaining the theory that Fleming had assaulted the boys on the top of the car, and had practically choked Vallier to death, and who were continually urging him to remember. This was the atmosphere that was constantly about him, until finally, one morning as he was getting out of bed and dressing himself, the whole thing came to him. This was not earlier than October 15th, over 40 days after the occurrence. He then remembered, as told by him at the first preliminary examination, as follows, omitting the matters that preceded their going to sleep on top of the car: "And then George Vallier laid down, and didn't say a word, and I laid down, and didn't say a word, too—we was so tired and sleepy, and I don't know how long it was. I kind of woke up, and looked around like that, and kind of seen the lights of some town, and just then I got struck in the side of the head, here. It kind of dazed me. I couldn't tell a minute, or second—I couldn't tell how long, and I looked up a little bit, and I seen—I hollered to George, and I seen an awful large man—it looked like he had on a trainman's suit—had hold of George's throat with one hand, and beating him with the other, and when this big man seen that I saw him, he just plunged over to me, and hit me on the back of the neck, and I can't remember anything more until I was talking to somebody here at the depot." Saying nothing about it to the mother and aunt, with whom he had breakfast, he went,

after breakfast, to the mother's attorney, and told his story. On October 22d he swore to these matters before a justice of the peace, and for the first time a warrant was issued for the arrest of Fleming. This story he clung to, with almost painful precision, on all occasions when he testified. On the trial on his cross-examination he said, in response to questions, that he could not say whether his story might not be "an imagination"; that "possibly" it might. It is to be borne in mind that Gobel must have seen Fleming on top of the car with him when he opened his eyes at Redding and was being assisted to the ground.

Aside from Gobel, the most important witness against Fleming was a colored man named Hooper, who at the time of this occurrence was a paroled convict from the state prison at San Quentin; the judgment against him being one based upon his conviction of the crime of grand larceny. He was then working as porter at the Lorenz Hotel. He testified substantially that, desiring to secure Pullman reservations for two men going south, he went north to Shasta street, three blocks above the station, to board the train as it passed, and see if he could secure reservations; that as the train passed he saw a man on top of a Pullman near the head of the train; that he got on the step of another car, and spoke through the door to a porter in the vestibule, and, the porter telling him that they were "chock-a-block," he jumped off, and ran to a car ahead, and jumped up to the lower step of another car; that standing there he saw through the glass doors a man getting down between the cars on the other side, and come to the ground; that he saw this man come under the car to the side on which he was, when the train stopped, and climb to the top of the car again, and assist in taking the boys down; that this man picked one of the boys up, and said, if they did not take him, he would throw him down. The man was Fleming. The evidence is very strong to the effect that Hooper did not tell his story to anybody until he told it to the aunt of Vallier after she and the mother came from Tacoma to investigate the matter.

Another one of the four witnesses referred to was a man named Sullivan. His own testimony showed that he had been convicted of a felony, and had served a term in a state prison in another state; that he had just served a six months' sentence in the county jail at Redding, being released therefrom only a week before this occurrence; that he had been working a few days in a small saloon in Redding, cooking; that he was a drinking man, and had been drinking during the two or three days immediately preceding the occurrence. He was hiding behind a pile of ties at or near Tehama street, two blocks north of the station, intending to beat his way out of town on this train. After the engine passed, he stepped out, and "sized up

the train," and saw a large man on top of one of the cars between two men who were lying there. This man walked rapidly towards the southerly end of the car, and went down in between two cars. He also first told his story to the aunt of deceased some weeks after the occurrence.

Of the remaining two witnesses, one had pleaded guilty to the crime of forgery, had served some months of his sentence, and had been pardoned. He likewise claimed to have seen a large man standing on top of the train before it stopped, and two boys lying there. The other was with a girl whom he had just met, and with whom he had walked up to a park near the depot. He was at or near the park when the train passed. He said he saw a large man in uniform on top of the train as it passed, and that this man disappeared at the end of the car, apparently between two coaches. He had not told his story to any one until a few days before the trial.

Enough has been said to show the character of the testimony upon which the prosecution relied to show the presence of Fleming on top of the car before the train stopped at Redding. The only other witness who testified to observing the train as it passed either the Shasta street or Tehama street crossing was one F. P. McNell, called by the prosecution to testify to the fact that Fleming appeared somewhat excited while at the depot. On cross-examination he testified that he stopped at the Tehama street crossing, with his bicycle, as the train passed; that he observed what he thought was a man lying on top of the train, and found out afterwards that there were two men there; and that he saw nobody standing on top of that car.

[1] We have not set forth the foregoing in regard to the evidence for the purpose of establishing that it is not technically sufficient to support a verdict of guilty, for under our well-established rule such a conclusion cannot be reached by an appellate court. While a full consideration of all the evidence, as shown by the record, brings us to the conclusion that it is extremely improbable that the defendant was on the top of this train at any time prior to its stopping at the station at Redding, the testimony of the four witnesses to whom we have referred, together with the other testimony on behalf of the prosecution to which we have alluded, was sufficient, if believed by the jury, to support the conclusion that the defendant did cause the death of Vallier. We may not be able to understand how the jury could have been satisfied beyond all reasonable doubt of the guilt of the defendant, in view of the testimony; but it was the exclusive function of that body to determine the amount of credit to be given to each and all of the witnesses. We have set forth the testimony showing, as we think, how extremely doubtful was the guilt of the defendant, in order

that the effect of certain erroneous proceedings on the trial may the better be understood.

[2-4] While the provision of our Constitution restricting the jurisdiction of appellate courts to "questions of law alone" (section 4, art. 6, Const.) has not been in terms amended, the amendment adopted in 1911, being section 4½ of article 6, undoubtedly makes it the duty of any appellate court in considering the questions of law presented on an appeal in a criminal case to consider the "entire cause including the evidence" for the purpose of determining whether any error or erroneous procedure complained of "has resulted in a miscarriage of justice." If the court be of the opinion that such has been the effect, it must reverse the judgment. It is plain, of course, that the evidence in a case, while technically sufficient to sustain a finding of guilt, may be so unsatisfactory as to render what in a plain case would be an absolutely harmless error one of vital importance, one affording ample ground for the conclusion that it has resulted in a miscarriage of justice. Under this amendment to our Constitution, an appellate court must necessarily be vested with a large discretion in determining the effect of errors, and each case must depend upon its own circumstances. It is the "opinion" of the court based upon a full consideration of the particular record that is to control upon the question whether the error complained of has resulted in a miscarriage of justice.

Conditions under which the defendant was tried, as shown by statements contained in affidavits filed on the motion for a new trial, and not disputed, were graphically depicted in the opinion of the District Court of Appeal in this case. It was said that it was not disputed that defendant was tried in the center of a community where a feeling of hostility against him and his employer prevailed. Newspaper articles were published from time to time from the day of his arrest to the end of the trial, the tendency of which, according to the District Court of Appeal, "would naturally be to direct and mold public sentiment so as to render difficult, if not impossible, a fair trial, and to influence and forestall the verdict of the jury regardless of the law and the evidence." As to the conditions in the courtroom during the closing argument, the District Court of Appeal said: "The situation was graphically described in one article published in a local newspaper, and incorporated in appellant's affidavit, as follows: 'The superior courtroom of Shasta county might have been a hall bedroom, as far as its capacity to hold people is concerned, when Special Prosecutor Braynard made his mighty closing argument that ends a case that has been before all eyes for three months. * * * The scene at the courthouse was never duplicated or even approached in its long history. The

upstairs corridors were so congested with an overflow that they were blocked. It was utterly impossible to get past the lines that were formed, as there was but more compactness beyond, and each man and woman was determined not to yield a step that would carry them from the sound of the great prosecutor's voice. * * * The scene presented in the courtroom was extraordinary. It was packed to every foot of its standing room during the noon hour by spectators who were content to wait. A hundred found seats on the floor, and the spectators' railing was no bar; a circle of spectators extending from it to the platform on which Judge Barber sat. Anything that could be utilized to sit on was taken advantage of, from sticks of wood to places of vantage on railings or an elevation. Every aisle was solid, and so was the space before the judge's bench. Doors could not be opened or closed, and during the evening session Judge Barber gave warning to all that, as the building had never been subjected to such a weight, it might give way, and spectators were ordered to use their discretion in remaining. Nearly as many people clustered on the outside as were on the inside. Even the walls were subjected to a strain, and windows broke with a loud crash. Officers of the court had to guard their seats to retain them. The chagrin of the defendant and the consternation of his few supporters were unpleasant to behold. They were almost crowded out of their seats by the sympathizers of the prosecution." To this may be added the account of the tribute to the special prosecutor when he entered the courtroom before the opening of court on the day of the final argument. It was a part of the same published article from which quotations have already been made, and was as follows:

"Riot of Applause.

"The appearance of Special Prosecutor Braynard in the courtroom was unlike anything ever witnessed in the courtroom of the county. He came in quietly, but was immediately observed, when he stepped to the platform to adjust his notes. A riot of applause came, intermingled with gusty shouts and stamping of feet, that ensued for 30 seconds, and so general and thunderous was the tribute that apparently every hand and throat in the courtroom participated. The prosecutor remained dignified, and the outburst would have continued had not Judge Barber, attracted by cheers and shouts in his chamber, rushed in to demand immediate silence."

The substantial correctness of these publications as to conditions in the courtroom was declared in affidavits presented and filed. It is uncontradicted that at least two of the jurors were in the courtroom at the time of the ovation to the special prosecutor. A portion of the closing argument of the special

prosecutor was quoted in the opinion of the District Court of Appeal as follows: "Its [the Southern Pacific Company's] all powerful and corruptive influence has been active and diligent throughout the trial, and we would not be surprised that witnesses have been bribed, that jurors have been approached, and subornation of perjury has been committed. However may be the effort of the Southern Pacific Company, we still have implicit faith in the personal integrity of each individual member of the jury, and we do not believe that it is within the power of this lawless corporation to besmirch and degrade the good name and good citizenship of Shasta county. * * * The people haven't had any money to expend in this case. We have not got the coin to pass out like the Southern Pacific Company usually does when it is involved in litigation in every conceivable shape and direction that they can possibly pass it, for justice. * * * We want to be reasonable, we want to be just, and we expect the same treatment from you, and the people of this county and this state demand it. We have offered the testimony here, we have presented the goods, and in justice to yourself, in justice to your conscience, in justice to your families and your good name, you cannot afford to violate your duties by returning to this court and saying that there is a possible doubt or reasonable doubt with reference to the identification of Daniel Fleming." As to this the District Court of Appeal said that it was not within the scope and purview of legitimate argument, and that it involved an unwarranted appeal to passion and prejudice and a scarcely veiled threat that if the jurors acquitted the defendant, they would be pilloried by public opinion as having been corrupted and bribed by this "lawless corporation," which may have been a decisive factor in the case.

[5] All of the foregoing matters were shown by affidavits presented on the motion for a new trial in the lower court. Copies of these were contained in the so-called "Transcript on Appeal" forwarded to the appellate court by the clerk of the superior court under section 1246, Penal Code; the papers and minutes contained therein being certified to be correct by the clerk of the superior court only. In his certificate he states that the foregoing are "full, true, and correct copies of * * * application for a new trial, together with affidavits and counter affidavits relating thereto and the order denying said application. * * *" Section 1246 of the Penal Code provides that the clerk's typewritten transcript shall contain, among other things, "a copy of other minutes of the action, including the proceedings on motion for arrest of judgment or new trial." The certified minutes of proceedings on motion for new trial recite that defendant's counsel presents to the court a written application for a new trial, "supported by

written affidavits of Mrs. Daisy T. Reed, J. J. Harrold, Daniel Fleming, A. F. Ross, and George W. Bush, said affidavits being made a part of said application, which said application with its accompanying affidavits is ordered filed and made a record of this court, said affidavits being deemed to have been read to the court." The minutes then show the filing of counter affidavits; said filing being ordered by the court, the name of the affiant in each case being stated. This is followed by copies of affidavits of each of the persons named; all bearing the file mark of the clerk showing filing by him on January 19, 1912, the day on which the motion for new trial was made and denied. No suggestion is made by either side that the record so certified does not contain full, true, and correct copies of all the affidavits presented on motion for a new trial. The District Court of Appeal concluded that under the law none of these affidavits was a properly authenticated part of the record on appeal, and therefore that it could not consider any of them. This conclusion was based upon the well-established rule under the statutes as they existed prior to the change in our laws relating to records on appeal in criminal cases made in the year 1909, to the effect that affidavits presented on a motion for a new trial and the minutes of proceedings on such a motion constitute no part of the judgment roll, that the clerk cannot make them a part thereof, and that they can be considered by an appellate court only when contained in a properly authenticated bill of exceptions. At that time section 1246 provided for the transmission by the clerk to the appellate court of copies only "of the notice of appeal, the record (the judgment roll, section 1207, Penal Code), and of all bills of exceptions," and sections 1171, 1174, 1175, and 1177, Penal Code, provided for the making up and settlement of bills of exceptions. In 1909, sections 1171, 1174, 1175, and 1177, Penal Code, were repealed, leaving us without any statutory provision whatever for a bill of exceptions in a criminal case. Section 1246, Penal Code, was amended so as to provide for the transmission by the clerk, in addition to the matters theretofore specified as constituting a part of the record (section 1207, Pen. Code), of 4, a copy of the demurrer, 6, a copy of other minutes of the action, including the proceedings on motion for arrest of judgment or new trial, and 9, any written or printed exhibits offered in evidence at the trial of the cause. Sections 1247, 1247a, 1247b, 1247c, and 1247d were added, providing for the transcription, certification by the reporter and by the trial judge, and forwarding of "the phonographic reporter's notes." It was evidently the design of the Legislature to have the record provided for in section 1246, as amended, and the new section, cover wholly the matter of the record on appeal, and dispense entirely with bills of

exceptions. It is clear that no authentication by the judge is required as to the matters that are to be certified by the clerk under section 1246, Penal Code. Section 1247 et seq. refer only to "the phonographic reporter's notes," which ordinarily would not be understood as including affidavits filed in the cause, including those presented and filed on a motion for a new trial. No particular reason is apparent why a phonographic reporter should take down in shorthand the contents of affidavits so presented and read to a court and filed in the cause, and we know as matter of fact that in practice he does not do so. The affidavits themselves present for all purposes the best evidence of their contents. We find nothing in section 1247 et seq. contemplating that the phonographic reporter's notes shall contain a statement of the matters shown by affidavits filed in the cause, and do not feel warranted in concluding that it was intended that such affidavits should be presented to an appellate court as a part of the phonographic reporter's transcript. If, then, such matters are not covered by section 1246, Penal Code, as matters to be certified by the clerk, there is no statutory method by which they may be presented to an appellate court. Such certainly could not have been the contemplation of the Legislature. Section 1246, Penal Code, should be liberally construed, of course, with a view to enabling a defendant to bring up all matters properly cognizable by an appellate court. It is not an unreasonable construction of subdivision 6 of the section to hold that it includes the affidavits presented on motion for a new trial, and we think it should be so construed. Of course, the affidavits set forth should be so referred to and identified as to make at least a prima facie case that they are the precise and only affidavits presented on the motion, and this was done here. We cannot see that such a practice would be in any way loose or uncertain, or productive of bad results. It is not to be doubted that an appellate court has full power, in the event that it is suggested that the clerk's record as to the matter of such affidavits is in any way defective or inaccurate, to determine the facts in regard thereto, and to require the clerk to make his record conform to the facts. The practice which we believe to be intended as to affidavits is undoubtedly expressly provided for as to "any written or printed exhibits offered in evidence at the trial of the cause" (subdivision 9, § 1246, Pen. Code), and any objections on the ground of policy that could be urged as to affidavits could, with equal force, be urged as to exhibits. We are of the opinion that the affidavits here should be considered to be a properly authenticated portion of the record on appeal. We are not, however, to be understood as holding that we would refuse to consider them if they were included in the reporter's transcript which is certified by the

trial judge. That is a question not presented. But, if we felt that we could not consider them if presented only in such a manner, we would order the clerk to send up a correct record showing the affidavits.

[8-9] As to the matters heretofore stated to be shown by the affidavits in relation to the argument of the special prosecutor, while we feel that portions thereof were subject to the criticisms stated by the District Court of Appeal which we have already set forth, it does not appear that objection was made by counsel for defendant at the time. It is now well settled that an appellate court will not consider a claim as to the misconduct of counsel in argument unless objection is so made. To properly present such a question on appeal in a criminal case, the phonographic reporter's transcript of his notes showing the portion of the argument complained of, and the objection and action of the trial court thereon, should be brought to the appellate court. As we are satisfied that the judgment should be reversed for other reasons, we do not deem it necessary to comment on the other conditions shown by the affidavits further than to say that they were of such a nature as to be likely to have a most prejudicial effect on the defendant's cause. While the courts cannot and do not desire to control public sentiment as to the merits of a cause, they are required, if there be anything in the guaranty of a fair and impartial trial, to see that such public sentiment is not expressed to or in the presence of the jury in such a way as to be likely to influence their determination. It goes without saying that a trial court should take every precaution to prevent anything by which, to use the words of the Supreme Court of South Carolina, in *State v. Weldon*, 91 S. C. 40, 74 S. E. 45, 39 L. R. A. (N. S.) 687, the jury may "be overawed, or their minds influenced by an atmosphere surcharged with hostility or partiality." The affidavits do, however, make apparent certain conditions existing at the trial proper to be taken into consideration in determining the prejudicial effect of certain errors, which we shall now refer to.

[10, 11] When P. J. Kindelon, chief special agent for the Southern Pacific Company, was on the stand, he was asked on direct examination by Mr. Hall of defendant's counsel the following question, viz.: "Since Daniel Fleming has been a railroad police officer under your supervision, what has been his record with the company?" This was objected to by the special prosecutor. In arguing his objection, the special prosecutor said: "This man says that he professes to know something about his record. I will say to counsel on the other side, if you consider this testimony material and relevant, will you object to us coming along with what we know of and concerning his record? If we will permit Mr. Kindelon to testify to what he knows about his record, will you open the door, and let us in to prove or establish cer-

tain acts, and such things as that, concerning his record?" Mr. Hall said: "Why, certainly, anything. Open the door wide as to any single act of Daniel Fleming." Mr. Braynard (the special prosecutor) then said: "All right; we will withdraw our objection." Mr. Hall then stipulated that the prosecution's proof in the matter must not be mere hearsay evidence, and Mr. Braynard said: "No; by eye-witnesses." The witness answered the question as follows: "His record for the six years that he worked for me is good, and there was no complaint against him as a police officer in that time." On cross-examination Mr. Braynard asked the witness: "During your service for the Southern Pacific Company as chief special agent, during your whole service as such, has any complaint ever been made to your office, or have you ever heard any complaint made generally by the public, about the manner that people have been beaten up and misused by train policemen on their train?" This was objected to, and the objection was overruled after some discussion. Thereupon Mr. Braynard made a statement, saying, among other things, that he felt that the ruling of the court "has been wrong with reference to this line of testimony," and "we now would like to withdraw this question, so that there can possibly be no error in this record," and that "we do not desire the rights of the people to be prejudiced by the admission of certain testimony which we know, if we go back and cross-examine concerning, they will take their objection, they will make a record, and it will be clear error if this case should hereafter be considered by the Supreme Court of this state." The question was then withdrawn. Later, however, he asked the witness: "Did you ever hear anybody speak about his knocking a man off the train, and breaking his leg?"—and the witness answered: "No; I didn't." This was followed by: "Q. On this division? A. I never did. Q. Never did? A. No complaint of that kind ever came to me. * * * Q. Did you ever hear of his putting a man off the train on this division, and beating him up after he was on the ground, and throwing him into a barbed wire fence? A. No; he never beat a man up in his life. Q. Oh, you know that, do you? A. You bet I do. Q. Yes? A. I am the man that knows it, too. * * * Q. You never heard of him knocking a middle age man down off the train on this division, and abusing him, and, while abusing him, standing over him with his feet placed on his legs or ankles, have you? Mr. Hall: Now, if your honor please, unless counsel is prepared to back these questions up with proof, we desire to object to them, and assign the asking of the question as prejudicial error. Now, we want them to be prepared to back up any of these questions that they ask. Mr. Braynard: Now, do you want us to do those things? Mr. Hall: Why, we surely do. Mr. Braynard: And you won't object to them? Mr. Bush: We told you before we wouldn't.

Mr. Hall: Bring in the proper proof. Mr. Braynard: We will bring in eyewitnesses. Mr. Bush: Well, that is what we want. Mr. Braynard: All right; we will bring them. Mr. Hall: Bring in a man who will identify this defendant. Mr. Braynard: Oh, we will identify him when we start to. Is that all your objection? Mr. Hall: We are just giving you warning, and assigning it as prejudicial error in advance, if you don't do it; that is all." The witness then answered the question in the negative. It is not disputed that no testimony was thereafter offered by the prosecution referring to these matters, and that no disavowal was thereafter made by the prosecution as to its ability to produce proof of the matters suggested by the special prosecutor.

We are of the opinion that the whole of this altercation was improper, and that it cannot be held, under the circumstances, to have been without prejudice to the substantial rights of the defendant. The vice of the matter was not in the mere asking of the three questions on cross-examination as to whether the witness had heard certain specified things about the defendant, but was in the expressions of the special prosecutor running throughout the altercation to the effect that the prosecution could produce proof along the lines of such three questions, and was only deterred from doing so by the fear that it might be held to be a prejudicial error by an appellate court, and bring about a reversal of a judgment of conviction. Such, we think, was the clear intimation conveyed by the conduct of the special prosecutor in this matter, and we can conceive of no other reason for such conduct than the desire to convey to the jury such an intimation. This conduct on his part was not invited by counsel for defendant. While the first question asked Kindelon by Mr. Hall as to the record of defendant with the company may have been objectionable, it constituted no ground or invitation for the proposition made in response thereto by the special prosecutor. That proposition was a plain statement to the effect that the prosecution knew things concerning defendant's record that were discreditable to him, and which they could prove by eyewitnesses, if the rules of evidence permitted proof thereof, or if the defendant would not interpose any objection thereto. The nature of these things was shown by the subsequent questions of the special prosecutor on the cross-examination of Kindelon, viz.: Acts of violence and brutality on the part of Fleming towards men found endeavoring to steal rides on the Southern Pacific Company's trains. It is too plain for discussion that the showing of any such matters would be extremely prejudicial to defendant's cause. Such conduct as was thus attributed to Fleming would naturally and justly be abhorrent to any person possessing a spark of humanity, and would go far towards inducing a conclu-

sion that, if he had done such things before, he might well be guilty of the brutal crime charged against him in this case. In his reply to the proposition thus made in the presence of the jury, counsel for Fleming, if satisfied that no such proof existed, simply adopted what was probably the most efficacious way of removing the impression that would otherwise have been caused by the making of the proposition. The subsequent statement of the special prosecutor in regard to not making any such proof solely because the admission thereof would constitute legal error, requiring a reversal in the event of conviction, did not assist. It was simply saying, in effect: "We have the proof; but we prefer to take no chances of a reversal, and, for that reason alone, we will not offer it." While it is true that defendant could not have complained on appeal of the admission of proof of such matters if he had interposed no objection thereto, the jury could not have known this, and the plain effect of the statement was that the prosecution had such proofs, but could not make them because the laws of evidence precluded such a course. The statements of the special prosecutor in his altercation with defendant's counsel in the course of the cross-examination clearly and emphatically reasserted the existence of such proofs. And at no time was any disavowal of the existence of such proofs made by the prosecution; the result being that the impression which must have been created by the statements of the special prosecutor was allowed to remain.

In view of the very grave doubt as to the guilt of the defendant of the crime charged against him, and in view of the nature of the acts charged against defendant as shown by the testimony of the witnesses for the prosecution, we are of the opinion that, despite the general instructions of the court to the jury to the effect that they must base their verdict exclusively on the evidence, the conduct of the special prosecutor in the matters we have been discussing, which clearly constitute misconduct on his part, contributed materially to the verdict that was rendered. See *People v. Derwae*, 155 Cal. 592, 102 Pac. 266. So believing, under the circumstances we have heretofore stated, we consider the case one in which section 4½ of article 6 of the Constitution contemplates a reversal on account of an error or erroneous procedure resulting in a "miscarriage of justice." See generally what is said in the opinion of Mr. Justice Sloss in *People v. O'Bryan*, 130 Pac. 1042. So far as we can see, defendant's counsel have sufficiently presented the question of prejudicial misconduct in this regard on appeal, and all the matters in connection therewith are shown by the phonographic reporter's transcript certified to by the trial judge.

[12] The trial court permitted the special prosecutor to ask the defendant, when being

cross-examined, if he had at any time assumed or gone by the name of Bob Clement, or by any other name than that of Daniel Fleming. Over specific objection that, among other things, the question was intended for the purpose of degrading the witness, he was required to answer, and said that he had assumed the name of Bob Emmett. The court erred in allowing the question, under the circumstances existing in this case. See *People v. Mohr*, 157 Cal. 734, 109 Pac. 476. There was no dispute whatever as to the true name of defendant, and obviously the sole purpose of seeking such proof was to reflect discreditably on the defendant by showing that he went under an assumed name, a thing, as said by this court, "not conducive to a good character for defendant." *People v. Arlington*, 123 Cal. 357, 55 Pac. 1003. Of course, it is claimed that the testimony, in the light of the subsequent explanation by defendant, could not have injured him in the minds of the jurors, and, in fact, counsel make quite an effort to show that the facts in the matter are rather to his credit than otherwise. The explanation came in answering questions of the special prosecutor designed to elicit answers showing that defendant had participated in boxing contests held under the auspices of the Reliance Club of Oakland, of which defendant was apparently an athletic member. All the evidence concerning this matter was entirely irrelevant, and all came in over the objection of defendant. The substance of defendant's testimony in this regard was that while employed by the Southern Pacific Company he participated in three or four such boxing contests, the same being four-round contests, under the name of Bob Emmett; that he was forced into the first of these contests as a substitute; and that "the club or the man that was running the club" gave him the name of Bob Emmett because the Southern Pacific would not "stand for" any one in its employ boxing, and he would have lost his position had it been known by his employer that he was engaging in these contests. Outside of these contests he was known about the club as Daniel Fleming, by which name he appeared on the rolls of membership. The standing of the Reliance Club as a respectable business men's and all-round athletic club would probably not be questioned by any one who knows the facts in regard thereto; but, so far as this jury was concerned, such standing was vouched for only by the testimony of defendant. People look at things differently, and we would indeed be ignorant as to existing conditions if we did not know that some people do not look with favor upon a man who engages in what they consider "prize fighting," even though the same be by amateurs as distinguished from professionals, and under the auspices of a club. We cannot tell how the various members of the jury regarded such matters. Obviously learned counsel for the prosecution did not think it would improve the standing

of defendant with the jury to be known as a participant in such contests. But, without regard to this, defendant was necessarily placed in the position of being compelled to admit that he had knowingly violated the regulations of his employer by so participating in such contests, and that he had assumed another name than his own for the purpose of escaping detection. Clearly this was not entirely creditable to defendant, and while, perhaps, most people would not have attached any particular significance to it in determining whether he was guilty of a brutal assault on Vallier, others would. The evidence in regard to these matters was improperly before the jury for its consideration, having been admitted by the trial court over objection. If it was the determining factor with even one juror, it materially contributed to the verdict, and in view of, to say the least, the closeness of this case on the evidence, and the very grave doubt as to defendant's guilt, it appears to us to be only reasonable to conclude that it did materially contribute to the verdict.

[13] We are also of the opinion that the trial court unduly curbed the cross-examination of Mr. Davis, a witness for the prosecution, on the question of his interest in the outcome of the case. The fact that he acknowledged having an interest, or the further fact that he acknowledged that there was a libel suit pending on the part of Fleming against the newspaper of which he was one of the owners, did not preclude defendant from further cross-examination as to the extent of his interest. And this was all that the defendant was doing when, the witness having said that he had no financial interest in a conviction, he asked him why he had no financial interest, and the trial court sustained an objection. And this, also, was what defendant was trying to do when he asked the witness if the article complained of in the libel suit was not one published at the time of his arrest in which it was substantially said that he had practically confessed his guilt, and if the article was not untrue in this respect. Of course, if these questions had been answered in the affirmative, the financial interest of the witness in the establishment of Fleming's guilt would be all the more apparent, and the jury was entitled to know the fact in considering his testimony. Defendant's counsel expressly stated to the court what they expected and offered to prove in this connection, and the court sustained an objection thereto; the offer being in the following language: "We offer to show, by this witness, that that paper published an article which was false—a statement that Fleming had confessed his guilt—and that by reason of that article, that Fleming commenced a \$10,000 damage suit against him, and we desire to show his interest in securing a conviction in this case."

[14] A portion of the argument of the special prosecutor which is assigned as miscon-

duct is contained in the phonographic reporter's transcript, with the objection of defendant thereto, and is reviewable here. Therein, counsel referred to Hooper as the man "that the sleuth hounds and special agents of the Southern Pacific Company tried to bribe, as shown by the records in this case," the same man "that they offered the fare to Georgia or New York." This was an improper statement to make, in view of the fact that the only basis for it was certain hearsay evidence which had been stricken out by the court. However, the jury was specially instructed to disregard this statement of counsel.

There is no other matter requiring consideration here, in view of our conclusion upon the matters already discussed. Upon the whole case we are satisfied from the record that the interests of justice demand that a reversal should be had.

The judgment and order denying a new trial are reversed.

BEATTY, C. J. If I were justified in assuming the correctness of the statement of facts contained in the opinion of the court, I should unhesitatingly concur in the judgment of reversal. But, by section 4½ recently added to article 6 of the Constitution, this court (and each of its members) is forbidden to reverse a judgment of conviction in any criminal cause for error or abuse in pleading or procedure, unless, after an examination of the entire record *including the evidence*, it is of the opinion that the error has resulted in a *miscarriage of justice*. The construction of this provision depends upon the meaning of the phrase "miscarriage of justice." Evidently errors and abuses in matters of procedure do not constitute a "miscarriage of justice," for the provision assumes that they may not result in such miscarriage, and that the presumption that they have not so resulted must prevail until an examination of the evidence has overcome that presumption. What, then, is a "miscarriage of justice"? The ordinary use of the phrase hitherto has been to characterize a case in which a person notoriously guilty of some serious offense has escaped conviction through some fault of those responsible for the enforcement of the law. The state in prosecuting an offender is seeking only justice, and the failure to convict where the evidence of guilt is clear is properly denominated a *miscarriage*. This, however, is not the sort of case that ever comes to the Supreme or appellate court. Appeals lie only in cases of conviction as the result of a trial, and a "miscarriage of justice" in such cases can only mean the correlative of such miscarriage in cases of acquittal, viz.: The conviction of a person who is probably innocent. For an opinion upon a question of fact—the question of guilt or innocence of which we are given jurisdiction by the amendment—must have at least a

probability to support it, not necessarily demonstration, of course, but necessarily the weight of evidence. If this is the true construction of the amendment—and I can see no room for another—then it is a solemn duty devolved upon every member of the appellate tribunals, charged as they are with the decision of questions of fact involving life and liberty, not merely to read hastily and cursorily the evidence allowed to go to the jury, and that excluded by the court, but to read it with close attention, weighing and balancing it, availing themselves of such slight aids as the cold record may afford for estimating the credibility of witnesses whose manner and appearance on the stand they have never seen.

Entertaining these views, and because in this case I have never found the time to read the 4,400 pages of typewritten record even in the most cursory manner, I do not feel qualified to concur in the judgment.

McGRORY et al. v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 1,360.)

(District Court of Appeal, Second District, California. Sept. 16, 1913. Rehearing Denied by Supreme Court Nov. 14, 1913.)

1. DEATH (§ 99*)—EXCESSIVE DAMAGES.

Decedent, at the time of his death, was 25 years of age, and was regularly employed as a butcher at a salary of \$20 a week. He was strong and in good health at the time of the accident, and the secretary of his employer testified that he was a quiet, steady man of good habits; that he had been first employed at \$18 a week, and had been afterwards raised to \$20. It was also shown that his life expectancy was 38 years. *Held*, that a verdict awarding \$20,000 was not so excessive as to indicate passion and prejudice, and therefore would not be set aside on appeal.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

2. APPEAL AND ERROR (§ 1048*)—RULINGS ON EVIDENCE—PREJUDICE.

Defendant, in an action for death, was not prejudiced by a question asked of a witness who represented the corporation by which decedent was employed, whether the witness had discussed with decedent the matter of increasing his compensation; the witness having answered that he did not remember.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Agnes McGrory and others against the Pacific Electric Railway Company and the Southern Pacific Company. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. W. McKinley and R. C. Gortner, both of Los Angeles (W. R. Millar, of Los Angeles, of counsel) for appellants. Morton, Holizer & Morton, of Los Angeles (T. A. Williams and F. M. Fowler, both of Los Angeles, of counsel) for respondents.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

JAMES, J. Agnes McGrory, a widow, for herself and as guardian of Agnes McGrory, her infant daughter, the two being the sole heirs at law of William McGrory, sued to recover damages alleged to have been sustained through the death of the husband and father, which was occasioned by a collision between a car of defendant Pacific Electric Railway Company, upon which deceased was riding, and an express train of the Southern Pacific Company. Defendants conceded their liability, but took issue as to the amount of damages to which plaintiffs were entitled. The jury sitting at the trial returned a verdict for the sum of \$20,000. This amount defendants contend is excessive, and beyond any sum which the evidence established as the total of plaintiffs' pecuniary loss.

[1] William McGrory at the time of his death was a young man, 25 years of age. He had been married less than one year, and was regularly employed as a butcher at a salary of \$20 per week. His widow testified that at the time of her husband's death they were living in a bungalow, for which payments were being made out of the wages earned by deceased; that her husband was strong and in good health at the time of the accident, and was of a very kind and loving disposition; that he gave her his wages each week, out of which she paid the family expenses and the installments due on the bungalow. The secretary of the business house who employed McGrory testified that McGrory had worked for his company for about two years; that his wages at first had been \$18 per week and afterwards \$20 per week, which latter sum he was receiving at the time of his death; that as the witness observed him, McGrory was a strong, quiet, steady man of good habits. It was stipulated at the trial that a man of the age and condition of health of McGrory would have a life expectancy of 38 years. The foregoing is the substance of all of the evidence upon which the jury measured the damages suffered by plaintiffs. If the deceased had lived for the full period of his expectancy, and had continued to earn \$20 per week, at the time of his death he would be 62 years old, and would have earned approximately \$36,000. The jury, under the rule established by the decisions, were permitted to consider the loss of the comfort which the society of deceased would have afforded plaintiffs, in determining the amount of their pecuniary loss. In order to warrant a court in setting aside a verdict for damages on the ground that too great a sum of money has been awarded, the sum must be so disproportionate to the result of any reasonable computation, based upon the facts shown in evidence, as to suggest at once that the jury must have been influenced by some factor, improper for them to consider, such as their sympathy for a plaintiff, or their bias or prejudice against a defendant.

Counsel for appellants have taken the facts of the case of *Diller v. Northern California Power Co.*, 162 Cal. 531, 123 Pac. 359, Ann. Cas. 1913D, 908, where the court sustained a verdict of \$20,000 damages for the death of a man whose life expectancy was 15.39 years, but whose earnings some of the evidence showed had amounted to \$6,000 per year, as a basis for argument against the fairness of the verdict returned in this case. They argue that if Diller had lived he would have earned a much larger sum of money during the period of his assumed expectancy than would the deceased McGrory. But in order to give any force to this argument the decision must be construed as holding that had any sum in excess of \$20,000 been awarded in the Diller Case, the judgment would have been set aside as being for too great an amount. That decision does not so declare. The Supreme Court in the Diller Case only asserted that it could not be said, under the facts shown, that the verdict was of such an amount as to suggest as a necessary inference that the finding was prompted by the passion or prejudice of the jury. To the same effect are the cases of *Valente v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95, *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400, and *Hale v. San Bernardino Co.*, 156 Cal. 713, 106 Pac. 83.

[2] Objection was taken to a question asked by plaintiffs' counsel of the witness who represented the meat company which had employed McGrory, as to whether that witness had discussed with McGrory the matter of increasing his compensation. The objection was overruled, but whether the question was a proper one or not, no prejudice could possibly have been worked against defendants' interests because the witness answered that he did not remember.

No sufficient reason is shown why a reversal should be ordered.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

PEOPLE v. WARR. (Cr. 288.)

(District Court of Appeal, Second District, California. Sept. 15, 1913.)

1. JURY (§ 181*)—BIAS—BELIEF IN POLITICAL DOCTRINE—"DIRECT ACTION."

Upon the prosecution for feloniously and maliciously attempting to explode dynamite near a public building to the intimidation and injury of certain persons, where it was not shown that defendant belonged to a political party believing in the doctrine of "direct action," which signifies an approval of physical force as a means to secure desired ends, a question of the prosecuting attorney in his examination of jurors as to whether they believed in that doctrine was proper in order that actual bias, if any existed in the minds of the jurors, should be brought out.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 561-582; Dec. Dig. § 131.*]

2. WITNESSES (§ 259*)—REFRESHING RECOLLECTION—TRANSCRIPT OF PRELIMINARY EXAMINATION.

To allow the stenographer who produced a transcript of shorthand notes taken at the preliminary examination of the defendant to read directly therefrom to the jury was irregular practice.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 894; Dec. Dig. § 259.*]

3. CRIMINAL LAW (§ 1043*)—TRIAL—GROUNDS OF OBJECTION—WAIVER OF OTHER GROUNDS.

Where defendant conceded that the transcript of shorthand notes taken at his preliminary examination furnished as good evidence as the shorthand notes themselves, but objected both to the notes and the transcript, such specific objection was a waiver of other grounds of objection, so that defendant on appeal could not urge that it did not appear that the witness needed the transcript to refresh his recollection.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

4. WITNESSES (§ 259*)—REFRESHING RECOLLECTION—GROUNDS.

Where a stenographer, asked to tell whether a certain section of the Political Code had been read to defendant at the preliminary examination, said that he could not tell without examining his notes, such fact in connection with a lengthy record afforded ground for allowing him to refresh his recollection by the use of his notes or some verified transcript thereof.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 894; Dec. Dig. § 259.*]

5. CRIMINAL LAW (§§ 1036, 1054*)—APPEAL—NECESSITY OF OBJECTION—ADMISSION OF EVIDENCE.

The admission in evidence of the defendant's statement to the examining magistrate that he was going to plead guilty in the superior court could not be reviewed in the absence of objection and exception thereto at the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631-1640, 2639-2641, 2662-2664; Dec. Dig. §§ 1036, 1054.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the whole evidence as to defendant's guilt was practically uncontradicted, error, if any, in the admission of evidence that he had stated that he would plead guilty in the superior court could not have been prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

7. CRIMINAL LAW (§ 723*)—TRIAL—ARGUMENT.

In a prosecution for feloniously placing dynamite near a building, and attempting to explode it, and to intimidate and injure certain persons, the prosecuting attorney's remark: "But, gentlemen, can you turn this man loose on the streets of this town, and go home, and sleep quietly in your beds? You may think, 'Well, he won't come to my place,' and he may not; but I hope to goodness if you do, I hope you will have the experience we had!"—went beyond proper and permissible argument.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. § 723.*]

8. CRIMINAL LAW (§ 728*)—TRIAL—ARGUMENT—ACTION OF COURT.

Such improper argument, in the absence of a request that the jury be instructed to disregard it, was not reversible error, since its

effect could have been removed by such instruction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.*]

9. CRIMINAL LAW (§ 829*)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

Where the prosecution claimed that defendant was guilty of the particular crime charged or of no offense at all, and the jury were so told, and the instructions on that issue were full and fair, defendant could not complain of a refusal to charge that, while he might not be guilty of the greater offense, he might be guilty of a lesser offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Carl Warr was convicted of feloniously depositing and attempting to explode dynamite with intent to intimidate and injure certain persons, and he appeals. Affirmed.

Thos. P. White, Alfred L. Bartlett, Irwin, White & Rosecrans, and Randall & Bartlett, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Appellant was convicted upon an information charging that he did "willfully, unlawfully, feloniously, and maliciously place, deposit, and attempt to explode at, in, and near a certain building, to wit, the Central police station, in the city of Los Angeles, a certain nitroglycerin explosive, commonly known as giant-gelatin or dynamite, with intent then and there to injure, intimidate, and terrify Richard H. Hilf and other human beings." He appeals from the judgment by which he was sentenced to serve 20 years in the state prison, and from an order denying a motion made on his behalf for a new trial.

On the morning of November 19, 1912, defendant, who was disguised by wearing a yellow mask over his face, and green goggles, entered the outer offices of the chief of police of Los Angeles, bearing a large parcel or box. He approached an officer, and demanded to see the chief of police. Upon being told that he must state his business before he could be permitted to see that official, he said that he had enough dynamite in the package which he carried to blow up the police station, and ordered the officer to produce before him immediately the highest official of a railroad company who he could find in the city of Los Angeles. He insisted upon his demand being complied with, and showed to the officers, others having gathered in the meantime, that he had his box of dynamite all arranged ready to explode. A glass panel had been placed in the top of the box, and a musket hammer could be seen through it; the hammer being held back in a position to be dropped, with caps and fuses attached. It was at first thought that the claim that there was dynamite in the box was false,

and that defendant was perpetrating some sort of a hoax. However, two men familiar with dynamite were permitted by defendant to examine some of the sticks, of which the box contained about 60, and they found that it really was dynamite, and of very high explosive quality. Defendant all of this while held one hand inside the box, and told the onlookers that the moment he withdrew it the hammer would descend and set off the cap, which in turn would fire the fuses and dynamite. The problem as to what was to be done with the visitor had become a serious one. The prisoners in the jail and the occupants of rooms upstairs were ordered out of the building. A pretense had been made to telephone to the railroad official whose presence the defendant demanded, and defendant was told that the man would come in 20 minutes. He stated that they must produce the highest official who happened to be in the city; that "they must go down the line" until they found one. A member of the city detective force and an officer attached to the district attorney's office decided to put an end to the suspense. One approached defendant as he sat in a chair, and struck him on the head with a policeman's billy, knocking him to the floor, where he lay unconscious. The other watched the box. As defendant fell the hammer of the infernal machine descended, and lighted the fuse. Grabbing up the sputtering box, the officer ran with it to the street, where he tore it into pieces, and disconnected the fuses. No explosion occurred. Defendant, upon recovering consciousness, expressed surprise that the dynamite had not exploded—also regret. He said that he had intended to scare the police officers, and "scare them good and plenty." He told how he had obtained the dynamite in San Bernardino county by substituting a lock of his own for one just like it which he found on the magazine door of a rock quarrying company, and taking the dynamite out at pleasure. He talked freely and voluntarily about the whole episode, both before and at the preliminary examination, and at the trial no facts were left in dispute at all. This latter condition of the evidence is referred to hereinafter in connection with a consideration of the points contended for as grounds entitling defendant to another trial.

[1] The district attorney, in his examination of the persons summoned to serve as jurors, inquired of them whether they believed in the doctrine of members of a certain political party known as "direct action," which signified that physical force was approved as a means to secure desired ends. These questions were objected to, and misconduct of the prosecutor is assigned because of the asking of the questions. Conceding that the matter of the alleged misconduct was properly presented to the trial judge, and in such a way as to entitle the

question to be here reviewed, which may be doubted for the reasons appearing later in this opinion where similar objections are dealt with, yet it must be said that the interrogatories were within the scope of a reasonable examination of the veniremen. It was not shown that defendant belonged to the particular political party referred to, and the questions should be considered as only requiring the veniremen to say whether they believed a person justified in using physical force in redressing his own injuries, real or fancied. The questions were proper in order that the matter of actual bias, if any existed in the minds of the prospective jurors, should be brought out.

[2-8] It was irregular practice to allow the stenographer who produced a transcript of his shorthand notes taken at the preliminary examination of the defendant to read directly from that transcript to the jury. But the only objection urged to that evidence was that it did not appear that the witness needed to thus refresh his recollection. The trial court determined that it was apparent that the reporter could not recollect the exact terms of the evidence given without referring to the transcript. The district attorney offered to use the shorthand notes instead of the transcription thereof, but defendant's counsel stated in effect that the objection made would be the same to the notes as to the transcript; in other words, they conceded that the transcript furnished as competent evidence as the notes themselves. Where particular and specific grounds of objection are stated, other grounds, however available or pertinent, will be held to be waived. The trial court here determined that the witness needed to use the transcript to refresh his recollection, and that matter was one peculiarly within the province of the trial judge to decide. At the outset the reporter, when asked to tell whether a certain section of the Penal Code had been read to defendant at the preliminary examination, replied that he could not tell without examining his notes. This answer of the witness, taken in connection with the fact that the record of the proceedings had, at the preliminary examination, been of some considerable length, which condition was made apparent to the trial judge from an inspection of the transcript exhibited to him, and which sufficiently appears here from the quantity of matter which was read into the record from the reporter's transcript, certainly afforded some ground for allowing the witness to refresh his recollection by the use of his notes or some transcription thereof made by him, and which he verified as being correct. The testimony given by the stenographer was as to what was stated by the defendant who testified as a witness at the preliminary examination. It is not contended that defendant was not fully instructed by the magistrate as to his right not to testify, and as to the

testimony so given being used against him in that event, and it sufficiently appears that the section of the Penal Code bearing upon that subject was read to him. He was then asked by the prosecuting attorney, "After having heard this section read, do you still want to tell your story?" to which the defendant replied, "I will tell all and all." The reporter read from the transcript the statement of the defendant which was by way of question and answer; when he had partially concluded reading, one of the attorneys for defendant arose, and stated that he understood that the reporter was wanted in another court, and said, addressing the court, "We are willing to stipulate that Mr. Hammon [the deputy district attorney] shall read the questions and answers to the jury in order that Mr. Wright can get away to attend to his business, if that is satisfactory to the court and the district attorney; if your honor is going to admit the testimony any way, it matters not who reads it." Thereupon the deputy district attorney mentioned proceeded to read the remainder of the testimony of the defendant, as set out in the reporter's transcript, including the order of the magistrate holding the defendant to answer. This latter was read no doubt for the reason that at the conclusion of his order the magistrate propounded the following rather unusual question to the defendant: "Are you going to plead guilty to this in the superior court?" and the defendant answered, "Yes, sir; so far as this; yes, sir." Counsel for appellant now strenuously insist that it was palpable and inexcusable error for the district attorney to introduce the order of the magistrate and the question and answer last set out. But there is neither objection nor exception upon which to found an argument as to this matter. At the time of the reading of it before the jury some intimation should have been given to the trial judge that the defendant objected to its introduction, or at least a motion should have been made after the reading of it to strike out the objectionable statements. It has already been pointed out that the objection previously made to the reading of the transcript was limited to the one question as to whether it had been shown that the reporter needed the transcript with which to refresh his recollection. This condition of the record furnishes, on the point, a complete answer to the argument that error exists demanding a reversal. A further answer might be made: Conceding error, and that the objection was properly raised in time, under the whole evidence, which was practically without dispute and uncontradicted as to any part or particular, no such prejudice could have been worked to defendant's rights as would amount to a miscarriage of justice.

[7, 8] And the conclusion just expressed must be said to change the hue of the entire list of alleged errors set forth in the argu-

ment of counsel for appellant. The defendant introduced no testimony which contradicted in any degree the narrative of his performance as told by the witnesses for the people. The jury might have left out of view altogether the statement of defendant as it was shown to have been made at the preliminary examination. The facts were clear and unclouded as to those essentials necessary to make out the offense with which he was charged. The deputy district attorney in his argument to the jury, and in the heat of his exhortation, went outside the established path marked out for prosecuting officers when he said: "But, gentlemen, can you turn this man loose on the streets of this town, and go home, and sleep quietly in your beds? You may think, 'Well, he won't come to my place,' and he may not; but I hope to goodness if you do, I hope you will have the experience with him that we had." But here, again, the defendant failed to make any request to the court that the jury be instructed to disregard the language of the prosecutor, and so failed to lay any foundation for a review of the objection, as was the case in *People v. Shears*, 133 Cal. 159, 65 Pac. 295. And conceding that there are cases where the misconduct may be of such a nature as to render an instruction from the court to the jury directing that no attention be paid to it futile and unavailing, and therefore unnecessary to be asked for, the situation presented here does not illustrate such an instance. There may well be times when the judge, by a clear intimation as to his opinion as to facts of a case, improperly made to a jury, could not, by following the misconduct, with a direction to the jury to disregard it, effectually clear the minds of the jurors of a prejudicial impression; but it very seldom happens that a mere observation of an attorney, expressed during the heat of his oration, fastens itself with such tenacity upon the minds of the jurymen as not to be dislodged by a direct instruction from the trial judge.

[9] Appellant offered an instruction, and requested that it be given to the jury, which advised that a conviction might be had of a lesser offense than that charged. The position of the prosecution was that the defendant was guilty of the particular crime charged or no offense at all. If the instructions were full and fair on that issue, as they were, it is all that defendant could ask or require. There could be no complaint made on his part because the court refused to tell the jury that, while the defendant might not be guilty of the charge laid, he yet might be guilty of a lesser offense, when the jury were told that, if he was not found to be guilty of the precise offense charged, he was entitled to an acquittal. *People v. Huntington*, 138 Cal. 261, 70 Pac. 284. The instructions as to the burden and quality of proof required to establish in-

sanity were full and complete, and no error appears from the action of the court in refusing any of the several charges asked for by defendant. The trial judge construed the term "place," used in the information, to mean the same as "deposit," and as applied to the charge under consideration it does not seem that any different definition was required or could have been used to more correctly express the meaning of that term.

Appellant has shown no sufficient cause warranting a reversal of the judgment or order denying a new trial.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

WEILL v. DANZIGER et al. (Civ. 1,828.)
(District Court of Appeal, Second District, California. Sept. 17, 1913.)

1. PRINCIPAL AND AGENT (§ 23*)—PROOF OF AGENCY—EVIDENCE—FINDINGS.

Evidence held to sustain a finding that K., in purchasing the goods sued for from plaintiff, acted as agent of and with authority from defendants.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

2. APPEAL AND ERROR (§ 1010*)—FINDINGS—REVIEW.

If from a consideration of the evidence it appears on appeal that there is any substantial evidence introduced which supports the court's findings, they will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

3. EVIDENCE (§ 501*) — OPINIONS—EXAMINATION OF WITNESS.

On an issue of agency, it was not error to permit the agent to testify that the goods sued for were charged to his account with the understanding from the other two defendants that they would reimburse him over an objection that the answer stated a conclusion of the witness, where he was thereafter examined as to the foundation which he had for the "understanding."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

4. APPEAL AND ERROR (§ 764*)—BRIEFS—REQUISITES—PRINTING.

The rule of the Supreme Court requiring printed briefs is applicable to the District Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3099; Dec. Dig. § 764.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by A. Weill against J. M. Danziger and others. From a judgment for plaintiff against defendant Danziger alone, and from an order denying his motion for a new trial, he appeals. Affirmed.

Geo. E. Whitaker, of Bakersfield, for appellant. J. W. Wiley, of Bakersfield, for respondent.

JAMES, J. Plaintiff herein brought this action to recover for goods, wares, and merchandise which he alleged he had furnished to defendant. Collins and Wiltsee were not served with process, and the cause proceeded to trial as against defendants Danziger and Kent. Judgment was in favor of plaintiff and against defendant Danziger alone. Motion for a new trial was made and denied, and an appeal was then taken from that order and from the judgment.

The merchandise on account of the purchase price of which this action was brought was all ordered by and first charged to defendant Kent. Later the charge, at Kent's direction, was transferred to the name of "Lost Hills Syndicate." The trial court found that Kent in making the purchase of the goods acted as the agent of his codefendants, and not as a principal. The evidence which it is claimed is insufficient to support this finding was mainly given by Kent himself, who testified that he was conducting the business for Danziger and Wiltsee in moving rig irons and operating in the Lost Hills territory. He testified as follows: "They were building rigs and holding down located ground. They were purchasing supplies. I purchased supplies for them from Mr. Weill. They were part of them charged to my account, in my name, with the understanding from Mr. Danziger and Mr. Wiltsee that they would reimburse me when they named the company and then change the account to the company's name. I told Mr. Weill that Mr. Wiltsee and Mr. Danziger would be responsible for these bills. I had authority from them for giving such instructions." A letter from Danziger to Kent was introduced in evidence, also a telegram. The letter informed Kent that a check for \$700 to be used in connection with expenditures in the Lost Hills was inclosed. The telegram contained instructions from Danziger to Kent to sacrifice rigs and rig irons if necessary to pay the King Lumber Company \$1,000. Kent testified that the goods which he purchased from the plaintiff, and for which the action was brought, were all used in connection with the operations which he was conducting and managing for Wiltsee and Danziger. The haze which enveloped the question as to the precise agreement under which defendants were operating was not clearly dispelled by any of the evidence. Danziger by his testimony admitted that he was associated in some way (not precisely defined or explained) with Kent and Wiltsee, and did not deny that the goods for which plaintiff's charge was made were used in the transaction of that business. He was extremely hazy in his explanation of how he was to be reimbursed for large sums of money which he admitted he furnished to Kent, but he denied that Kent was authorized to make the charge on his behalf for the mer-

chandise which was furnished by plaintiff. All of the evidence introduced seems to have been competent for the purpose of proving the general business in which defendants were engaged and in illustrating the representative capacity in which Kent claims to have acted.

[1,2] It cannot be said that there was no evidence to sustain the finding of the trial court wherein it is held that Kent acted as the agent for Danziger and his co-defendants. If from a consideration of the evidence on this review it appears, as it does, that there was any substantial evidence introduced which supports the findings of the court, that is all that can be inquired into, for the question as to where the preponderance of the proof may lie is one which addresses itself to the trial court, and to that court only.

[3] There are no other errors specified which call for separate or particular discussion, unless it be the objection raised to that portion of the testimony of Kent wherein he stated that the goods were charged to his account "with the understanding from Mr. Danziger and Mr. Wiltsee that they would reimburse me." Counsel for defendant Danziger moved to strike out this answer as stating a conclusion of the witness, which motion was denied. While technically the objection as framed was pertinent, still it cannot be said that there was any prejudicial error in allowing the testimony to remain, for the witness thereafter was sufficiently examined as to the foundation which he had for this "understanding."

[4] The briefs in this case, except the opening brief on behalf of appellant, do not conform to the rule of the Supreme Court, which is also applicable to this court, and which provides that printed briefs shall be submitted. There is neither explanation nor apology for the violation of this rule, which is committed both by counsel for appellant and for respondent, and the fact that the court has examined in this case the briefs in the improper form in which they have been submitted should not give assurance that a like violation in the future will be similarly treated.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

DUNAWAY v. ANDERSON et al. (Civ. 1,123.)

(District Court of Appeal, Third District, California. Sept. 17, 1913.)

1. APPEAL AND ERROR (§ 1001*)—FINDINGS—REVIEW.

While the Supreme Court has power to set aside a finding that is supported by substantial evidence, or when it appears reasonably certain that the finding or verdict is wrong, the court is in no position to exercise such

power justly, or to be assured that the finding or verdict is wrong, when it is supported by substantial testimony that is not inherently improbable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. CORPORATIONS (§ 432*)—OFFICERS—CONTRACTS—INDIVIDUAL LIABILITY.

Evidence held to warrant a finding that certain of the defendants contracted with plaintiff individually, and not as an officer of a corporation, to construct a dam in connection with an irrigation project, and that plaintiff was therefore personally liable for the work.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

3. CORPORATIONS (§ 306*)—CONTRACTS—LIABILITY OF OFFICER—CORPORATE LIABILITY.

Where an officer of a corporation was held individually liable on a contract for work done in the construction of a certain part of its plant, it was no concern of his that the court found that the corporation was also liable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. § 306.*]

4. PLEADING (§ 126*)—DENIALS—NEGATIVE PREGNANT.

Certain defendant contractors having filed a cross-complaint for services in the construction of a dam in connection with irrigation works, plaintiff filed a denial that between August 10, 1909, and November 15th following, or at any time, such defendants or either of them performed the labor or services in the erection or construction of a certain dam for storage of water on a specified description of land, or at any place, and in the construction of three miles of canal and ditch, or either, at the special instance or request of plaintiffs, or either of them or at all. Held, that such allegation, construed as a separate denial of each of the averments, was nevertheless defective as a negative pregnant in the denial that the contractors constructed three miles of canal as alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. § 126.*]

5. APPEAL AND ERROR (§ 731*)—QUESTIONS REVIEWABLE—SPECIFICATIONS OF ERROR.

Appellant was not entitled to review, on appeal, of alleged insufficiency of evidence to support a finding, where the objection was not specifically set out in his specifications of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by T. F. Dunaway against August Anderson and others, in which defendants filed a cross-complaint. From a judgment in favor of defendant Anderson on the cross-complaint, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

James Glynn, of Reno, Nev., and Pardee & Pardee, of Susanville, for appellant. R. M. Rankin, of Susanville, and Grover C. Julian, of Woodland, for respondents.

BURNETT, J. Defendants August Anderson and Alfred J. Anderson, in addition to their answer to the complaint, filed a cross-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

complaint, and were awarded judgment thereon against plaintiff and the Madeline Land & Irrigation Company (a corporation), the latter having been made a defendant in the cross-complaint, for the sum of \$1,242. The appeal is by plaintiff from the order denying his motion for a new trial, and he states in his opening brief, that "the propositions we submit herein are: (1) The insufficiency of the evidence to support the judgment and findings thereon against T. F. Dunaway, plaintiff and appellant herein, made a defendant with the Madeline Land & Irrigation Company, by the defendants and respondents herein, in the third cause of action, by way of cross-complaint; and (2) that said findings therein are against law." The two propositions thus stated, however, simply amount to the contention that, as a matter of law, the evidence is insufficient to support the following findings of the court: "That between the 10th day of August, 1909, and the 15th day of November, 1909, the defendants August Anderson and Alfred J. Anderson, at the county of Lassen, state of California, performed labor and services in the erection and construction of a certain dam for the storage of water on the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 22, township 36 N., range 16 E., M. D. M., and in the construction of three miles of canal and ditch, at the special instance and request of the said plaintiff T. F. Dunaway, and the Madeline Land & Irrigation Company."

It is not disputed that the services were performed by said defendants, and that they were worth the amount found by the court, but appellant insists that there is no warrant for the conclusion that he employed defendants, the contention being that their contract was solely with the said Madeline Land & Irrigation Company, and that his connection with the matter was simply as an officer of said corporation. Appellant does not seem to appreciate fully the difference between the situation of an appellate court and that of the trial court in passing upon the merits of a motion for a new trial. He says: "The Supreme Court properly has the right, under the Constitution of the state of California, to review questions of fact and thereunder examine evidence for the purpose of determining whether the court below erred in its finding." He cites as authority Hayne on New Trial and Appeal, p. 1631 (revised Ed.), wherein it is stated: "The implication of the Constitution, therefore, is that in civil cases the Supreme Court shall review questions of fact as well as questions of law. But however this may be, the Constitution certainly contains no *prohibition* upon the review of questions of fact. Nor is there anything in the statutes which prohibits the review of such questions." The learned author criticises the use of certain expressions implying the want of authority in the Supreme Court to review questions of fact, like

the following: "The finding of the jury under the conflict is conclusive, and not subject to review here." *Bundy v. Sierra, etc., Lumber Co.*, 149 Cal. 772, 87 Pac. 622. The verdict of a jury or the finding of a trial court on conflicting testimony cannot be reviewed." *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276. "With the conclusion of the lower court on conflicting evidence we cannot interfere." *Riverside, etc., Co. v. Riverside Trust Co.*, 148 Cal. 457, 83 Pac. 1003. "We have no power to interfere with the finding on conflict of testimony." *Humboldt, etc., Socy. v. Dowd*, 137 Cal. 408, 70 Pac. 274. It is declared that "such language cannot be accepted as a correct statement of the true principle of law under consideration. It cannot be said that the appellate court cannot *review* a finding made upon conflicting evidence, for it is well settled that it is always the duty of the court to ascertain whether there is really a conflict, and, if so, whether there is substantial support to the finding itself, and this process necessarily involves a review of the evidence." It is also stated that there is no foundation for the assertion that the appellate court lacks *power* to interfere with a finding, though there be a conflict in the evidence, for the existence of the power has never been doubted. However, the conclusion is reached that "the following is a correct statement of the rule, viz.: That where there is a substantial conflict in the evidence the Supreme Court will not disturb the verdict or other decision of fact, although it may be against the weight of the evidence; but that if it appear to a reasonable certainty that the verdict or decision was wrong upon the evidence, it will be set aside although there be direct testimony in its support. Perhaps as good a statement of the rule as can be given (so far as motions for new trial are concerned) is that a motion for new trial, on the ground of the insufficiency of the evidence, is addressed to the discretion of the court below, and that the ruling thereupon will not be disturbed except for an abuse of discretion."

[1] Technically considered, no doubt the Supreme Court has the power to interfere with a finding that is supported by substantial evidence, or to set it aside when it appears "reasonably certain" that said finding or verdict is wrong, but, of course, it is in no position to exercise the power justly or to be assured that the finding or verdict is wrong, where it is supported by substantial testimony that is not inherently improbable. This arises from the circumstance, to which attention has been often directed, that the appellate court is deprived "of those important aids to the attainment of a correct conclusion which the jury and the court below find in the appearance and general bearing of the witnesses." *Rice v. Cunningham*, 29 Cal. 492. If the weight of the evidence was to be determined by the number of witnesses,

then the rule manifestly would be applied differently by the appellate courts. But it is well known that one witness may be truthful and a dozen opposing witnesses be untruthful. In short, as said by Baldwin, J., in *Kimball v. Gearheart*, 12 Cal. 28: "It is almost impossible for an appellate court to satisfy itself in a decision upon such matters. So much depends upon the manner, bearing, character of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony." The question is not one of the existence of the power or authority, but rather of the only feasible and practicable method of exercising that power.

The situation of the trial judge in passing upon the motion for a new trial is manifestly different from that of the appellate court. This is pointed out in the case of *Green v. Soule*, 145 Cal. 102, 78 Pac. 340, wherein it is said that the Supreme Court "cannot pass upon the credibility of witnesses, and hence cannot interfere upon this ground," but that "the trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it."

[2] With the foregoing considerations in view, how is it possible for this court to say that full credit should not be given to defendant August Anderson in his testimony that "I did a lot of work on dam No. 1. I did it at Dunaway's request. There was no writing; verbal understanding made at Reno at the time I was there trying to find out whether I should go to work, or whether I should stop at the same time the work was tied up. The conversation was that I should go ahead and do all that I could, and so as to get the water for the following year, and if I needed any help I was to let him know. I wrote him on the 15th of October that I wanted \$1,500. I didn't get it. He said to go ahead and do all I can to get the water; he said he would make it right. The work was done between the 10th day of October and the 15th day of November. Alfred Anderson and I did the work. It was done at Dunaway's request; it was all done on dam No. 1. I did other work building the canal. I built three miles of canal that was started by Edwards. That three miles of canal was built a long time before I took the contract for making dam No. 3. I valued it at \$60 a mile, three miles would be \$180."

It is not disputed that dam No. 1 is the dam that is referred to in said count No. 3 of the cross-complaint. A mere reading of said testimony of Anderson makes it plain that the court was justified in concluding that as to said dam Dunaway was personally responsible to the Andersons for the value of their services in constructing it.

Since it does not appear that Dunaway made the request in a representative capac-

ity, it would be presumed, of course, that he was acting as a principal, and this presumption is strengthened by the fact that he had a personal interest in the work to be done.

[3] It is manifestly of no concern to appellant that the court found that the corporation was also liable for the debt.

The finding as to the canal and ditch presents a somewhat different aspect. Anderson says that this was built a long time before he "took the contract for making dam No. 3." The court found that the contract for the construction of said dam No. 3 was made between the corporation and the Andersons, and the evidence supports this finding. The conversation at Reno between appellant and August Anderson occurred after the latter took the contract for dam No. 3. It would follow that we could not look to the conversation at Reno for the origin of the contract to build said canal.

[4] The record is indeed obscure as to the contract for this canal or ditch. It is at least doubtful whether there is disclosed sufficient evidence to support the finding that it was constructed at the instance and request of Dunaway. Appellant, however, is in no position to urge a reversal of the judgment on this ground. His denial of said allegation of the cross-complaint was as follows: "Deny that between the 10th day of August, 1909, and the 15th day of November, 1909, or at any time, the defendants hereinabove named or either of them, at the county of Lassen, or elsewhere, performed labor and services in the erection and construction of a certain dam for the storage of water on the southeast quarter of the southeast quarter of section 22, township 36 north, range 16 east, M. D. M., or at any place, and in the construction of three miles of canal and ditch, or either, at the special instance or request of the said plaintiff T. F. Dunaway and the said Madeline Land & Irrigation Company, or either of them or at all." The answer is therefore substantially a denial that plaintiffs built the dam and the three miles of canal and ditch or either the canal or ditch at the instance of appellant. It may be questioned whether a denial in this conjunctive form presents an issue. But if we construe it as a separate denial of each of said allegations, we still have a striking example of a negative pregnant in the denial that the Andersons constructed three miles of canal and ditch. As a matter of fact, it may be remarked, the evidence shows that these did not represent separate entities, but both terms were applied to the whole artificial channel of three miles in length.

[5] But if the foregoing somewhat technical consideration be not sufficient to warrant an approval of the finding in the absence of any evidence on the subject, it is at least fair to hold that appellant, if he expected to rely upon this point, should have specifically indicated it in his specifications of error. He

contented himself with the statement that "the evidence is insufficient to justify finding 21; nor is there any evidence that each and every allegation contained in paragraph 1 of defendants' third cause of action by way of cross-complaint is true." We may assume that to his failure to particularize may be attributed the absence of evidence in the record as to this point. In this connection it may be stated that the bill of exceptions does not purport to give all the evidence, and it discloses no evidence whatever to negative the finding; appellant himself not having taken the stand.

We think the order denying the motion for a new trial should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. WOODLEY. (Cr. 214.)

(District Court of Appeal, Third District, California. Sept. 17, 1913. Rehearing Denied by Supreme Court Nov. 14, 1913.)

1. DIVORCE (§ 320*)—RIGHT TO REMARRY—FOREIGN STATUTES.

The statute prohibiting divorced persons, under penalty, from marrying again within a period of six months has no extraterritorial jurisdiction, and, the marriage being completely dissolved, a remarriage by a divorced person outside the jurisdiction is not invalid by reason of the statute.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 818, 819, 844; Dec. Dig. § 320.*]

2. DIVORCE (§ 320*)—RIGHT TO REMARRY—WHAT LAW GOVERNS.

Under the direct provisions of Civ. Code, § 63, the courts in determining the validity of a marriage celebrated without the state are bound by the law of the place of the celebration.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 818, 819, 844; Dec. Dig. § 320.*]

3. DIVORCE (§ 320*)—REMARriage—VALIDITY.

A local statute prohibiting divorced persons from remarrying within the period in which an appeal may be taken applies only to residents, and will not render invalid a marriage celebrated within the state by nonresidents, even though the divorce of one of the spouses in another state had not been granted for the length of time required by the local statute.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 818, 819, 844; Dec. Dig. § 320.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

J. R. Woodley was convicted of crime, and he appeals. Affirmed.

W. D. L. Held, T. J. Weldon, and Walter F. Stringley, all of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted under the charge of having placed and permitted his wife, known as Pearl White, to remain in a house of prostitution, and he was sentenced to a term of five years in the penitentiary. It is not disputed that an es-

sentential element of the crime, and necessary to be shown by the people beyond a reasonable doubt, is that said female was in contemplation of law the wife of defendant; that they were, in other words, the parties to a valid marriage contract. *People v. Mock Yick Gar*, 14 Cal. App. 334, 111 Pac. 1039. As to this the people made out a sufficient case; but defendant contended that the woman was not his wife as that term is used in the law, that the apparent marriage was in fact entirely void, and therefore that the prosecution, brought as it was under section 266 of the Penal Code, must fail. It appeared that the marriage ceremony between defendant and the said Pearl White was performed in the state of Oregon on April 28, 1905. The parties were then residents of the state of Washington. Prior to said purported marriage appellant had been married to one Josephine Woodley, who is still living, and he was granted a decree of divorce from her by the superior court of Spokane, in said state of Washington, on December 17, 1904.

By reason of the fact that the said marriage to Pearl White, which we shall designate hereafter as marriage No. 2, occurred within six months of the entry of said decree of divorce, it is the contention of appellant that, under the law of the state of Washington and also of Oregon, said marriage No. 2 was and is invalid.

In his effort to establish his theory he sought to introduce the statute of Washington providing that neither party to a divorce proceeding shall be capable of contracting marriage within six months from the date of the entry of a decree therein, and that all marriages contracted in violation of that law, whether contracted within or without the state, are void. The court sustained an objection to the offered proof.

Attention was also called by appellant to the decision of the Supreme Court of Washington (*In re Smith's Estate*, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573), wherein said law was construed as suspending the operation of the decree of divorce for the period of six months. Therein, referring to said statute, it was said: "The first part of the section directs that in granting a divorce the court shall order a complete and full dissolution of the marriage as to both parties. The provision, however, if given force, must place some limitation upon this, in that a decree of divorce could not be full and complete if the parties are not allowed to contract marriage with other persons until the time for an appeal shall have expired, or, in case of appeal, until the same shall have been determined. If the provision is to have any force, it seems to us it must limit the preceding part of the section, and the divorce cannot be held to be full and complete until the time mentioned in the provision has

expired. It is full and complete for all purposes, excepting neither party shall enter into a marriage with any other person during the time specified, and it may be a limitation upon it in that respect. During this time, for this purpose, the decree of divorce is suspended and inoperative to that extent.

• • • Consequently these parties were incapable of contracting the marriage relation within said time, and, no marriage between them having been solemnized thereafter, it follows that they were never husband and wife as to each other."

An acceptance of that decision as a sound exposition of the Washington statute would necessarily lead to the conclusion that the declared marriage of defendant and the said Pearl White was in fact no marriage at all. This would follow for the reason that he had a wife living from whom he was not divorced. His status in the state of Washington being that of a married man, it would continue the same wherever he went, and another attempted marriage in any state would be invalid unless that state permitted bigamy, which supposition, of course, is to be rejected. But the Smith decision is not followed by subsequent cases in Washington, and it is not in harmony with the declared views of the Supreme Court of this state, as we shall ultimately see.

In *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923, the Supreme Court of Washington held that said statute had no extraterritorial operation, saying: "We do not think the prohibitions of the Code of 1881 were in effect beyond the jurisdiction of the state or territory," and it was determined that a marriage valid in California, where it was celebrated, was also valid in the state of Washington.

In *State v. Fenn*, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800, it was held that the Washington statute, "though invalidating a remarriage in Washington within the prohibitory period of persons divorced in that state and marriages in other states and countries of persons divorced and domiciled in Washington made to evade her laws, the parties intending to return to Washington, did not invalidate a foreign marriage within the prohibited period of a woman divorced in Washington, if she was divorced in good faith and if she was domiciled in good faith in the country where the marriage occurred at the time it was performed."

And, in *Pierce v. Pierce*, 58 Wash. 622, 100 Pac. 45, following the *Fenn* Case, supra, it was held that the Washington statute did not affect the validity of a marriage contracted in Victoria by parties who were domiciled there; the court saying: "If the marriage is entered into by one who has in good faith removed to another jurisdiction, not for the mere purpose of the marriage or to evade the rigor of the local law, but to establish a domicile, the marriage should be held to be

valid; whereas, if it appears that the parties, being domiciled in this state, have gone to another jurisdiction with the primary intent to evade our law and marry in defiance of it, the marriage should be held to be void."

Appellant, realizing, no doubt, that the declaration in the *Smith Estate* as to the scope and effect of said Washington statute was probably too sweeping, and that it did not invalidate a marriage in another jurisdiction, sought to prove the Oregon statute by offering the decision of the Supreme Court of that state in the case of *McLennan v. McLennan*, 31 Or. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. Rep. 835. Waiving the question as to the proper method of proving the statute, we may find there a statement of the law in that state and also an interpretation of it in harmony with the decision in the *Smith Estate*, supra. In the *McLennan Case* the court said: "The sole question presented on the appeal is as to the validity of the Vancouver marriage, and its determination depends upon the construction of section 503 of our statute (Hill's Ann. Laws), and its effect upon marriages solemnized in a neighboring state. By the section it is provided that 'a decree declaring a marriage void or dissolved at the suit or claim of either party shall have the effect to terminate such marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and, if he or she does so contract, shall be liable therefor as if such decree had not been given, until the suit has been heard and determined on appeal, and, if no appeal be taken, the expiration of the period allowed by the Code to take such appeal.' It is clear that a marriage in this state in violation of this section would be null and void, because, by its provisions, the parties are incapable of entering into such a relation within the time specified, for the reason that the decree does not to that extent terminate the former marriage." And the court holds that a marriage in violation of said statute, although contracted in the state of Washington by persons domiciled in the state of Oregon, is absolutely void when called in question in the courts of the latter state. The doctrine of this case, however, is impliedly, if not expressly, rejected in the subsequent decisions of the Oregon court.

In *State v. Leasia*, 45 Or. 410, 78 Pac. 328, the question involved was whether a divorced wife was a competent witness against her former husband as to a matter arising after the decree was entered. The crime was committed on May 24, 1903, and the decree of divorce was entered on the 18th of the same month, and the contention was made that the decree did not operate to sever the marital relations of the parties until finally determined upon the appeal. But it was held that, under the decisions of that court, the defendant having failed to appear in the di-

voice proceeding, he was wholly without the right of appeal, and, there being no appeal, the divorce decree became operative and finally effective when rendered. The wife was therefore declared to be a competent witness against her husband.

In *Wallace v. McDaniel et al.*, 59 Or. 378, 117 Pac. 314, also decided by the Supreme Court of Oregon, it was held that, since the wife alone in that case was entitled to appeal, she could waive her right and validly marry a third person on the last day on which she could take the appeal.

It is quite apparent that the construction thus accorded to the Oregon statute is entirely inconsistent with that found in the *McLennan Case*, *supra*.

It may be well to notice how the question has been regarded in the other cases cited by counsel.

In the *Inhabitants of Phillips v. Madrid*, 83 Me. 205, 22 Atl. 114, 12 L. R. A. 862, 23 Am. St. Rep. 770, it appeared that Ella R. Hinckley was legally married to one Wardwell, of Clinton, in the state of Maine, May 25, 1879; that she and her husband afterwards moved to Massachusetts, where they separated, and she returned to the state of Maine. While she was there her husband brought a suit of divorce and obtained a decree in Massachusetts, in November, 1882, which was made absolute in November, 1883. She remained in the state of Maine, and, on the 6th of September, 1884, was duly married to one Lorestein Hinckley, in the town of Phillips. It was claimed by the defendants that by the statute of Massachusetts and also of Maine a husband or wife for whose fault a divorce was granted could not marry again within two years from the decree of divorce, and, as that time had not elapsed in September, 1884, the marriage of said Lorestein and Ella R. Hinckley was illegal. The Supreme Court of Maine, however, decided against this position, saying: "We think the contention is not sound. When the divorce was granted, Ella R. was no longer the wife of Wardwell. *Burien v. Shannon*, 115 Mass. 438; *Commonwealth v. Putnam*, 1 Pick. (Mass.) 136. The prohibition to remarry within the time named was in the nature of a penalty. It had no force as a disability to remarry out of the state of Massachusetts. It did not attach to the person of the wife in this state. This rule is held in many courts. [Citing cases.] Nor does the prohibition upon the guilty party to remarry by the statute of this state attach to said Ella R. Our statute applies only to divorces granted by the courts of this state. It has no reference to a decree granted in another state. *Bullock v. Bullock*, 122 Mass. 3." It was accordingly held that said marriage of September 6, 1884, was legal.

The Louisiana Supreme Court decided, in the *Succession of Hernandez*, 46 La. Ann. 962, 15 South. 461, 24 L. R. A. 831, that: "The

prohibition of the statute of New York to the effect that no second or other subsequent marriage shall be contracted by any person, during the lifetime of any former husband or wife of such person, in case the former marriage be annulled or dissolved on the ground of adultery, has no extraterritorial effect, being a penal statute, and it cannot be given the effect of annulling a contract of marriage between persons at the time residing abroad, notwithstanding it was solemnized in the city and state of New York; the contracting parties announcing their intention to be to thereafter reside in Louisiana, and afterwards actually residing there."

[1] But, as far as this case is concerned, we must keep in mind that the validity of said marriage No. 2 is to be determined by the rule laid down by the Supreme Court of this state.

In *Estate of Woods*, 137 Cal. 129, 69 Pac. 900, the court was called upon to construe section 61 of the Civil Code, which at that time provided as follows: "A subsequent marriage contracted by any person during the lifetime of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless: 1. The former marriage has been annulled or dissolved; provided, that in case it be dissolved, the decree of divorce must have been rendered and made at least one year prior to such subsequent marriage." The court said: "That the Legislature had power to provide for the rendition of a decree of divorce by a court which should not be absolute for the period of one year after its rendition we have no doubt; but that the Legislature has failed to so provide by section 61, or even attempted so to do, we also have no doubt. The obvious meaning of the section is that neither of the divorced parties shall marry within the period of one year after the decree of divorce is rendered. The statute is a prohibition pure and simple upon the marriage of either party for one year, and declares the penalty for a violation of this prohibitory provision to be nullity of the marriage. * * * Section 61, subd. 1, does not purport to operate upon or affect a decree of divorce. It deals with divorced persons. It affects them after the decree of divorce has been rendered. It deals with them after they have become unmarried."

The same reasoning may be applied to the Washington statute. Indeed, the decree offered in evidence by appellant shows that the parties were divorced. No condition was attached to it. The decree was absolute, and thereby appellant became an unmarried person, but subject to the penalty of having his second marriage invalidated if he attempted to remarry a third person in the state of Washington within six months.

Again, in the *Estate of Wood*, *supra*, the Supreme Court decided that said section 61

of the Civil Code had no extraterritorial operation, and it quoted with approval the following from *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, 60 Am. St. Rep. 936: "Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state just as though the statute did not exist."

Under the rule thus announced, we must eliminate altogether from consideration the said statute of Washington.

[2] It is equally sound that we must look to the law of Oregon to determine whether the said marriage No. 2 is valid. Our Code itself (section 63, Civ. Code) so provides, as follows: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state."

[3] Was the marriage, then, valid according to the laws of the state of Oregon, where it was celebrated? The answer would undoubtedly be in the negative if the parties had been divorced in that state. But, when the statutes of Oregon refer to a decree of divorce, they contemplate a decree rendered by the courts of that state, and not of a foreign jurisdiction.

As said, in *State v. Shattuck*, supra: The language of the statute is general, and "it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it." There is exactly the same reason for holding that the Oregon statute does not refer to divorces granted in other states as there is for holding that the penalty therein provided does not refer to marriages celebrated in other states.

The statute, in the absence of language extending its application extraterritorially, must be confined to domestic decrees of divorce and domestic marriages. It may be true that this construction makes an invidious distinction against those who are divorced and remarry in the same state and in favor of those whose divorce and remarriages occur in separate states; but this is a matter entirely for legislative control. No doubt the Oregon statute might have covered the case of one divorced in another state; but, as we conceive it, the Legislature did not so provide.

Of course, if there had been in the state of Washington a statute like that of this state, found in section 61 of the Civil Code, as amended in 1903 (Stats. of 1903, p. 176), marriage No. 2 would have been utterly void, since appellant would not have been an unmarried person; but it cannot be said in any

sense that the Washington judgment was an interlocutory decree of divorce.

Under sound principles of construction, we think it cannot be held that the said Pearl White was not the wife of appellant, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

LAWRENCE v. WHEELER.

(Supreme Court of Kansas. Nov. 8, 1918.)

(Syllabus by the Court.)

1. OFFICERS (§ 42*)—DE JURE COUNTY TREASURER.

Under the undisputed facts of this case the appellant was not holding the office of county treasurer, during the time he received the salary of such office, as an intruder or in violation of law, but was holding it in accordance with a certificate of election and a judgment of a court of competent jurisdiction, the execution or operation of which judgment was not stayed, but which judgment was in full force and effect. He was not, however, the de jure county treasurer.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 64; Dec. Dig. § 42.*]

2. OFFICERS (§ 95*)—COMPENSATION—RECOVERY AGAINST OCCUPANT.

The appellee is therefore entitled to recover the amount of the salary which appellant received as such officer, less the amounts actually and necessarily paid out by him for clerk hire and in transacting the business of the office.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 134, 139; Dec. Dig. § 95.*]

3. OFFICERS (§ 95*)—COMPENSATION—RECOVERY AGAINST OCCUPANT.

The appellant is entitled to no compensation for his own services in the office, nor any deduction for profits or earnings which the appellee may have acquired during the time appellant withheld the office from him.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 134, 139; Dec. Dig. § 95.*]

Appeal from District Court, Finney County.

Action by H. V. Lawrence against A. C. Wheeler. From judgment for plaintiff, defendant appeals. Reversed.

Hopkins & Hopkins, of Garden City, for appellant. Hoskinson & Hoskinson, of Garden City, for appellee.

SMITH, J. At the time of the general election in November, 1906, the appellee, Lawrence, then holding the office of county treasurer of Finney county by a former election, was a candidate for re-election, and the appellant, Wheeler, was his opponent. On the canvass of the votes it was determined that Wheeler had received the greater number of votes, and a certificate of election was issued to him, and he duly qualified as county treasurer. Lawrence contested the election before the county contest board, which resulted in a judgment for Wheeler. The judgment was afterwards affirmed in the district court of Finney county, and an appeal was taken to this court by Lawrence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to reverse such judgment, but no application for stay of the judgment was made. When the tax roll was made up the board of county commissioners caused it to be placed in the hands of Wheeler as county treasurer. All the other records of the treasurer's office were in the possession of Lawrence, in a room occupied by him as county treasurer during his term of office. Wheeler demanded of Lawrence the money, books, and papers in his hands as county treasurer, which demand was refused. The county attorney thereupon brought an original action in mandamus in this court to compel Lawrence to turn over the money, books, and records in his office to Wheeler as treasurer. The decision in that case is found in 76 Kan. 940, 92 Pac. 1181, *State v. Lawrence*. The judgment prayed for by the county attorney was rendered in this court. The syllabus in the case reads: "Where the title to the office of county treasurer has been determined by the district court on proceedings in error from a contest court, and the execution of such judgment is not stayed, the state may, upon the relation of the county attorney, maintain mandamus to compel the delivery of the money, books and records of the office to the person so adjudged to be elected, although the defeated party in the contest is prosecuting proceedings in error in this court from such judgment." Thereafter the appeal of Lawrence from the judgment of the district court in the contest case was heard in this court, and the judgment of the district court was reversed. *Lawrence v. Wheeler*, 77 Kan. 209, 93 Pac. 602. By that decision the case was remanded to the district court, and a trial thereon resulted in a judgment in favor of Lawrence. An appeal was taken by Wheeler to this court, and the judgment of the district court was affirmed. *Wheeler v. Lawrence*, 78 Kan. 878, 99 Pac. 228. Upon the rendition of the latter judgment Lawrence demanded of Wheeler the money and records of the treasurer's office, which demand Wheeler complied with, and turned over the office to Lawrence. Thereafter Lawrence brought this action in the district court of Finney county to recover from Wheeler the amount of salary which Wheeler had received during the time he had occupied the office of county treasurer, in accordance with the judgment of this court in the mandamus case. Lawrence recovered judgment in the district court for the aggregate sum of \$1,017, with interest on each of the four payments of salary, which aggregated that sum, from the time such payments were made. Wheeler appeals from this judgment to this court. This is the fourth time we have been called upon to determine questions arising out of this controversy.

[1, 2] The appellee cites *Com'rs of Saline Co. v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171, *Rule v. Tait*, 38 Kan. 765, 18 Pac. 160, and *Fenn v. Beeler*, 64 Kan. 67, 67 Pac. 461, in support of his contention that he is enti-

tled to the entire salary of the office during the entire time he was deprived thereof. This is undoubtedly the correct rule where one illegally usurps the office to which the one duly elected thereto is entitled. Wheeler, however, did not intrude himself into the office, or receive the salary thereof, without authority of law, but under and in accordance with the judgment of this court as well as the judgment of the district court of Finney county and the county contest board. Had Lawrence, upon his appeal from the decision of the district court, stayed the operation of the judgment as provided by law, this court might have held in the mandamus case, to preserve the status quo in the contest case, that Lawrence was entitled to hold the office until it was judicially determined otherwise; but he did not elect so to do, and, with the judgment in full force and effect, refused the demand of Wheeler to surrender the office. Wheeler was not a party to the mandamus action; it was brought by the county attorney in the interest of the public, for the reason, probably, that there was confusion in the business of that office; there being two claimants thereto.

In *Rule v. Tait*, 38 Kan. 765, 18 Pac. 160, an officer was allowed to recover the full amount of the salary, but there no question of any deduction was presented. Moreover, the defendant in that case was a mere intruder, without color of right, and probably would not have been entitled to any reduction. By the weight of authority one who performs the duties of an office under a claim of right, made in good faith and upon reasonable grounds, will be required to account to a successful claimant only for its net proceeds. The following are illustrative expressions approving this view:

"There is * * * strength in the contention that a trespasser may not set off the expense he incurred in executing the trespass. It has been held, in a well-considered case, there can be no deduction for the personal services of the intruder. *People v. Miller*, 24 Mich. 458 [9 Am. Rep. 181]. It was said in that case, however, that: 'There may be reason for deducting from any official earnings the actual cost of obtaining them, which would have been entailed on any person who might have held the office.' This may be said of the expenses in controversy in the case at bar. *Mayfield v. Moore*, 53 Ill. 428 [5 Am. Rep. 52], is the leading case which sustains the right to deduct such expenses. This case is followed by others in the same court, and the same view has been announced by other courts. We think they express the correct rule. It makes the measure of recovery the extent of the injury, and the injury, it is clear, is not the gross earnings of an office, but such earnings less, to use the language of Mr. Chief Justice Campbell in *People v. Miller*, supra, 'the actual cost of obtaining them which would have been entailed on any person who might have held the

office." *Albright v. Sandoval*, 216 U. S. 331, 341, 30 Sup. Ct. 318, 321, 54 L. Ed. 502, 509.

"Nearly all the cases recognize that the de facto officer, acting in apparent right, when sued by a de jure officer for the fees and emoluments of the office, may retain the reasonable expenses incurred in earning them." Note, 54 L. Ed. 502, 503.

"A de jure officer who has been kept out of his office by an intruder may recover, in an action on the case against such intruder, all the profits of the office which he would have received had he exercised the office, less the necessary expenses of earning them." Note, 32 Am. St. Rep. 236.

"Where a public officer is wrongfully excluded from his office, the measure of damages is the amount of his salary during the period of exclusion, deducting, however, if the defendant acted in apparent right and good faith, his reasonable expense in earning it." 2 *Sedgwick on Damages* (9th Ed.) § 569.

It is sometimes said that a deduction for expenses may be made against fees, but not against salary. *Bier v. Gorrell*, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17. But the real distinction is that a deduction may be made for money necessarily paid out, but not for the personal services of the de facto officer. Expenses will rarely be incurred in earning a salary, but often in earning fees. But if, in order to discharge the duties of an office, it is necessary to employ assistance, no reason is apparent why this should not be taken into account in determining the net returns of an office.

In *Fenn v. Beeler*, 64 Kan. 67, 67 Pac. 461, one who had wrongfully held an office and collected the salary attempted to show, when sued by the rightful claimant, the amount the plaintiff had received for his services elsewhere during the time he was deprived of the office. His offer was refused. That ruling could doubtless have been justified upon the ground that the defendant was without color of right. The reason given was that the salary attached to a public office goes to the officer, as an incident of his office, not by force of any contract, but because the law gives it to him. That reason applies where the action is against the public body of which the plaintiff is an officer (*Reising v. City of Portland*, 57 Or. 295, 11 Pac. 377, Ann. Cas. 1912D, 895; *Wynne v. City of Butte*, 45 Mont. 417, 123 Pac. 531), but has less force in a case like the present. In an action between individuals, where the recovery is measured by the actual injury suffered, a deduction for incidental benefits seems not unreasonable. In the present case, however, no claim of that character is made.

The appellant, however, contended in the trial court that while he was holding the office under the judgment of the district court, he was the de jure as well as the de facto county treasurer. He could not consistently

unite with this claim a claim for expense incurred in conducting the office. The law (section 3656 of the General Statutes of 1909) does not authorize the allowance by the board of county commissioners of any sum for clerk hire to county treasurers of counties of the then population of Finney county. If the county treasurer employed a clerk it devolved upon him to pay such assistant. That he claimed more than he is entitled to should not have debarred him from a just claim included therein.

[3] In his appeal here the appellant acquiesces in the judgment that appellee is entitled to the salary pertaining to the office, but contends that the judgment should be only for the sum remaining after deducting therefrom the actual and necessary expenses incurred in conducting the business. As we have seen, this is the true measure of damages; interest being allowed on such balance.

The judgment is reversed. The amount recoverable is the salary received, less the amount, if any, which the appellant necessarily and actually expended in conducting the office. No allowance is to be made for his own services therein, nor any deduction for any profits or earnings the appellee may have secured in other business during the time. If not determined by agreement of the parties, a new trial should be granted by the court for the purpose only of determining what credits the appellant may be entitled to. All the Justices concurring.

TEPPER v. CITY OF WICHITA.

(Supreme Court of Kansas. Nov. 8, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 788*)—INJURY FROM DEFECTIVE STREET—LIABILITY.

A city given control of its streets and charged with the duty of maintaining them in a safe condition cannot, by any permission it may give to individuals to plow the streets and to remove earth therefrom, avoid liability for injuries resulting to travelers from the negligent manner in which the work is done or the dangerous condition in which the street is left.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.*]

2. MUNICIPAL CORPORATIONS (§ 788*) — INJURIES FROM DEFECTIVE STREETS — NOTICE OF DEFECT.

Where a city grants permission to a third party to plow or excavate in a street, it is bound to exercise diligence for the protection of the traveling public and to know the condition of the street while the work is in progress and after it is done the same as it would where the work is directly done by its own officers or agents.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.*]

Appeal from District Court, Sedgwick County.

Action by Catherine Tepper against the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

City of Wichita. From a judgment for plaintiff, defendant appeals. Affirmed.

Earl Blake, Jno. W. Blood, and R. C. Foulston, all of Wichita, for appellant. Dale, Amidon & Madalene, of Wichita, for appellee.

JOHNSTON, C. J. This action was brought by Catherine Tepfer to recover damages from the city of Wichita for injuries sustained by her while passing along a street of that city which had been plowed and left in a dangerous condition. In going from her home to her place of business she had been in the habit of walking down the center of Elm street, which was unpaved and without sidewalks. On the morning of October 27, 1910, she went east on Elm street about a block to Hillside avenue where she took a downtown car, as was her habit, and at that time Elm street was in a smooth and safe condition. According to her usual custom she left her business house at about 6:45 o'clock in the evening to return home and when she alighted from the street car at Elm street it was then dark so that the condition of the street was not readily apparent. During the day the street had been plowed, leaving furrows and large clods in the part of the street ordinarily used by pedestrians. She started up the street in the darkness and, stepping into a furrow, she stumbled and fell, sustaining serious injuries. The testimony in her behalf was to the effect that the commissioner of the city had authorized one Campbell, who needed earth for private use, to plow Elm street and take dirt therefrom. The commissioner, however, denied that such permission had been granted and testified that no authority had been given to Campbell or any one else to take dirt from that street at that time. In answer to a special interrogatory, the jury found that, although Campbell, who plowed the street, was not an officer of the city, the work was done by him with permission of the city and that authority to plow the street was given to him by H. J. Roetzel, the commissioner in charge of the streets. The general verdict was in favor of the appellee, and in its appeal the city insists that, as the plowing was not done by any officer, agent, servant, or employé of the city, it cannot be held liable for injuries resulting from the plowing of the street by others unless the city had actual or constructive notice of the defect and a reasonable time thereafter to discover and remedy the defect. The trial court instructed the jury on the several phases of the case but practically eliminated the matter of notice in case the plowing was done by authority of the city. In one of the instructions given it was said that: "If you find that the city of Wichita or H. J. Roetzel, as commissioner of the city of Wichita, authorized one Campbell to plow up the street in question and remove the dirt therefrom and that said Campbell plowed up the street or removed the dirt therefrom and left it in a dangerous condi-

tion and did not place lights or other signals to warn the public of its condition, then you are instructed that the city is charged with knowledge of the condition of said street."

[1, 2] Assuming, as we must, that the street was plowed with authority from the city commissioner, it must be held that the city is chargeable with notice and knowledge of the dangerous condition caused by the authorized act. The city, having been given the control of the streets and charged with the responsibility of maintaining them in a safe condition for use by the public, cannot, by any contract which it may make or permission which it may give to third persons to dig therein, avoid liability for injuries resulting from a breach of this primary duty. The obligation to discharge this duty cannot be evaded by intrusting the duty to others, nor can the city escape liability for resulting injury because the plowing of the street was done by another under its authority. So far as its liability is concerned, it is immaterial whether the defect in the street is caused by the direct act of the city or that of a third party acting under authority of the city. If the plowing of the street had been done by officers or employes of the city, it would not have been necessary to have given the city special notice of the dangerous condition of the street, and no more was it necessary where a third party was authorized to plow it and to take earth therefrom.

In *City of Salina v. Trosper*, 27 Kan. 544, permission had been given to a property owner to excavate a cellarway in the street which was left open and unguarded for several days and into which a person accidentally fell. Although the excavation was known to some of the city officers and had existed so long that the city was deemed to have implied notice of the danger of the place and was therefore liable without the giving of a special notice, there was a suggestion by the court that, permission having been granted to excavate in the street, the city was bound to know at all times of the excavation and the exact condition of the street. It was also remarked that the parties who made the excavation were liable for the resulting injury but that their liability did not relieve the city from liability, as it was charged with the primary duty of keeping the streets in a reasonably safe condition, and that, as it had given permission to another to dig up the street, it would be deemed to have knowledge of the dangerous excavation even if no notice had been given to any city officer.

In *Kansas City v. McDonald*, 60 Kan. 481, at page 490, 57 Pac. 123, at page 126 (45 L. R. A. 429), where permission was given to deposit building material upon a street opposite a building in process of construction, it was held that such an encroachment on a street was not unlawful; "yet, such use being exceptional and foreign to the purposes for which the thoroughfare was laid out and maintained, the duty devolved upon the city

to exercise vigilance with respect to the rights of a traveler who might be harmed by such obstructions in this way."

The question of notice was presented in *Mehan v. St. Louis*, 217 Mo. 35, at page 46, 116 S. W. 514, at page 517. Obstructions had been placed in an alley under permission from the city, and the sufficiency of a petition was challenged on the ground that it did not allege that notice of the existence of the obstructions had been brought to the attention of the city, and it was held that, where a city grants permission for an act to be done in the streets, the law charges it with notice of everything which is done pursuant to that permission. In the opinion it was said: "The petition also states a good cause of action without the last allegation mentioned, for the reason that, where the city grants permission for an act to be done in the street, then the law charges it with notice of everything which is done in pursuance of that notice, and of course the party who performs the act is not entitled to notice, for the obvious reason that he has actual knowledge thereof. That rule is sustained by the common sense of the situation and by an unbroken line of authority in both this and other states."

In *Mayor, etc., of Savannah v. Donnelly*, 71 Ga. 253, at page 259, an injury had resulted to a traveler who fell into an excavation or ditch in one of the streets of the city. The city had given permission to an individual to open a ditch across the street in order to connect water pipes, and it was held that the relation of the city to the work done was such that notice to it was unnecessary. The court treated the opening of a ditch by express permission of the city as in effect the opening of the ditch by the city itself, saying: "It was the act of the city; and it was liable for any damages which might accrue to any person by reason of the careless and negligent manner in which the work was done. It was the duty of the city to have superintended and overlooked the work which it permitted to be done on its streets and to have seen to it that the work was done in such a manner that no injury should come to any one passing along the street from any defect in the work. The question of notice, for these reasons, is not in this case."

In *City of Louisville v. Keher*, 117 Ky. 841, at page 853, 79 S. W. 270, at page 273 (25 Ky. Law Rep. 2003), an obstruction was placed in the street by permission of the city and no light warning travelers of the obstruction was placed near it. A person riding in the night ran against it and sustained an injury. It was contended that the city could not be held liable for the injury unless it had notice that lights had not been placed upon the obstruction. The court remarked that: "To so hold would be to relieve the city entirely of its primary duty to keep its streets in a reasonably safe condi-

tion. It had authorized or acquiesced in the obstruction of the street and therefore had notice of the obstruction. Knowing the obstruction, it was bound to exercise ordinary care for the protection of the traveling public in giving warning of the danger."

The Supreme Court of the United States had before it the question of the liability of the municipality to one who fell in an opening in the sidewalk, and, in speaking of the effect of permission to excavate for water mains, gas pipes, or sewers, it was said: "If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted." *District of Columbia v. Woodbury*, 136 U. S. 450, 464, 10 Sup. Ct. 990, 995 (34 L. Ed. 472). See, also, *Merritt v. Telephone Co.*, 215 Mo. 299, 115 S. W. 19; *City of Logansport v. Dick*, *Administratrix, et al.*, 70 Ind. 65, 36 Am. Rep. 166; *Park et al. v. Board of Commissioners of Adams County*, 3 Ind. App. 536, 30 N. E. 147; *Anderson & Son v. May & Coun. of Wilmington*, 8 Houst. (Del.) 516, 19 Atl. 509; 4 Dillon, *Municipal Corporations* (5th Ed.) § 1720.

In *Columbus v. Penrod*, 73 Ohio St. 209, 76 N. E. 826, 3 L. R. A. (N. S.) 386, 112 Am. St. Rep. 716, a different view was taken and a distinction was drawn between an act done in a street under a license, and which but for such license would be illegal or a nuisance, and acts which did not create nuisances nor require licenses from the municipality to legalize them. Accordingly it was held that a permit to use part of a street for the placing of material used in the construction of a building on adjoining property was a mere regulation of the right of the property owner to make use of the street, and that a city would not be liable in damages to a person injured in consequence of the obstruction and the failure to guard it with lights unless it had notice of the omission of the property owner to place the lights there and after such notice was guilty of negligence. This case, however, is out of line with our own (*Kansas City v. McDonald*, supra) and apparently is against the weight of authority on the subject.

The instructions of the court are, in the main, in accord with the view we have taken, and we find no substantial error in them.

On the motion for a new trial appellant alleged surprise at the testimony given on the trial to the effect that the city had given permission to Campbell to plow in the street, and affidavits were filed alleging that such permission was never given. The petition, however, alleged that the work was done with the knowledge and under the supervision of officers of the city, and hence there is little ground for surprise at the testimony that it was done with the permission of the city. Besides, there was a counter affidavit which in effect stated that, when

the claim of appellee was first presented to the city for allowance, Roetzel, the commissioner, stated that he had given Campbell permission to remove dirt from the street and that Campbell had then agreed to do it in a proper manner and so save the city from liability. It is clear that the showing made did not require the granting of a new trial.

The judgment will be affirmed. All the Justices concurring.

STATE v. SIMONS.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 150*)—NONPAYMENT OF POLL TAX—PROSECUTION—DEFENSE.

The passage of an ordinance under the permissive authority given to cities of the second and third classes by the general road law (Laws 1911, c. 248) to carry out the provisions of the act relative to poll taxes is not a condition upon which liability for the tax depends.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 405, 406; Dec. Dig. § 150.*]

2. HIGHWAYS (§ 150*)—NONPAYMENT OF POLL TAX—PROSECUTION.

In the absence of such an ordinance, a resident of a city liable for the tax may be prosecuted in a justice's court for failure to make payment after due notice.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 405, 406; Dec. Dig. § 150.*]

Appeal from District Court, Crawford County.

A. M. Simons was convicted for failure to pay a poll tax, and appeals. Affirmed.

Jos. G. Sheppard, Kate Sheppard, and J. I. Sheppard, all of Ft. Scott, and O. T. Boaz and L. W. Johnson, both of Pittsburgh, for appellant. John S. Dawson, Atty. Gen., and A. B. Keller, of Pittsburgh, for the State.

BENSON, J. The question upon this appeal is whether a resident of a city of the second class is liable to prosecution in a justice's court for failure to pay a poll tax under the provisions of chapter 248 of the Laws of 1911.

The statute referred to is a general road law. Section 15 makes each city of the second and third class a road district, authorizes the appointment of a street commissioner to perform the duties in the city prescribed in the act for the trustees in a township, empowers the city to use the road tax in paving, macadamizing, or grading streets, and gives authority to pass ordinances to carry out the provisions of the act. The act declares that all male persons between 21 and 50 years of age, who have resided 30 days in the state, and who are not a public charge, shall be liable to pay each year the sum of \$3 to the township trustee or to the proper officer of the city, to be expended on the public roads of the township or city in which

such person lives. Any city having a volunteer fire department may exempt the members of such department from paying the tax. It is made the duty of the township trustee or proper officer of the city to give notice to persons liable for the tax, and it is declared that any person so liable who fails to make payment within 30 days after notice shall be deemed guilty of a misdemeanor, and fined \$5.

[1] The defendant is a resident of Girard, a city of the second class. The city has not passed an ordinance to carry out the provisions of the statute referred to. The defendant is in the class of persons designated by the statute as liable for the tax. He was duly notified by the street commissioner, and failed to pay within the time allowed. His contention is that he is not liable for the tax because the city has passed no ordinance on the subject, and that the state has no authority to prosecute him for failure to pay it.

The tax is imposed by the statute. The authority of cities to pass ordinances to carry out the provisions of the statute is permissive. Under such ordinances regulations may be made for the applications of the taxes to street improvements within the limitations prescribed by the law, and for exemptions therein authorized. Possibly other regulations may be made consistent with the statute. But the adoption of such an ordinance is not a condition of liability for the tax, the collection of which is a part of the general scheme for highway improvement in the cities referred to as well as the townships of the state.

[2] Having failed to pay the tax after due notice, the defendant was liable to prosecution in the name of the state in a justice's court in the absence of a city ordinance relating to the subject.

The judgment is affirmed; all the Justices concurring.

STATE ex rel. ATCHISON, Co. Atty., v. DAWSON, Atty. Gen.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

ATTORNEY GENERAL (§ 3*)—COMPENSATION.

Under existing legislation the Attorney General is entitled to retain the fees adjudged and paid to him as costs in proceedings to punish for contempt the violation of an injunction under the prohibitory law.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 3; Dec. Dig. § 3.*]

Original proceedings in mandamus by the State, on the relation of W. E. Atchison, County Attorney of Shawnee County, against John S. Dawson, as Attorney General. Writ denied.

W. E. Atchison, of Topeka, for plaintiff. John S. Dawson, Atty. Gen., in pro. per.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

WEST, J. This action to compel the Attorney General to pay over to the State Treasurer a certain fee presents one question: Can that officer for services during the present term retain, in addition to his salary, a fee adjudged and paid to him in a contempt proceeding under the prohibitory law? Section 6 of chapter 488, Laws of 1905, like chapter 181, Laws of 1891, fixed the salary at \$2,500. Section 16 of chapter 181 required all fees received by any of the salaried officers mentioned in the act to be accounted for and paid into the general fund of the state treasury. The \$2,500 provision remained unchanged until the enactment of chapter 313, Laws of 1913, which increases the salary to \$4,000, beginning January, 1915, when it requires the Attorney General to pay into the state treasury all fees and allowances, including the kind involved here. In addition to the provision of the act of 1891 (Gen. Stat. 1909, § 9007), the appropriation acts of 1907 and 1909 each contained a section requiring state officers to account for and turn over certain fees for making certified copies, etc. Laws 1907, c. 2, § 4; Laws 1909, c. 5, § 4. In the appropriation act of 1911 (Laws 1911, c. 2, § 7) the language was broadened, and it was made the duty of salaried state officers to account for and deliver to the Treasurer of State all fees received by them and turn over "all fees collected by them, or either of them, for any services required of them or either of them by law or that may hereafter be required of them by law for which they may charge and receive a fee." It is claimed by the plaintiff that this provision, significant because of its departure from those made by former Legislatures, forbids the retention by the Attorney General of the fee here involved. But section 1 of chapter 338 of the Laws of 1903 (Gen. St. 1909, § 4388) expressly provides that, for violation of an injunction against maintaining a nuisance in case judgment is rendered in favor of the plaintiff, "the court shall also render judgment for a reasonable attorney's fee * * * therein, which attorney's fee shall be taxed * * * as costs therein, and when collected paid to the attorney or attorneys of the plaintiff therein."

In 1911 an act was passed increasing the salary of the Attorney General and requiring all such fees to be turned into the state treasury, and this was vetoed; one of the express grounds being that it would remove the incentive to a vigorous prosecution of the prohibitory law. The act of 1913 makes it the duty of the Attorney General on and after the second Monday in January, 1915, to account for and turn over all fees paid to him "under color of any general or special statute for criminal convictions secured by him in violations of the prohibitory law and fees awarded him by virtue of any statute for abating liquor nuisances * * * and

every other fee or allowance in any civil or criminal case whatsoever whether specifically mentioned in this act or not." Laws 1913, c. 313, § 1. This specific and sweeping language implies that the Legislature deemed this officer entitled until January, 1915, to these fees under existing legislation. The identical language of section 7 of the act of 1911 constitutes section 17 of chapter 1 of the Laws of 1913, an act making appropriations for the executive and judicial departments. This was not deemed by the Legislature of 1911 or by the Governor any bar to the retention of fees in liquor cases, for the statute passed by the one and vetoed by the other shows that new legislation was considered essential for the purpose of turning such fees into the state treasury, and the terms used in chapter 313 show that the succeeding Legislature entertained a similar view and made plain its purpose to devote to state use such fees when, and not before, the act should become operative.

In addition to this manifest legislative intention, we are mindful of the rule that the express provision of the statute under which the fee is claimed should not be stricken down unless a clear repeal by implication can be found in the section of the act of 1911 relied on. That section was inserted in the body of an act with this title: "An act making appropriations for the executive and judicial departments of the state for the fiscal years ending June 30, 1912, and June 30, 1913, and deficiencies for the fiscal year ending June 30, 1911; and amending sections 8998, 9012, 9020 and 4914 of the General Statutes of Kansas of 1909, and repealing said original sections; and fixing the salaries of certain officers, clerks and employees herein named, and making appropriations for the current expenses of the State Orphans' Home at Atchison, for the fiscal years ending June 30, 1912, and June 30, 1913; and for special improvements for the fiscal year ending June 30, 1912."

While section 16, art. 2, of the Constitution, requiring the single subject of an act to be clearly expressed in its title, is not so frequently invoked as formerly, it is still as binding as ever. This matter of accounting for and turning over fees is not embraced even within the composite subject of executive and judicial appropriations, salaries, current expenses of the orphans' home (section 8998), salary of auditor and his assistants (9012), salary of treasurer and his assistants (9020), state horticultural society (4914), adjutant general's office, and special improvements; and hence it is outside the scope of the title and void. The congressional practice of putting riders on appropriation bills is not permitted under our Constitution. While this section was incidentally considered in *Nation v. Tulley*, 86 Kan. 564, 121 Pac. 507, no question as to its validity was suggested or decided as that

case depended upon the construction of other statutes. The defendant presents the question now and its decision becomes necessary.

Section 16 of chapter 181, Laws of 1891 (Gen. St. 1901, § 6091), requires the officers named in the act, including the Attorney General, to account monthly for all fees received by them, and, when this requirement was sought to be repeated in the appropriation acts of 1907 (chapter 2, § 4) and 1909 (chapter 5, § 4), it was that they account "as provided in section 6091, General Statutes of 1901." And, while the quoted clause was omitted from the act of 1911, such omission must be construed not as a repeal of original section 16 of the act of 1891 but as leaving that section in force. But, as already indicated, the act of 1903 did operate as a repeal to the extent of relieving the Attorney General from the duty of accounting for the fee to which by that act he is expressly entitled. The writ is denied.

BURCH, MASON, SMITH, PORTER, and BENSON, JJ., concur. JOHNSTON, C. J., concurs in the judgment on the first ground stated in the opinion but does not assent to the view that the title of the act is too narrow to cover the provision in controversy.

COCKRILL v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. WITNESSES (§ 349*)—APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—CROSS-EXAMINATION OF PARTY—DISCRETION.

When a party takes the stand as a witness, his adversary has a right on cross-examination for the purpose of affecting his credibility to inquire touching his past life and conduct; the limits of such inquiry being ordinarily within the discretion of the trial court. When such limits are unnecessarily restricted, but the party has testified concerning only matters on which there was other evidence, such restriction may not be and in this case was not materially prejudicial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349; * Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

2. WITNESSES (§ 255*)—EXAMINATION—MEMORANDUM TO REFRESH MEMORY.

The report of a commission company used by a shipper of cattle to refresh his recollection of the sums received for the animals composing the shipment, stated by him to be substantially correct as he remembered, is competent as a memorandum touching such sums; its weight and probative force being for the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.*]

3. EVIDENCE (§ 244*)—ADMISSIONS—ENTRIES IN COURSE OF BUSINESS.

Reports, telegrams, and memoranda relating to a shipment of cattle, made by the trainmen at the time in the line of their duty, were competent evidence under section 384 of the Code of Civil Procedure (Gen. St. 1909, § 5979), and

should have been admitted; but, such trainmen having testified substantially to all that such papers would have shown, their exclusion under the circumstances of this case worked no substantial prejudice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

4. CARRIERS (§ 218*)—INJURY TO SHIPMENT—NOTICE.

When it is shown that some of the cattle were dead and others crippled when set at the chute, and that a representative of the railway company was present at the unloading, the necessity for the written notice usually provided for in contracts of shipment is obviated, as such notice could not afford the carrier any knowledge which it did not already possess.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

Appeal from District Court, Miami County.

Action by T. S. Cockrill against the Missouri, Kansas & Texas Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

John Madden and W. W. Brown, both of Parsons, and R. E. Coughlin, of Paola, for appellant. Frank M. Sheridan, Charles T. Meuser and Bernard L. Sheridan, all of Paola, for appellee.

WEST, J. The plaintiff sued for damages to a car load of cattle alleged to have been shipped, by oral agreement, over the defendant's road from Parker, Kan., to the Kansas City stockyards in Kansas City, Kan., averring that the defendant furnished a defective car, which was switched back and forth at Paola for four or five hours, delaying the shipment, and causing four of the cattle to be killed, and four crippled and rendered unfit for the market, to the plaintiff's damage of \$350. The answer alleged that the shipment was made under a written contract, by the terms of which the defendant was to deliver the cattle to the consignee at Kansas City, Mo., and written notice of any loss or injury should be given before the shipment should leave the defendant's lines or be mingled with other live stock or removed from pens at destination. The reply alleged that, if the plaintiff did sign the contract set up in the answer, it was because he was compelled to do so after the cattle were received for shipment and loaded, and that he was not apprised of its terms or offered any choice of rates therein referred to, but was advised that, unless he signed, the cattle would not be shipped; that he was not familiar with the terms of the contract, and did not agree to any of them; and, further, that the representative of the defendant had actual knowledge of the condition of the cattle upon their arrival at the destination. The jury found in favor of the plaintiff in the sum of \$295.25, being \$135.25 for cattle killed, \$65 for those crippled, \$45 for inability to "take the fill," and \$50 for loss of mar-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ket. The last two items were remitted, and judgment was entered for \$200.25 and costs.

[1] The defendant appeals, and complains that the court refused it the right to pursue the plaintiff on cross-examination as to his connection with the notorious Buckfoot sprinters for the purpose of affecting his credibility. An offer to go into details was overruled; but the defendant was permitted to inquire, and the plaintiff was required to answer, touching his arrest in connection with the leader of this band on the charge of obtaining money fraudulently. The plaintiff, having taken the stand as a witness, thereby held himself out as truthful and reliable, and, under the well-settled rule in this state, the defendant had a right to search into his previous life and conduct for the purpose of enabling the jury to judge as to his character and credit. The limit to which such cross-examination should go is ordinarily discretionary with the trial court (*State v. Pugh*, 75 Kan. 792, 796, 90 Pac. 242; *Ramsey v. Partridge*, 86 Kan. 398, 121 Pac. 343), and, while in this case it was unnecessarily restricted, still, as the plaintiff testified mainly as to the shipment, its value, and returns, on all of which points there was other testimony, the defendant suffered no material prejudice by the restriction.

[2] The court admitted the report the commission company made to the plaintiff and stated by him to be substantially correct as he remembered it, and which was evidently the basis on which he settled for the shipment. This was competent as a memorandum to refresh his memory touching the sums realized for the dead and crippled cattle; its weight and probative force being for the jury. *McNeely v. Duff*, 50 Kan. 488, 31 Pac. 1061; *Telegraph Co. v. Collins*, 7 Kan. App. 97, 53 Pac. 74.

[3] Certain reports, telegrams, and memoranda touching the shipment made by the trainmen in the line of their duty were rejected on the ground of incompetency. These were proper reports of transactions or events made in the regular course of business, and were admissible under the Civil Code, § 384 (Gen. Stat. 1909, § 5979; *Richolson v. Ferguson*, 87 Kan. 411, 124 Pac. 360; *Barker v. Railway Co.*, 88 Kan. 767, 129 Pac. 1151, 43 L. R. A. [N. S.] 1121); but, as the witnesses stated substantially all that was shown by these reports, no material prejudice is deemed to have arisen from the ruling.

[4] Complaint is made of an instruction that the written notice provided for in the contract does not apply to animals which are dead when they leave the defendant's control or to those so nearly dead that they could not be removed by the plaintiff. The jury found that upon unloading the shipment four cattle were dead and three crippled, and that these seven were removed from the car after the others had been unloaded. The testimony shows that the de-

fendant had a switch foreman at the place of unloading who looked after the handling of stock, and whose duty it was to report when he set cattle at the chute, and that the report of the stockyards company in this case stated as the cause of the delay the removal of the dead and crippled cattle, and that this notation was made after the car was set at the chute, and after the stock had been unloaded. Under these circumstances, we see no possible benefit which the defendant could have derived by receiving a written notice of what it already knew respecting these dead and crippled cattle. *Railway Co. v. Fry*, 74 Kan. 546, 87 Pac. 754; *Railway Co. v. Frogley*, 75 Kan. 440, 89 Pac. 903; *Darling v. Railway Co.*, 76 Kan. 893, 901, 93 Pac. 612, 94 Pac. 202; *Railway Co. v. Wright*, 78 Kan. 97, 95 Pac. 1132.

An instruction and certain special findings touching the contract in question and the matter of different rates for the shipment are criticized. If the blank contract was signed by the shipper in response to a statement of the agent that otherwise the cattle would not go out, as claimed by the plaintiff, and if, as also claimed by him, he had no knowledge of the existence of different rates, then, of course, the defendant would be liable for the cattle killed or crippled by its negligence. If, on the other hand, the contract when filled out was in all respects binding on the plaintiff, the defendant would still be liable for negligently killing or crippling the cattle, if proper written notice were given, or if, without such notice, the defendant knew the condition of the cattle while unloading as fully as it could have known by such notice. Therefore the instructions and questions referred to become immaterial.

It is insisted that the finding that the defendant's foreman at the stockyards examined the cattle when they were being unloaded and reported their condition was entirely unsupported by the evidence; but the testimony of one of the defendant's witnesses as set out in the counter abstract sustains the finding. *Hayes v. Railway Co.*, 84 Kan. 1, 5, 113 Pac. 421.

One or two of the jury's answers to questions touching the duty and relation of the stockyards company justify some complaint; but in view of the other findings and the testimony no prejudicial error is apparent.

Complaint is also made that certain questions submitted by the defendant were answered contrary to the evidence; but we find nothing of substance in this respect.

Certain testimony touching statements made by the plaintiff upon a former trial rejected by the court and on the motion for a new trial produced by affidavit is regarded by the defendant as material; but, as it touched the contract of shipment only, we think, as already indicated, that, whatever view of such contract be taken, the entire evidence fairly tended to show liability for

so much of the damage as was covered by the final judgment of the court.

Finding in the record no error materially prejudicial to the defendant, the judgment is affirmed. All the Justices concurring.

STATE v. MOBERLY.†

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 159*)—CRIMINAL LAW (§ 1186*)—AMENDMENT.

A conviction for robbery will not be set aside merely because an amendment to the information, setting out the ownership of the property taken, was allowed after the defendant had pleaded to an original information in which such allegation was omitted.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 505-514; Dec. Dig. § 159; * Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

2. WITNESSES (§ 349*)—CROSS-EXAMINATION—PROSECUTION FOR ROBBERY.

The scope of cross-examination as to the past conduct of a witness, for the purpose of discrediting him, is largely discretionary, and in this case the discretion was not abused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1135-1139; Dec. Dig. § 349.*]

Appeal from District Court, Cowley County.

Jack Moberly was convicted of robbery in the first degree, and appeals. Affirmed.

Ed. J. Fleming, of Winfield, for appellant. Jno. S. Dawson, Atty. Gen., and O. P. Fuller, of Winfield, for the State.

MASON, J. Jack Moberly was convicted of robbery in the first degree, and appeals.

[1] The original information omitted to state the ownership of the property taken. A motion to quash was overruled, and the defendant entered a plea of not guilty. Afterwards the county attorney, upon leave granted by the court, filed an amended information, which supplied this deficiency. The defendant was then required to plead to the new information, and did so. Complaint is made of the allowance of this amendment after the defendant had pleaded. The statute reads: "An information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant." Gen. Stat. 1909, § 6647 (Code Cr. Proc. § 72).

In an information for robbery the ownership of the property is required to be stated, in order to negative the idea that the defendant took his own property. 34 Cyc. 1803. The original information charged that the property was taken "unlawfully and feloniously," and that robbery was committed, so that the idea referred to was inferentially negated, and the amendment was

of form rather than of substance. In any event, as the defendant was given an opportunity to plead to the new information, he suffered no prejudice, and no error was committed that would warrant a reversal. Gen. Stat. 1909, § 6867 (Code Cr. Proc. § 293).

[2] The principal witness for the state was cross-examined as to his past conduct, with a view to impeaching his credibility. He admitted a number of discrediting acts. The court placed a limit upon the cross-examination in this regard, ruling out some of the questions asked. The scope of inquiry to be allowed in a particular case is largely discretionary (Cockrill v. Railway Co., 90 Kan. 650, 136 Pac. 322), and it cannot be said that in this instance the discretion was abused.

Other questions regarding the admissibility of testimony have been examined, but are not thought to require separate discussion.

The judgment is affirmed. All the Justices concurring.

SOUTHWESTERN PAINT & WALL PAPER CO. v. PERKINS et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 149*)—STATEMENT OF LIEN—SUFFICIENCY.

The owners of adjacent lots erected buildings on them. The owners employed the same contractor who worked on both buildings at the same time. He purchased material for both buildings of a subcontractor who charged it all to one account. The buildings were erected according to the same plan, and the various kinds of material used in both were of the same grade. After all the material had been furnished, it was apportioned between the two buildings according to a rule which is not in dispute. One of the owners paid his proportion in full, and the subcontractor filed a mechanics' lien against the building of the other. In the lien statement all the items furnished for both buildings were specified, all credits for payments on both buildings were specified, and a lien was claimed for the balance. Another subcontractor who had furnished material and kept his account in the same way separated the items which went into the building against which the lien was filed from the others and specified them in its lien statement. Held, the original confusion of accounts was not prejudicial and that the lien statements were sufficiently itemized.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 256-259; Dec. Dig. § 149.*]

2. MECHANICS' LIENS (§ 156*)—NOTICE—SUFFICIENCY OF SERVICE.

Written notice of the filing of a mechanics' lien served by registered mail which reaches the owner personally is valid.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 187; Dec. Dig. § 156.*]

3. MECHANICS' LIENS (§ 110*)—LIEN OF SUBCONTRACTOR—LIMITATION BY PRINCIPAL CONTRACT.

It appeared that the contract price of the building was fixed by the owner and the contractor in a settlement made after the building was completed. Held, that the liability for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 13, 1913.

subcontractors' liens was not limited to such price.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 143; Dec. Dig. § 110.*]

4. MECHANICS' LIENS (§ 304*)—PLEADING (§ 237*)—AMENDMENT—JUDGMENT.

It appeared on the trial that the contractor was really the agent of the owners in purchasing material and employing labor for the erection of the building. *Held*, that amendments to the petition to conform to the proof and a personal judgment against the owner were proper.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 632-635; Dec. Dig. § 304;* *Pleading*, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

(Additional Syllabus by Editorial Staff.)

5. MECHANICS' LIENS (§ 5*)—CONSTRUCTION OF STATUTE.

In view of the liberal rule of construction prescribed by Gen. St. 1909, § 9850, and of the fact that the *Mechanics' Lien Law* is framed on broad principles of justice and equity, such lien law is not to be strictly construed because in supposed derogation of the common law.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.*]

Appeal from District Court, Montgomery County.

Action by the Southwestern Paint & Wall Paper Company against Maurice V. Perkins and others. From a judgment for plaintiff, defendants appeal. Affirmed.

S. H. Piper, of Independence, and Luther Perkins, of Coffeyville, for appellants. Charles D. Welch and D. W. Knapp, both of Coffeyville, for appellee.

BURCH, J. The action in the district court was one to foreclose mechanics' liens for labor and material furnished to improve the property of Charles Riley. Riley died pending the proceeding, and the action was revived against his administrator, Maurice Perkins, and against his sole heir, Robert Riley. Liens were established in favor of the Southwestern Paint & Wall Paper Company, the McCoy Lumber Company, and F. F. Clough, subcontractors under W. G. Powell, the contractor who erected the improvements. The administrator and heir appeal.

[1] Riley and J. H. Roberts owned adjacent lots. Each one erected a building on his own lot; the two structures, however, having a common wall. Powell acted as the contractor of both owners and worked on both buildings at the same time. He purchased material for both buildings from the paint company and from the lumber company. Each one charged the material it furnished to an account on its books designated as "Roberts & Riley Job." After the last material ordered from the paint company had been furnished, it made a complete and accurate segregation of the items used in the Riley building. The account thus prepared was approved by Powell and by the foreman of the work. Powell gave an order on Riley for its payment, and a copy of it

was attached to the lien statement. The lumber company, with the assistance of Powell and Roberts, made an apportionment of the material it had furnished to each building. The floor space of the buildings was adopted as a basis for the apportionment; the two having been constructed according to the same plan and the material furnished having all been of the same grade. Roberts paid for his proportion. Riley had made some payments on account and Powell gave the lumber company an order on Riley for the balance. In its lien statement the lumber company set out all the items charged to the Roberts and Riley job, together with all credits, showing by whom paid, and claimed a lien for the balance. It is argued that the paint company and the lumber company are not entitled to liens because of a confusion of accounts and because the lien statements were indefinite.

[§] It may be premised that the mechanics' lien law of this state is not, like similar laws in some other states, construed strictly because in supposed derogation of the common law. The law is framed on broad principles of justice and equity which would call for a liberal interpretation in the absence of a statutory rule governing the matter. *Deatherage v. Henderson*, 43 Kan. 684, 690, 23 Pac. 1052; *Lumber Co. v. McCurley*, 84 Kan. 751, 115 Pac. 590; *Lumber Co. v. Douglas*, 89 Kan. 308, 316, 131 Pac. 563. But besides this the Legislature has prescribed a rule which reads as follows: "The rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this state, but all such statutes shall be liberally construed to promote their object." Gen. St. 1909, § 9850.

A confusion of accounts destroys the basis of a lien only when confusion actually results. The items furnished by the paint company for the Riley building were separable and were in fact separated from those furnished for the Roberts building and were specified in the lien statement. While the items furnished by the lumber company to the Riley building could not be segregated from those which were furnished to the Roberts building, those which went into one were of the same class as those which went into the other, and they could be apportioned and were apportioned between the two by a rule of conceded validity. There is no contention that the result of the apportionment was incorrect or unfair or that the balance ascertained in that way was not justly due from Powell. Therefore the original confusion of items on the account books of the lumber company worked no prejudice to any one, and the only question is if the lien statement complied with that part of the mechanics' lien statute which reads as follows: "Any person who shall furnish any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such material or perform such labor under a subcontract with the contractor * * * may obtain a lien * * * by filing * * * a statement, verified by affidavit, setting forth the amount due from the contractor to the claimant, and the items thereof as nearly as practicable." Gen. St. 1909, § 6246.

Under the circumstances the items of the amount due the lumber company from the contractor were set forth as nearly as practicable. In the beginning it would have been possible for the contractor to give separate orders for each building, but it was much simpler and therefore good business to give orders in bulk for all material of the same kind needed for both. The final result was an account showing all items furnished and all credits, including pay for the portion assigned to Roberts. The remainder was chargeable to the Riley building and the lien statement so claimed. If the lien statement had recited all the facts, there would have been no indefiniteness or uncertainty and the statement would have been unimpeachable. Since the statute only requires "items" as nearly as practicable, and since these were given as nearly as practicable, the statement was sufficient to support a lien.

The appellants cite the case of *Nixon v. Cydon Lodge*, 56 Kan. 298, at page 302, 43 Pac. 236, at page 238, in which the account was itemized as follows:

| Items. | |
|--|-------------|
| To contract price as per agreement..... | \$23,900 00 |
| Value and amount of material furnished and labor performed up to the abandonment of contract and building by the owner | \$23,523 60 |
| By cash paid..... | 12,423 17 |
| Balance | \$11,100 43 |

The court said: "As will be seen, this is no more than a lumping of the items included in the whole contract price, another including the estimated value and amount of material furnished and labor performed, and another giving a credit for the amount which had been paid. * * * That it was not itemized as nearly as practicable is readily seen, since they do not separate the labor from the materials, they do not give the amount of the subcontracts, nor do they separate the amounts expended for excavation, for stone, for brick, for iron, for terra cotta, and for wood, and the labor upon each, as might have been done. From the record, it appears that the work was largely divided up and sublet to others, and a detailed statement to that extent was practicable and might have been readily made."

Other cases are cited in which one lien was

sought for the aggregate amount of material furnished under distinct contracts, in which the confusion was such that no separation was possible, and in which apportionment was attempted to be made by guess. Manifestly none of these decisions is applicable to the present controversy.

[2] Written notice of one of the liens was served on Riley himself by registered mail. The statute provides that notice in writing shall be served on the owner without prescribing the method. Any method which effectually accomplishes the statutory purpose is sufficient.

It is claimed that some of the lien statements were not filed in time. After the building was so far completed that nothing remained to be done except to attend to some small but necessary details, material was furnished for that purpose. Lien statements were filed in due time if the furnishing of these items was not a mere subterfuge adopted for the purpose of extending the period within which liens might be perfected. The question was one of fact which the trial court determined adversely to the appellants on sufficient evidence.

[3] It is said that the judgment makes the owner liable beyond the contract price of the building. In the beginning the contractor had only a pencil sketch of a one-story building 110 feet long which he agreed to erect for a certain sum. Then a second story was added 50 feet long. Then the second story was extended to 110 feet and a third story was added 50 feet long. After the building had been completed and a portion of it had been leased, a settlement was made between the owner and the contractor in which estimates were made with reference to the second and third stories, and separate contracts were then signed relating to them. The sum of the three contracts was much less than the actual cost of the building. From this and other evidence the court rightly concluded as a matter of fact that there was no "contract price" until after the building was finished, and rightly concluded as a matter of law that a contract price fixed in that way did not limit the liability of the owner to subcontractors.

[4] There was ample proof that Powell was really the agent of Riley in purchasing material and employing labor for the erection of the building and not simply a contractor within the meaning of the mechanics' lien law. Amendments to the pleadings to conform to this proof were properly allowed, and judgment was properly rendered in accordance therewith against the administrator for the amounts of the subcontractors' unpaid bills.

The judgment of the district court is affirmed. All the Justices concur.

STATE v. MADDEN et al.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 622*)—SEVERANCE—WAIVER OF RIGHT—DISCRETION.

Four defendants jointly charged with felony were with their counsel present in court when their case was called. The state announced itself ready for trial when the defendants interposed a motion for continuance supported by the affidavits of each. After the latter were read, the court suggested that as to one of the defendants no diligence was shown but that the others had raised a question which would probably be for the jury. The state put upon the stand a witness and examined him orally and agreed that the affidavits of the three might be used as depositions of the witnesses named therein. A jury was then called and sworn to answer questions, whereupon the county attorney stated briefly the nature of the case. At this point one of the counsel for the defendants, who had been out of the room to use a telephone, demanded a separate trial, which demand was refused as coming too late. Held, that the right to a separate trial (Gen. St. 1909, § 6797) is one that may be waived, and, under the circumstances of this case at the time it was demanded, severance became discretionary with the trial court, and its refusal was not an abuse of such discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. § 622.*]

Porter, J., dissenting.

Appeal from District Court, Sedgwick County.

Thomas Madden and others were convicted of burglary with explosives, and appeal. Affirmed.

J. C. Milton and Chas. B. Hudson, both of Wichita, and J. S. Dean, of Topeka, for appellants. J. S. Dawson, Atty. Gen., and George McGill, W. A. Blake, and R. C. McCormick, all of Wichita, for the State.

WEST, J. The defendants appeal from a conviction of burglary with explosives. Numerous errors were assigned, and having examined the record and also the transcript, the evidence not being brought up, we find only one matter of sufficient importance to merit extended consideration. It is strongly urged that the trial court erred in refusing the defendants a severance, which the statute (Gen. St. 1909, § 6797) provides may be had by any one defendant jointly charged with others for felony, when requiring it. The state asserts that the requirement or request came at a time when the right must be deemed to have been waived, or at least when the matter had become discretionary with the trial court.

An examination of the transcript shows: That the defendants were arrested March 24th, the information filed March 31st, and the case called for trial April 21st. That on April 18th the state filed notice that permission would be asked to indorse the names of certain witnesses on or before the time the case should be called for trial. On the 21st

of April, each of the defendants filed an affidavit for continuance. On the same day the transcript recites that the cause came regularly on for hearing, the defendants being present in person and by "its attorneys." That the jurors being excused to the jury room, the court asked if the state was ready, and received a reply in the affirmative. On inquiring if the defendants were ready, counsel replied, "I have a motion, your honor," and proceeded to read the affidavits for continuance, which cover seven pages of the transcript. The motion for continuance as to Redman was overruled, and, the county attorney desiring to offer evidence as to the others, a witness was put upon the stand whose testimony covers two pages of the transcript. After some discussion it was announced by the court that in the case of Redman no diligence was shown, but in the other cases there was some showing as to an alibi which would probably be a matter for the jury to pass upon. It was then agreed by the state that the affidavits of the three other defendants should be treated as depositions of the witnesses named therein. Thereupon the jury were called into the box and sworn to answer questions, and the county attorney stated the nature of the case, when the following occurred: "Defendant's Counsel (Mr. Milton): If the court please, I want to except to the jury, and state that the defendants insist on a separate trial. By the Court: You are too late. Mr. Milton for Defendants: I was gone to the phone, your honor. By the Court: It was your business to be here. (To which ruling of the court the defendants except.)" The trial then proceeded and at no other time was the question raised. An objection to testimony, a motion to dismiss the jury at the close of the state's evidence, and a motion to discharge after the verdict made no mention of the refusal of a separate trial, neither was it referred to in the motion for a new trial.

The statute already referred to does not indicate at what time a separate trial is to be demanded by the defendants, and the question has never been passed upon in this state. It was held by the Nevada Supreme Court (*State of Nevada v. McLane*, 15 Nev. 345) that the demand must be made before the formation of the jury is begun. In *McJunkins et al. v. State*, 10 Ind. 140, it was held that a separate trial cannot be demanded as a matter of right after the jury has been sworn and evidence partly heard. In *Hullinger & Hullinger v. State*, 25 Ohio St. 441, a waiver was held to be implied when the parties proceed without objection to impanel a jury and exercise a right to challenge. In Alabama the application is required to be made before the state has announced itself ready for trial. *Austin et al. v. State*, 139 Ala. 14, 35 South. 879. The Texas Court of Criminal Appeals decided, in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Crawford v. State, 74 S. W. 552, that a motion for severance comes too late when made after the jury has been impaneled and a plea of not guilty entered. In *Miller et al. v. State*, 130 Ala. 1, 30 South. 379, a rule of practice that the right to demand a severance shall be deemed waived unless claimed at the time of arraignment, or at least when the case is set for trial and an order is made to summon a jury, was held not to violate a statute similar to ours. To the same effect is *Hudson et al. v. State*, 137 Ala. 60, 34 South. 854. The Court of Appeals of Kentucky decided, in *Radley v. Commonwealth*, 121 Ky. 506, 89 S. W. 519, 28 Ky. Law Rep. 477, that the motion made after the swearing of the jury is too late. The Supreme Court of Oklahoma, in *Nichols v. Territory*, 3 Okl. 622, 41 Pac. 108, held that the request must be made before the trial begins, and that for this purpose it begins from the time the work of impaneling the jury begins. This decision cites *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262, which holds that for the purpose of the requirement that the defendant shall be personally present at the trial where the indictment is for a felony the trial commences, at least, from the time the work of impaneling the jury begins, which appears to have been approved in *Lewis v. U. S.*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011. In *State v. Bush et al.*, 41 Wash. 13, 82 Pac. 1024, the record showed that when the defendants entered their pleas of not guilty, and when the case was set down for trial, which was more than two weeks after arraignment, no demand for severance was made, and it was held that such demand, made after the jury had been called into the box, was too late, citing *State v. Mason*, 19 Wash. 94, 52 Pac. 525. In *State v. White*, 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132, a case involving the question of jeopardy, it was held that ordinarily former jeopardy must be pleaded in bar of further prosecution and such plea must be made upon arraignment and before pleading to the merits; that, when about to be placed in jeopardy before a second jury, it is the duty of the accused to make his election then, and, failing to do so, he must be held to have waived his right. Jeopardy was carefully considered in *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186, and was considered not to attach so as to entitle a defendant to plead a former acquittal or conviction unless he had been arraigned or waived arraignment and pleaded not guilty, or had such plea entered for him. The decision in *State v. Hansford*, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548, does not impair the force of the rule just referred to, and, while the transcript here does not show when the arraignment or waiver thereof and pleas of not guilty were made, we must assume, as no question in respect thereof is raised, that it was before calling the jury into the box.

It is suggested that, as the question of error in relation to severance was not raised on the motion for a new trial, it cannot be considered here; but without stopping to pass upon the correctness of this suggestion, and assuming, without deciding, that the assignments of error are sufficient to call the matter to our attention, it may be said that especially to the defendant Madden the matter was extremely important, as he was arrested far away from where his codefendants were apprehended, and claimed innocence and ignorance of the offense charged. Whether both of the defendants' counsel were present when the matter of continuance was presented, discussed, and decided, and one of them left the room to use the telephone as the jury were called into the box, or whether both were then temporarily absent from the room, the transcript shows that when the case was called the defendants appeared in person and by their attorneys, or, as the transcript was literally worded, "his attorneys." Why no requirement was made or such action suggested until the jury had been sworn and a statement of the case made by the county attorney we do not know, and, while the demand made at this late point in the proceeding might have been granted by the court, it appears quite clearly, from the authorities cited and from many others which could be adduced, that the right of severance is one which may be waived and which to be availed of must be exercised before the prosecution has so far progressed as to indicate that the defendant has really waived the right he afterwards concludes to assert.

If the defendants were in custody, as we take the fact to be, they were doubtless brought into the courtroom together, and were advised in person and by their counsel that they were there to meet the charge preferred against them; and when the case was called for trial, and the state announced itself ready, and time was taken to present and consider motions and evidence written and oral covering about nine pages of the transcript, and after disposing of this matter the jury were called and sworn, the defendants having, as we assume, already pleaded not guilty, it can hardly be said upon principle or on authority that a demand then made for the first time could force one case to be severed into four or any longer be insisted upon as a matter of statutory right.

We have examined and considered the various other matters touched upon in the brief and arguments of counsel for the defendants, but find nothing materially prejudicial.

The judgment is therefore affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and BENSON, JJ., concurring.

PORTER, J. (dissenting). Technically the request for separate trials should have been made five minutes earlier in the proceedings

and before the jury were sworn to answer questions. The request was made, however, before the jury were sworn to try the case. What seems to be a fairly reasonable excuse for the delay appears from the fact that one of the attorneys for defendants had stepped out of the courtroom to use the telephone when the case was called for trial. I do not believe the state should, upon such technical grounds, deny a substantial right to a defendant. The defendant Madden, it seems, was not arrested with the other defendants, but at another time and place; and he claimed that he had never been associated with the others and had never had anything to do with them. I think he was deprived of a substantial right for a very insufficient reason, and therefore that the judgment should be reversed as to him.

STATE v. STICKLER.

(Supreme Court of Kansas. Nov. 8, 1913.)

(Syllabus by the Court.)

1. FORGERY (§ 30*)—INFORMATION—SUFFICIENCY.

An allegation, in an information, that the accused feloniously and falsely altered a check by adding \$100 to the amount for which it had been drawn, and that it was done with the intent to defraud the drawer, sufficiently alleges that the alteration was made without the drawer's consent or authority.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 82-84; Dec. Dig. § 30.*]

2. FORGERY (§ 29*)—INFORMATION—SUFFICIENCY.

As the check alleged to have been materially altered was apparently valid and the foundation of a legal liability if genuine, it was unnecessary to allege extrinsic facts as to how it might have been used to defraud the drawer.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. § 29.*]

3. INDICTMENT AND INFORMATION (§ 108*)—SUFFICIENCY—REFERENCE TO STATUTE.

The information was not defective because it did not refer to the particular section of the crimes act under which the accused was prosecuted.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 284, 285; Dec. Dig. § 108.*]

4. FORGERY (§ 38*)—EVIDENCE—INTENT TO DEFRAUD.

In a prosecution for altering and forging a check, the reception of testimony as to the disposition which the accused made of the check was not error, as it tended to support the charge that the altering and forging was done with intent to defraud.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 108; Dec. Dig. § 38.*]

5. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The receipt of a photographic copy of a paper which itself had been introduced in evidence is not material error, where it appears that the photograph is a true copy of the original.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 8088, 8130, 8137-8143; Dec. Dig. § 1169.*]

(Additional Syllabus by Editorial Staff.)

6. INDICTMENT AND INFORMATION (§ 86*)—SUFFICIENCY—PLEA OF OFFENSE.

Under Gen. St. 1909, § 6686, subd. 2, an information for forgery was not insufficient because it stated the place of the offense only in the opening sentence.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230-243; Dec. Dig. § 86.*]

Appeal from District Court, Seward County.

Joe N. Stickler was convicted of forgery in the second degree, and appeals. Affirmed.

V. H. Grinstead and A. C. Scates, both of Liberal, for appellant. John S. Dawson, Atty. Gen., and Clyde R. Commons, of Liberal, for the State.

JOHNSTON, C. J. The appellant was prosecuted upon the charge of altering a check and was convicted of forgery in the second degree. In the information, it was, in substance, alleged that he unlawfully, feloniously, and falsely altered a check drawn upon the Citizens' State Bank by C. W. Johnson in favor of himself for \$25 by placing the figure "1" before the figures "25" in that part of the check where the amount is shown by figures and by writing the words "one hundred" over the words "twenty-five" in the line where the amount is written; that the change was made after the check had been delivered to appellant; and that it was feloniously and falsely altered and raised for the purpose of defrauding Johnson.

[8] The sufficiency of the information is challenged, the first contention being that it failed to state that the alteration was made in Seward county. There is no ground for this contention, as in the opening sentence containing the charge it is stated: "That on or about the 8th day of September, A. D. 1911, in the county of Seward and in the state of Kansas, said defendant * * * did then and there" do the things contained in the charge. The information may be exceptional in that the venue was stated but once in charging the commission of the offense, but a repetition of it would not have strengthened the charge. Gen. St. 1909, § 6686, subd. 2.

[1] There is a claim that the information is defective in failing to state that the check was altered without the authority or consent of the drawer. It is alleged that it was falsely and feloniously altered and forged with the intention of defrauding the drawer, which was fair warning to appellant that he was expected to answer the charge that it was done without the drawer's authority. It is, in general, sufficient to charge an offense in the words of the statute, and this information contained that, and more also. The language of the charge clearly implies that the check was altered without authority. The trial court proceeded on that interpretation of the charge, as it appears that express tes-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

timony was offered and received to the effect that Johnson gave appellant no authority to alter or raise the check.

[2] Another objection is that the information did not state how Johnson was defrauded. On its face the check as altered appeared to be a valid instrument, of legal efficacy, and the foundation of a legal liability, and hence any averments of extrinsic facts as to how it might be used to defraud were unnecessary. *State v. Foster*, 30 Kan. 365, 2 Pac. 628; 19 Cyc. 1405. It would have been superfluous to have alleged or shown the effect that the forgery or loss of \$100 would have had upon Johnson.

[3] It was not necessary, either, to allege the section of the statute under which the appellant was prosecuted, as he insists should have been done. It was enough to allege plainly that an offense had been committed without incorporating in the information the part of the printed statute in which its definition might be found. *Gen. Stat. 1909, § 6685, subd. 4.*

[4] Another complaint is that testimony in regard to the passing of the check was received, although no averment of uttering it was contained in the information. It came out incidentally in the trial in proving the intent to defraud that the appellant had transferred the check to Smith, the druggist, who, upon learning that Johnson had a sufficient amount in the bank to meet it, paid the appellant \$125 for the check and then had it deposited at the bank and received a credit in his account for the amount. This testimony was not offered to establish the offense of uttering, but rather for the purpose of showing the intent of appellant to defraud Johnson. The intent to defraud is the essential element of the offense of forgery, and any testimony of acts or statements of the accused tending to show that the alteration was made to defraud was competent.

[5] Complaint is also made as to the admission of photographic copies of blank leaves of the check book. Instead of having stubs at the ends of the blank checks, the check-book was made up of alternate leaves, one a blank check and the one below a stub on which was to be kept a record of the check issued. In writing the check the indentation made by the pencil on the check could be seen on the stub leaf below, and that leaf indicated that the check as originally written was for \$25 only. On the indented leaf containing the impression of what had been written on the leaf above the figure "1" does not appear before the figures "25," nor do the words "one hundred" appear before the words "twenty-five" on the line of the check where the amount was written. The check-book itself, with the stub leaf so intended, was introduced in evidence and tended to support the theory of the prosecution. It was unnecessary to offer the photographic

copies of the leaf after the leaf itself had been introduced, and as they were not the best evidence the court might well have excluded them. The original and the copies of the leaf have been presented to this court and the photographs are found to be true copies of the original leaf. Since the photographs contain nothing more than is in the original leaf which was introduced in evidence, no possible prejudice could have resulted from their introduction.

Some criticism is made of the instructions given to the jury, but nothing is found in them to justify complaint.

The testimony appears to uphold the verdict, and the judgment of the trial court will be affirmed. All the Justices concurring.

SCHEURMANN v. MATHISON et al.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—NEGLIGENCE—UNAVOIDABLE ACCIDENT—EVIDENCE.

Plaintiff, who had been employed on a building for several days on Saturday afternoon, left his tools in a corner on the second floor; there being then no partitions in that part of the building. When he returned on Monday partitions had been put in, leaving a hallway through which he was compelled to pass to get his tools. The rear of the hallway was not lighted, and he stepped into an open hole in the floor and fell to the floor below. *Held*, that such facts were insufficient to justify an instruction on unavoidable accident, since if the hole was unguarded or insufficiently guarded defendant was negligent, and if it was sufficiently guarded and plaintiff went over the guard and fell in consequence, or, if the aperture was unguarded, and the danger was so apparent that one in the exercise of ordinary care ought to have avoided it, plaintiff would be negligent, and could not recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.*]

2. TRIAL (§ 260*)—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

An instruction that the proof of the accident alone did not entitle plaintiff to recover without proof of negligence, and if it was an accident without any negligence, then plaintiff could not recover, sufficiently covered a request to charge that an accident might happen, and a person be injured, without fault or negligence of any one, and if plaintiff's injuries resulted from a pure accident, he could not recover, etc.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. TRIAL (§ 260*)—REQUEST TO CHARGE—DUTY TO GIVE—PARTICULAR LANGUAGE.

It is not error to refuse to give an instruction in the language requested, where the same matter is given in other language in the general charge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. TRIAL (§ 250*)—INSTRUCTIONS—ISSUES.

In an action for injuries, a request to charge that plaintiff could not recover for doctor's fees or hospital bills was properly refused, where no claim was made in the complaint,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and no testimony offered as to any damages by reason of physician fees or hospital expenses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.*]

Department No. 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Jacob Scheurmann against S. Mathison and others, doing business as Mathison & Anderson. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action for damages for personal injuries. The complaint alleged and the testimony on behalf of plaintiff tended to show that he had been employed for several days at masonry work on the building; that on Saturday afternoon he left his tools in a corner on the second floor; that there were then no partitions in this part of the building, but that on Monday, when he returned, partitions had been put in, leaving a hallway through which he was compelled to pass to get to the place where he had left his tools; that there was no light in the rear end of the hallway, and that, when proceeding carefully along, he stepped into an open hole or hatchway in the floor and fell a distance of 17 feet to the floor below, sustaining the injuries complained of; and that the hole was entirely unguarded in any way. The defendant denied any negligence on its part, alleging that the hole was sufficiently guarded, and charging contributory negligence on the part of plaintiff, and introduced evidence tending to show that plaintiff knew of the existence of the hole, and that there was sufficient light to have disclosed its existence. On the trial defendants requested the following instructions: "An accident may happen and a person be injured without the fault or negligence of any one, and if you believe from the evidence herein that the plaintiff fell and was injured, and believe from a preponderance of the evidence that under all of the circumstances the fall of the plaintiff resulted from a pure or unavoidable accident, then the plaintiff cannot recover, and your verdict should be for the defendants. * * * The fact that the plaintiff in this case fell while in the building, as alleged in the complaint, raises no presumption that the defendants were guilty of negligence as charged, nor that the defendants were to blame for the accident, but before the plaintiff can recover he must prove the allegations of his complaint by a preponderance of the evidence. * * * The plaintiff in this case has not asked for anything by way of doctor's fees or hospital bills, between the time of the said accident and the filing of said complaint, and I instruct you that if you should consider the question of damages in this case, you should not allow any damages on account of these items. * * * You are instructed that you must disregard any feelings of sympathy that you may have in

this case for the injured person, and base your verdict entirely upon the evidence introduced herein and the instructions of the court."

M. E. Crumpacker, of Portland (Wilbur & Spencer, of Portland, on the brief), for appellants. R. F. Peters, of Portland (A. E. Clark and M. H. Clark, both of Portland, on the brief), for respondent.

McBRIDE, O. J. (after stating the facts as above). [1] There was nothing in the testimony to justify the court in instructing in respect to an unavoidable accident. If the hole was unguarded, or insufficiently guarded, as claimed by plaintiff, it follows as a necessary consequence that defendant was negligent. If it was sufficiently guarded, and plaintiff went over the guard and fell in consequence, it follows logically that he was not exercising reasonable care and was negligent; or, if the aperture was unguarded, and the danger was so apparent that a person in the exercise of ordinary care ought to have seen and avoided it, he was guilty of such contributory negligence as should have precluded a recovery. There is absolutely no room for saying that the testimony presents a case of unavoidable accident. It is a case where one party or the other, or both, were negligent.

[2] The court, however, gave the following instruction, which we think covered the matter requested and refused: "The accident alone does not entitle him to recover in this case without proof of negligence, and if it was an accident without any negligence, then of course there can be no recovery by the plaintiff."

[3] The second requested instruction, we think, was sufficiently covered by that portion of the general charge which reads as follows: "He can recover only upon the causes which are set forth in his complaint—failure to inclose that opening there, and because of improper light. The defendants do not insure the men who come into their employ, but they do undertake to exercise the care which is required by the statute of 1910, to which I have directed your attention. In this case the burden of proof is upon the plaintiff to prove to your satisfaction, by an outweighing or by preponderance of the evidence, as we say, that the defendants were negligent, and that their negligence was the proximate cause of the injury which came to him, and that he has been damaged thereby. The defendants have pleaded contributory negligence, and as to that the burden of proof is upon them, but in all other respects it is upon the plaintiff. Excepting as to contributory negligence the plaintiff is the burden bearer in this case, and must convince you of his cause by a preponderance of evidence. * * * If he has not sustained the burden of proof, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the other side has made it appear that the weight of testimony is with them, then the defendants are entitled to your verdict. If you find that the scales hang so evenly that you cannot say that the preponderance is one way or the other upon any issue which the plaintiff is bound to sustain by a preponderance of the testimony, then there has not been a preponderance upon his side. It must weigh more, and if it does not weigh more in the way I have indicated, the defendants are entitled to your verdict." It is not error for the court to refuse to give an instruction in the language requested if the same matter is given in other language in the general charge. *State v. McDaniel*, 39 Or. 184, 65 Pac. 520; *State v. Megorden*, 49 Or. 259, 88 Pac. 306; 14 Ann. Cas. 130; *Galvin v. Brown & McCabe*, 53 Or. 598, 101 Pac. 671.

[4] The third request was properly refused for the reason that no claim was made in the complaint and no testimony offered as to any damages by reason of physician fees or hospital expenses. *Davis v. Shepherd*, 31 Colo. 141, 72 Pac. 57.

The fourth request was for a cautionary instruction to the jury, admonishing them not to allow sympathy for the plaintiff to influence their verdict, the giving of which is usually held to be a matter of discretion with the trial court. *State v. Megorden*, supra; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; *Central Branch U. P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276. At circuit in this state the practice has not been uniform. Some judges always give cautionary instructions similar to those requested in the case at bar, while others refuse to give them. The writer when upon the circuit bench was in the habit of giving such an instruction as a matter of course in cases of this character and in trials for homicide, but is not certain that it ever had a particle of effect, as no jurymen are ever aware that his opinion is being affected by the subtle influence of sympathy.

The trial in this case seems to have been very fair, the issues well presented in the instructions, and the verdict moderate.

The judgment is therefore affirmed.

MOORE, BURNETT, and RAMSEY, JJ., concur.

OWEN v. JONES et al.†

(Supreme Court of Oregon. Nov. 20, 1913.)

1. PRINCIPAL AND AGENT (§ 172*)—WRONGFUL ACTS OF AGENT—MISREPRESENTATIONS.

Where an agent offering a leasehold interest in exchange made false representations as to its condition and income, the principal, by availing himself of the benefits of the transaction, is bound by such representations, whether he authorized them or not, since he could not rati-

fy the transaction in part, and repudiate it in part.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 656-658; Dec. Dig. § 172.*]

2. EXCHANGE OF PROPERTY (§ 8*)—RESCISSON—RETURN OF CONSIDERATION.

In a suit in equity to rescind a contract for the exchange of property on the ground of fraud, it was not necessary for plaintiff before suit to return or offer to return the consideration received; but it was enough if he alleged a willingness and ability to place the defendant in statu quo, so that the court could protect the rights of the defendant by decreeing a restoration in consideration of the rescission.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. § 10; Dec. Dig. § 8.*]

In Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by Edith Owen against Minerva A. Jones and another. Decree for plaintiff, and defendants appeal. Affirmed.

This is a suit in equity to rescind a contract whereby certain real property owned by plaintiff was, on the 9th day of April, 1912, deeded to defendant Minerva A. Jones in exchange for a certain lease of an apartment house at 927 Union avenue, Portland, Or., for the term of five years from September 1, 1911, together with the furniture therein. From a decree in favor of plaintiff, defendants appeal.

The plaintiff alleged in her complaint that she was induced to make the transfer of the property by reason of the false and fraudulent representations made to her by the defendant Minerva A. Jones and her agent, O. J. Brooks, to the effect that the rent payable under the lease was \$108 per month, when in truth and in fact it was \$130 per month; that all the apartments were occupied, and were furnished alike, and that defendant owned all the said furnishings; that the cost of heating the house would average \$10 per month, whereas, the same would run as high as \$65 per month, and the furnishings in a number of the apartments did not belong to the defendant Minerva A. Jones, but were the property of the tenants. The complaint alleged that O. J. Brooks was the agent of defendant Minerva A. Jones, with whom plaintiff had various conferences concerning the transaction; that plaintiff was shown two or three apartments, but that she was unable to see them all for the reason that defendant told her that the tenants were out, or that they did not wish to be bothered; that the plaintiff was unfamiliar with the conduct of apartment houses, and had no knowledge thereof, and relied upon the representations made by the defendant Minerva A. Jones. Plaintiff offers to reassign the lease, and return all the consideration she received in such exchange. Defendants filed an answer, in which, as a further and separate defense, they alleged that O. J. Brooks was a real estate broker of Portland, Or., who made the first proposition of the exchange as the agent of plaintiff, and brought the latter and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied December 30, 1913.

defendants together; that all the negotiations for the exchange of the properties were thereafter made between such parties; that the sale was consummated after the plaintiff had made a personal inspection of the apartment house and the terms and conditions of the lease, and after she had been furnished with an itemized list of all the furnishings contained in the apartment house, and the sale and transfer; that the plaintiff had full knowledge of what property and furniture were being conveyed to her, of the terms and conditions of the lease, of the apartments and number of persons occupying the same, and of all matters connected with the operation of the house; that she relied upon her own inspection and investigation, and not upon the representations made by defendants; and that she ought to be estopped from claiming that she did not have such knowledge. Plaintiff, by her reply, denied the new matter set out in the answer. There was a mortgage of \$1,100, and a street lien of \$86, upon the house and lot conveyed by plaintiff, which defendant Minerva A. Jones assumed and agreed to pay, and plaintiff executed in favor of such defendant notes and a mortgage on the furniture in the apartment house for these sums, after deducting \$125 for furniture sold defendant Minerva A. Jones. Upon the consummation of the sale April 16, 1912, both the plaintiff and the defendants entered into possession of the respective properties, and on the 15th of May, 1912, plaintiff commenced this suit to rescind the contract.

Manning & White, of Portland, for appellants. Allen R. Joy, of Portland, and W. T. Hume, of San Francisco, Cal., for respondent.

BEAN, J. (after stating the facts as above). The evidence shows, and the trial court found, in effect that the material allegations of the complaint were, in substance, sustained by the evidence, and that O. J. Brooks was not the agent of plaintiff as alleged in defendants' answer, but was the agent of defendant Minerva A. Jones, whom she agreed to pay \$100 as commission; that defendant largely through her agent represented to plaintiff and gave figures showing that the income of the apartment house and the expenses were such that the plaintiff could make a payment of \$40 per month upon the mortgage given by plaintiff to defendant Minerva A. Jones upon the furniture, with \$56 net profit remaining. It appears that plaintiff was unaccustomed to that kind of business, and that she had had former dealings with O. J. Brooks, and was induced to and did believe and rely upon his representations, but that the ordinary expenses of the apartment house were such that after paying the same there was practically nothing left; that the lease was of no value to her; that, if the contract is not rescinded, plaintiff will receive practically nothing for her home and lot.

The cost of heating the apartment house was a material item, and defendant Minerva A. Jones and her agent, O. J. Brooks, both testified that they did not represent that the average cost thereof did not exceed \$10 per month. As to the contrary, the plaintiff is strongly corroborated by other witnesses that Brooks made the statement that the house could be heated for \$10 per month, and made an argument to substantiate the statement, and in a general way painted the transaction with a roseate hue to Mrs. Owen, who was credulous, did not appear to understand figures, and believed his statements, but soon after entering into possession of the property found to the contrary. It appears that, according to the lease, after the first two years the rent would be \$130, instead of \$106 per month; that, when Mrs. Owen requested to examine the lease, defendant Minerva A. Jones stated that Mr. Brooks had it, and upon a like request to Mr. Brooks, the manipulator, the latter stated that an attorney had it. It also appears that Mr. Brooks was very careful that Mrs. Owen did not see the lease until after the deed to defendant Minerva A. Jones, and the bill of sale, and assignment of the lease to plaintiff were executed. Mrs. Owen states that she would not have made the trade had she known of this stipulation in the lease.

[1] Mrs. Jones seeks to evade the responsibility of the misrepresentations made by Mr. Brooks. He being shown to be her agent in the transaction, she cannot escape the consequences of his acts, whether she authorized the same or not. By availing herself of the benefits of the transaction, she is bound by the representations made and the methods employed by her agent to effect the contract. She is precluded from ratifying a part thereof, and repudiating the same in part. *Copeland v. Tweedle*, 61 Or. 303, 122 Pac. 302; *Wilson v. McCarthy*, 134 Pac. 1189; *Elwell v. Chamberlain*, 31 N. Y. 611, 619; *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809.

[2] It is contended by counsel for defendants that the plaintiff's complaint is insufficient in that it does not show that prior to the commencement of this suit plaintiff offered to return the property received by her. In a suit in equity to rescind a contract voidable for fraud, it is not necessary for plaintiff to return or offer to return before suit the consideration received; but it is enough if the plaintiff alleges a willingness and ability to place the defendant in statu quo, and the court can protect the rights of defendant by decreeing a restoration in consideration of the rescission. This the trial court did in the case at bar. *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858; *Hoyt v. Jaques*, 129 Mass. 286. In the former case, at page 122 of 31 Or., at page 860 of 49 Pac., of the opinion, Mr. Chief Justice Moore said: "The maxim that 'he who seeks equity must do equity' is evidently not violated by the failure of the plaintiff, in

a suit to rescind a contract for fraud, to allege a restoration of, or an offer to return, the consideration, or a willingness even to do so, for by his application to the court for equitable redress he concedes that before it will be awarded he must do equity, which will compel him to account for everything of value he may have received, thereby tacitly inviting the court to protect the rights of the defendant by decreeing a restoration in consideration of the rescission."

The plaintiff has in no way ratified the contract involved. She acted promptly in bringing this suit to accomplish a rescission.

The decree of the lower court was right, and it is affirmed.

HABERLY v. TREADGOLD et al.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. ADVERSE POSSESSION (§ 63*)—WHAT CONSTITUTES—CONTRACT OF PURCHASE.

Possession under a pretended contract of purchase is not adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 333-357; Dec. Dig. § 63.*]

2. DEDICATION (§ 53*)—PROPERTY DEDICATED—SALE.

Property dedicated to the public for a street may be vacated but cannot be sold by the board of trustees and recorder of the town to which it has been dedicated.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 53.*]

3. DESCENT AND DISTRIBUTION (§ 84*)—TRANSFERS BY HEIRS—AUTHORITY—EXTENT.

Where title to land in controversy was in certain heirs, some of whom were minors, authority given by the oldest heir alone, who was of age, to an agent to sell the property could affect only his own interest and did not bind the other heirs.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 309, 322-325; Dec. Dig. § 84.*]

4. EXECUTORS AND ADMINISTRATORS (§ 130*)—REAL PROPERTY—POSSESSION—RIGHT AGAINST TENANT BY CURTESY.

An administrator of the estate of a wife was not entitled to possession of real property in which the surviving husband had a curtesy interest until his right of possession had been determined in a proceeding to which he was a party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 535, 537-540; Dec. Dig. § 130.*]

Department 2. Appeal from Circuit Court, Coos County; J. S. Coke, Judge.

Action by Adolph Haberly against G. T. Treadgold, administrator of the estate of Emma N. Jones, deceased, and others. Judgment for defendants, and plaintiff appeals. Reversed and dismissed.

Geo. P. Topping, of Bandon, for appellant. G. T. Treadgold, of Bandon, for respondents.

EAKIN, J. [1] The complaint indicates that the plaintiff is relying on a title to the property by adverse possession; but, as his

possession is under a pretended contract of purchase, it is not adverse. He has also given evidence that, in platting into town lots the ground on which the lots are situated, the instrument of dedication attached to the plat declares: "And we do dedicate the said land so platted to the public"—evidently a gross error; but plaintiff has had the president of the board of trustees and the recorder of the town execute to him a bargain and sale deed to the lots, as authorized by ordinance, although this is beyond their authority.

[2] Property dedicated to the public is not subject to sale and transfer at the whim of the board. A street may be vacated under certain circumstances but not sold by the city; and there is nothing in the record to show that the deed attempted to be authorized by the city was within its power or authority or by what authority they conveyed it to plaintiff and not to the owner. So far as shown here the deed is void. Evidently it was an attempt by a short method to circumvent the owner. If the dedication in the plat was an error, as stated in the deed, it should have been vacated either by a court proceeding for that purpose or by the board under authorized proceedings, and thus the property would revert to the true owner. Plaintiff has shown no title to the lots claimed, but by the reply attempted to state facts entitling him to a decree of specific performance of a contract of sale, made with Barrow, claiming to be the agent of the McLean heirs, three of whom are minors.

[3] Authority was given to the agent by the oldest heir alone, who was of age, but such authorization could affect only his own interest and would not bind the other heirs. It further appears that the legal title to the property was in Emma N. Jones at the time of her death in 1894, and it is alleged that the McLean heirs referred to are also Mrs. Jones' heirs. It also appears by the evidence that G. W. Jones was the husband of Mrs. Jones at the time of her death; that he is still alive and has a curtesy estate in the property; and that Mrs. Jones left one or two sisters surviving her, who were also her heirs. There is in the record no showing as to who are the heirs of Mrs. Jones, nor is any issue tendered in regard thereto; but it is assumed that the McLean heirs are the only heirs without even showing who they are. Neither does the record show any connection of G. W. Jones, Grace McLean, Alex McLean, or Frank McLean with the subject of the litigation or liability in this suit, or that the plaintiff is entitled to any relief against them even upon the allegations of the reply. The same is true as to Margaret Hanley and Annie Woodward, whose interest in the property is not made to appear. Therefore, without deciding whether the new matter in the reply is a departure, plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is entitled to no relief under it, and the suit should be dismissed.

[4] The decree of the circuit court adjudging that Treadgold, as administrator of the estate of Emma N. Jones, is entitled to possession of the property is erroneous as against the tenant by the curtesy. The right to the possession against him cannot be adjudicated until he has had his day in court upon an issue tendered by the administrator against him. Quere, whether the estate of the tenant by the curtesy is subject to the debts of the wife and therefore subject to possession by the representative of the estate. See note to 12 Cyc. 1013; note to 24 Ann. Cas. 575; *Johnson v. Savage*, 50 Or. 294, 91 Pac. 1082; *Runyan v. Winstock*, 55 Or. 202, 104 Pac. 417, 105 Pac. 895. This is a question not raised in the lower court and therefore not before us for decision.

The decree is reversed, and the suit is dismissed.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

SULLIVAN et al. v. KING.

(Supreme Court of Oregon. Nov. 20, 1913.)

JOINT ADVENTURES (§ 5*)—SETTLEMENT BETWEEN PARTNERS—FINDINGS—EVIDENCE.

Evidence held to require a finding that decedent and defendant had settled their joint adventure in the purchase of certain real property, and that in such settlement it was agreed that defendant should retain the property in controversy.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. § 5.*]

Department 1. Appeal from Circuit Court, Linn County; William Galloway, Judge.

Action by Maggie S. Sullivan and Cornelius H. Sullivan by his guardian ad litem, and Maggie S. Sullivan, administratrix of the estate of Cornelius Sullivan, deceased, against Griff King. Judgment for plaintiffs, and defendant appeals. Reversed and judgment entered for defendant.

This is a suit by the widow of Cornelius Sullivan in her individual capacity, in her representative capacity as administratrix of her husband's estate, and as guardian of her minor son, Cornelius H. Sullivan, whom she joined as plaintiff, against Griff King, to compel a conveyance from the defendant to her son and herself of certain real property which she says was purchased by her husband during his lifetime, taking the title in the name of the defendant. She also prays that the defendant be required to account for and pay to her the rents and profits of the lands accruing since her husband's death. Traversing all the allegations of the complaint except as otherwise stated, the defendant says of four tracts mentioned in the complaint that he and the decedent were partners in the ownership of those lands, and

that on April 15, 1906, the two partners had an accounting and settlement of the affairs of the partnership, the result of which was that it was agreed that defendant should retain as entirely his own the title of all the property; the same being then in his name. This in turn was traversed by the reply. From a decree in some measure in favor of plaintiff, the defendant appeals.

H. H. Hewitt, of Albany (Hewitt & Sox and L. L. Swan, all of Albany, on the brief), for appellant. J. K. Weatherford, of Albany (Weatherford & Weatherford and L. M. Curl, all of Albany, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). At the trial the plaintiff, Maggie S. Sullivan, testified to some statements made to her by her husband while he lived, in the absence of the defendant. It was urged in the argument that the administratrix was not a proper party to this suit, and that the complaint did not state facts sufficient to constitute a cause of suit in her favor against the defendant, and hence that she did not come within the proviso attached to section 732, L. O. L., which reads thus: "Provided, that when a party to an action, suit, or proceeding by or against an executor or administrator appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject-matter in his own favor may also be proven." We do not deem it necessary to decide this question, in view of the testimony given at the trial and reported in the record.

It was shown that the decedent was in the habit of investing in real estate and taking title in the name of other persons, the reason assigned being that he was superintendent of a railroad, and he thought objection might be made by the officers of the company if he speculated in realty along the line of the road. As to the propriety of admitting testimony of such transactions between the decedent and parties other than the defendant we make no intimation. The defendant admits that in some cases he took title for the decedent, investing no money of his own. He avows this, but says that in other instances they invested equal amounts of money, and were, in fact, partners in property of the latter class, although the title stood in the name of the defendant. The plaintiff, administratrix, testified at the trial, and when asked what her husband said as to the ownership of the property, she answered: "He said that he had Griff King work for him; that he could do things that he could not get anybody else to do, and in some instances he would give him a half interest." Again, she says: "We were talking of moving out of the house we were living

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in. My husband wanted to move to the Ellsworth street house, and I told him that I would not move there as long as Griff King had an interest in it." She was also asked this question: "You may state what, if anything, Mr. Sullivan said to you in reference to Mr. King having some of his property in his name." She answered: "Mr. Sullivan said that he was going to quit the railroad business very soon before his death. We talked of it on Decoration Day; that he would take all of his property out of Griff King's name." It is conceded, then, concerning the only tracts involved in the testimony, that at one time the decedent had an interest in the property, the title of the whole of which was in the name of the defendant. The testimony shows by a great preponderance that each owned an undivided half of the property. The defendant testified to the same. The transactions at the time of taking the title showed that each paid one-half of the money, and the statement of the administratrix about what her husband said concerning the defendant sometimes owning a half interest confirms this theory.

The case turns upon the alleged settlement of the partnership affairs concerning these tracts. The defendant testified that he had loaned the decedent three items of cash, as follows: December 15, 1901, \$300, April 10, 1902, \$800, and October 21, 1905, \$200. He is corroborated by two witnesses as to the \$800 item. The witness Horton was visiting at the store of the defendant at Kingston when the decedent came in and asked for the loan of money. The defendant, according to this witness, produced quite a sum in bank notes and currency and delivered it to the decedent. The witness said to them that he would not part with so much money without taking security, but the decedent said it was all right; that he and the defendant were partners. In a day or two thereafter, they purchased one of the tracts involved, and in the presence of disinterested witnesses the decedent paid \$800 in currency as his part of the purchase price, and the defendant paid his share separately. The item of \$200 is verified by the defendant's check, drawn in favor of and indorsed by the decedent. These constituted the charges against the decedent, and in the settlement he is credited with his half of the tracts involved, and one-half of two notes held by the concern, amounting in all to \$1,300, balancing the cash items alluded to. That such a settlement was had is corroborated by the testimony of a clerk in a drug store where the settlement took place. He deposes that the defendant and the decedent came into his store and said that they had some business together, and went to themselves and were engaged some time in consultation. There is no testimony to contradict the defendant about this settlement. In

fact the plaintiff relates a conversation had with her husband two days before his death, thus: "Mr. Sullivan told me that he was about to rent the building that we were living in on the corner of Second and Lyon to Pete Anderson—that is, if the town went wet he was going to take it for a saloon—and he wanted to know if I had made up my mind which house I would move to. I said, 'No, not unless you had that settlement that you was going to have with Griff King about two or three weeks ago when he was at our house,' and he says, 'we fixed it,' and I wouldn't agree to move into either of those houses there until it was all settled." This supports the defendant on the point that the business was settled and settled as he says, for unless that were so, some conveyance from the defendant for the property involved would probably have been taken, either to the decedent or to some one for him. Nothing of the kind appears in the record, however, respecting the four tracts involved. The clear weight of the testimony on the disputed question of fact is with the defendant. It is to be regretted that men make such scant memorials of their transactions when it is possible to do business in a way that would leave no room for dispute; but, in the absence of such evidence, we must determine the matter according to the weight of such testimony as we have. The result is that the issue must be decided in favor of the defendant on the testimony adduced. The decree of the circuit court is reversed, and one entered here according to the prayer of the defendant's answer.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

GREENWOOD v. EASTERN OREGON LIGHT & POWER CO.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. ELECTRICITY (§ 19*)—INJURIES—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for personal injuries caused by contact of the top of plaintiff's hay derrick with electric wires strung by defendant over a highway, whether plaintiff was guilty of contributory negligence in attempting to drive under the wires held a question for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Contributory negligence is a question of law only where the facts are undisputed, or where only one inference can be drawn from the evidence, but is a question for the jury if the evidence conflicts, or if it is undisputed, but different inferences may be drawn therefrom.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. ELECTRICITY (§ 19*)—INJURIES—JURY QUESTION—NEGLECT.

In an action for personal injuries by being shocked by a hay derrick which plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was driving coming in contact with electric wires strung by defendant over a highway, whether defendant was guilty of negligence in allowing its wires to be maintained as low as they were held a jury question.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

4. *ELECTRICITY* (§ 14*)—*CARE REQUIRED*.

Where derricks similar to that one which plaintiff was driving when it came in contact with defendant's electric wires strung over the highway were common in the county, it was defendant's duty to use care commensurate with the highly dangerous character of its business, to maintain its wires at highway crossings so as to minimize the danger to persons lawfully using the highway.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

In Banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by R. P. Greenwood against the Eastern Oregon Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for personal injuries. The material parts of the complaint are substantially as follows: "That prior to the commencement of this action, and long prior to the happening of the acts and omissions of negligence by defendant hereinafter alleged, defendant obtained from the county court of Union county, state of Oregon, license, permission, and authority to use and occupy the public highways of said county for the purpose of setting, stringing, placing, and maintaining poles, upon which to stretch, string, attach to, and extend and maintain wires for the purpose of transmitting electricity from point to point in said county, over, through, and by means of said wires so to be strung, stretched, extended, attached to, and maintained upon such poles. * * * That by the terms of said franchise, permission, and authority granted by said county to defendant, it was provided the defendant, at all points and places upon such public highways and roads of said county, where the defendant should extend its wires for transmitting electricity as aforesaid, over and across said highway or public road at any road crossing or junction of any two roads or otherwise, that said wires should be extended, strung, stretched and maintained not lower than thirty-five (35) feet above the surface of the road and highway at such crossing and junction and at such a height and in such a manner as not to interfere with traffic and travel upon such public highway and road at and upon such crossing and junction; and that the poles upon which such wires should be so stretched, strung, and maintained over, above, and across such crossing and junction of such highway and road, should not be more than one hundred (100) feet apart and distant from each other. * * * That on the 17th day of June, 1912, the defendant negligently, carelessly, and wrongfully set,

erected, had and maintained, as a part of its line of transmission, two poles, one on either side of the public highway and crossing, and at a junction of two public highways and roads, by then and there having, setting, and maintaining said poles at a greater distance than one hundred (100) feet apart and from each other, and at a distance of about one hundred and forty-nine (149) feet apart; and that said poles were so negligently set, erected, had, and maintained by defendant, at a point on its line of transmission, at and near the northwest corner of the northwest quarter (N. W. $\frac{1}{4}$) of section thirteen (13), in township three (3) south, of range thirty-eight (38) E. W. M., and about four (4) miles east of the city of La Grande, in said Union county, Or. * * * That on the said 17th day of June, 1912, the defendant negligently, carelessly and wrongfully stretched, strung, extended, and maintained upon said poles so negligently, carelessly, and wrongfully set, erected, and maintained, its wire and wires over, above, and across the said highway and public road at said junction and crossing thereof, without other support, at a distance many feet lower than thirty-five (35) feet above the surface of the said public highway and crossing at said junction, and at a distance and in a manner to greatly interfere with and endanger the property and lives of persons and the general public engaged in traffic, or traveling or working, at, in, upon, about, and near the said public highways and road, at said crossing and junction thereof. That said defendant then and there so negligently, carelessly, and wrongfully stretched, strung, and maintained said wire and wires at a distance of about thirty (30) feet from and above the surface of the said public highways and road at said crossing and junction thereof. * * * That on the said 17th day of June, 1912, the defendant wholly, negligently, carelessly, and wrongfully failed, neglected, and omitted to fully, completely, or at all insulate said wire and wires at or near said point and points, or at any point between said two poles, and when and while said poles were then and there so negligently, carelessly, and wrongfully set, had, erected, and maintained, and when and while said wire and wires were then and there so negligently, carelessly, and wrongfully stretched, strung, extended, and maintained on said poles, and when and while said wires, by the said negligent, careless, and wrongful acts and omissions of defendant, were wholly uninsulated, the said defendant negligently, carelessly, and wrongfully charged, maintained, and carried over, through, and upon said wire and wires, a high, deadly, and dangerous current and voltage of electricity, in transmitting the same from point to point in said county. * * * That on the said 17th day of June, 1912, and when and while said poles of defendant were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—22

so carelessly, negligently, and wrongfully set, had, erected, and maintained, and when and while said wire and wires were then and there so negligently, carelessly, and wrongfully stretched, strung, extended, and maintained thereon, and when and while said wire and wires were then and there, by the said negligent, careless, and wrongful acts and omissions of defendant, were without full, complete, or any insulation at all, and when and while said wire and wires were so negligently, carelessly, and wrongfully charged with, maintaining and carrying a high, deadly, and dangerous current and voltage of electricity, and without any warning or knowledge of the said negligent, careless, and wrongful acts and omissions of defendant, the plaintiff went and was lawfully upon said highways and road at said crossing and junction thereof, conducting over, across, and upon said public highways and road a hay derrick, said hay derrick, at the highest point thereof, being many feet lower than thirty-five (35) feet from and above the surface of said highways and road, and under said wire and wires of defendant, so negligently, carelessly, and wrongfully stretched, strung, extended, and maintained over, across, and above said highways and road at said crossing and junction thereof. And that the highest point of said hay derrick, from and above the surface of said highways and road at, upon, and under said wire and wires, at said crossing and junction of said highways and road, was about thirty (30) feet; and that said hay derrick was of the kind and height in common use in the neighborhood and vicinity of said crossing and junction of said highways and road. * * * That when and while plaintiff was so traveling and conducting said hay derrick upon, over, and across said public highways and road at said crossing and junction thereof, the extreme top of said hay derrick came in contact with and touched the said wire and wires of defendant, when, by reason of the said negligent, careless, and wrongful acts and omissions of defendant, and by reason of each of them, a heavy, deadly, and dangerous current and voltage of electricity was diverted from said wire and wires to, in, upon, and through the head, body, and limbs of plaintiff, thereby giving him a great and painful shock, knocking him down with great, sudden, and painful violence, rendering him unconscious for a long time, thereby causing the team of plaintiff to become greatly frightened and to run away, and drag said hay derrick over the prostrate body of plaintiff, thereby inflicting upon him great and painful injuries, wounds, and bruises in and upon his head, face, body, and limbs." Then follow allegations as to the extent of the injuries suffered by plaintiff.

Defendant answered admitting its corporate existence and the motive of its business, admitted the allegations in paragraph 2 of

the complaint, and denied all the other allegations of the complaint, except as affirmatively stated in the answer. For a further answer defendant alleged: That the transmission line complained of was constructed in 1904 by the Grande Ronde Electric Company under and by authority of the county court of Union county, and was afterwards operated and maintained by them until purchased by defendant. "That on the 17th day of June, 1912, and at all times prior thereto, the plaintiff had full knowledge of said transmission line and knew that it crossed the road at the point where the plaintiff alleges that he was injured, and plaintiff knew that the wires of said transmission line were charged with electric energy and that, if said wires were brought into contact with the derrick which the plaintiff was then hauling and transporting along the said road, great danger to plaintiff would necessarily result with such contact between said transmission wires and said derrick. * * * That at said time the said derrick so being hauled and transported along the said road by plaintiff as aforesaid was being so hauled and transported by plaintiff in broad daylight and with the derrick pole and attachments extending straight up a distance of about 41 feet above the ground, and was being so hauled and transported without lowering the said derrick pole so as to permit it to pass under said wires without coming into contact therewith. * * * That the plaintiff knew, or by the exercise of due caution could have known, the height of the derrick pole and the distance above the ground of the top of said pole, and knew, or by the exercise of due care could have known, that the said derrick pole in the position in which the same was at said time being hauled and transported along the road could not pass under the said wires of said transmission line. * * * That at said time the plaintiff with full knowledge of all of said matters and things above set forth, and without lowering said derrick pole or in any way attempting to prevent the said derrick pole and its attachments from coming into collision and contact with the said wires of said transmission line, and without the exercise of due caution and care upon his part, carelessly, negligently, and recklessly drove and hauled the said derrick along the said road at the place where the said transmission line crossed said road and brought said derrick pole, so extended above the road as aforesaid, into contact and collision with said transmission wires so charged with electric energy as aforesaid; and, if any damage or injury resulted to plaintiff from said derrick pole coming into contact with said wires or otherwise, such damage and injury resulted wholly from the carelessness and negligence of the plaintiff as aforesaid and not by or through any fault or negligence of this defendant whatsoever."

The reply denied the new matter in the answer. Plaintiff introduced a franchise granted to defendant in May, 1912, granting it permission to erect and maintain electric lines along the public highways of Union county, conditioned, among other things, that at any point where there was a junction of roads or road crossing the poles of said crossing should not be placed more than 100 feet apart, and not lower than 35 feet above the surface of the road; but it appeared that the franchise for the line in question was granted to the Grande Ronde Electric Company, the predecessor in interest of the defendant, and that the line was actually constructed by that company and afterward sold to defendant, who continued to maintain it. Plaintiff then offered to introduce the franchise granted to the Grande Ronde Electric Company, which offer was rejected, and thereafter the court practically instructed the jury that a violation of the franchise in question could not be a ground of recovery. Numerous requests of both parties for instructions were presented and overruled, which, being too voluminous to be included in this statement, are briefly noticed in the opinion. The plaintiff had a verdict, and defendant appeals.

A. A. Smith, of Baker (John L. Rand and Wm. H. Packwood, Jr., both of Baker, on the brief), for appellant. F. S. Ivanhoe, of La Grande, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] One of the principal points relied upon by defendant on this appeal is the contributory negligence of the plaintiff. There is evidence tending to show that plaintiff was moving his hay derrick, which had a mast or pole reaching to a height of 29 feet and 4 inches above the surface of the road, and was substantially of the same construction and height as other derricks in common use in Union county; that he had previously driven under this line of wires with another derrick, which he supposed was about the same height, but which was, in fact, somewhat lower, without injury, and that upon the day of the injury he drove under these wires, which were placed so low that the top of the derrick came in contact with a live uninsulated wire of defendant's power line, causing him to receive the shock which occasioned the injury. Plaintiff saw the wires, and, no doubt, knew the danger which might ensue in case the pole of his derrick should come in contact with them; but it was for the jury to say, in view of all the evidence, whether, under all the circumstances, a reasonably prudent and careful man would have been justified in assuming that the defendant had placed its wires at such a height or so insulated them that they would not be a source of danger.

[2] The question of contributory negligence is rarely a question of law for the

court, but usually a question of fact for the jury. It is only where the facts are undisputed, and only one inference can be drawn from the testimony, that the question is for the court. When there is a conflict of evidence, or even when the facts are undisputed, but different inferences may be drawn therefrom, it is a question of fact for the jury. *Webb v. Heintz*, 52 Or. 444, 97 Pac. 753; *Nosler v. Coos Bay R. Co.*, 39 Or. 331, 64 Pac. 644; *Wolf v. City Ry. Co.*, 45 Or. 446, 72 Pac. 329, 78 Pac. 668; *Lewis v. Rio Grande Western Ry. Co. (Utah)* 123 Pac. 97; *Reynolds v. Los Angeles Gas & Electric Co.*, 162 Cal. 327, 122 Pac. 962, 39 L. R. A. (N. S.) 896.

[3] The evidence of the negligence of defendant in allowing its wires to be maintained in the position in which they were was sufficient to go to the jury. Irrespective of the allegations in the complaint in respect to the franchise granted by the county court, the complaint states a good cause of action against defendant for negligence. The instructions given by the court practically eliminated the franchise from the case, and it was given to the jury as a common-law action for negligence.

[4] The evidence tends to show that derricks of the same character as that driven by plaintiff are common in Union county, and it was the duty of defendant to have used care commensurate with the extremely dangerous character of the force it was engaged in transmitting in maintaining its wires at crossings as to minimize their danger to citizens lawfully using the public roads. The measure of care required of defendant is well stated in *Shank v. G. D. & T. F. W. P. Co. (C. C. A.)* 205 Fed. 833, which was a case arising, as did the one at bar, from a hay derrick having come in contact with an electric wire. Judge Morrow, referring to the defendant in that case, said: "It was clearly its duty to have used every reasonable precaution to raise and keep its high power transmission wires sufficiently high above ground for the safe passage of such structures as the plaintiff was engaged in moving at the time and place he was injured. Such structures were common to that locality. It was not of unusual height, and its passage along the highway over the bridge was to be expected at any time." To the same effect are *Perham v. Portland Gen. Elec. Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 73 Am. St. Rep. 730; *Fitzgerald v. Edison Elec. Mfg. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Ermis v. Gray*, 70 Hun, 462, 24 N. Y. Supp. 379.

It would have been but a small item of expense to defendant to have placed its wires high enough above the road to have eliminated all probability of danger to persons traveling on the highway, and, if it neglected this precaution to the injury of a citizen, the courts will not search for technical rea-

sons to protect it from the consequences of its carelessness.

We have carefully examined the instructions requested by and refused both parties as well as those given, and have come to the conclusion that no substantial error was committed, and that a correct verdict and judgment were rendered in the case.

The judgment is therefore affirmed.

McKENNA et al. v. McHALEY et al.
(Supreme Court of Oregon. Nov. 20, 1913.)

1. COUNTIES (§ 124*)—EMPLOYMENT OF DETECTIVE—RATIFICATION.

Where an account of the deputy district attorney for compensation additional to his salary was one that the county court might legally contract, it could ratify it when the services rendered were at the request of a member of the court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. § 124.*]

2. COUNTIES (§ 63*)—POWERS OF COUNTY COURT—EMPLOYMENT OF DETECTIVE.

The county court can employ a detective to make investigation looking to the prosecution of criminals.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. § 63.*]

3. COUNTIES (§ 101*)—ACTION AGAINST COUNTY OFFICERS—ISSUES AND PROOF.

In an action against county officers to compel the return of an amount paid to a deputy prosecuting officer, in addition to his salary, as compensation for investigation with a view to criminal prosecution, the fact that the statement and warrant pleaded designated it as compensation for extra services as district attorney would not exclude proof as to the authority and circumstances under which the services are rendered.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 152-159; Dec. Dig. § 101.*]

In Banc. Appeal from Circuit Court, Grant County; Dalton Biggs, Judge.

Action by Alex McKenna and others against R. R. McHaley and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 62 Or. 1, 123 Pac. 1069.

This is a suit brought by certain taxpayers of Grant county against the judge and commissioners of the county court and W. W. Wood for the purpose of having restored to the county treasury the sum of \$250, paid by the county to W. W. Wood, which sum is alleged to have been paid to him as deputy district attorney for the county. The facts out of which the suit arose are: That on December 25, 1909, Oliver Snyder was under arrest, charged with murder, and was unlawfully taken from the officer who had him in custody, and shot, and killed; that on the 5th day of January, 1910, R. R. McHaley, as county judge of the county, instructed Wood to go to the vicinity of where the said crime had been committed, near Hamilton or Monument, to investigate as to all the facts and circumstances surrounding the commission

of the crime, to detect the parties guilty of the same, and to secure evidence that the perpetrators of the crime might be prosecuted; that the county would pay him the expenses incurred therefor, to which arrangement defendants Porter and Trowbridge, the county commissioners, a little later also agreed; that thereafter, on July 9, 1910, the matter came up formally before the county court, and \$250 was allowed to W. W. Wood as compensation for said expenses, and a warrant was issued to him therefor, which was paid by the county treasurer. This suit is brought to compel the return to the county treasury of the amount so paid. In the statement presented to the county court the amount allowed is mentioned as, "extra compensation on account of criminal cases," and the warrant says, "for extra compensation as deputy district attorney." The statement, however, was not made out by Wood. Defendants answered the complaint, setting out the circumstances leading up to the issuance and payment of the warrant. The allegation of the answer relating to the arrangement by which the county judge authorized Wood to investigate the case is as follows: "That on or about the 5th day of January, 1910, the defendant R. R. McHaley, as county judge of the defendant Grant county, Oregon, conferred and advised with the defendant W. W. Wood in regard to said crime and the necessity of apprehending and bringing to justice the perpetrators thereof, and did then and there contract with and employ the said W. W. Wood for and in behalf of Grant county, Oregon, to go to the vicinity where the same crime had been committed, as aforesaid, and to thoroughly investigate all the facts and circumstances surrounding the commission of said crime, and to detect the parties guilty of the same, and to seek out and find any and all evidence by means of which the perpetrators of the crime might be prosecuted and brought to justice, and then and there promised and agreed that the defendant Grant county, Oregon, would pay all reasonable costs and expenses of said service." And the testimony of R. R. McHaley relating thereto is to the effect that shortly after the lynching of Snyder, as soon as he heard of the killing: "I told him [Wood] I thought so too [that it ought to be investigated], and I told him I thought the best thing to do would be to go over there, and try to investigate it, and try to find out who the guilty parties were, and get all the information he could relative to running down the criminals." And on behalf of the county he authorized him to do so, and told him whatever cost there was the county court would pay him. As soon as Porter and Trowbridge came over, he put the matter up to them, and they told him he had done right, and ratified it. The trial of this suit resulted in findings and decree against plaintiffs,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the suit was dismissed. Plaintiffs appeal.

Errett Hicks and J. E. Marks, both of Canyon City, for appellants. A. D. Leedy, of Canyon City (Geo. H. Cattanch and V. G. Cozad, both of Canyon City, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). [1] There is little or no dispute as to the facts. The whole contention of plaintiffs is that a deputy district attorney is not entitled to extra compensation; his salary being the whole measure of his remuneration. They further contend that defendants' allegation of a contract with the county judge can only be established by the entries in the court journal. Counsel urge in the brief that from a fair consideration of the evidence Wood received from the county the \$250 for services rendered as deputy district attorney. We think this contention is not a proper conclusion from the evidence. The evidence of Judge McHaley quoted above shows that the service asked of Wood was not in the line of his duties as district attorney, but the work of a detective; and the testimony of Wood recites the character of the service rendered in detail, showing it was not service in his official capacity. It was considered by the judge, as well as by Wood, that it was not in the line of his official duties, and, although it is designated in the statement and the warrant as "compensation for extra services as district attorney," yet the facts are different, and neither in the answer nor in the evidence is it claimed that the service was rendered in his official capacity. If the action were by Wood against the county to recover, in which the county was resisting his claim, a very different issue would arise; but here we have an agreement by the members composing the county court, expressed unofficially, that Wood would be compensated by the court when it convened, and the court actually approved the action of the judge and the promise of the commissioners by appropriating the money to him therefor, thus constituting a complete ratification of the agreement of the county judge. Of course, that would not bar the court if the claim were an illegal one, or fraudulent, and that is the only question to be determined. If the account is one that the court might legally contract, then it can approve it when the services rendered are at the request of a member of the court.

[2] We do not conceive there can be any doubt but that the county court can employ a detective as a special executive officer to render services of this character. It is said by Mr. Justice McBride, on the first appeal of this case (62 Or. 1, 123 Pac. 1069), that traveling expenses in hunting up witnesses and other expenses of like character do not appear to be for matters within the regular duties

of a district attorney, and that such expenses necessary to bring criminals to justice would constitute a valid claim for which he would be entitled to compensation. *Steiner v. Polk County*, 40 Or. 124, 66 Pac. 707, is a case involving this exact question. The county court ratified the act of the county judge in providing for the care of a pauper, but refused to allow the whole of the expenses incurred therefor, holding that the ratification is equivalent to an allegation of authorization, and binds the county court the same as an individual.

[3] We think that neither the form of the bill presented nor the form of the warrant issued is sufficient to exclude the facts, and that the proof is not at all at variance with the pleadings.

The decree is affirmed

SALEM HOSPITAL v. OLCOTT, Secretary of State.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. STATUTES (§ 255*)—CONSTRUCTION—TIME OF TAKING EFFECT—REFERENDUM—WORKMEN'S COMPENSATION ACT.

"June 30th next following the taking effect of this act," within Act Feb. 25, 1913, c. 112, the "Workmen's Compensation Act," § 12, providing that "every workman subject to this act * * * who, after June 30th next following the taking effect of this act * * * sustains personal injury * * * resulting in his disability," shall be entitled to receive certain sums from the industrial accident fund created by the act, is June 30, 1914, so that authority of the commission, under section 23, to provide hospital accommodations to workmen "who are entitled to benefits hereunder" does not apply to workmen injured before that time; the act having been approved at a referendum election held November 4, 1913, under Const. art. 4, § 1, providing that "any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 336; Dec. Dig. § 255.*]

2. MASTER AND SERVANT (§ 250½, New, vol. 16 Key-No. Series)—WORKMEN'S COMPENSATION ACT—CLAIMS—AUDITING.

No workmen injured before June 30, 1914, being entitled to benefits under Act Feb. 25, 1913, c. 112, the "Workmen's Compensation Act," and the commission being authorized, by section 23, to provide hospital accommodations only for injured workmen "who are entitled to benefits hereunder," the Secretary of State properly refuses to audit the claim of a hospital for the sum the commission has contracted to pay it for hospital accommodations during December, 1913, for workmen entitled to benefits under such law; it being impossible that there can be such workmen.

In Banc. Original mandamus proceeding by the Salem Hospital, a corporation, against Ben W. Olcott, Secretary of State. Defendant demurs to the writ. Demurrer sustained, and proceeding dismissed.

The alternative writ of mandamus in this proceeding original in this court recites the corporate character of the plaintiff, the ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pointment and organization of the State Industrial Accident Commission, together with the adoption by that body of rules and regulations for first aid to workmen entitled to allowances from the industrial accident fund. It then states, in substance, that the commission anticipated that personal injuries would happen to workmen during the month of December, 1913, and, with that in view, contracted with the plaintiff for hospital accommodations for that month to be rendered to workmen entitled to benefits under the law establishing the commission, the consideration for which was to be \$180, of which \$25 was to be paid on or before November 13, 1913. The writ further avers readiness and ability of the petitioner to perform the contract; that there were funds in the state treasury applicable to the payment of the claim; that the commission presented a voucher to the defendant, Secretary of State, with the request that he audit and approve the claim and draw his warrant on the state treasurer in payment of the same; and that the defendant has refused to audit the claim or draw his warrant as requested. The writ commands the defendant to audit and approve the claim and draw his warrant on the treasurer, payable out of the industrial accident fund, or show cause why he has not done so. The defendant has demurred to the writ.

Claude C. McColloch, of Baker, for plaintiff. A. M. Crawford, Atty. Gen., for defendant. James B. Kerr, of Portland, *amicus curiæ*.

BURNETT, J. (after stating the facts as above). [1, 2] The act of February 25, 1913, passed by the legislative assembly at its twenty-seventh biennial session, being chapter 112 of the Laws of 1913, commonly known as the "Workmen's Compensation Act" was referred to the people by petition under the sanction of section 1, art. 4, of the state Constitution, establishing the referendum as a final step in the process of legislation. The act mentioned was approved at the election held throughout the state November 4, 1913. The section of the Constitution mentioned contains this declaration of the will of the people: "Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise." In view of this plain, mandatory language it is manifest that the act in question did not go into effect at least until immediately after the election, although section 3479, L. O. L., requires the Governor to proclaim the result of the canvass of votes and to declare approved measures to be laws from the date of his proclamation. Section 12 of the act says that "every workman subject to this act while employed by an employer subject to this act, who, after June 30th next following the taking effect of this act, while so

employed sustains personal injury by accident arising out of and in the course of his employment and resulting in his disability" shall be entitled to receive certain specified sums from the industrial accident fund created by the act. Section 23 declares that "the commission shall have authority to provide, under uniform rules and regulations, first aid to workmen who are entitled to benefits hereunder, together with transportation, medical and surgical attendance and hospital accommodations for injured workmen at an expense not exceeding two hundred and fifty dollars in any one case, and to contract therefor in its discretion." The act took effect, as already stated, not prior to November 4, 1913, the date of the election at which it was approved by the people. "June 30th next following the taking effect of this act" cannot mean anything else than June 30, 1914. It is only the workman who sustains personal injury after this last-mentioned date and is otherwise qualified that is entitled to the benefits of the act, and it is only for such workmen that the commission is authorized to provide hospital accommodations under section 23 of the act. Until after June 30, 1914, there cannot be any one who may enjoy the bounty of the statute. It is axiomatic that no disbursing officer can lawfully apply the public funds to objects not authorized by law, and the Secretary of State, as public auditor under section 2 of article 6 of the Constitution, is well within his duty and authority when he refuses to audit or draw his warrant on the treasurer in payment of the claim in question; it being for hospital accommodations in advance for individuals, impossible under the law, at a time when such benefits cannot be lawfully conferred. *Boyd v. Dunbar*, 44 Or. 380, 75 Pac. 695; *Calbreath v. Dunbar*, 46 Or. 580, 81 Pac. 366.

Much was said at the hearing about the intent of the legislative assembly as a canon of construction. It was urged that as the act, but for the referendum, would have taken effect on June 3, 1913, that being 90 days after the close of the session on March 4th of that year, the Legislature meant June 30, 1913, when it said "June 30th next following the taking effect of this act," which, being interpreted, signifies 27 days after the law became effective. Computation, however, is not necessarily interpretation. Legislative intent, also, is controlled by the Constitution; that being the paramount expression of the authority of the people. The Legislature could have said "twenty-seven days after the taking effect of this act," but it did not. It chose to insert in the statute a certain calendar date occurring next after the law came into force, to wit, June 30th. That does not mean December 1st, as contended at the hearing, and we cannot give it that significance without acting as legislators, a function forbidden to us by the fundamental law.

So far as intent of the Legislature is concerned, that body must be presumed conclusively to have acted with direct reference to the possibilities of the referendum so plainly written in the Constitution. The argument of counsel could have been used with probable effect when the bill for this act was under consideration before the legislative assembly to procure an amendment eliminating the fixed date, and providing for a certain number of days after the act should take effect; but, controlled as we are by the direct mandate of the people that a referred act shall take effect only after their approval and not otherwise, we cannot yield to that reasoning.

The demurrer to the writ is sustained, and the proceeding dismissed.

MOORE and EAKIN, JJ., did not sit.

BARBER v. TOOMEY et al.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. APPEAL AND ERROR (§ 878*)—QUESTIONS REVIEWABLE.

Under L. O. L. § 550, providing a party may appeal from some specified part of a decree, and his notice of appeal shall specify the particular part, and section 557, providing that the court may affirm, reverse, or modify the decree in the respect mentioned in the notice, and not otherwise, certain defendants appealing only from the part of the decree in mortgage foreclosure holding their interests subject to the mortgage, plaintiff, not appealing, may not have reviewed the decision refusing him a personal judgment against such defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573-3580; Dec. Dig. § 878.*]

2. LANDLORD AND TENANT (§ 81*)—MORTGAGE OF LEASEHOLD—CONSTRUCTIVE NOTICE OF CONVEYANCE BY MORTGAGOR.

The record of a deed of an undivided interest in a lease and in the lessee's right therein is constructive notice to one thereafter taking from the lessee a mortgage of his interest in the leased property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 258-260; Dec. Dig. § 81.*]

3. TENANCY IN COMMON (§ 46*)—MORTGAGE BY TENANT—CONTRACT OF COTENANT TO PAY.

Statement to B., pending suit by him, to foreclose a mortgage given him by T., lessee of property, on his interest in the leased property, by C., who before the giving of the mortgage had received from T., and recorded, a deed of a half interest in the leasehold, that he intended in good time to pay the mortgage, and that he was responsible for half the mortgage and note, and that he recognized the B. mortgage, does not constitute a contract, or create an obligation, but at most tends to prove some previous obligation.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 138; Dec. Dig. § 46.*]

4. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS.

Statement of witness that another "recognized" a certain mortgage is a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

5. TENANCY IN COMMON (§ 46*)—MORTGAGE BY TENANT—EXTENSION TO COTENANT'S INTEREST.

Even if a lessee's assignees of a half interest in and under the lease had an intention to contribute to the payment of a loan, which, after the assignment, the lessee obtained, securing its payment by mortgage of his interest in the leased premises, and though they put aside funds for that purpose, this would not have the effect of extending the mortgage over their interest.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 138; Dec. Dig. § 46.*]

6. TENANCY IN COMMON (§ 46*)—MORTGAGE BY TENANT—CONTRACT OF COTENANT TO PAY.

Evidence of statements, made by a lessee's assignees of a half interest in the lease, indicating that they felt bound in some way for part of a debt, by the lessee contracted, and secured on his interest in the lease, after he had made such assignment, is insufficient to prove the making of a contract by them to pay part of the debt.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 138; Dec. Dig. § 46.*]

7. CONTRACTS (§ 28*)—EVIDENCE TO ESTABLISH.

To establish a contract, the evidence must show when, where, and by whom it was made, and the terms thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 123-140, 1755, 1782-1784, 1785½, 1820, 1821; Dec. Dig. § 28.*]

8. MORTGAGES (§ 27*)—EQUITABLE MORTGAGE—NECESSITY OF AGREEMENT.

To constitute even an equitable mortgage, there must be some kind of an agreement by the owner of the property that it shall be held as security for a debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 43, 45-53, 55; Dec. Dig. § 27.*]

9. TENANCY IN COMMON (§ 46*)—POWER TO MORTGAGE.

A tenant in common, as such, has no power to mortgage or convey the interest of his cotenant.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 138; Dec. Dig. § 46.*]

10. LANDLORD AND TENANT (§ 79*)—COVENANTS OF LEASE—EFFECT ON LESSEE'S ASSIGNEE.

While assignees of a lease are bound to the lessor by covenants of the lease, and so are bound by the covenant therein of the lessee to erect, on the premises, a building, such covenant, not even providing when the building should be erected, does not authorize the lessee, after assigning an interest in the lease, to borrow money with which to erect the building, and to mortgage the interest of the assignees to secure the loan.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry R. McGinn, Judge.

This is a suit in equity by S. J. Barber against J. M. Toomey and others, to foreclose a mortgage. A decree was rendered in the court below for the plaintiff. The defendants J. D. Casey and J. H. Hutchinson appeal from a portion of said decree. None of the other parties appeal. Modified.

Leroy Lomax, of Portland, for appellants. Wirt Minor and Geo. W. Stapleton, both of Portland (Teal, Minor & Winfree, of Portland, on the brief), for respondent.

RAMSEY, J. On August 14, 1908, S. M. Barr and others leased to J. M. Toomey for the period of 25 years, lots 6 and 7 in block 37 in Couch's addition to the city of Portland, Or. In addition to paying a monthly rent for the use of the premises, the lessee covenanted that he would erect on said premises a new building covering said lots. Said new building was required by said lease to be so constructed as to be suitable for stores on the main floor and for hotel purposes upon the upper floors, and was to be a good modern building, strong, substantial, and durable. The lease does not state when this building should be erected, but it provides that, if said lease shall be in force to the end of said period of 25 years, the lessors shall pay to the lessee one-half of the cost of said building. Said lease provides, also, that each and all of the terms and provisions thereof shall apply to and bind each and all of the heirs and assigns of the parties thereto, as well as the lessors and lessee. On July 30, 1909, the defendants Toomey, Mueller, Klesendahl, and Jennings borrowed from the plaintiff, Dr. Barber, \$20,000, and executed to him their joint and several promissory note therefor, whereby they promised to pay to his order, five years after date thereof, said sum of \$20,000 in United States gold coin, with interest thereon, in like coin, at the rate of 8 per cent. per annum, from date until paid, the interest to be paid semiannually to July 16, 1910, and quarterly thereafter, and it was further provided by said promissory note that if said interest should not be so paid, the whole sum of both principal and interest should become immediately due and collectible at the option of the holder of said note. Said note provided, also, for the recovery of a reasonable attorney's fee in any action or suit instituted to collect said note. To secure the payment of said \$20,000, and interest and attorney's fee according to the terms of said promissory note, the defendants, who executed said promissory note as above stated, on the 31st day of July, 1909, executed to the plaintiff a mortgage, whereby they sold and conveyed to the plaintiff, all the interest of the mortgagors and of each of them in and to lots 6 and 7 of block 37 in Couch's addition to the city of Portland, Or., and to all buildings and other improvements then on said lots, and in addition thereto all buildings and other improvements which should be put on said property by the mortgagors or by any or either of them, etc. Default was made in the payment of the interest due on said note and mortgage, and this suit was instituted to foreclose the same and to recover from said mortgagors said sum of \$20,000, with interest thereon at the rate of 8 per cent. per annum from August 6, 1911, and attorney's fees, and for the recovery from J. D. Casey of the sum of \$10,000, with interest from August 6, 1911, and for the recovery from J. H. Hutchinson of

\$5,000, with interest from August 6, 1911, and costs and disbursements. On the 16th day of March, 1909 (before the execution of said mortgage), said J. M. Toomey, by a written deed under seal and duly executed, sold and conveyed to the appellant J. D. Casey an undivided one-half interest in and to the lease, made as aforesaid by said S. M. Barr and others to said J. M. Toomey, of said lots 6 and 7 of said block 37 of Couch's addition to the city of Portland, for the said term of 25 years, including an undivided half interest in all the rights of said Toomey in said lease. This deed was recorded in the record of deeds of Multnomah county, on July 29, 1909, two days before said mortgage was executed. On the 31st day of July, 1909, the day on which said mortgage was executed, the defendant Toomey executed to the defendants A. Mueller, E. Klesendahl, and R. J. Jennings a deed of conveyance, purporting to convey to them an undivided three-fourth interest in and to the above-mentioned lease, made by said S. M. Barr and others to said Toomey on the above-described lots. On May 19, 1911, the defendant Toomey executed a paper to the defendants Casey and Hutchinson, purporting to lease and let unto them an undivided one-half interest in and to that certain three-story and basement building known as the Barr Hotel, with the contents thereof and furniture (excepting the piano and barroom furniture and fixtures), said building being situated on said lots, for the term of six months, with an option to retain said property 42 months after the expiration of said term of six months. Casey and Hutchinson agreed to pay \$600 per month rent for said half interest in said hotel for said period. Said lease contains this provision: "It being further understood that there is a certain mortgage on said leased property made in favor of S. J. Barber for the sum of \$20,000.00 and bearing date on or before August 1, 1909, wherein and whereby the said party of the first part has agreed to deposit on account of said mortgage and other expenses \$1,000.00 per month in the Portland Trust Company of Oregon, it is further understood and agreed that \$500.00 of each of the said rental payments shall be deposited by the parties of the second part with the Portland Trust Company of Oregon, and will be credited with like payments on this lease, and the balance due the party of the first part on this lease, to wit: One hundred dollars per month, shall be placed to the credit of the party of the first part in the U. S. National Bank of Portland, Oregon." After the defendant Casey purchased of Toomey a one-half interest in said lease made to Toomey by S. M. Barr, and others as aforesaid, he conveyed one-half of his said one-half interest therein to the defendant Hutchinson. The defendants Casey and Hutchinson own a one-half interest in said leasehold estate created by the lease made by S. M.

Barr and others to said Toomey, each of them owning an undivided one-fourth thereof. The defendants Hurley and Daniels claim some interest in said leasehold estate, subsequent in time and subordinate in equity to the rights of the plaintiff. In the court below the plaintiff asked for a personal decree against the defendant Casey for \$10,000, and against defendant Hutchinson for \$5,000; but the trial court refused to grant a personal decree against either of them for any sum. The court below entered a decree in favor of the plaintiff and against the defendant Toomey, Mueller, Klesendahl and Jennings, for the recovery of \$20,000, with interest thereon from the 6th day of August, 1911, at the rate of 8 per cent. per annum, and the further sum of \$666 as attorney's fee and for costs and disbursements, and also a decree declaring said sums of money to be a lien under and by virtue of said mortgage executed by said Toomey and others to the plaintiff, upon the whole of said leasehold estate for said term of 25 years, created by said lease made by said S. M. Barr and others to said J. M. Toomey, as stated, supra, and declaring that the one-fourth interest in said leasehold estate owned by the defendant J. D. Casey and the one-fourth interest in said leasehold estate owned by the defendant J. H. Hutchinson are subject to the lien of the plaintiff on said leasehold estate for the above-specified sums of money owing on said mortgage; and said court also decreed the foreclosure of the plaintiff's said mortgage on said leasehold estate and the sale of said property. The court below held that the said mortgage to the plaintiff of the said leasehold estate in said lots 6 and 7 in block 37 of Couch's addition to Portland covered, not only the one-half interest therein that Toomey and the other mortgagors owned therein on July 31, 1909, when said mortgage was executed, but that it covered, also, the one-half interest in said leasehold estate that J. M. Toomey sold and conveyed to J. D. Casey on the 16th day of March, 1909, *more than four months prior to the execution of said mortgage.*

[1] 1. The defendant Casey and Hutchinson are the only parties that have appealed, and they have appealed only from that portion of said decree holding that said mortgage was prior in time and right to their interests in said leasehold estate, and was a lien upon their interests in said property, etc. No other part of said decree is appealed from.

Under section 550, L. O. L., a party to a decree is authorized to appeal from the whole decree "*or from some specified part thereof,*" and his notice of appeal should specify the particular part of the decree from which he appeals, if he does not appeal from the whole thereof.

Section 557, L. O. L., is as follows: "Upon an appeal, the appellate court may affirm, re-

verse, or modify the * * * decree appealed from *in the respect mentioned in the notice, and not otherwise,*" etc.

In Roach's Estate, 50 Or. 189, 92 Pac. 122, the court says: "In construing these provisions (those referred to supra) it has been held that the final decree of circuit courts was to be modified only in the manner specified in the notice of appeal, and that, when no cross-appeal is taken, it will be presumed that the respondent is satisfied with the determination of the cause, as made by the court below."

In Shook v. Colohan, 12 Or. 242, 6 Pac. 505, the court, referring to the sections of the statute cited, supra, says: "Subdivision 1 of section 527 of the Civil Code provides 'that such notice (the notice of appeal) shall state that the appellant appeals from the judgment or decree of the circuit court, *or some specified part thereof.*' And section 534 of the Civil Code provides that: 'Upon appeal, the appellate court may affirm, reverse, or modify, the judgment or decree appealed from, in the respect mentioned in the notice and not otherwise.' * * * These two provisions, taken together, seem to restrict the review to the part of the decree specified in the notice, although, the latter portion of section 533 of the Code provides that, upon an appeal from the decree given in any court, the suit shall be tried anew upon the transcript and the evidence accompanying it."

In this case, we can review only that part of the decree of the court below appealed from by Casey and Hutchinson. We cannot review the decision of the court below refusing to render a personal decree against the defendants Casey and Hutchinson for the payment of the money which the plaintiff asked in his complaint. The failure of the plaintiff to appeal from that part of the decree precludes our examining that subject.

2. The question for decision on this appeal is, Does the plaintiff's mortgage cover the one-half interest in the leasehold estate described in the complaint and in said mortgage which J. M. Toomey conveyed to J. D. Casey on March 16, 1909?

[2] The deed to Casey was executed March 16, 1909, and recorded July 29, 1909. The plaintiff's mortgage was made July 31, and recorded August 2, 1909. The record of Casey's deed on July 29, 1909, imported constructive notice to the plaintiff of the execution of said deed and of its contents. The amended complaint (printed record, pp. 4, 5) alleged that soon after said S. M. Barr and others executed to said Toomey said lease, Toomey entered into an oral agreement with Casey, to the effect that Casey should have an undivided one-half interest in said leasehold estate, and that Toomey conveyed to Casey said one-half interest in said leasehold estate by an indenture in writing. It appears beyond any doubt, that Casey owned an undivided one-half of said leasehold es-

tate at the date of the execution of said mortgage, and that Toomey owned the other one-half thereof. They were tenants in common of said estate. There is no allegation in the amended complaint, and there is no evidence tending to prove, that the plaintiff did not know when he loaned the money to Toomey, that Toomey owned only a one-half interest in said estate. There is no allegation in the amended complaint that Casey was guilty of any fraud; nor is there any plea of estoppel as to Casey or Hutchinson. There is no allegation in the amended complaint, or any evidence in the record, to the effect that either Casey or Hutchinson made any contract that said mortgage should cover their respective interests in said leasehold estate.

Toomey, as a witness, for the plaintiff, testified, on pages 27 and 29 of the evidence, that Casey refused to assist him to borrow said \$20,000, and that after Casey refused to join with Toomey in executing the mortgage to the plaintiff, Toomey went about and executed it himself. But, in order to get the money, Toomey had to obtain the signatures of Mueller, Klesendahl, and Jennings to the note and mortgage. The note for the \$20,000 bore interest at 8 per cent. per annum, and until July 16, 1910, the interest was payable semiannually, and after that date quarterly. It seems, also, that \$2,000 of the amount had to be paid to some money broker as commission for obtaining the loan. It is hardly surprising that Casey refused to be a party to such a loan. The evidence shows that Casey refused, in the presence of five witnesses, to have anything to do with said loan.

[3] The respondent in his brief quotes from the evidence of the plaintiff, in which he says that after this suit was begun, he saw Casey and Hutchinson in the courtroom, and asked them why they did not pay the mortgage and stop the costs, and that they replied "that they intended to do it in good time, or something to that effect, and one of them remarked that they were responsible for their half of the mortgage and the note, but they didn't feel disposed to comply with my request. They said, however, that they recognized the Barber mortgage, and one of them said that they didn't get their money that way." Talk like that does not constitute a contract, or create an obligation. It might tend to prove some previous obligation.

[4] Mr. Sinnott says that Casey and Hutchinson "recognized" the Barber mortgage, but such a statement is a conclusion. It does not appear just what is meant by "recognizing the Barber mortgage." Both Casey and Hutchinson knew and recognized that Toomey and others had executed said mortgage.

[6] Mr. Sinnott says, also, that according to his recollection, when Casey sold to Hutchinson a one-fourth interest in said leasehold estate, Mr. Hutchinson retained \$5,000 of

the purchase price, which was one-fourth of the Barber loan, and he says that he thinks that this money was retained "in view of the Barber loan." However, Casey and Hutchinson may have contemplated contributing toward the payment of said loan. If they had such intention and put aside funds for that purpose, that would not have the effect to extend Barber's mortgage over their property.

[8] Mr. Walton testified that Casey and Hutchinson both said to him that they would not pay any more on this mortgage until it was foreclosed, and that Casey said he had sold his half interest to Mr. Hutchinson, and that the latter had retained \$5,000. Casey said to him that Hutchinson owed either him or Dr. Barber \$5,000 and said he assumed payment of half, which would amount to \$10,000. This witness says that Casey told him that he was liable to Dr. Barber on the mortgage. These statements tend to show that Casey considered himself in some way obligated to pay part of the plaintiff's mortgage. Casey and Hutchinson were interested in the building that had been erected, and doubtless felt that they ought to assist in bearing the expense of its erection. If Casey and Hutchinson made a contract binding them to pay a part of the Barber loan, they must have made it with some person at some time and place. They do not appear to have made any such contract with either Barber or Toomey. In fact there is no evidence in the record showing that they made any such contract with any one. The evidence is insufficient to prove the making of such a contract. There is evidence tending to show that they made statements indicating that they felt bound in some way for part of said debt.

[7] In order to establish a contract, the evidence should show *when, where, and with whom* the contract was made, and the terms thereof. There is no evidence in the record showing that either Casey or Hutchinson agreed with Barber, Toomey, or any person that the Barber mortgage should cover their half interest in the leasehold estate, and, without such a contract, said mortgage cannot be a lien thereon.

[8] To constitute even an equitable mortgage, there must be some kind of agreement by the owner of property that it shall be held as security for a debt. 1 Jones on Mortgages (6th Ed.) § 167; 11 Am. & Eng. Ency. L. (2d Ed.) p. 123.

[9] One tenant in common, as such, has no power to mortgage or convey the property of his cotenant. Freeman on Cotenancy and Partition, § 183.

[10] The assignee of a lease is bound to the lessor by the covenants of the lease. In this case the covenant of Toomey to erect, on the leased premises, a building was binding on Casey and Hutchinson, but the covenant does not provide *when* such building

should be built, nor does it authorize Toomey to borrow money with which to erect the building, and to mortgage the one-half interest in the leasehold estate which he had sold to Casey to secure the loan.

The part of the decree of the court below declaring that the one-fourth interest in said leasehold estate owned by J. D. Casey and the one-fourth interest in said leasehold estate owned by J. H. Hutchinson are subject to the plaintiff's said mortgage, and that said mortgage is prior in time and superior in right to the said interest of said Casey and Hutchinson in said leasehold estate, and declaring, also, that the interests in said leasehold estate owned by said Casey and Hutchinson are subject to said mortgage, and directing that the whole of said leasehold estate created by the lease of said S. M. Barr and others be sold, and foreclosing and barring the said interests of said Casey and Hutchinson in said leasehold estate, and all provisions of said decree in any manner attempting to subject to the lien of said mortgage, or to have sold or barred or foreclosed the said one-fourth interest of J. D. Casey or the one-fourth interest of said J. H. Hutchinson in or to said leasehold estate or the buildings on said premises, are erroneous, and are reversed and set aside, and said decree is so modified as to provide for the foreclosure of the plaintiff's said mortgage on only the one-half interest in said leasehold estate that was owned by J. M. Toomey, A. Mueller, E. Kiesendahl and R. J. Jennings, when they executed said mortgage to the plaintiff on July 31, 1909, and providing that the one-fourth interest of said Casey and the one-fourth interest of said Hutchinson in and to said leasehold estate are not in any manner subject to said mortgage or the lien thereof, and are not to be sold.

The decree of the court below is modified as above stated.

McBRIDE, MOORE, and BURNETT, JJ.,
concur.

SIMPSON et al. v. DURBIN et al.†

(Supreme Court of Oregon. Nov. 20, 1913.)

1. WILLS (§ 302*)—EXECUTION—ATTESTATION.
Evidence held to show that the testator duly executed the will and acknowledged it before the attesting witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

2. WILLS (§ 289*)—EXECUTION—PRESUMPTIONS.

In case of a holograph will, where it appears to have been attested and executed in accordance with the requirements of the law, there is a strong presumption in favor of its validity, notwithstanding the absence of an attestation clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653-661; Dec. Dig. § 289.*]

3. WILLS (§ 282*)—PROBATE—CONTEST.

Where a will probated in short form is contested, the proponents must re-probate the same de novo by original proof, but the contestant's petition may waive or admit some of the necessary facts attending the probate, in which case the proponents need not prove them, and hence, where the petition contesting a will specifically attacked it on the ground that it was not properly attested and that it was executed by reason of the beneficiary's undue influence, the issues of testamentary capacity and of the execution of the will by the decedent are waived.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. § 282.*]

4. WILLS (§ 163*)—CONTEST—UNDUE INFLUENCE—BURDEN OF PROOF.

Where a will was executed and acknowledged in the absence of the principal beneficiary, the testator at that time managing his own affairs, the contestants have the burden of proving undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

Department 1. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Petition by J. T. Simpson and others against Sarah A. Durbin and others to revoke the probate of a will. From a decree of the county court dismissing the petition, petitioners appealed to the circuit court, which affirmed the decree, and petitioners again appeal. Affirmed.

This is a will contest. Francis Marion Smith died March 28, 1910, in Salem, Or., leaving no lineal descendants. The petitioners and respondents were all next of kin to decedent and were his legal heirs. About April 1, 1910, a paper purporting to be the last will and testament of the decedent was probated ex parte in short form in the county court of Marion county, Or. Thereafter, about August 10, 1910, these petitioners commenced a proceeding in the above-mentioned county court to contest the said will, which proceeding was heard by said court, and the will sustained and admitted to probate; the petition being dismissed. The pretended will is written with pen and ink on a sheet of small note paper and is apparently all, including the name of F. M. Smith signed thereto, in the same handwriting, being in the following words and figures: "Salem, Oregon, Dec. 9th, 1903. This is my only and last will. I gave all my real estate and personal property and money and accounts to my sister, Sarah Durbin, except \$100 dollars to Frank W. Durbin for name. Also 100 dollars to Frank Smith for name. Also to Frank Edwards 100 dollars for name. Also Marion Hunt 100 dollars for name, and Frank W. Durbin, Junior, 100 dollars for name; the balance of my brothers and sisters' children to have one dollar a piece, and I appoint my sister, Sarah Durbin, to administration of my estate without bonds. Subscribe my name: F. M. Smith. L. B. Hixon, witness. C. W. Yannke. This will is not to take effect until after my death." The names "L. B. Hixon"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 13, 1914.

and "C. W. Yannke" are in different handwriting and with different ink from that used in the body of the instrument.

F. A. Lewis, of Sheridan, and Frank Holmes, of Salem (Simpson & Lewis, of Sheridan, on the brief), for appellants. John H. McNary and W. L. Spaulding, both of Salem (Carey F. Martin and C. L. McNary, both of Salem, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). There are several assignments of error, but they are all answered by the decision of two questions, namely: (1) Did the decedent write the will; and (2) did he acknowledge to the witnesses that it was his will or an instrument he executed?

[1] The witness to the will Hixon testified: That decedent came to his house in East Salem in a buggy. "I rode down town with him, got along about the State House, and he asked me 'if I would sign the statement he had written out; what he wanted to do with his property. He said something might happen to him.'" That the decedent read the statement over to him and he signed it in his presence in Derby's office. Decedent then went to the stable of C. W. Yannke and said to him: "Charlie, I have a paper here for you to sign as a witness. Will you sign as a witness?" Yannke took the paper and went into the stable office and signed it. In the light of the description of the relative positions of the witness and the decedent, by this witness and another, there can be no doubt but that Yannke was within the view of decedent when he signed the paper. Decedent was at the door of the office and could see the desk, which was directly opposite the door and not more than eight feet away, and he was within hearing of Yannke. The evidence shows that the witnesses do not pretend to give all that was said by decedent, but, it is certain that there was something said by him to both the witnesses from which they understood that the statement he asked them to witness was a will. McFarlane says that Yannke called him, stating that it was Smith's will, and needed two witnesses; and Hixon heard the will read and knew it was a will. This testimony was given nearly two years after the acts and conversations took place, and witnesses say they do not recall all the circumstances or the words spoken. This fact is certain, decedent had evidently drawn a will. He called it a statement of the disposition of his property. He was a farmer able to be about his business, evidently in usual health. He had in mind the persons he wanted to witness his will, went in his buggy, and got Hixon as one, and passing over Derby, who was convenient, secured Yannke's signature as the other witness. They did sign it as witnesses at decedent's special request and in his presence, after he had exhibited it to them as a paper he wanted them to witness. That was an acknowledgment of it to the wit-

nesses. There is no better evidence of the genuineness of a will than that it is his own handwriting. Hixon said: "He (Smith) asked me if I would sign a statement he had written out." He was not in extremis, where great care must be observed in the formal execution of the will and where the opportunity is great to impose upon or overreach one weak in body and mind; and the circumstances proved are convincing that the two witnesses knew this was decedent's will and signed it at his request in his presence as such witnesses thereto.

[2] Jarman on Wills, p. 105, says: "It may be here mentioned that, if a will appears on the face of it to have been executed and attested in accordance with the requirements of the act, the maxim, 'Omnia præsumentur rite esse acta,' applies, unless it is clearly proved by the attesting witnesses that the will was not in fact duly executed. But, if the evidence is clear, the probate will be refused. Even where the document is informal (as where there is no attestation clause or the clause is incomplete), it may be assumed to have been duly executed (especially if it is a holograph will), although no evidence of its due execution is forthcoming."

This principle announced by Jarman is followed by this court in Mendenhall's Will, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033, as follows: "Where the memory of witnesses is at fault in establishing a real or necessary incident attending the formal execution of the will, the attestation clause comes to the support of its validity, and the law will presume a due execution from the recitations of the requisite facts therein, or even without it, upon the hypothesis that the requirements of law have been duly observed."

And in a holograph will this presumption is particularly applicable when executed in the manner here shown and regular on its face. See, also, Schouler on Wills (2d Ed.) §§ 9, 255.

[3] Furthermore contestants on this appeal contend that there is no evidence of the mental capacity of the decedent nor that he signed the will, but by the petition they admit these facts. In Mendenhall's Will, supra, 43 Or. at page 547, 73 Pac. 1034, this court, quoting from the case of Hubbard v. Hubbard, 7 Or. 44, says: "It is claimed by counsel for appellants that where a will has been probated 'in common form,' or by proceedings wholly ex parte, as in this case, and the validity of the will is attacked by a direct proceeding, it is incumbent upon the person seeking to maintain the validity of the will to re-probate the same de novo, by original proof, in the same manner as if no probate thereof had been had. This proposition, we think, is correct, if the allegations are sufficiently broad to question the validity of the will and the competency of the proof as to its execution. In every such proceeding the onus probandi lies upon the party propounding the will, and he must prove every

fact, which is not waived or admitted by the pleadings, necessary to authorize its probate in the county court. Whatever may be the form of the issue as to every essential and controverted fact, he holds the affirmative." And the court proceeds: "This language implies that the allegations of the petition for contest must be sufficiently broad and specific to call in question the validity of the will and the competency and sufficiency of the proof as to its execution. The petition may waive or admit the necessary facts and formalities attending the probate, and good practice would suggest that it ought to point out with common perspicuity the specific features upon which reliance is placed for defeating the probate. As to all matters waived or admitted by the pleadings, it would seem that no additional proofs are necessary; but, as to those brought in question by the petition, the proponent has the burden of the proof and must establish them in the first instance."

Construing the petition by this definition of the issues, paragraph 5 thereof specifically points to the matters contested, namely: "That the said writing is not now nor never was the last will or testament of the said Francis Marion Smith, deceased, * * * nor did either of said alleged witnesses, to wit, L. B. Hixon and C. W. Yanneke, sign the alleged instrument in the presence of the said alleged testator, Francis Marion Smith, or in the presence of each other, or at his request, nor did he sign the alleged writing in the presence of said alleged witnesses, nor did they sign it at his request, nor was there any sufficient or competent or other proof thereof before the said court at the time of said alleged probate of said pretended will." Subdivision 8 thereof, at least by recital, admits the execution and signing of the will: "That at the time of the execution of said pretended will by the said Francis Marion Smith he was of the age of 75 years or thereabouts; that he was an unmarried man, always having lived a bachelor and susceptible to the influence of his sister, Sarah A. Durbin; that the said Sarah A. Durbin by means of persuasions and wrongful and undue influence and by means of constraint which the said Francis Marion Smith was unable to resist induced the said Francis Marion Smith to make the said writing, purporting to be his will. * * * Thus the issue as to the testamentary capacity of the decedent and of his writing and signing the instrument is waived by the petitioners, having tendered specific issues in relation thereto.

[4] The circumstance of the execution of the will as above recited prima facie discloses a want of undue influence, and the burden to establish undue influence is upon the contestants. Schouler on Wills (2d Ed.) § 239, says: "The burden of proving fraud or force in the procurement of a will, unlike the simple issue of testamentary capacity, lies upon

those who contest the instrument, and anything which imputes heinous misconduct of the party concerned and interested in its execution ought to be fairly established by a preponderance of the proof. As to undue influence, in the usual and less offensive sense, the burden of proving affirmatively that it operated upon the will in question lies still on the party who alleges it, either by direct evidence or proof of circumstances." See, also, Schouler on Wills and Administration, §§ 170, 239. And no evidence was offered upon this question.

Therefore we conclude that the will was duly executed, properly witnessed, and was entitled to probate; and the decree of the circuit court is affirmed.

MOORE, BURNETT, and BEAN, JJ., concur. McBRIDE, C. J., and RAMSEY, J., not sitting.

ZIMMERLE v. CHILDERS.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. PLEADING (§ 248*)—AMENDMENTS—ALLOWANCE.

Under L. O. L. § 102, providing that the court may, at any time before trial, allow any pleading to be amended, and for like reasons may allow such pleading to be amended at any time before the cause is submitted, when the amendment does not substantially change the cause of action, the complaint in an action of replevin may be amended before trial by excluding some of the chattels mentioned and including others, the trial court having such extensive power to allow amendments before trial that it may allow the filing of an amended complaint containing a new cause of action, and the last provision in the statute applying only to trial amendments.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.*]

2. TRIAL (§ 127*)—ARGUMENTS OF COUNSEL.

In replevin against a sheriff for chattels taken upon attachment, the sheriff being the real party in interest, though he has an indemnity bond, statement of counsel in argument that he was not the real party in interest, thus bringing before the jury the fact that he had the indemnity bond, is improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. § 127.*]

3. TRIAL (§ 120*)—ARGUMENTS OF COUNSEL—SCOPE.

In replevin for chattels which plaintiff claimed under a bill of sale, argument of counsel to the effect that the bill of sale had been recorded is improper, where the evidence did not show such recordation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 285-287; Dec. Dig. § 120.*]

4. TRIAL (§ 120*)—ARGUMENT OF COUNSEL—DUTY OF COURT.

It is the duty of trial courts to compel counsel to keep within the limits of legitimate argument, and they should not allow them to argue matters not within the issues and not within the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 285-287; Dec. Dig. § 120.*]

5. APPEAL AND ERROR (§ 1031*)—REVIEW—HARMLESS ERROR.

Improper argument by counsel constitutes reversible error; there being a presumption of prejudice unless the appellate court can see that the adverse party was not injured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.*]

6. CHATTEL MORTGAGES (§ 6*)—WHAT CONSTITUTES—DETERMINATION.

In determining whether a transaction is a sale or a chattel mortgage, the court will take into consideration the intention of the parties in view of all the circumstances; the question whether a bill of sale is really a chattel mortgage or a sale being principally one of intent.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 23-41; Dec. Dig. § 6.*]

7. CHATTEL MORTGAGES (§ 34*)—BILLS OF SALE—WHAT CONSTITUTES.

Where a bill of sale was given as security for the payment of two overdue notes, the transaction constitutes a chattel mortgage, it appearing that the payee of the notes retained them and was to sell the property covered by the bill of sale and credit the amount received on the debt, but that no credit was to be made until the payee received something out of the sale of the property.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 24, 38; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1098-1106.]

8. CHATTEL MORTGAGES (§ 34*)—ACTIONS—ESTABLISHMENT.

In an action at law upon a document purporting to be a bill of sale absolute on its face, it may be shown to be a chattel mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 24, 38; Dec. Dig. § 34.*]

9. CHATTEL MORTGAGES (§ 85*)—RECORDATION.

A bill of sale, if to secure a debt, may be recorded as a chattel mortgage, provided it is duly attested, acknowledged, and certified.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 153-160; Dec. Dig. § 85.*]

En banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by David Zimmerle against Frank P. Childers. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Turner Oliver, of La Grande, for appellant. R. J. Green, of La Grande (F. S. Ivanhoe, of La Grande, on the brief), for respondent.

RAMSEY, J. On the 25th day of October, 1912, the plaintiff began this action to recover possession of 24 hogs and a lot of other personal property described in the original complaint. On November 21, 1912, the defendant filed an answer to said complaint. On October 20, 1912, the plaintiff filed a motion for leave to file an amended complaint, and appended to his motion a copy of the proposed amended pleading. It appears that said amended complaint adds to the property sought to be recovered by the original complaint 17 tons of baled timo-

thy hay of the alleged value of \$175. We believe that the court did not pass on said motion for leave to file said amended complaint. On January 9, 1913, the plaintiff filed another motion for leave to file an amended complaint, and appended a copy of said proposed amended complaint to said motion. The court on February 27, 1913, made an order permitting said amended complaint to be filed. This was done against the objection of the defendant. This amended complaint omits all the personal property described in the original complaint excepting the 24 hogs, and includes the 17 tons of baled timothy hay, not mentioned in the original complaint. This hay was included in the other amended complaint referred to, supra. It will be noticed that the amended complaint, allowed by the court below to be filed, omits a large amount of property described in the original complaint, and includes 17 tons of hay not named therein, and that the only property described in both the original and the amended complaint so filed is the 24 hogs. On January 27, 1913, the defendant filed an answer to said amended complaint denying every allegation thereof, excepting as especially admitted in said answer. The answer alleged in substance, inter alia, that the defendant was the sheriff of Union county; that J. B. Weaver began an action against the Grande Ronde Orchard Company, a corporation, in the circuit court of Union county, on July 11, 1912, to recover from said company the sum of \$442.37 and costs; that in said action a writ of attachment was duly issued and directed to the defendant as sheriff of said county, requiring him to attach and safely keep any property that he could find in said county belonging to said Grande Ronde Orchard Company, to secure the payment of any judgment which said J. B. Weaver might recover in said action; that said writ was duly issued out of said circuit court in said cause; that said writ was placed in the hands of the defendant herein, as sheriff for service on July 11, 1912; that on said day, by virtue of said writ, the defendant herein did attach as the property of the Grande Ronde Orchard Company the said 17 tons of timothy hay and said 24 hogs, described in the amended complaint and some other property; that on November 4, 1912, said J. B. Weaver, in the said action by him begun against said Grande Ronde Orchard Company, as aforesaid, duly obtained in said circuit court a judgment against said company for the sum of \$505.85 and \$138.80 costs and an order for the sale of said attached property; that on November 11, 1912, a writ of execution and an order of sale of said attached property was regularly issued out of said court to enforce said judgment; that said writ of execution was placed in the hands of the defendant herein for service; that the defendant herein as such sheriff, by authority of said execution and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

order of sale, after giving due notice thereof, on November 29, 1912, duly sold all of said 17 tons of timothy hay and 22 of said hogs, and released all of the other property so attached; that the defendant herein alleged, also, that the plaintiff was the treasurer and business manager of said Grande Ronde Orchard Company, and that on or about March 12, 1912, the plaintiff procured, to be made out at Seattle, Wash., by one H. D. Smith, who claimed to be the president and one John Leigh, who claimed to be secretary of said company, a bill of sale, by which said president and secretary of said company pretended to sell and convey to the plaintiff, who was treasurer and general manager of said corporation, the said 17 tons of timothy hay and 24 hogs, and a large amount of other personal property belonging to said company; said pretended bill of sale was made without any valuable consideration; that it was made by said president and secretary without any authority from the board of directors of said company, and without any valuable consideration passing from said David Zimmerle to said corporation, and pretended to transfer to said Zimmerle all of the personal property belonging to said company; that said pretended sale was sham, and without consideration, and was made for the purpose of hindering, delaying, and defrauding the creditors of said company, and especially said J. B. Weaver; that it did so hinder and defraud said J. B. Weaver; that the said pretended bill of sale was sham and fraudulent; that all of said personal property remained in the possession of said company, and that no part thereof was ever delivered into the possession of the plaintiff, but it remained wholly in the possession of said company after said pretended bill of sale was made until it was attached, as aforesaid; and that the plaintiff did not, at any time, own said property, or any part thereof, etc. The plaintiff replied to said answer, denying most of the new matter therein, and setting up new matter. The reply alleges, in substance, inter alia that at the date of the bill of sale referred to in the answer, said Grande Ronde Orchard Company owed the plaintiff two promissory notes, one for \$2,400 and the other for \$1,000—both past due, and, being unable to pay the same, on the 12th day of March, 1912, sold all of said personal property to the plaintiff, and that the consideration for said sale was that the plaintiff should sell said personal property, and apply the proceeds thereof on said notes, and that said bill of sale was made in good faith, etc.

The defendant specifies several alleged errors for which he asks a reversal of the judgment of the court below.

[1] 1. The first point made is that the court erred in permitting the plaintiff to file the amended complaint. Section 102, L. O. L., provides: "The court may, at any time be-

fore trial, in the furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause," etc. The statute relating to amendments of pleadings is liberally construed in favor of parties asking permission to amend.

It is within the power of the trial court to allow, *before trial*, an amended complaint to be filed containing a new cause of action. Talbot v. Garretson, 31 Or. 256, 49 Pac. 978; Llieuallen v. Mosgrove, 37 Or. 448, 61 Pac. 1022; York v. Nash, 42 Or. 327, 71 Pac. 50.

In Talbot v. Garretson, *supra*, the court says: "It follows, we think, that it is within the power of the trial court to allow, *before trial*, an amended complaint to be filed containing a new cause of action or suit material to the controversy then before the court."

In Llieuallen v. Mosgrove, *supra*, the court says: "It must be regarded as settled in this state that the court may, *before trial*, allow a pleading to be amended by inserting a new cause of action or defense, if it is germane to or connected with the subject-matter of the controversy."

In York v. Nash, *supra*, the court says: "Indeed, the court may, in the exercise of a sound discretion, permit a pleading to be amended *before trial* by introducing a new cause of action or defense, material to the subject-matter of the controversy."

In this case, the amendment of the complaint consisted in leaving out a large amount of personal property that was described in the original complaint, and inserting in the amended complaint the 17 tons of baled timothy hay that was not included in the original pleading. The 24 hogs were described in both pleadings. The 17 tons of timothy hay were attached by the defendant at the same time that he attached the 24 hogs, and the other property. It appears by the answer that the property that was omitted from the amended complaint was released by the defendant when he sold the hay and hogs.

The provision of section 102, L. O. L., providing that the amendment of a pleading shall not substantially change the cause of action or the defense does not apply to amendments made *before trial*. It applies only to amendments made during the trial. The order of the court permitting the amended complaint to be filed was properly made.

[2, 3] 2. When the trial began, the attorney for the defendant stated that J. B. Weaver, in whose action the property in dispute was attached and sold, was absent from the state of Idaho, and that he had been unable to get in communication with him, or to have him present at the trial. One of the attorneys for the plaintiff, in making his opening statement to the jury, declared that the defendant was only a

nominal party; that Mr. Weaver was the *real* party in interest, but did not show sufficient interest in the case to be present at the trial. The defendant took exception to the remark of said counsel for the plaintiff, and the exception was allowed by the court. Afterwards in rebuttal, said attorney for plaintiff called the defendant as a witness, and over the objection of the defendant to such evidence as immaterial, he was required to testify that he was the sheriff at the time the action was commenced, and that he had an indemnity bond of \$500 to indemnify himself against loss in case the jury should find against him. And, in his closing argument to the jury, said attorney for the plaintiff declared, in effect, that the defendant Childers was only a *nominal* party to the suit; that J. B. Weaver was the *real* party in interest, who had not shown sufficient interest in the trial to attend. The attorney for the defendant excepted to said remarks, and his exception was allowed by the court. The said attorney for the plaintiff, in his closing address to the jury, appealed to the jury to find for the plaintiff because plaintiff had shown his good faith by getting a bill of sale from the Grande Ronde Orchard Company and *placing the same on record as notice to all the world* that he was the owner of the property in dispute on the 12th day of March, and thereafter. The attorney for the defendant objected to this statement, and asked that the same be taken from the jury, on the ground that there was no evidence before the jury that any such bill of sale, or pretended bill of sale, was ever placed on record, and that the pretended bill of sale was not witnessed so as to entitle it to be recorded, and there is no law authorizing a bill of sale to be placed on record, even if properly witnessed. The said attorney for the plaintiff declared that he did not claim that the instrument was entitled to go on record, but insisted that the jury had a right to consider the fact that it was placed on record as showing good faith of the plaintiff. The defendant's request was denied by the court, and an exception to the ruling allowed.

The questions in this case were, whether the plaintiff was the owner of the property described in the amended complaint, and if he was, what was its value. The real and only party plaintiff was David Zimmerle, and the real and only party defendant was Frank P. Childers. J. B. Weaver was not a party to the action in any sense. The judgment sought by the plaintiff was against Childers, and not against Weaver. The counsel for the plaintiff had no right to say to the jury that Childers was only a *nominal* party, and that Weaver was the *real* party. He had no right to bring Weaver into the case at all. The case was between Zimmerle and Childers. To assert

that Childers was only a *nominal* party, and that Weaver was the *real* party was to misrepresent the issue to be tried. It was immaterial to any issue in the case to prove that the defendant had a bond to indemnify him against having to pay a possible judgment. The indemnity bond was a matter between the defendant and the person who gave it. The jury had no right to consider that fact at all. To prove that the defendant had a bond of indemnity, and then to appeal to the jury and say that the defendant was only a *nominal* party, and that Weaver was the *real* party, was an indirect way of saying to the jury that Weaver or the person who gave the bond and not Childers would have to pay the judgment, and therefore that they should be the more willing to find a verdict for the plaintiff. Such appeals are made for the purpose of injecting into a case an irrelevant and vicious element.

There was no evidence that the bill of sale had been recorded. Notwithstanding this fact and the farther fact that counsel for the plaintiff expressly admitted that it was not entitled to be recorded, he appealed to the jury to find for the plaintiff, because, as he asserted, the plaintiff had shown his good faith by obtaining the bill of sale and *placing it on record as notice to all the world that he was the owner of the property in dispute*. The counsel for the plaintiff did not prove that the paper had been recorded, but asserted that fact without proof. Counsel has no right to place a fact like that before the jury by a statement made in his argument. If he wanted that fact before the jury, he should have offered proof of it. If he had offered proof that the bill of sale had been recorded, it would have been objected to and probably ruled out. He got it before the jury as a part of his closing address, and appealed to them to consider it in finding their verdict.

[4, 5] The trial of a hotly contested lawsuit is a battle, and able lawyers with good intentions, sometimes, out of zeal for their client's success, overstep the lawful bounds of their privileges, as counsel, to the injury of the opposite party. When they do so, it is the duty of the trial courts to stop them and constrain them to keep within the limits of their privileges. When objections are made to improper remarks by counsel, in their addresses to juries, and the courts overrule the objections, and permit counsel to go on with improper statements, such action is reversible error, unless it can be seen by the appellate court, that the adverse party was not injured by such remarks.

In Elliott's General Practice, vol. 2, § 695, the author says: "Whenever counsel is guilty of misconduct in argument, an objection should be made, and exception to the ruling of the court, or refusal to rule thereon, taken at the time and brought into the record by

bill of exceptions. Counsel has a right to interpose, in a proper manner during the argument of adverse counsel, to make such objection. If that court, over proper objection, erroneously permits counsel to persist in such misconduct, an instruction to the jury to disregard, or not to consider, the improper remarks, will not, as a general rule, cure the error." The same author in the same volume (section 698) says: "As a general rule, counsel in argument *must confine themselves to the facts brought in evidence*. Thus, it is error, and cause for a new trial, to permit counsel, over proper objections and exceptions, to state and comment upon facts pertinent to the issue, but not in evidence. So, it is improper for counsel to refer to facts not pertinent to the issue, but calculated to prejudice the case to the injury of the opposite party."

In 38 Cyc. pp. 1497, 1498, it is said: "*It is highly improper, and ordinarily ground for reversal, for counsel in argument to tell the jury that defendant is insured or has indemnity against any verdict rendered against him in the case on trial.*"

In *Lassig v. Barskey* (Sup.) 87 N. Y. Supp. 425, the court says: "In view of the information conveyed by plaintiff's counsel to the jurors, under the guise of inquiring into their qualifications, that the defendant was insured against loss in the event of a recovery against him, and a repetition of this reprehensible practice in the course of the cross-examination of one of defendant's witnesses, the judgment and order appealed from should be reversed, and a new trial ordered."

In *Hollis v. U. S. Glass Co.*, 220 Pa. 49, 69 Atl. 55, the facts were that the plaintiff's counsel, in the court below, had said in his argument to the jury: "It is nothing to the glass company what this verdict shall be; it is the insurance company that will have to pay the verdict," etc. Commenting on this, the court said: "This was an invitation to find a verdict on false grounds, and it is open to the objections named in the opinion in *Saxton v. P. R. Co.*, 219 Pa. 492 [68 Atl. 1022]. * * *

"In determining whether there was actionable negligence and damages sustained, it cannot be pretended that the fact that the defendant was insured against loss had the slightest bearing. The statement of counsel was improper, and it was prejudicial to the defendant."

In *Manufacturing Co. v. Woodall*, 115 Tenn. 605-608, 90 S. W. 623, the facts were that the plaintiff was suing for damages for personal injuries, and the counsel for the plaintiff made several attempts to prove that the defendant was insured against having to pay any verdict that might be recovered, but the trial court would not permit such evidence to be given. However, in the argument to the jury the attorney for plaintiff claimed that he had a right

to assume that the defendant had such insurance, and claimed that if it had not had such insurance it would have been more careful. Counsel for the defendant at once objected to said remarks, and moved for a mistrial on account thereof, but the trial court denied the motion and instructed the jury not to consider said improper remarks. The Supreme Court commenting on said remarks and the action of the trial court said: "Should a verdict obtained under such conditions be permitted to stand? We think not. It is too well settled to require citation of authorities that, in an action of negligence, it is incompetent to show that the defendant is insured against loss in case of a recovery against him on account of his negligence. * * * The effect of this could not have been otherwise than prejudicial to the company, in that the jury would the more readily return a verdict against it upon the assumption that it was indemnified against loss."

In *Lone Star Brewing Co. v. Voith* (Tex. Civ. App.) 84 S. W. 1100, the court says: "There are a number of assignments of error predicated upon bills of exception which show on the part of appellee's counsel," persistent efforts "during the trial, from the beginning to the close of his argument, to get before the jury the fact that appellant was insured by some insurance company against loss, by reason of appellee's injuries, and to create the impression upon the jury that by reason of such insurance the damages sued for, if recovered, would fall upon the insurance company, and not upon the appellant. We are of the opinion that this conduct on the part of plaintiff's counsel was prejudicial to the defendant, and constitutes error, which requires a reversal of the judgment."

In this case, the counsel for plaintiff, over the objection of the defendant, proved that the defendant had a bond indemnifying him against having to pay any judgment not exceeding \$500, that might be recovered, and then argued to the jury that the defendant was only a *nominal* party and that the *real* party was J. B. Weaver, at whose suit the property was attached. This conduct of the plaintiff's counsel was prejudicial error.

The remarks of the plaintiff's counsel, over the objection and exception of the defendant, concerning the pretended recording of said bill of sale, were error, also. Trial courts are clothed with ample power to prevent counsel's arguing to jurors matters not within the issues, or not within the evidence, and they should not hesitate to use this power, and thus safeguard the rights of litigants.

3. As a new trial will be granted, it is not necessary to pass on the question whether the onus is on the plaintiff to show that the bill of sale was executed by proper authority, or whether the authority of the officers will be presumed *prima facie* from the manner in which said paper appears to have been

executed. The parties can get their evidence in better form for a new trial, we presume.

[8, 7] 4. The appellant contends that said bill of sale, if it has any validity, is shown by the evidence to be a mortgage. On its face it is a bill of sale. The evidence tends to prove that, at the time that this paper bears date, the Grande Ronde Orchard Company was indebted to the plaintiff in the sum of \$3,400, which was evidenced by two promissory notes. These notes were past due, and the company was in financial distress and unable to pay them. One note was given for \$1,000 and the other for \$2,400. The bill of sale purports to have been made for \$1 and other valuable considerations. The plaintiff alleges in his reply that the consideration for the execution of the bill of sale was that he should sell the property described therein and apply the proceeds thereof upon said two promissory notes. In his evidence he testifies, that he demanded the money owing him on said two notes, and that he got the bill of sale, with the agreement that he would sell the property and apply what he should get therefrom on said notes. He kept both notes and has not credited anything on either of them. The plaintiff had this bill of sale prepared and sent it to Seattle, and received it back through the mail, after it had been signed. Mr. Geo. L. Cleaver, one of the directors of the Grande Rondo Orchard Company, testified, in substance, that it was his understanding that this bill of sale was made to the defendant so that he could sell some of the property on the ranch at Cove, and apply it on his notes that were due. While this instrument on its face purports to be an absolute bill of sale, the allegation in the reply cited supra, and the evidence of the plaintiff and Mr. Cleaver, tend to prove that it was executed to secure the payment of the promissory notes referred to supra.

If this bill of sale was intended at the time that it was executed to operate as security for the payment of a debt owing by the vendor to the vendee, it is, in effect, a chattel mortgage. In 35 Cyc. pp. 34, 35, the law is stated thus: "In determining whether a transaction is a sale or a chattel mortgage, the court will take into consideration the intention of the parties, in view of all the circumstances."

In 4 American & English Ency. L. (2d Ed.) pp. 562, 563, the rule is stated thus: "A bill of sale, although absolute on its face, if taken as security for a debt, is in effect a chattel mortgage, and, as to the immediate parties thereto, will in equity be treated as such. But, on the other hand, the general principle is that, where the transaction clearly shows that the entire interest in the property is conveyed without reservation, it will be treated as an absolute sale."

In Nicklin v. Betts Spring Co., 11 Or. 407,

5 Pac. 52, 50 Am. Rep. 477, the court says: "It is hardly necessary to cite authorities to show that a bill of sale absolute in its terms becomes a chattel mortgage upon proof by parol that it was made to secure a debt. It is the nature of the transaction at its inception which determines the character of the instrument."

In Spalding v. Brown, 36 Or. 166, 59 Pac. 187, the court says: "There is perhaps no conclusive single test by which it may be determined that any transaction may be denominated or legally characterized as a mortgage, as distinguished from a conditional sale. The primary inquiry may be said to be the intention of the parties, and this may be determined, not alone by the instrument which forms the basis of the transaction, but by the attendant and surrounding circumstances, and the conditions under which it was delivered and designed to become effective."

In this case if it was the intention of the parties at the time the instrument was executed to convey to the vendee the entire interest in the property without reservation, said instrument was a bill of sale; but, if it was the intention of the vendor to convey the property to the plaintiff to secure the debt which the company owed him, with the agreement that he was to sell the property and to credit the amount received for it on the debt, and that no credit was to be made on the debt until the plaintiff received something for the sale of the property, such instrument was in effect a chattel mortgage. It is largely a matter of intention, to be determined by the facts and circumstances surrounding the transaction. But, in cases of doubt, courts are inclined to construe the transaction as a mortgage. Spalding v. Brown, 36 Or. 160, 59 Pac. 185.

[8, 8] 5. In this state, in an action at law, a bill of sale, absolute on its face, may be shown to be a chattel mortgage. Bartel v. Lope, 6 Or. 326; Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523.

If a bill of sale is made to secure a debt, it is a chattel mortgage, and, if executed, witnessed, acknowledged, and certified as a chattel mortgage is required to be, it is entitled to be recorded as a *chattel mortgage*. Nicklin v. Betts Spring Co., 11 Or. 406, 5 Pac. 51, 50 Am. Rep. 477.

We do not find it necessary to pass on the other questions raised on this appeal.

The judgment of the court below is reversed, and a new trial is granted.

STATE v. McALLISTER.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. SODOMY (§ 5*)—INDICTMENT—SUFFICIENCY.

L. O. L. § 1439, provides that the manner of stating the act constituting the crime as stated in the appendix to the Criminal Code is sufficient, where the forms are applicable, and

in other cases forms may be used as nearly similar as the nature of the case permits. The form of indictment given on page 1011 for charging rape is that defendant "forcibly ravished C. D., a woman of the age of 14 years." The indictment alleged that accused did unlawfully "commit the crime against nature in, upon, and with one R. K., then and there being a male person; said crime against nature being too well understood and too disgusting to be herein more fully set forth." *Held*, that the indictment was sufficient under the Code, though it would not be sufficient at common law.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 6; Dec. Dig. § 5.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for committing the crime against nature with a male person, evidence that accused had committed the same offense with others than the person named in the indictment was not admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

3. COURTS (§ 89*)—STARE DECISIS.

The doctrine of stare decisis should not be departed from, unless it appears, on subsequent examination of the question, that the former case was decided contrary to sound principle.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

4. CRIMINAL LAW (§ 762*)—TRIAL—INSTRUCTIONS—COMMENT ON FACTS.

L. O. L. § 139, provides that in charging the jury the court shall state all matters of law which it thinks necessary for the jury's information, but shall not present the facts of the case. In a prosecution for the crime against nature the court stated that: "The court thinks that a man with normal sexual instincts is incapable of committing the crime, and that it is only a person of abnormal sexual sense that is capable of committing it. So if you are satisfied that one was possessed of this unnatural or abnormal sexual sense, you might infer that he had a motive." *Held*, that the instruction was prejudicial error as being an expression of the court's individual opinion on a matter of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

5. CRIMINAL LAW (§ 762*)—PROVINCE OF JURY.

The court should not express an opinion on any fact in the case in charging the jury; it being for the jury to determine what the facts are.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754, 1758, 1759, 1769; Dec. Dig. § 762.*]

6. CRIMINAL LAW (§ 1044*)—QUASHING INDICTMENT—TIME OF MOTION—MOTION IN SUPREME COURT.

A motion to quash the indictment and discharge accused should be filed in the trial court, and may not be made in the Supreme Court, L. O. L. § 1625, providing that the judgment appealed from can be reviewed only as to questions of law appearing upon the transcript, and Supreme Court rule 4 (117 Pac. ix) requiring the appellant to set out in full in his first briefs the errors alleged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. § 1044.*]

McBride, C. J., and McNary and Eakin, JJ., dissenting.

In Bank. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

El S. J. McAllister was convicted of the crime against nature, and appeals. Reversed, and new trial granted.

R. J. Slater, of Portland, for appellant. Robert F. Maguire, Deputy Dist. Atty., of Portland (Walter H. Evans, Dist. Atty., and Frank Collier, both of Portland, on the brief), for the State.

RAMSEY, J. The defendant demurred to the indictment, alleging that it does not substantially conform to the requirements of chapter 7 of title 8 of Lord's Oregon Laws, in that it does not contain such specifications of the crime attempted to be charged and the particular circumstances thereof as required by said provisions, and that the facts stated do not constitute a crime.

The charging part of the indictment is in the following words: "The said El S. J. McAllister, on the 28th day of October, 1912, in the county of Multnomah and the state of Oregon, then and there being, did, then and there, unlawfully and feloniously commit the crime against nature in, upon, and with one Roy Kadel, he, the said Roy Kadel, then and there being a male person; said crime against nature being too well understood and too disgusting to be herein more fully set forth," etc.

Subdivision 6 of section 1448, L. O. L., requires the act charged as the crime to be clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

All forms of common-law pleadings in criminal actions were abolished by section 1435, L. O. L.

Section 1439, L. O. L., provides that the manner of stating the act constituting the crime, as set forth in the appendix to the Criminal Code, is sufficient in all cases where the forms there given are applicable, and said section further provides that "in other cases, forms may be used as nearly similar as the nature of the case will permit."

The forms given in the appendix of the Criminal Code are very brief and use no surplus words, and, in cases where no forms are given, the pleader is authorized to follow the models given as nearly as the nature of the case will permit. No form is set forth for the crime against nature, but a form for rape is set forth on page 1011, L. O. L. Where the person upon whom the rape is committed is above the age of consent, the charging words are that the defendant "forcibly ravished C. D., a woman of the age of 14 years." It is not necessary to allege that the defendant "carnally knew" the person ravished. The crime against nature is much like rape as to the manner of its commission.

In the case of *Com. v. Dill*, 160 Mass. 536,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

36 N. E. 472—a sodomy case—the indictment charged that the defendant did “unlawfully and feloniously commit a certain unnatural and lascivious act,” with a person therein named. The Massachusetts statute provided that it should not be necessary to allege a description of the crime in the indictment. Passing upon the sufficiency of the indictment, the court said: “We think the indictment good without reference to section 2 of the statute. Before the statute, sodomy had long been known as a crime against nature.”

In *People v. Williams*, 56 Cal. 647, an information for an attempt to commit the crime against nature, charged that the defendant “did willfully and unlawfully and feloniously make an assault on H. G., with intent to commit in and upon the person of H. G. the infamous crime against nature,” etc. The court held it sufficient, saying: “We have examined the information in this case and consider it good. The acts constituting the offense are stated in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; * * * every person of ordinary intelligence understands what the crime against nature with a human being is.”

In *McClain's Criminal Laws*, vol. 2, § 1154, the author says: “An indictment which charges that the defendant did unlawfully and feloniously commit a certain unnatural and lascivious act with a person named, or did feloniously, etc., commit the infamous crime against nature with, etc., is sufficient.”

[1] We hold that the indictment is sufficient, although it would be insufficient at common law. The demurrer was properly overruled.

[2] 2. On the trial, in the court below, several witnesses were permitted, over the objections of the defendant, to give evidence tending to prove that the defendant had committed, with persons other than the person named in the indictment, the crime against nature. The case of *State v. Start*, 132 Pac. 512, is a case in which the defendant was charged with the crime against nature, committed with another man. In that case the trial court had permitted to be given in evidence testimony tending to prove that the defendant had committed the crime against nature with other persons. It was held in that case, by a majority of the court, that such evidence was not admissible. In that case the opinion of the majority of the court was written by Justice Burnett, and concurred in by Justices Moore and Bean. The opinion of the minority was written by Chief Justice McBride and concurred in by Justice Eakin. Those opinions examined, with thoroughness and ability, the question as to the admissibility of evidence tending to prove that the defendant had committed the crime against nature with persons other than the one named in the indictment, and the majority of the court held that such evidence

was not admissible, while the opinion of the minority came to the opposite conclusion. We do not deem it necessary to re-examine that question in this case. We hold that the rule declared in that case by a majority of the court should be followed.

In *Giblin v. Jordan*, 6 Cal. 418, the court says: “This case may be a hard one; but it forms no reason why the former decisions should be disregarded. The frequent instances in which courts have relaxed rules to avoid the consequences of cases like this have done more to confuse and complicate the law * * * than all other cases put together. A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will have been more beneficial than if constantly deviated from.”

In *Hogatt v. Bingham*, 7 How. (Miss.) 569, the court says: “It should require very controlling considerations to induce any court to break down a former decision and lay again the foundations of the law.”

In his work on *Bailments*, Sir William Jones, commenting on the maxim “that nothing is law that is not reason” says: “This is a maxim in theory excellent, in practice dangerous; as many rules, true in the abstract, are false in the concrete. For, since the reason of Titius may, and frequently does, differ from the reasoning of Septimius, no man who is not a lawyer would ever know how to advise, unless courts were bound by authority as firmly as pagan deities were supposed to be bound by the decrees of fate.”

In *Grignon's Lessee v. Astor*, 2 How. (U. S.) 343, 11 L. Ed. 283, the court says: “We do not deem it necessary now, or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that or the other cases which preceded it rested. They are founded on the oldest and the most sacred of the principles of the common law; time has consecrated them; the courts of the states have followed, and this court has never departed from, them.”

In *Sydnor v. Gascoigne*, 11 Tex. 455, the court says: “The rule of stare decisis, so far as it applies to decisions of our own court, should not be disregarded but on the fullest conviction that the law had been settled wrong; and, even then, we should pause and consider how far the reversal would affect transactions entered into and acted upon, under the law of this court.”

In *Wells on Res Adjudicata and Stare Decisis*, section 596, the author says: “Hence, when once a principle has been fully recognized, it should not be changed, except it is found to be unbearably wrong, or else it is changed or abrogated by the Legislature, to whom the correction of errors ought usually to be left as to long-established principles, acted upon as a rule of property.”

[3] In *State v. Clark*, 9 Or. 470, the court says: “Stare decisis is the policy of the courts, and the principle upon which rests

the authority of judicial decisions as precedents in subsequent litigation, and this doctrine ought not to be departed from, except when subsequent examination shows *the case to have been decided contrary to principle*." See, also, *Multnomah County v. Sliker*, 10 Or. 65; *Despain v. Crow*, 14 Or. 404, 12 Pac. 806.

We believe that the rule stated in *State v. Clark*, *supra*, is the correct one, and that a doctrine declared by a former decision of this court should not be overruled or departed from, unless the court is satisfied upon subsequent examination of the question that the former case was decided contrary to sound principle.

The case of *State v. Start*, *supra*, was thoroughly considered, and it is directly in point on this question, and a majority of the court find nothing therein contrary to sound principle, and we follow that case, holding, that all evidence received by the court tending to prove that the defendant had committed the crime against nature with persons other than Roy Kadel (the person named in the indictment) was incompetent and irrelevant, and that its admission was error.

[4] 4. The court below gave this instruction to the jury: "The court thinks that a man with normal sexual instincts is incapable of committing the crime, and that it is only a person of *abnormal sexual sense* that is capable of committing it. So if you were satisfied that one was possessed of this *unnatural or abnormal sexual sense*, you might infer that he had a motive, a reason or a force, impelling him to do such an act," etc.

Section 139, L. O. L., provides: "In charging the jury, the court shall state to them *all matters of law* which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case," etc. The opinion of the court stated in the foregoing charge may or may not be true as a fact. It certainly is not a *matter of law*. The court has no right to state facts to the jury, unless they are of such a nature that the court can properly take judicial notice of them.

The case of *Keen v. Keen*, 49 Or. 366, 90 Pac. 149, 10 L. R. A. (N. S.) 504, 14 Ann. Cas. 45, was an action by a wife against another woman for damages for alienating her husband's affection, and at the trial the judge inadvertently, passing upon an objection to a question, made the following remarks, in the presence of the jury: "I don't think it makes any difference in this case. The charge is that she seduced him. My experience has been, my observation has been, that a woman is not liable to be seduced without she contributes a little in some way to the general purposes of the case." There the judge stated the result of his observation in the hearing of the jury, and not as a part of his charge, and it was held to be error. Passing upon the matter the court says: "Our statute commands that, in charging the jury, the court shall not present the facts of the

case, but shall inform the jury that they are the exclusive judges of all questions of fact.

* * * The remark complained of was, in our opinion, a violation of the provision last named, and, believing that it was not expressly withdrawn, it is impossible to say what the effect of such language was on the minds of the triers of fact, and hence the judgment is reversed and a new trial ordered."

Thompson, in his work on Charging the Jury, pp. 79, 80, says: "Juries—particularly ignorant juries—watch with great eagerness any expression of opinion from the bench, and are very apt to follow it, whether it falls from the lips of the judge as a casual remark. * * * Still less will the law permit an expression of his own opinion of the facts of the case, based, not upon the evidence, but upon his own knowledge."

[5] Our statute is express that the court "shall not present the facts of the case," but shall state to the jury "all matters of law which it thinks necessary for their information" in rendering a verdict. It is the province of the jury to determine what the facts are in any case, and the court has no right to express an opinion on any fact in a case, when charging the jury. Kelly, Chief Justice, in the case of *State v. Whitney*, 7 Or. 390, says: "It is the exclusive province of the jury to determine questions of fact. They, and they only, have the right to judge of the credibility of witnesses, and of the weight and effect of their testimony. It has always been held to be an erroneous instruction when the court assumed any controverted facts to be proven, instead of submitting to the jury the question whether or not it has been established by the testimony before them."

In this case the trial judge told the jury that he thought a man with normal sexual instincts was not *capable* of committing the crime charged, and that only a person of *abnormal sexual sense is capable* of committing such an offense. The court then added that if the jury were satisfied that one was possessed of this *unnatural or abnormal sexual sense*, they might *infer that he had a motive, a reason, or a force impelling him to do such an act*. The court practically assumed the position of an expert witness, and gave the jury *his opinion* concerning the kind of person *who could* and the kind of *one who could not* commit the crime against nature. This was prejudicial error.

We do not find it necessary to examine the other points made on the appeal.

[6] Counsel for the defendant filed in this court, at the time of the argument, a motion for an order of this court quashing the indictment, and discharging the defendant, but we think that such a motion should be filed in the court below, and not here. Section 1625, L. O. L., provides that upon an appeal, the judgment or order appealed from *can be reviewed only* as to the questions of law *appearing upon the transcript*. Rule 4 of this

court (117 Pac. ix) is as follows: "In criminal causes, the appellant shall set out in full, in his first brief, the errors alleged." The appellant's first brief does not mention the point made by said motion. Possibly this court in criminal causes is authorized to pass upon the questions only that arise upon the transcript, and are assigned as errors in the appellant's first brief. However, we do not decide that point. The defendant can properly present to the court below the matter urged in his said motion to quash the indictment.

For the errors referred to, *supra*, the judgment of the court below is reversed, and a new trial granted, and the cause is remanded to the court below.

McNARY, J. (dissenting). At the doorway of a consideration of this case, we are confronted by a motion of counsel for defendant to dismiss the appeal and quash the indictment for the reason that section 2099, L. O. L., under which the indictment was drawn, has been repealed and substituted by an act of the Legislature approved January 31, 1913. The crime with which defendant is charged was committed during the month of October, 1912. The grand jury returned the indictment December 2, 1912. On February 24, 1913, the trial jury found defendant guilty. The day following judgment was entered. On February 25, 1913, the notice of appeal and undertaking were filed.

Section 2099, L. O. L., which was the law extant at the time of the commission of the crime, reads as follows: "If any person shall commit sodomy or the crime against nature, either with mankind or beast, such person, upon conviction thereof shall be punished by imprisonment in the penitentiary not less than one year nor more than five years." By legislative enactment this section was amended in 1913, becoming effective June 4, of that year, so as to read: "If any person shall commit sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustain osculatory relations with the private parts of any man, woman or child, or permit such relations to be sustained with his or her private parts, such person shall upon conviction thereof, be punished by imprisonment in the penitentiary not less than one year nor more than fifteen years." Laws 1913, p. 56. From a time antedating the formation of this government the enactment of laws which impose a punishment for acts which were not punishable when committed have been prohibited, and, from a time equally remote a statute increasing the punishment of offenses which were committed before its enactment have been inhibited. So vitally are those principles associated with civil government that they are to be found in the federal Constitution and in the Constitutions of the several states of the Union. Defendant occupies no position coming with-

in those sacred rules, and therefore cannot beckon them to his aid. The amendatory act is without this case, as the defendant was indicted, tried, convicted and sentenced under the criminal section of the statute existing at the time the crime was committed. The status of the defendant will not be altered in the least by the change in the statute, and nothing remains to be done but the execution of the judgment.

The trial court is accused of committing error when it advised the jury that Harry Work was not an accomplice of Roy Kadel in the commission of the crime alleged in the indictment. The jurors were told that Roy Kadel was an accomplice of defendant, and that a conviction could not be had upon the uncorroborated testimony of an accomplice, but that his testimony must be supported by some evidence tending to connect defendant with the commission of the offense. The testimony of the witness Harry Work is undisputed, and, in narrative form, is that he met Roy Kadel on one of the busy thoroughfares of Portland, and accompanied him unwittingly to the office of the defendant, where both remained in the reception room until Kadel was beckoned by defendant to enter his private office; that, growing impatient at the failure of Kadel to return, Work stepped into the hall and knocked on the door leading into defendant's private office, whereupon defendant opened the door and Work entered and saw Kadel wiping his penis with a handkerchief; that Work ejaculated, "Hello, what is this?" and Kadel replied, "McAllister and I are having a little trade," which, in the parlance of the morally depraved, means the performance of the act defined in the indictment; that Work further stated: "Well I'm in a hurry; I am going back to the hotel"—and defendant remarked, "All right, boys, I'll see you again," whereat Work and Kadel stepped into the hallway and were gone. The record discloses that this was the only visitation, these two boys ever made to McAllister's office in each other's company. This court in *State v. Carr*, 28 Or. 389, 42 Pac. 215, stated that whenever a conflict exists in the testimony as to whether the witness is or is not an accomplice, the issue must be submitted to the jury, but, where the facts are undisputed, the sole arbiter is the judge. Here, so far as the record unfolds the situation, no voice was raised in protest or contradiction of the testimony given by Work as to the details surrounding the filthy transaction staged in defendant's office. Under the circumstances it became the plain duty of the trial court to declare that Work was not an accomplice, and in so doing no error was committed.

Additional error is predicated upon the refusal of the lower court to direct a verdict of not guilty, for the reason "there is no testimony in the case connecting the defendant with the commission of the crime outside of the testimony of accomplices." This assign-

ment of error necessitates a brief review of the testimony. Roy Kadel, the person with whom the crime was committed, described in detail every repulsive step taken by defendant in the criminal transaction. Supplementing this testimony is the uncontradicted declaration of Harry Work, heretofore mentioned, and which corroborates Kadel in his statements of many of the situations surrounding the commission of the crime. Above all of this, defendant, when sojourning in Boston, Mass., during the early fall of 1912, and prior to the time of the doing of the act alleged in the indictment, wrote, addressed, and mailed to Roy Kadel a postal card in words and figures as follows: "9/29/12. Dear Roy: I send you this as a mark of my appreciation of your frequent calls. [Signed] McAllister." The language employed by defendant in this message to Kadel indicates most strikingly the cordial relations existing between them, and manifests defendant's appreciation of Kadel's "frequent calls," which were for an illicit purpose. After considering the testimony on this phase of the case, en masse, we can but say the lower court acted wisely in refusing to entertain defendant's motion for a directed verdict.

Grievous complaint is made by defendant of the action of the trial court in permitting evidence to be given conducing to show that defendant had committed the crime against nature with other persons, and, in the court telling the jury "that evidence of other offenses was admitted solely for whatever tendency it may have to show a motive on the part of this defendant for committing the crime with which he is charged by this indictment, and for whatever tendency it may have to show that the defendant was capable of committing the crime charged." To my mind this suggests the most serious aspect presented on appeal.

The case of *State v. Start*, 132 Pac. 512, is relied upon by counsel for defendant as conclusive of the law of this case. *Start* was indicted and convicted of committing the same disgusting crime. An appeal was taken to this court, and the judgment of conviction was reversed for the reason that a majority of this court held that an error was committed by the trial court in admitting evidence to the jury of the commission by the defendant of similar acts of depravity with other persons. I am aware of the large responsibility I assume in disregarding that case, which has never carried conviction to my mind, and unless overruled will remain a fruitful source of embarrassment in administering punishment to those depraved individuals affected with moral viciousness and degeneracy. The value of law is its proximity to reason, its certainty and universality. The two latter elements are the support of the rule known as *stare decisis*—to abide by decided cases. The abuse in the administration of law is to adhere blindly to a rule that savors of iniquity simply because it is a

judicial decision. The first duty of a court is to decide the law correctly so far as it lies within the human mind. The next duty is to smite that rule of human action which is found to be unjust, however well it may be buttressed by precedent. Great reluctance to overthrow an established doctrine would naturally proceed from an established rule where property rights or individual liberty were at stake; but, where neither one nor the other of these long-respected rights have been entrenched by reason of judicial utterance, no hesitation should deter one from uprooting that rule which he believes to be subversive of common justice. The law of the *Start* Case was made subsequent to the commission of the crime by the defendant McAllister, and after his trial and conviction, and therefore in no wise afforded him an assurance of immunity from the commission of the act for which he had been tried and convicted.

The presiding judge was circumspect in admitting the testimony to which objection is made, and told the jury that it could not be considered for the purpose of showing the character of the defendant, or to excite prejudice against him, or be used to corroborate the testimony of Kadel. That a person cannot be convicted of one offense upon the proof that he committed another is a general rule of law that is certainly so old as to have been long laid up among its settled elements, but to this principle of law are several well-recognized exceptions which doubtlessly were in the mind of the trial court when it allowed the jury to receive evidence of similar defenses committed by defendant with other persons, upon the hypothesis that the evidence might tend to show a motive and a capacity to commit the crime alleged in the indictment. Criminal motive is the inducement present in the mind of a person, causing him first to intend then later to commit the crime. It exists as a component in every crime, and frequently is, when discovered, a powerful aid in the detection of the perpetrator. True it is that evidence of an independent crime which has no connection with that for which the accused is on trial cannot be proven simply to disclose a criminal tendency to commit a crime. Yet such evidence is admissible if it shows an emotion which supposedly led defendant to the doing of the act. That is this case. When the state introduced the testimony of independent, yet similar, crimes committed by defendant upon other boys, it showed the emotion which prompted defendant to invite to his private office Roy Kadel, the lad with whom the vile act was committed; that defendant's association with Kadel was for bestial purposes; that defendant's dealings with Kadel were not prompted by natural affection; that defendant courted Kadel's friendship for the purpose of satisfying a lustful and unnatural passion. The inquiry logically arises what motive induced defendant to usher Kadel

into his office? Was it in response to a legitimate business transaction? The law presumes it was. To overcome that presumption and to show that defendant entertained an emotion to perform a forbidden and unnatural act with Kadel evidence of similar crimes with other boys was admitted. Where no motive can be shown it is indeed hard to convince the ordinary juror's mind that defendant has committed the crime with which he is charged, for men do not ordinarily commit unlawful acts unless there is in their minds a motive sufficient to break down the barriers that nature has set up in opposition thereto. One of these barriers is a controlled and natural sex instinct for the opposite gender, and when men are accused of a crime involving a perverted or inverted sex instinct, it becomes important to seek the motive that impelled the act. Confessedly no man would commit this unnatural act unless his motive be to satisfy a perverted sexual passion, and to prove that emotion it was pertinent to show that defendant had revealed its existence by similar offenses with other persons. "Mental capacity," says Wigmore in his excellent work on Evidence, "like other human qualities or conditions, may conceivably be evidenced circumstantially by three classes of facts: (1) The person's outward conduct, manifesting the inward and causing condition; (2) pre-existing external circumstances, tending to produce a special mental condition; and (3) the prior or subsequent existence of the condition, from which its existence at the time in question may be inferred." Section 227.

Mental capacity or capability must not be confounded with a mere tendency to commit a crime, as the latter is never a probative fact in the proof of the commission of an offense. Evidence of the former element must be restricted to that character of crimes coming under the classification of unnatural or abnormal offenses—crimes which alone can be associated with mental abnormality, superinduced by moral depravity. If the crime under consideration is one that a normal man, induced by natural impulses might commit, no purpose would be accomplished by showing the mental capacity of the offender, as that specie of testimony would simply show a tendency or likelihood to commit the crime, but if the crime is one impossible of conception by a normal man, then the capacity or the capability is relative and fact evidential. By way of a concrete example: A. is on trial for the crime of murder, arson, larceny, etc., crimes which are supposed to be the result of a natural and oft-occurring mental impulse. Let us take the first example, murder. Proof of other similar crimes committed by defendant would be incompe-

tent to prove the homicide with which he was charged because that would be proffering evidence of a tendency, and not a mental capacity or capability, to perpetrate the crime. But, reversing the illustration, A. is accused of and is on trial for committing the crime against nature, proof of the commission by defendant of crimes of a like nature at other times would evince a mental capacity or abnormal perversity from which guilt of the crime might be logically inferred, as no one would do such an unnatural act unless he possessed an abnormal perversion, which is never presumed, but on the contrary, must be proven. In virtue of the unnatural quality of the crime the evidence was admissible.

During the delivery of the charge to the jury the court remarked: "The court thinks that a man with normal sexual instincts is incapable of committing the crime, and that it is only a person of abnormal sexual sense that is capable of committing it. So if you are satisfied that one was possessed of this unnatural or abnormal sexual sense, you might infer that he had a motive, a reason or a force, impelling him to do such an act," etc. Defendant insists that this expression of the court invaded the province of the jury, and was prejudicial to defendant. The statute of this state requires the court to present to the jury "all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case." Section 139, L. O. L. When the court assumes the existence of a disputed fact, it thereby commits an error, but in this case no dispute arose over the horrible character of the acts, but only as to defendant's commission of the act. Section 729, L. O. L., authorizes the court to assume certain facts, such as the laws of nature. This crime from its very name suggests that its commission is unnatural, for it is denominated "the crime against nature." Therefore, if its commission is opposed to nature and is unnatural, the court gave utterance to a truism sanctioned by statute when he said "that a man with normal sexual instincts is unable to commit the crime." No fact is better understood to modern medical science than that sodomy and its allied vicious concomitants are never committed except by persons impelled by a perverted and diseased mind. The court made no error in this respect.

For the reasons herein stated I believe no errors were committed by the trial court and that the judgment of conviction should be sustained, and therefore dissent from the opinion of the majority of the court.

Judgment should be affirmed.

McBRIDE, C. J., and EAKIN, J., concur.

SIMON v. HAMILTON LOGGING CO. et al.
(Supreme Court of Washington. Nov. 5, 1913.)

1. PHYSICIANS AND SURGEONS (§ 18*)—MALPRACTICE—ACTIONS—EVIDENCE.

In an action against a surgeon for malpractice, the question of his negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

2. MASTER AND SERVANT (§ 92*)—INJURIES TO SERVANT—LIABILITY OF MASTER.

Where a master employs a surgeon for the benefit of its men and without profit to itself, it is not liable for the surgeon's malpractice, in case it exercised reasonable care in the selection of a competent surgeon.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 143; Dec. Dig. § 92.*]

3. MASTER AND SERVANT (§ 270*)—MATERIALITY — REMOTENESS — NEGLIGENCE — INJURIES—ACTIONS.

In an action against a master for the negligence of a surgeon employed by it to treat its servants, evidence of malpractice on the part of the surgeon some six years previous is too remote to be admissible to show that the master did not exercise reasonable care in selecting the surgeon.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

4. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ACTION—EVIDENCE.

In an action against a master for negligence in selecting an incompetent physician to treat the employes, a single act of negligence on the part of the physician will not establish his incompetency, but such acts may be shown as on the question whether the employer knew that the physician was incompetent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

5. MASTER AND SERVANT (§ 270*) — INJURIES TO SERVANT—ACTION—EVIDENCE.

In an action against a master for negligence in employing an incompetent physician to treat its servants, evidence of the acts of incompetency occurring after the negligence on the part of the surgeon which was complained of is inadmissible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

6. EVIDENCE (§ 535*)—MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ACTION.

In an action against a master for negligence in failing to use ordinary care in hiring a physician to treat its servants, evidence of the opinion of a layman, who lived some miles from the place of the master's business, that the physician was an unskillful obstetrician is inadmissible to show that the physician was incompetent to treat the men in a lumber camp.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 535.* *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

En Banc. Appeal from Superior Court, Snohomish County; John B. Yahey, Judge.

Action by N. P. Simon against the Hamilton Logging Company, a corporation, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Willet & Oleson, of Seattle, for appellant. Cooley & Horan and R. Mulvihill, all of Everett, for respondents.

CHADWICK, J. In April, 1909, defendant Hamilton Logging Company employed Dr. R. G. Kellner to treat and care for such of its employes as might become sick or injured while in its employ. One dollar a month was deducted from the wages of each employe, and the whole sum so deducted was paid over to Dr. Kellner in pursuance of a contract, the material parts of which are as follows: "In consideration of the sum of one dollar (\$1.00) lawful money of the United States, for each and every individual employed by the party of the second part, for a period of not less than one week nor more than one month, and ten cents daily for less than one working week, said party of the first part agrees to take care of, treat and use such professional knowledge and skill as he is capable of in all cases of sickness and accident, of said employes of the party of the second part. Conditions: 1. Minor trivial accidents and ailments to be treated, but not to include bed and board. * * * 3. Contagious diseases while calling for treatment not to be admitted to the hospital. * * * Plaintiff was employed by defendant logging company as a fireman, and had worked during the months of October, November, and December, 1910. On December 14th plaintiff's right great toe became sore and painful. On the 17th the pain had become so intense that he was compelled to quit work. He informed the foreman of his affliction, and was told to go to Dr. Kellner at Hamilton, for treatment, and on the morning of the 18th plaintiff walked to the hospital. Dr. Kellner then examined the plaintiff's toe, saying to the plaintiff "that is a bad toe; a bad callous there." He then gave plaintiff a prescription, with directions for its application. After obtaining the medicine prescribed plaintiff returned to his cabin at the logging camp. Dr. Kellner did not then offer to take plaintiff into his hospital for treatment, although it is apparent from the record before us that plaintiff's condition must have been serious, and that he was suffering intense pain. Plaintiff applied the remedy prescribed during the following two or three days, but without relief. The infection, as it proved to be, began to spread over the foot, causing it to swell. About the 20th of December Dr. Kellner came to the camp, but did not see the plaintiff. On the 21st plaintiff asked the bookkeeper of the company to call the doctor by phone. This was done, but the doctor did not come until the afternoon. He again examined plaintiff's foot, but did nothing, saying to plaintiff, "Keep on with the salve." No suggestion that plaintiff be taken to the hospital for treatment was made by the doctor, although plaintiff himself was so impressed with the seriousness of his condition that he asked the doctor to amputate the toe. On December 23d the camp was closed for the holidays, and all of the employes paid off, including

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff, the \$1 being deducted from their wages and the aggregate sum paid to Dr. Kellner. On the evening of the 22d plaintiff asked the company for a card that would admit him to the Sedro-Woolley hospital. This was refused, and plaintiff was told to go to the Hamilton hospital (Dr. Kellner's place) and stay there. Plaintiff then went by train to Sedro-Woolley, being supported and assisted on the trip by some of his fellow employés. On December 27th his toe was amputated. On January 12th following a portion of his foot was amputated, and on March 1st his foot was amputated at the ankle. These successive amputations were necessary to arrest the spreading infection. Inasmuch as the remaining facts weave themselves into our discussion of the law of the case, we will make no mention of them at this time. Plaintiff began this action to recover damages against the doctor on the ground of general negligence and unskillful diagnosis and treatment, and against the logging company upon two grounds: First, that the company is liable in any event for the negligence of its agent; and, second, that it is liable for negligence in the employment of and retaining in its employ, an unskillful and incompetent physician and surgeon. Upon the trial, plaintiff having rested, the court entertained a motion to dismiss the case on account of the insufficiency of the evidence. The motion was sustained as to the logging company, but denied as to defendant Kellner. Whereupon it was agreed by counsel that a like order of dismissal should be entered in favor of Kellner, with the understanding that any disposition of the case which might be made by this court upon appeal as to the logging company, should also apply as to him. From a judgment of dismissal, plaintiff has appealed.

[1] Upon the record before us, there can be no question as to the right of the appellant to have the question of Dr. Kellner's negligence submitted to a jury, and we shall not discuss his acts of omission except in so far as it may be necessary in our examination of the logging company's case.

[2] This court has held that a company employing a surgeon for the benefit of its men, and without profit to itself, is not liable in any event, but that the measure of its duty is to exercise reasonable care in the selection of a competent surgeon. *Wells v. Ferry-Baker Lumber Co.*, 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; *Wharton v. Warner*, 135 Pac. 235. Although we are invited to review and distinguish our own cases, and to declare the contrary rule, we think the one announced is supported by reason, as well as the better authority, and have determined to adhere to it without reopening the discussion.

[3] Appellant sought to show that Dr. Kellner was incompetent and unskillful. He first offered to show an instance of alleged malpractice occurring in the year 1904, some six years before the contract of employment was

entered into. This was clearly too remote and was properly rejected by the court.

[4, 5] Appellant then offered to prove by several witnesses, specific acts of alleged malpractice occurring after this case arose, and that they were matters "of common knowledge in and about Hamilton, Wash." While incompetency cannot, as a rule, be shown by proof of a single act of negligence, it is proper to show repeated acts of carelessness and incompetency on the part of a fellow servant; we understand that the logging company's liability is to be tested by the same rule—as touching the question whether the employer knew or might have known that the servant was incompetent if he had exercised ordinary care in his selection or retention. *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016; *Hage v. Luedinghaus*, 60 Wash. 680, 111 Pac. 1041; 1 *Labatt, Master & Servant* (1st Ed.) § 189; *Bailey, Master's Liability*, etc., p. 55; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841; *Dossett v. St. Paul*, etc., *Lum. Co.*, 40 Wash. 276, 82 Pac. 273. What Dr. Kellner may have done or omitted to do after he ceased to treat appellant could not be held to bind the logging company, even though knowledge had been brought home to it, for the very act charged may have been the culminating circumstance that made his acts subject to the common knowledge of men in and about Hamilton. The company's liability must rest upon a want of due care in the selection of the surgeon, or in its negligence in retaining him at the time appellant was treated. This argument applies also to an offer to prove that at the time of the trial Dr. Kellner's reputation was that of an unskillful and incompetent person. It must be remembered that the evidence of reputation of Dr. Kellner as to competency, in so far as it is admissible here, is not for the purpose of proving the negligence of Dr. Kellner at the time of his treating of appellant, but is for the purpose of proving the negligence of the logging company in employing Dr. Kellner after knowledge thereof on the part of the logging company. What Dr. Kellner may have done after ceasing to treat appellant clearly has nothing to do with influencing the logging company, one way or the other, in employing or continuing the employment of Dr. Kellner up to the time he treated appellant. Indeed, the very acts of negligence on the part of Dr. Kellner, claimed by appellant to have caused his injuries, would have weight in the public mind in determining Dr. Kellner's reputation to the prejudice of the logging company, yet manifestly his reputation should not be measured by those acts as against the logging company. Its negligence, if any, occurred prior to that time. Specific acts of negligence brought home to a defendant, and reputation, are evidence of the same quality, and the employer cannot be bound unless there is knowledge, express or implied, at a

time when, if acted upon, he could have refused to employ, or, having him employed, discharge the employé so as to prevent the injury.

[8] Appellant offered to prove by one witness, and by her husband, that the doctor had treated her unskillfully in a confinement case occurring in August, 1910. Another offer was made to prove by a husband that his wife had been negligently treated in a confinement case in April, 1910. No expert testimony was offered. Merely the opinion of nonprofessional witnesses. Nor did appellant offer to prove, except inferentially, that these cases were matters of common knowledge. Appellant offered no facts from which it might be inferred that the logging company operating two miles away had, or might have had, knowledge of these cases, if indeed incompetency as an obstetrician would, in any event, be held to imply incompetency in the treatment of men employed in a logging camp.

Finding no error, the judgment is affirmed.

CROW, C. J., and GOSE, MAIN, ELLIS, MORRIS, FULLERTON, and MOUNT, J.J., concur.

STATE v. PACIFIC AMERICAN FISHERIES.

(Supreme Court of Washington. Nov. 10, 1913.)

En Banc. On rehearing. Former opinion adhered to.

For former opinion, see 73 Wash. 37, 131 Pac. 452.

PER CURIAM. Upon a rehearing en banc, a majority of the court adhere to the department opinion as reported in 73 Wash. 37, 131 Pac. 452.

The judgment will therefore be affirmed.

CARR v. CITY OF MONTESANO et al.

(Supreme Court of Washington. Nov. 15, 1913.)

APPEAL AND ERROR (§ 781*)—TERMINATION OF CONTROVERSY—PAYMENT OF DEBT—DISMISSAL OF APPEAL.

Where, in a taxpayer's suit to restrain defendant city and its treasurer from paying a city warrant, no service was had on the treasurer, and pending appeal he paid the warrant from funds applicable thereto, such payment terminated the controversy and required a dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.*]

Department 2. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by F. L. Carr against the City of Montesano and others. Judgment for defendants, and plaintiff appeals. Dismissed.

Morgan & Brewer, of Hoquiam, for appellant. O. M. Nelson, of Montesano, for respondents.

MOUNT, J. This action was brought by a taxpayer to restrain the city of Montesano and its treasurer and deputy treasurer from paying a certain city warrant, which had theretofore been issued by the city to Tuttle & Maloney in payment for a certain street improvement, and to restrain the officers of the city of Montesano from incurring or attempting to incur additional indebtedness until such time as the existing indebtedness should be brought within the constitutional limit of indebtedness. It is claimed in the complaint that the city of Montesano had passed its limit of indebtedness at the time this warrant was issued and therefore that the warrant was illegal. The city treasurer was named as a party to the action, but no service was ever made upon him, and he did not appear as a party to the action. Upon issues joined with the city, the cause was tried to the court, and upon the trial the court concluded that the city had not reached its limit of indebtedness at the time the warrant was issued, and for that reason dismissed the action. The plaintiff has appealed.

There is a showing in the record to the effect that after judgment in the action the city treasurer duly called the warrant in question for payment, and that the same has been paid. The respondent moves to dismiss the appeal upon the ground that the controversy has ceased. We think this motion must be sustained. It is apparent from the record that the sole question in the case was whether or not the city had reached its limit of indebtedness at the time this warrant was issued. The city treasurer was not a party to the proceeding. After the trial of the case the warrant was duly called and paid. It is not contended that the claim upon which the warrant was issued was not a valid claim, made in good faith against the city, and for which the city was liable; but the sole question was whether the city had passed its limit of indebtedness and therefore could not issue warrants in payment of its obligation. The trial court, upon a hearing of all the evidence in the case, found that the warrant was issued within the legal limit of indebtedness. Thereafter the city treasurer, who was not a party to the proceedings, called and paid the warrant. There is no showing in the record that there are other warrants, either prior or subsequent to the date of the one in question, which might be held to have been issued in excess of the debt limit; and if the judgment in this case might be reversed because this particular warrant was unlawfully issued, no restraining order could now issue, and it is at least doubtful if the city might recover from the payee the amount of the

warrant. It is apparent, therefore, that the question of the legality of this warrant is now a moot question.

If we are required to go into the merits of the case, as was done in *Hartson v. Dale*, 9 Wash. 379, 37 Pac. 475, in order to determine whether there is merit in the appeal before passing upon the motion to dismiss, the same result must follow; for, without entering into a discussion of the questions presented, we are of the opinion that the court properly found that the city had not reached its limit of indebtedness. But we think the rule announced in that case does not control in this, because there the respondent in the action paid the outstanding warrant pending the appeal, while in this case the city treasurer, whose duty it was to call the warrant for payment when he had sufficient funds in his hands for that purpose, was not a party to the case, and, not being a respondent, it was therefore clearly his duty to pay the warrant with the funds in his hands applicable thereto, which was done.

The action is therefore dismissed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

DISTLER et ux. v. GRAYS HARBOR & P. S. RY. CO. et al.

(Supreme Court of Washington. Nov. 17, 1918.)

EMINENT DOMAIN (§ 124*)—TIME WITH REFERENCE TO WHICH COMPENSATION IS TO BE MADE.

Under the constitutional provision that private property cannot be taken for public use without damages first being ascertained and paid, the damages are to be ascertained as of the time of the trial of the condemnation proceeding though the property may have been previously appropriated, since, whatever the physical situation may be, in contemplation of law there can be no taking until the damages have been ascertained and paid, and it is the date of such taking that determines the damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 332-344; Dec. Dig. § 124.*]

Department 2. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Rudolph Distler and wife against the Grays Harbor & Puget Sound Railway Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Bridges & Bruener, of Aberdeen, and Bogle, Graves, Merritt & Bogle, of Seattle, for appellants. A. M. Abel, of Aberdeen, and W. H. Abel, of Montesano, for respondents.

MORRIS, J. Appellants, in 1910, under a franchise from the city of Cosmopolis, constructed and have since maintained their tracks on the public street upon which respondents' property abuts. No condemnation proceedings were instituted by appel-

lants, and no rights obtained by them to the use of the street or the right to damage abutting property, except as granted in the franchise. Subsequently respondents brought this action to recover damages to the abutting property owned by them. The case was tried in March, 1913, under a stipulation that the action should be tried in the same manner as if it were a condemnation proceeding instituted by appellants. Upon the trial the court below permitted witnesses to testify as to the value of the land, excluding the railway, at the time of the trial, and instructed the jury to the same effect. This is urged as error, appellants contending that the value should be determined as of the time of the appropriation by the railway company, and not at the time of the trial. The rule in this state applicable to condemnation proceedings is that the damages shall be ascertained as of the time of the trial. *Enoch v. Spokane Falls & Northern Ry. Co.*, 6 Wash. 393, 33 Pac. 966; *Grays Harbor & P. S. Ry. Co. v. Kauppinen*, 53 Wash. 238, 101 Pac. 335; *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 88, 102 Pac. 1041, 104 Pac. 267. These cases are based upon our constitutional provision that private property cannot be taken for public use without damages first being ascertained and paid, and follow the rule laid down in other states having like constitutional requirements, the theory being that, as the Constitution provides that payment of damages shall precede the taking, there can, in contemplation of law, be no taking until damages have been ascertained and paid, and that whatever be the physical situation, no title or right of use as against the landowner passes until compensation is first ascertained and paid. It follows from these decisions that private property is taken or damaged for a public use when it is appropriated according to the forms of law, and it is this date that determines the damages, whether the actual physical entry precedes or follows it.

In discussing a like question under a similar constitutional provision, it is said in *County of Blue Earth v. St. Paul & Sioux City R. Co.*, 28 Minn. 503, 11 N. W. 73: "That this means the time of taking and appropriating the property by appropriate legal proceedings, and not the time of some previous wrongful and tortious entry, necessarily follows from the constitutional provision which requires compensation to be first made. Until that time the property still belongs to the original owner. The fact that a railroad company has, in advance of proper condemnation proceedings, committed a trespass and wrongfully taken possession of the land gives it no right to insist that such proceedings, subsequently instituted, shall relate back to the date of the trespass." This is the rule laid down in those jurisdictions having constitutional provisions similar to ours, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Ser'es & Rep'r Indexes

where, in dealing with the rights of abutting owners upon public streets, it is the law, as here, that the fee to the street rests in the owner of the abutting property. *Milwaukee & Miss. R. Co. v. Eble*, 3 Pin. (Wis.) 334; *Morin v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 100, 14 N. W. 460; *Lyon v. Green Bay & M. Ry. Co.*, 42 Wis. 548; *San Francisco & San Jose Ry. Co. v. Mahoney*, 29 Cal. 112; *Harlan County v. Hogsett*, 60 Neb. 362, 83 N. W. 171; *Newgass v. St. Louis, A. & T. Ry. Co.*, 54 Ark. 140, 15 S. W. 189; *Chicago, M. & St. P. R. Co. v. Randolph*, 103 Mo. 451, 15 S. W. 437; *Texas Western Ry. Co. v. Cave*, 80 Tex. 137, 15 S. W. 786; *San Antonio & A. P. Ry. Co. v. Hunnicutt*, 18 Tex. Civ. App. 310, 44 S. W. 535.

Appellants cite cases from Kansas and Indiana supporting their contention, but those cases are not authoritative here, for the reason that, contrary to the rule adopted in this state, each of those states holds that in condemnation proceedings the values should be ascertained at the time of the taking and not at the time of the trial. They are therefore based upon a rule which does not obtain in this state.

For these reasons, the ruling of the lower court is sustained, and the judgment is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

RANSOM v. CITY OF SOUTH BEND.

(Supreme Court of Washington. Nov. 22, 1913.)

MUNICIPAL CORPORATIONS (§ 741*)—STREETS—OBSTRUCTIONS—INJURIES TO TRAVELERS—NOTICE—FAILURE TO GIVE—EXCUSE.

Rem. & Bal. Code, § 7998, provides that all claims for damages against any city or town of the second, third, or fourth class must be presented to the council and filed with the clerk within 30 days after the claim accrued. *Held*, that such requirement is mandatory, and that failure of a person, injured by an obstruction in the streets, to file notice of her claim until 73 days after the happening of the accident was not excused by the fact that she was confined to her bed for several months, and was so incapacitated that she was unable to attend to having the claim filed and presented within the time specified.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1562; Dec. Dig. § 741.*]

Department 1. Appeal from Superior Court, Pacific County; A. E. Rice, Judge.

Action by Bertha Ransom against the City of South Bend. Judgment for defendant, and plaintiff appeals. Affirmed.

Corliss & Skulason, of Portland, Or., for appellant. Fred M. Bond and Welsh & Welsh, all of South Bend, for respondent.

GOSE, J. The plaintiff seeks to recover damages for personal injuries resulting from

a fall upon a sidewalk upon one of the streets of the defendant, a city of the third class. She alleges that she sustained the injury in consequence of the defendant's negligence in this: That it permitted an obstruction, consisting of a timber two inches by four inches and about six feet in length, nailed diagonally to the sidewalk, to remain upon the walk for more than a week prior to the date of her injury, without having provided a barrier, light, or other warning to indicate the presence of the danger. She sustained the injury on the 3d day of January, 1910. She presented her claim to the city council, and filed it with the city clerk of the defendant city on the 16th day of March following, 73 days after the accident happened. She alleges that she was confined to her bed "almost continuously for several months, and was so crippled and disabled, both mentally and physically, and suffered such intense pain, that she was wholly unable to attend to the business of having said claim filed and presented" within 30 days after the injury, or until the date of its presentation. After the jury had been impaneled and sworn, and after counsel for the plaintiff had made his opening statement and introduced his first witness, counsel for the city objected to the introduction of any evidence: (1) Because the complaint does not state facts sufficient to constitute a cause of action; and (2) because of the failure of the plaintiff to present her claim within the time prescribed by statute. The court sustained the objection, but gave the plaintiff the privilege of amending her complaint. This she declined to do, whereupon a judgment was entered dismissing the action.

Our statute (Rem. & Bal. Code, § 7998) provides that: "All claims for damages against any city or town of the second, third or fourth class must be presented to the city or town council and filed with the city or town clerk within thirty days after the time when such claim for damages accrued. * * *" We have held that the 30-day limitation in this statute is mandatory; that the statute is clear, definite, and precise in its terms; that a compliance with its provisions is "a condition precedent to the bringing of the action"; and that the giving of the notice "in substantial compliance with the statute must be alleged and proven." *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840; *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113; *Benson v. Hoquiam*, 67 Wash. 90, 121 Pac. 58. We have also held that physical or mental incapacity, running through the entire period fixed by a city charter for presenting claims against the city, excuses a compliance with the charter. *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827. The appellant invites us to apply this rule of interpretation to the statute. This we

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cannot do without trenching upon powers vested exclusively in a co-ordinate branch of the state government. When the lawmaking branch of the government has spoken, the courts may interpret, but cannot add to or take from the clear and unambiguous meaning of the law. To do so would be legislation rather than interpretation. The policy, expediency, and wisdom of a statute are legislative and not judicial questions. *Point Roberts Fish Co. v. George & Barker Co.*, 28 Wash. 200, 68 Pac. 438.

In *State v. Carey*, 4 Wash. 424, 30 Pac. 729, addressing itself to this question, the court said: "Yet, conceding the right of the Legislature to legislate upon the subject, the wisdom of the act, its reasonableness or unreasonableness is a question for legislative discretion, and not for judicial determination. Judge Cooley says, in his work on Constitutional Limitations (5th Ed.) p. 201: 'The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power.'"

Courts of other jurisdictions have construed similar statutes, varying slightly in phraseology, in harmony with our construction of this statute. *Schmidt v. Fremont*, 70 Neb. 577, 97 N. W. 830; *Ellis v. Kearney*, 80 Neb. 51, 113 N. W. 803; *McCollum v. South Omaha*, 84 Neb. 413, 121 N. W. 438; *Touhey v. Decatur*, 175 Ind. 98, 93 N. E. 540, 32 L. R. A. (N. S.) 350; *Huntington v. Calais*, 105 Me. 144, 73 Atl. 829; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553; *Hay v. Baraboo*, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. (N. S.) 84, 115 Am. St. Rep. 977; *Crocker v. Hartford*, 66 Conn. 387, 34 Atl. 98; *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704; *Trost v. Casselton*, 8 N. D. 534, 79 N. W. 1071; *Gribben v. Franklin*, 175 Ind. 500, 94 N. E. 757. In the *Schmidt*, *McCollum*, and *Ellis* Cases it was held that incapacity, caused by the injury which formed the basis of the suit, did not excuse a failure to give the notice within the time prescribed by the statute. In *Davidson v. Muskegon*, 111 Mich. 454, 69 N. W. 670, and *Winter v. Niagara Falls*, 190 N. Y. 198, 82 N. E. 1101, 123 Am. St. Rep. 540, 13 Ann. Cas. 486, the same rule was applied to infants. In *Morgan v. Des Moines*, 60 Fed. 208, 8 C. C. A. 569, the statute was held a bar to a suit by an infant four years of age who had not complied with the terms of the statute. In the *McCollum* Case the court said: "The effect of the holding is that the Legislature may fix a limitation applicable to all, and that exceptions omitted from the statute do not exist." In the *Ellis* Case the same view is expressed in the following language: "It is not the province of the courts to make

the law, or read into it exceptions not intended by the lawmakers." In the *Schmidt* Case the court observed that it had no power to "ingraft an exception upon it [the statute] by construction."

The appellant argues that, because we have held that there is a common-law liability upon a municipality failing to maintain its highways in reasonably safe condition for travel (*Collins v. Spokane*, supra, and kindred cases), the cases from other jurisdictions, such as *Nebraska* and *Indiana*, where the liability of a municipality for defective streets is held to exist only in virtue of the statute, are not directly in point. To the extent that they announce the rule that courts cannot ingraft an exception into a statute where the statute makes no exception, they announce a correct rule of interpretation.

It is also argued that the statute should be interpreted according to its spirit rather than its letter, citing, among other cases, *Gluricevic v. Tacoma*, 57 Wash. 329, 106 Pac. 908, 28 L. R. A. (N. S.) 533. We there said that, in interpreting a statute, the court should keep in mind "the mischief to be met." The mischief which the statute seeks to avoid is the presentation of claims long after the accident occurred, and at a time when the opportunity for investigating the merits of the claim and the claimant may well be presumed to have been lost or much abridged.

The New York courts have held that a failure to serve a preliminary notice required by a legislative charter (within 48 hours after the happening of the accident) is not a bar to an action, where the injured party was unable to transact business during the time fixed in the charter for the service of the notice. *Walden v. Jamestown*, 178 N. Y. 213, 70 N. E. 466. This holding was rested upon two maxims of the law: (a) "That a thing which is in the letter of a statute is not within the statute itself, unless it is within the intention of the statute makers," and (b) that the law does not seek "to compel a man to do that which he cannot possibly perform." These are sound maxims when soundly applied. There is another maxim, however, which we apprehend is even more potent, viz., that the Legislature is presumed to have meant what it said. The notice in that case was served 72 hours after the accident occurred. The court said that this "was a substantial compliance with the statute."

We felt constrained to adopt the view that the Legislature thought it best not to except either incapacity or disability.

Affirmed.

CROW, C. J., and MAIN, ELLIS, and CHADWICK, JJ., concur.

CUDIHEE v. PHELPS, County Auditor, et al.

(Supreme Court of Washington. Nov. 5, 1913.)

1. STATUTES (§§ 107, 125*)—CONSTITUTIONAL AMENDMENT—SUBMISSION—BILL—TITLE.

Laws 1911, c. 108, proposing to submit a recall amendment to the Constitution, was entitled "An act to amend article 1 of the Constitution of the state of Washington authorizing and empowering the voters to call a special election at any time to recall and discharge any public elective officer and elect his successor by adding thereto at the end of said article one, two new sections which shall be numbered sections 33 and 34 of said article one." The act itself, however, was narrower than the title in that the latter purported to cover all public officers and the election of successors of those recalled, while the proposed amendment set forth in the body of the act excepted judges therefrom and made no provision relative to the election of successors. *Held*, that the title sufficiently covered the subject-matter of the act and was not objectionable as embracing more than one subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134, 187-191; Dec. Dig. §§ 107, 125.*]

2. CONSTITUTIONAL LAW (§ 7*)—CONSTITUTIONAL AMENDMENT—PASSAGE—JOURNAL ENTRIES—"ENTER."

Const. art. 23, § 1, provides that amendments to the Constitution may be proposed in either branch of the Legislature and, if agreed to by two-thirds of the members elected to each of the two houses, shall be "entered" on their journals with the ayes and noes thereon and be submitted to the electors for their approval at the next general election. *Held*, that the word "enter," as so used, did not mean that the entire constitutional amendment proposed should be recorded in full on the journals of the House and Senate but that, where the amendment is proposed in the form of a bill with a proper title, it is sufficiently entered on the journals by an entry of its number and the full title of the bill.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 3, 4; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2400-2408.]

3. CONSTITUTIONAL LAW (§ 9*)—STATE CONSTITUTION—AMENDMENT—PUBLICATION—TIME.

Const. art. 23, § 1, provides that the Legislature shall cause proposed amendments to the Constitution that are to be submitted to the people to be published for at least three months next preceding the election in some newspaper in every county where a newspaper is published, throughout the state. Laws 1911, c. 108, providing for the submission of a proposed constitutional amendment authorizing the recall of elective public officers, provided by section 2 that the Secretary of State should cause the amendment proposed to be published for three "weeks" next preceding the election, at which the amendment was to be submitted, in some weekly newspaper in every county where a newspaper was published, throughout the state. *Held*, that the word "weeks" as used in section 2 was a misprision for months, the legislative intention being that the publication should be for the constitutional term and that the Secretary of State had power to publish the proposed amendment for three months, and, having done so prior to submission of the amendment, it did not fail of adoption because of such error.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7; Dec. Dig. § 9.*]

4. CONSTITUTIONAL LAW (§ 9*)—CONSTITUTIONAL AMENDMENT—SUBMISSION TO VOTERS—STATEMENT ON BALLOT.

The proposed constitutional amendment for the recall of elective officers having been published in full for a period of three months in every county of the state before the election at which it was submitted, as provided by Laws 1911, c. 108, the fact that the statement of the question on the ballot, like the title of the act, was somewhat broader than the provisions of the proposed amendment in that it seemed to refer to all officers without exception, and also to the election of their successors when the amendment itself excepted judges, and did not provide for the election of successors, etc., did not render the ballot misleading so as to invalidate the submission.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7; Dec. Dig. § 9.*]

5. OFFICERS (§ 70½, New, vol. 17 Key-No. Series)—ELECTIVE OFFICERS—RECALL HEARING.

Const. art. 1, §§ 33, 34, added by amendment adopted 1912, providing for the recall of elective officers and declaring that whenever a petition demanding the recall of an officer has been filed, reciting that such officer has committed acts of malfeasance or misfeasance while in office or has violated his oath of office, the county auditor shall prepare a synopsis of the charge or charges to be embodied in a formal petition which may be circulated for signatures and, when signed by 25 per cent. of the voters and properly verified, shall be ground for calling an election to determine the question of recall, does not confer on the officer whose recall is attempted the right to a judicial hearing to determine the truth of the charges made against him before the question of his recall and discharge can be submitted to the people at an election called for that purpose.

6. OFFICERS (§ 61*)—ELECTIVE OFFICERS—RECALL—STATUTES.

Laws 1913, c. 146, relating to the recall of elective officers, amply provided for the carrying out of the provisions of the recall amendment to the Constitution, adopted in 1912, adding sections 33 and 34 to article 1 of the Constitution, and was not defective in requiring that the truth of the charges on which the officer is sought to be recalled be triable before the people rather than before the courts.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. § 61.*]

7. OFFICERS (§ 61*)—RETROACTIVE OPERATION—RECALL.

Const. art. 1, §§ 33, 34, providing for the recall of elective officers, was adopted by the people at the general election in 1912, and Laws 1913, c. 146, was thereafter passed to carry the constitutional provisions into effect; the statute taking effect in June, 1913. Complainant was elected sheriff of King county at the general 1912 election, and, after the act of 1913 took effect, a petition to recall him was filed for acts of malfeasance occurring prior to that time. *Held*, that the act was remedial in effect, and, complainant's misconduct having occurred subsequent to the adoption of the constitutional amendment providing for recall, the act of 1913 should be construed as making the recall effective from the date of the adoption of the constitutional amendment.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 90; Dec. Dig. § 61.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Suit by Edward Cudihee against Byron Phelps, as Auditor of King County, and an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

other. Judgment for defendants, and plaintiff appeals. Affirmed.

Walter S. Fulton and William H. White, both of Seattle, for appellant. Brady & Rummen, John F. Murphy, and Samuel Morrison, all of Seattle, for respondents.

PARKER, J. The plaintiff Edward Cudihee, sheriff of King county, commenced this action in the superior court for that county, seeking to have the defendant Byron Phelps, as county auditor, enjoined from taking any action upon a petition filed in his office by the defendant John M. Young, a citizen and voter of King county, demanding the recall and discharge of Edward Cudihee, as sheriff, under the provisions of sections 33 and 34 of article 1 of the state Constitution and chapter 146 of the Laws of 1913, enacted in pursuance thereof. The case proceeded to final hearing upon the pleadings and stipulated facts, resulting in judgment, denying the relief prayed for, and a dismissal, from which the plaintiff has appealed to this court. We shall notice the facts as may become necessary in the discussion of the several contentions made by counsel for appellant.

[1] The main contentions of counsel for appellant have to do with the adoption of sections 33 and 34, art. 1, as an amendment to the state Constitution at the general election of 1912, and their claim that those sections never became a valid portion of the Constitution. It is first contended that the act of the Legislature (chapter 108, p. 504, Laws of 1911) proposing and submitting this amendment to the people is void and ineffectual because of its insufficient and misleading title. The title and body of that act, in so far as we need notice them in this connection, read:

"An act to amend article one (1) of the Constitution of the state of Washington, authorizing and empowering the voters to call a special election at any time to recall and discharge any elective public officer and to elect his successor, by adding thereto at the end of said article one (1) two new sections which shall be numbered sections 33 and 34 of said article one (1).

"Be it enacted by the Legislature of the state of Washington:

"Section 1. That at the general election to be held in this state on the Tuesday next succeeding the first Monday in November, 1912, there shall be submitted to the qualified electors of the state, for their adoption and approval or rejection, an amendment of article one (1) of the Constitution of the state of Washington, authorizing and empowering the voters to call a special election at any time to recall and discharge any elective public officer and to elect his successor, by adding thereto at the end of said article sections 33 and 34 of said article one (1), and which shall read, as follows:

"Article 1.

"Sec. 33. Every elective public officer in the state of Washington except judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.

"Sec. 34. The Legislature shall pass the necessary laws to carry out the provisions of section thirty-three (33) of this article, and to facilitate its operation and effect without delay: Provided, that the authority hereby conferred upon the Legislature shall not be construed to grant to the Legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people. The percentages required shall be, state officers, other than judges, senators and representatives, city officers of cities of the first class, school district boards in cities of the first class; county officers of counties of the first, second and third classes, twenty-five per cent. Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five per cent."

We shall assume, for argument's sake only, that, when the Legislature proposes and submits to the people a constitutional amendment by bill instead of by resolution, the title of such bill must conform to the requirements of section 19, art. 2, of the Constitution, providing that: "No bill shall embrace more than one subject, and that shall be expressed in the title." A comparison of the title with the body of the act will readily show that, instead of the title being narrower than the body of the act, it is in fact broader in that it seems to refer to all public officers and to the election of successors, while the proposed amendment set forth in the body of the act excepts judges therefrom and makes no provision relative to the election of successors. That the title expresses the entire subject-matter of the body of the act and proposed amendment, if we treat the broader terms of the title merely as surplus-

age, seems to us quite plain. The argument of counsel seems to be that, because of its broader expressions, the title is misleading. We are not able to agree with this contention. The view of this court as to the sufficiency of the title of an act is tersely stated by Judge Fullerton, speaking for the court, in *Shortall v. Puget Sound Bridge, etc., Co.*, 45 Wash. 290, 294, 88 Pac. 212, 213 (122 Am. St. Rep. 899), as follows: "This court has uniformly held that the title need not be an index of the act but is sufficient if it so indicates its substance and scope as to put a person of ordinary intelligence upon notice and inquiry as to its provisions." *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728; *National Surety Co. v. Bratnaber Lumber Co.*, 67 Wash. 601, 122 Pac. 337.

Clearly this title would give to a person of ordinary intelligence notice that the proposed amendment related to the recall of officers. We do not think that the fact that the title seems to indicate that the proposed amendment relates to the recall of all officers, without exception, and to the election of successors lessens the force of the fact that the title clearly covers the whole subject-matter of the proposed amendment and fairly gives notice thereof. Nor do we think that the title is subject to the objection that it embraces more than one subject, assuming that such objection would be available against the title, apart from such objection to the body of the act. Surely the recall and discharge of an officer and the choosing of his successor can be legislated upon as one subject in a single act, and of course exceptions of certain persons or things from the operation of the effect of a law would not relate to a separate subject-matter. The Supreme Court of Missouri, in *State v. Bronson*, 115 Mo. 271, 276, 21 S. W. 1125, 1126, dealing with a title which was broader in its terms than the act, disposing of the contention that the title was insufficient in the light of a constitutional amendment in substance the same as ours, said: "Now the precise point of objection here is, not that this act contains more than one subject, but that the subject is not clearly expressed in the title in this: That the title indicates a law relating to all the public schools in the state, while the act itself excludes from its operation cities and districts having more than 100,000 inhabitants. In other words, the objection is that the title is broader than the act itself. The Constitution does not say the title shall be as narrow as the act. What it says on this point is that the single subject shall be clearly expressed in the title. The fact, therefore, that the title is broader than the act can be no objection, unless the title is comprehensive enough to admit of disconnected and incongruous subjects. Says Cooley: 'The generality of a title is therefore no

objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection.' Cooley on Constitutional Limitations (6th Ed.) 172. The fact that the title speaks of 'all the public schools within this state,' while the proviso to section 11 excludes from the operation of the act cities and districts having more than 100,000 inhabitants, does not make the law unconstitutional." This is quite in keeping with the views of this court expressed in former decisions touching the sufficiency of titles to acts and also finds support in the following authorities: *State ex rel. v. Frazier*, 36 Or. 178, 59 Pac. 5; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *McEl-downey v. Wyatt*, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609, 615; 1 Lewis' *Sutherland's Statutory Construction* (2d Ed.) § 124.

We are of the opinion that the title to the act proposing and submitting to the people this constitutional amendment sufficiently expresses the subject-matter of the act and the proposed amendment. We have preferred to deal with the question of the sufficiency of the title to the act rather than with the question of the necessity of a title thereto, because of the manner in which the record entry of the act appears in the Senate and House Journals.

[2] It is contended that there was not made upon the journals of the Senate and House such entry or record of the proposal of this Constitutional amendment as is required by the Constitution, and that therefore it was not legally proposed and submitted to the people. The proposal of amendments to the Constitution by the Legislature and the making of record thereof is provided for therein by section 1, art. 23, as follows: "Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two Houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this Constitution." The amendment to the Constitution proposed by this act was not recorded in full in the Senate Journal. The bill for the act was introduced in the House and designated as "House Bill No. 62." After its passage by the House, it went to the Senate. It was there read three times in due course and passed by the requisite majority; the vote thereon by "ayes" and "noes" being properly recorded in the journal, reference to the bill being therein made as "House Bill No. 62," followed by its title recorded in full. Reference to the bill was

made in this manner in the journal upon its first and second readings as well as upon its third reading and final passage. Our attention is here called only to the Senate Journal entries; the argument of counsel assuming that the House Journal entries were made in the same manner. This, it is insisted, was not such entry of the proposed amendment upon journals of the Senate and House as is required by section 1, art. 23, of the Constitution, above quoted. It is argued that the words "shall be entered on their journals" constitutes a mandatory requirement that the proposed amendment shall be recorded in full upon the journals, and that a reference to such an amendment, even though proposed in the form of a bill with a proper title as such, by its number and title set out in full, is not an entering upon the journals within the meaning of this constitutional requirement. It is apparent, then, that this branch of the case turns upon the meaning of the word "enter" or "entered" is used in section 1 of article 23 of the Constitution. The decisions are not in harmony upon this question. Some hold that such a constitutional provision is complied with by a memorandum entry made upon the journals by reference to the proposal, using the language of the title of the proposing act or resolution or other appropriate language if the proposal be by resolution without a title, while others hold that such a constitutional provision is complied with only by a copying of the entire proposed amendment in the journals of the Senate and House.

The Supreme Court of California, in the case of *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 12 Pac. 801, 1 Am. St. Rep. 17, reached the former conclusion, and we think correctly. Justice Temple, speaking for the court in that case, said: "The only question submitted is whether the constitutional amendment No. 1, ratified by the electors at the general election in 1884, being an amendment to section 19, art. 11, was proposed by the Legislature as required by section 1, art. 18, of the Constitution. That section provides that amendments may 'be proposed in the Senate and Assembly, and, if two-thirds of all the members elected to each of the two Houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in the journals, with the yeas and nays taken thereon,' etc. The objection is that the proposed amendment was not entered in the journal of either House, as required by the Constitution. It was not copied into the journal, but there was entered an identifying reference, such as is always entered in regard to legislative bills; that is, it was proposed as a Senate Bill and was referred to by title and number. The yeas and nays were entered as directed. It is agreed that the amendment thus proposed was submitted to the people and received a very large majority of the votes cast. * * *

All admit that the constitutional requirement must be strictly performed. But it does not follow from this that the language of the instrument must be understood literally. The same rules of construction must be applied, to ascertain what its requirements are, as though it were not mandatory and prohibitory. And we think, when an act commanded or authorized may be done in different ways, either of which would be a strict compliance with the terms of the instrument understood in some common and popular sense, either mode may be pursued, unless some reason is discoverable for holding that one of such modes only will answer. If, for instance, the direction to enter the amendment in the journal is complied with, in some usual and popular sense of the language, either by copying the amendment into the journal or by placing upon the journal an identifying reference only, either will do unless the context shows a different intention. Now the word 'enter' primarily means to go in, or to come in, but has many derivative meanings, and is often employed in elliptical expressions, and is quite apt to be so used that the literal or most obvious meaning cannot be attributed to it. We read, for instance, in the laws of Congress that citizens may enter at the Land Office a tract of land, and the expression is repeated in different forms many times. We are often told that a certain horse has been entered for a race or an animal has been entered at a fair. What is really done in each instance is to make a record of certain important facts for preservation or notice. And such is certainly a very ordinary meaning of the word 'enter,' when used in this derivative sense; that is, to register the essential facts concerning the thing said to be entered. And we think it may be fully admitted that the most natural and obvious meaning of the word when employed in this derivative sense is to copy, without greatly affecting the argument. We find near the title page of nearly every book printed that it has been entered in the office of the librarian of Congress. What is really left with the librarian is the title page of the proposed book, and this constitutes the entry, although after it is printed the author is now required to present a copy of the book for the congressional library. We sometimes read that a certain play of Shakespeare was entered at Stationers' Hall. We find that the entry really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word and of the phrase in which it occurs might be multiplied indefinitely, but these are enough to show that this usage is quite common. Now, if we substitute in all these and like cases the word 'copy' or the phrase 'enter at large' for the word 'enter' we are conscious at once that a great change has been made. Indeed the mere fact that

the qualifying words, 'at large,' 'at length,' 'in full,' do so often accompany the word 'enter' is proof that all feel that it is not a synonym of the word 'copy.' * * * This is sufficient to uphold the amendment, unless we can see from the context that something else was meant. We perceive no such intent. The evident purpose of the entire provision doubtless was to preserve a record of the vote. As a majority controls the journals, it may have been apprehended that it might be made to appear that the proposal was duly passed, although lacking the requisite majority, and so it was required that the yeas and nays be entered. But, however this may be, the principal thing is the record of the yeas and nays, and this purpose is accomplished as perfectly by the entry made as it would be by any other. As to preserving the identity of the amendment proposed, there is no greater difficulty in this matter than with reference to bills."

The Maryland Court of Appeals in *Worman v. Hagan*, 78 Md. 152, 163, 27 Atl. 616, 617, 21 L. R. A. 716, 719, reached the same conclusion, making the following observations: "The fourteenth article of the Constitution prescribes the mode in which it may be amended. It declares that 'the General Assembly may propose amendments to this Constitution: Provided that each amendment shall be embraced in a separate bill, embodying the article or section as the same will stand when amended and passed by three-fifths of all the members elected to each of the two Houses, by yeas and nays, to be entered on the journals with the proposed amendment.' We find that the Legislature, by Act 1890, c. 255, proposed an amendment to section 1 of article 7, and that the act was passed by three-fifths of all the members elected to each House. It was stated on the journal of each House that 'An act to amend section one of article seven of the Constitution of this state' was passed, and the yeas and nays are set forth, being more than three-fifths of all the members elected to each House. The requirements of the Constitution were in all respects observed, unless it is necessary, as maintained by the appellants, that the act should be set out verbatim on the journals. Each House had the bill in its possession when it passed it, and the bill was fully and clearly identified by its title. There would have been no greater certainty if every word of it had been recited. We must give a reasonable construction to the words of the Constitution. There was but one bill with this title. The entries on the journals of the two Houses that this bill had been passed by the yeas and nays, which were stated, described their legislative action as distinctly as it could be expressed. The yeas and nays were associated as closely as possible with the enactment contained in the bill; that is to say, with the proposed amendment. It was not in the power of

any person to mistake the meaning of the entry."

The following decisions are to the same effect: *State v. Herried*, 10 S. D. 109, 72 N. W. 93; *Prohibitory Amendment Cases*, 24 Kan. 700; *In re Senate File No. 31*, 25 Neb. 864, 41 N. W. 981. The Supreme Courts of Iowa and Nevada entertain a contrary view. *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *State v. Tuffy*, 19 Nev. 391, 12 Pac. 835, 3 Am. St. Rep. 895. / Some cases have come to our notice involving constitutional provisions requiring proposed amendments to be "entered in full" upon the legislative journals, but we think the decisions rendered under such provisions are of no aid here. We are of the opinion that the weight of authority, as well as the better reason, supports the view that it is sufficient compliance with our Constitution to enter upon the journals of the Senate and House reference to the proposed amendment, using the language of the title of the proposing act, as was done in the proposal of this amendment. We conclude that this amendment has not failed of lawful adoption because of the manner in which record thereof was made of its proposal by the Legislature.

[3] It is contended that the proposed constitutional amendment was not authoritatively published in the several counties of the state as required by article 23, § 1, of the Constitution, which provides: "The Legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding the election, in some weekly newspaper, in every county where a newspaper is published throughout the state."

By section 2 of the act proposing the amendment, the Legislature directed publication thereof as follows: "The Secretary of State shall cause the amendment proposed in section one of this act to be published for three weeks next preceding the said election therein described in some weekly newspaper in every county where a newspaper is published throughout the state." This, it will be noticed, when read literally, is an authorization for the Secretary of State to publish the proposed amendment for three weeks instead of three months, as specified in the Constitution. It is insisted that this is fatal to the validity of the proposed amendment regardless of the time it may have been actually published by the Secretary of State; it being argued that any publication by the Secretary of State beyond the time specified in the act would be a publication without authority and therefore of no avail. It is conceded that the Secretary of State did publish the proposed amendment for three full months next preceding the general election of 1912 in a weekly newspaper printed and published in each and every county of the state. Counsel invoke the general rule

that an election called without authority of law will be held void, regardless of how fairly conducted. The question, then, really is: Was the publication for three months prior to the election made by the Secretary of State without lawful authority? Such publication was clearly sufficient unless rendered ineffectual by the mere fact that the words "three weeks" appear in section 2 of the act as above quoted instead of the words "three months" as required by the Constitution. After a reading of this entire act purporting to submit to the people this constitutional amendment, having in mind its manifest intent, it seems to us nothing could be plainer than that the Legislature intended to propose and cause to be submitted to the people of the state this amendment to the Constitution in such manner that it would be constitutionally and legally adopted if ratified by a majority of the electors voting thereon. The very first declaration in the act is that, at the general election to be held in 1912, "there shall be submitted to the qualified electors of the state, for their adoption and approval or rejection, an amendment of article 1 of the Constitution of the state of Washington, * * * and which shall read, as follows." In the light of this declaration, we cannot escape the conclusion that the words "three weeks," found in section 2 of the act, as above quoted, were intended by the Legislature to read "three months," so as to meet the requirements of the Constitution. To hold otherwise would be to convict the Legislature of an intention to pass this submission act without any purpose whatever, unless it be to make a mere pretense of satisfying what they conceived to be a public demand, but with a "joker" in the proposal, to the end that the will of the people might ultimately be defeated should they adopt the proposed amendment at the polls. We are of the opinion that the proposed amendment did not fail of adoption because of the use of the words "three weeks" instead of "three months" in section 2 of the act; the proposed amendment having been published in such manner as to satisfy all of the requirements of the Constitution by the Secretary of State, the officer who was by the Legislature directed to publish the same. We conclude that the Legislature intended the Secretary of State to so publish the proposed amendment, to the end that it might be constitutionally adopted, if ratified by a majority of the electors voting thereon.

[4] Some contention is made that the title of the act proposing the amendment to the Constitution, as well as the expression of the subject-matter of the amendment upon the ballots used by the voters, was misleading to the voters. Section 3 of the act provides for the form of ballot to be used as follows: "There shall be printed on all ballots provided for the said election, the words: 'For the proposed amendment to

article one (1) of the Constitution, by adding thereto at the end of said article one (1) two new sections to be numbered sections 33 and 34 of said article one (1) authorizing and providing for the recall and discharge of any elective public officer and election of his successor.' 'Against the proposed amendment to article one (1) of the Constitution, by adding thereto at the end of said article one (1) two new sections to be numbered sections 33 and 34 of said article one (1), authorizing and providing for the recall and discharge of any elective public officer and election of his successor.'" This statement of the question on the ballot, it will be noticed, is, like the title, somewhat broader than the provisions of the proposed amendment in that it seems to refer to all officers without exception and also to the election of successors. The title of the act, we have seen, served its purpose as such, and was not misleading or deceptive to the members of the Legislature, and was therefore sufficient. The same, we think, may be said as to this statement of the subject-matter of the proposed amendment found upon the ballot. Neither the title of the act nor this statement upon the ballot constituted the notice given to the people of the contents of the proposed amendment. That, as we have seen, was published in full for a period of three months in every county in the state. So far as the people were informed of the contents of that amendment, its publication constituted their notice. The statement upon the ballot was not required to be more than a mere reference, in very general terms, to the constitutional amendment to be voted on. *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 110 N. W. 1113, 10 L. R. A. (N. S.) 149, 15 Ann. Cas. 781. This statement upon the ballot clearly would direct the mind of a person of ordinary intelligence to this proposed amendment. No other proposed constitutional amendment of like import was then before the people to be voted upon. The ballot manifestly had reference to this particular proposed constitutional amendment, and a vote in the terms as expressed upon the ballot for or against such amendment was a vote for or against this amendment, and no person of ordinary intelligence could have thought otherwise. We are of the opinion that the amendment did not fail of adoption because of the manner of stating the subject-matter thereof upon the ballot.

It must be conceded that there has attended the proposal and submission of this constitutional amendment to the people some informalities out of keeping with ideally correct methods of legislation. But it seems to us the objections claimed to render void the proposal and submission of the amendment to the people deal with matters of form rather than substance. This amendment received favoring its adoption 112,320 votes, while against its adoption there were

but 46,372. Not only did the people have ample legal notice, as we have seen, of the contents of the proposed amendment prior to the election of 1912, and of the fact that it was to be voted upon at that election, but it is a matter of common history, to which the court will not shut its eyes, that the subject of recall and this proposed constitutional amendment thereon was one of the public questions uppermost in the minds of our people from the time of the passage of the act proposing the amendment until the vote was had thereon at the 1912 election, a period of nearly two years. In conclusion upon this branch of the case, we quote with approval the language of Judge Haney, speaking for the Supreme Court of South Dakota in *State v. Herried*, 10 S. D. 115, 72 N. W. 95: "It is well settled that provisions of a Constitution, while mandatory, are, like statutes, to receive a fair and reasonable construction with the view of ascertaining the intention of the two Houses of the Legislature and the people in their proceedings taken to effect an amendment; and it is the duty of courts, when that intent is ascertainable from the proceedings taken, to carry it into effect. The action of the two Houses, and the will of the people, as expressed by their vote, should not be set aside or disregarded upon purely technical grounds when no material requirement of the Constitution has been omitted and where the proceedings taken clearly manifest the intention of those bodies and the people to amend the fundamental law." We conclude that the amendment was lawfully submitted to and adopted by the people of the state and thereby became a part of our fundamental law.

[5] It is contended that the Legislature has not passed the necessary laws to carry out the provisions of this constitutional amendment, even conceding that it has been legally adopted by the people. The Legislature of 1913 passed an act manifestly intended for that purpose. Laws 1913, c. 146, p. 454. That act provides in substance that, whenever a legal voter desires to demand the recall and discharge of an elective officer, he shall prepare a typewritten charge, reciting that the officer has committed an act or acts of malfeasance or an act or acts of misfeasance while in office, or has violated his oath of office, stating the act or acts complained of in concise language, verify the same and file it, in case the officer whose recall is demanded be a county officer, with the county auditor. Thereupon the county auditor is required to prepare a synopsis of the charge or charges, constituting a concise statement thereof, not to exceed 200 words, which synopsis is to be embodied in a formal petition, which petition, when so prepared and printed, may be circulated for signatures of voters, and, when signed by 25 per cent. of the legal voters of the county and properly verified, becomes au-

thority for the county auditor calling an election to determine the question of recall and discharge of the officer whose recall and discharge is sought. In this case respondent Young had filed such a petition, the sufficiency of which is not challenged, and the auditor was proceeding to make the synopsis and prepare the formal printed petition for the signatures of the necessary 25 per cent. of the voters when this proceeding was commenced in the superior court. The argument of learned counsel for appellant seems to be that since the constitutional amendment provides that an officer shall be subject to recall whenever a petition demanding his recall has been filed, "reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or who has violated his oath of office," there is thereby contemplated a hearing of a judicial nature to determine the truth of the charges made against such officer before the question of his recall and discharge can be submitted to the people at an election called for that purpose. In other words, the argument seems to be that, since the officer is to be discharged for cause, there is involved, at least in a measure, his right to the office as a property right. We are not unmindful of the general rule that, as between two persons claiming an office, the right thereto is, in a sense, regarded as a property right when involved in a judicial proceeding, but we are unable to see that there is any right of that nature here involved, for as between the officer and the public, so far as his right to hold the office is concerned, there is manifestly no property right whatever involved. The people, speaking in the manner provided by law, may discharge their public officers for any cause, or without any cause, as their laws may provide. Indeed, the people's rights are as complete in that respect as when they choose such officer. In other words, as against the people, a public officer, their servant, has no rights whatever, so far as his possession of the office is concerned, which may not be ignored by the people speaking in a lawful manner. While it seems true that, under this constitutional provision, an officer is to be removed for cause only, yet the question being purely a political one, unless expressly provided otherwise by statute or Constitution, it is manifest that the tribunal before which the sufficiency of the cause is to be tried is that of the people. It may be that the courts have jurisdiction to determine the sufficiency of the statement of the allegations made as cause for removal if presented in a proper proceeding involving the question of the calling of the election, but the trial of the question of whether such cause actually exists, and as to whether the officer shall be discharged, is to be had before the tribunal of the people and decided by them at the polls. It is not the trial of a question of life, liberty, or property; hence

there is not involved any question of due process of law guaranteed by the state or federal Constitution, cognizable by the courts.

[6] Express constitutional and statutory provisions might make such question triable in the courts, but we have no such provisions. We are of the opinion that the act of the Legislature of 1913 amply provides for the carrying out of the provisions of the amendment relating to the recall of public officers, and that it is not defective in that the truth of the charges upon which the officer is sought to be recalled is triable before the people rather than before the courts.

[7] Finally it is contended that the act of 1913, providing for the carrying out of the provisions of the constitutional recall, is not applicable to this case because it is not retroactive in its effect. This law went into effect in June, 1913. The acts of malfeasance charged against appellant, upon which it is sought to have him recalled and discharged, occurred before that time. The right of recall, it is plain, existed in the people immediately upon the adoption of this constitutional amendment which occurred at the general election in 1912, at which election appellant was also elected sheriff of King county. His alleged acts of malfeasance occurred, if at all, after that time and after the right of the people to invoke the recall provisions of this amendment had become fixed, though there was no remedial statute providing the method of its exercise. We think this statute should be construed as to its retroactive effect like any ordinary remedial statute. It is manifestly for the purpose of making effective the exercise of a right which was in existence before its passage. In the text of 36 Cyc. 1209, it is said: "In accordance with the general rule that remedial statutes should be given a liberal construction, they will be freely construed to have a retrospective operation whenever such seems to have been the intention of the Legislature, unless such a construction would impair the validity of contracts, disturb vested rights, or create new obligations." This principle, we think, renders appellant's contention as to the retroactive effect of the law unavailing.

We conclude that the judgment must be affirmed. It is so ordered.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

STATE ex rel. LYNCH et al. v. FAIRLEY et al., City Council.

(Supreme Court of Washington. Nov. 1, 1913.)

1. MUNICIPAL CORPORATIONS (§ 124*)—ELECTIONS—RECALL—GENERAL STATUTES.

As both the constitutional amendment of 1912, which was incorporated in the Constitution as article 1, §§ 33, 34, and Laws 1913, c. 148, enacted in pursuance of the amendment,

are expressly made applicable to cities of the first class and constitute the general law on the subject of the recall of officers, they supersede the charter provisions of such cities relating to the recall, and a petition for recall election must comply with their requirements to be acted upon.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 290-297; Dec. Dig. § 124.*]

2. CONSTITUTIONAL LAW (§ 9*)—CONSTITUTIONAL AMENDMENT—RECALL OF OFFICERS.

The constitutional amendment of 1912, relating to the recall of officers, which was incorporated in the Constitution as article 1, §§ 33, 34, is not invalid because of irregularities in its proposal and submission to the people.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 5, 7; Dec. Dig. § 9.*]

Appeal from Superior Court, Spokane County.

Mandamus by the State, on the relation of C. B. Lynch and another, against Robert Fairley and others, composing the city council of the city of Spokane. From a judgment denying the writ, relators appeal. Affirmed.

Burcham & Blair, of Spokane, for appellants. H. M. Stephens, of Spokane, for respondent.

PARKER, J. These actions are brought here by relators seeking a review and reversal of judgments of the superior court for Spokane county denying mandamus to compel the city council of that city to order a recall election submitting to the voters the question of the recall of two of its councilmen, under the provisions of its charter. The superior court denied the relief prayed for upon the ground that the recall provisions of the Spokane charter are superseded by the provisions of the amendment to the state Constitution of 1912, being sections 33 and 34 of article 1 thereof, and chapter 148, Laws 1913, enacted in pursuance of that amendment. The contention is made by counsel for relators, rested upon section 10, art. 11, of the Constitution, permitting cities of more than 20,000 inhabitants to frame and adopt charters for their own government, that the recall provisions of the Spokane charter, which was framed and adopted in pursuance of section 10, art. 11, of the Constitution, is not superseded by this amendment and the law of 1913 passed in pursuance thereof, providing generally for the recall of public officers.

[1] We agree with the learned trial court that this contention is not well founded. Both the constitutional amendment and the law of 1913 enacted in pursuance thereof are made applicable to cities of the first class by specific reference therein made to such cities and constitute a general law upon the subject of the recall of officers of such cities as well as the recall of officers of the state and other political subdivisions of the state.

It has become the settled law of this state that freehold city charters framed in pursuance of the permission granted by section 10, art. 11, of the Constitution, are controlled

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by general laws. State ex rel. Webster v. Superior Court, 67 Wash. 37, 43, 120 Pac. 861, Ann. Cas. 1913D, 78. It is conceded that the petitions for recall of the city councilmen here involved do not conform to the constitutional amendment, nor the law of 1913 enacted in pursuance thereof, either in the allegations of cause for the recall of such councilmen nor in the number of signatures thereto required by the constitutional amendment and law of 1913, nor does the city charter of Spokane make the requirements in that regard as are found in the constitutional amendment and the law of 1913. We are of the opinion that this constitutional amendment and law of 1913 enacted in pursuance thereof constitute a general law upon the subject of recall of city as well as other officers, the requirements of which must be conformed with as a prerequisite to the holding of a recall election.

[2] Contention is made that the constitutional amendment of 1912 has not become a valid part of our Constitution by reason of irregularities in its proposal and submission to the people. This question we have dealt with, and held to the contrary of such contention, in our decision just rendered in Cudlhee v. Phelps et al., 136 Pac. 367.

We conclude that the judgments of the trial court must be affirmed. It is so ordered.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

LEAVENWORTH et al. v. BRANDON et ux.
(Supreme Court of Washington. Nov. 21, 1913.)

1. SALES (§ 340*)—ACTION FOR PRICE—COMPLAINT—THEORY OR FORM OF ACTION.

Where a complaint alleged a sale and delivery of merchandise, its value, the amount paid, and the balance claimed as due, and then alleged the execution and delivery of promissory notes under an agreement that the amount due should bear interest from the date of the notes, the action was upon an open account, and not on the notes; they being merely evidentiary.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

2. APPEAL AND ERROR (§ 852*)—HARMLESS ERROR—THEORY OF TRIAL.

In an action on an open account for merchandise, evidenced by notes, the trial court held that the action was on an open account, and struck out the paragraph setting forth the notes. Thereafter it reinstated such paragraph and treated the complaint as stating two causes of action. In deciding the case it ruled that there was but one cause of action on an open account, and that the notes were merely evidentiary, and rendered judgment on that theory. Held, that the court having reached the right conclusion and judgment, the fact that it wavered during the trial in its opinion as to the nature of the action did not destroy the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 852.*]

3. PLEADING (§ 364*)—COMPLAINT—EVIDENTIARY MATTERS.

In an action on an open account for merchandise evidenced by notes, the notes, being merely evidentiary matter, had no place in the complaint, and the paragraph setting them out was properly stricken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156-1162; Dec. Dig. § 364.*]

4. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

In an action on an open account evidenced by notes, where the trial court reached the correct conclusion and judgment, the reinstatement of a paragraph of the complaint, setting out the notes after it had once been stricken, was not reversible error, though evidentiary matter should not be included in the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

5. PARTNERSHIP (§ 239*)—LIABILITY—COMMENCEMENT OF LIABILITY.

Where a contract of partnership expressly related back and covered a prior enterprise of one of the partners for the purpose of which goods were furnished him by a third person, the other partner was liable therefor.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 487, 488, 495-499; Dec. Dig. § 239.*]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by L. W. Leavenworth and another, partners as L. W. Leavenworth & Co., against Anton Brandon and others. From a judgment for plaintiff, the defendant Brandon appeals. Affirmed.

James T. Lawler and C. M. Miller, both of Seattle, for appellant. Walter B. Allen, of Seattle, for respondents.

MORRIS, J. Respondents brought this action to recover a balance claimed to be due upon account of certain merchandise sold Kalberg & Brandon, a partnership. Judgment having been rendered as prayed for, Brandon appeals.

[1, 2] He contends that the action is on a number of promissory notes executed by Kalberg for a debt contracted prior to the formation of the partnership relation, and hence no liability can be enforced against him. Complaint is also made of the ruling of the trial court in striking paragraph 5 of the complaint upon his own motion and subsequently reinstating it. The action is plainly one upon an open account. After reciting the sale and delivery of the merchandise, its value, the amount paid, and the balance claimed as due, the complaint in paragraph 5 alleged that, subsequent to the sale, Kalberg, acting for the partnership, executed and delivered to the respondents six promissory notes, aggregating \$1,853.78, under an agreement that the amount due should bear interest at 8 per cent. from the date of the notes. At the commencement of the trial appellants objected to certain evidence, upon the ground that the action was on the notes. The lower court held other-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

wise, and struck the paragraph referring to the notes from the complaint, holding that the action was upon an open account. The trial had not proceeded very far before the trial court changed his mind, and of his own motion reinstated the stricken paragraph, and, treating it as a plea of a separate cause of action, held that two causes of action were stated, one on an open account, the other on the notes. When it came to the final decision the trial court ruled that there was but one cause of action, and that upon an open account, and held the notes were merely evidentiary.

[3, 4] The fact that the lower court was, during the trial, wavering in its opinion does not destroy its judgment, if at last the right conclusion was reached and incorporated in the judgment. The action being on an open account, the notes were merely evidentiary matter, and had no place in the complaint; hence it could not be error to strike reference to them. And while the insertion of evidentiary matter in a complaint is bad practice, and the court should not have again burdened the complaint with it, we do not think that doing so was such a vice as to call for a reversal of the judgment. The evident fact that the trial judge had difficulty in determining the character of the action, and insisted on changing the complaint to suit his varying views, should not vitiate a judgment which the evidence convinces us was properly entered.

[5] The contract of partnership, while entered into subsequent to the commencement of the delivery of the merchandise, by its express terms relates back and covers the enterprise for the purpose of which the goods were furnished, and there can be no question but that appellant was liable as a partner. The judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

ERICKSON et ux. v. WASHINGTON-OREGON CORPORATION.

(Supreme Court of Washington. Nov. 17, 1913.)

1. DAMAGES (§ 208*)—NEW TRIAL (§ 77*)—QUESTIONS OF FACT—PASSION OR PREJUDICE.

In a married woman's action for injuries, where under the evidence there was ample room for differences of opinion as to whether and to what extent operations upon her ovaries were necessitated by the previous cystic condition thereof, and the jury could well have found that, notwithstanding such previous condition, the operations were necessitated by the injuries received rather than by such previous condition, the question of allowing damages for such injury was for the jury, and the allowance thereof did not show passion or prejudice.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208; * New Trial, Cent. Dig. §§ 157-161; Dec. Dig. § 77.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for injuries sustained by stepping into an excavation in a street, an instruction that any person making such an excavation and negligently failing to guard it was liable in damages to any person injured by reason thereof who had no knowledge of the excavation and who was at the time of the injury in the proper use of the highway or street, was not, because of the omission of any reference to the care required of a traveler on the street, prejudicial to defendant, where other instructions fully stated the traveler's duty of exercising proper care.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

3. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

A married woman 23 years old, in comparatively good health, and having one child, through defendant's negligence, sustained injuries to her womb and ovaries and other internal injuries. She was incapacitated from her usual duties, was under almost constant treatment for three months at her home, when she was compelled to go to a hospital and undergo operations resulting, among other things, in the removal of one of her ovaries and a large part of the other. She was treated at the hospital six weeks longer, and a year after receiving the injuries her health was still very materially impaired and in such condition as to indicate that it would be so impaired indefinitely. Her expense for physicians, nurses, and hospital care amounted to over \$1,000. Held, that a verdict for \$6,000, although large, was not excessive as a matter of law.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by S. C. Erickson and wife against the Washington-Oregon Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Forney & Ponder, of Chehalis, for appellant. C. A. Studebaker and W. A. Reynolds, of Chehalis, for respondent.

PARKER, J. This is an action for damages alleged to have resulted to the plaintiff, Louise Erickson, from the negligence of the defendant, in digging and leaving in an unprotected and dangerous condition a hole in one of the public streets of the city of Chehalis, into which she fell while walking along the street. The trial resulted in a verdict and judgment in favor of the plaintiff in the sum of \$6,000, from which the defendant has appealed.

A day or two prior to October 12, 1911, appellant dug a hole about 2½ feet in diameter and 5 feet deep in Washington avenue in Chehalis near the northerly side of that avenue at a point on, or very near, a path frequently used by the public. That portion of the avenue was unimproved and unlighted at night. The hole was dug for the purpose of setting a pole for appellant's electric power line. Appellant's employes placed some brush and pieces of wood across the hole, but did not securely cover it, nor was any light placed there at night. Mrs. Erick-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

son lived in the neighborhood, and frequently passed along this path. On the evening of October 12, 1911, after it had become dark, she was returning to her home along this path from one of her neighbor's, not knowing that the hole had been dug there. She then stepped into the hole and fell astride of one of the pieces lying across the hole, and thereby received very severe injuries, consisting of injuries to her womb and ovaries, and other internal injuries. She was incapacitated from her usual duties, was under almost constant treatment for a period of three months at her home, when it became necessary for her to go to a hospital and undergo surgical operations resulting, among other things, in the removal of one of her ovaries and a large part of the other. Thereafter she was treated at the hospital some six weeks longer, and at the time of the trial, which occurred over a year after receiving her injuries, her health was still very materially impaired, and in such condition as to indicate that it would be so impaired indefinitely in the future. Her expense for physicians, nurse, and hospital care amounted to upwards of \$1,000. She was, at the time of receiving her injuries, about 23 years old, was married, had one child, and was in comparatively good health.

[1] Contention is made in behalf of appellant that the evidence conclusively shows that the operations performed upon Mrs. Erickson were necessitated by reason of her pre-existing physical infirmities, especially by reason of a pre-existing cystic condition of her ovaries. Counsel for appellant seem to concede that Mrs. Erickson's injuries other than the injury to her ovaries may have been sufficiently shown to make a case for the jury; but their principal contention seems to be that the jury were moved by passion and prejudice in arriving at their verdict, and this, it is argued, is shown by conclusive proof of this pre-existing cystic condition, and the evident view of the jury that she was entitled to damages measured by the injury to her ovaries as well as other injuries. We are unable, however, to see that this presents other than a question of fact. A review of all the evidence to which our attention has been called by counsel convinces us that there was ample room for differences of opinion as to whether and to what extent the operations performed upon Mrs. Erickson were necessitated by the previous cystic condition of her ovaries. The jury could well have come to the conclusion that, notwithstanding such previous condition, even that portion of the operation was necessitated by the injuries received rather than by such previous conditions. The jury found specially that her ovaries were not diseased in such manner prior to her injuries "so as to necessitate the operation which was performed." This, we think, the evidence justified.

Some contention is made on behalf of appellant that the trial court should have held, as a matter of law, that appellant was not negligent, and that Mrs. Erickson's own negligence caused her injuries. Both of these questions were for the jury. We deem it unnecessary to review the evidence in detail here.

[2] It is contended that the court committed prejudicial error against appellant in giving the following instruction: "The court instructs the jury that any person or corporation who makes an excavation in a public highway or street, and who carelessly and negligently fails to provide proper safeguards for the protection of the public passing along said highway or streets, is liable in damages to any person injured by reason of such excavation, if such person had no knowledge of the excavation and such person was at the time of the injury, in the proper use of the highway or street." It is argued that the concluding words of this instruction are prejudicial to appellant in that the element of the proper care on the part of a traveler upon the public street is not suggested therein, leaving the inference that such care would not be required of a traveler under the circumstances supposed by the instruction. It seems to us this is fully answered by reference to other portions of the instructions, where we find that the court fully instructed the jury that the duty of exercising proper care was upon Mrs. Erickson, while passing along the street. It seems clear to us that this instruction is not prejudicial, especially in the light of the other instructions.

[3] It is contended that the verdict is excessive. While it does seem large, we cannot say as a matter of law that it exceeds the fair measure of Mrs. Erickson's damages in view of the expense incurred, her pain and suffering, and her impaired health. We think our views expressed in *Shaw v. Seattle*, 39 Wash. 590, 81 Pac. 1057, relied upon by counsel for appellant, do not call for reversal of this case on the ground of excessive verdict.

A review of this record convinces us that there is little else here involved than questions of fact. We do not feel called upon to discuss the cause further.

The judgment is affirmed.

CROW, C. J., and MORRIS, FULLERTON, and MOUNT, JJ., concur.

STATE v. NELSON. (No. 2,060.)

(Supreme Court of Nevada. Nov. 13, 1913.)

1. CRIMINAL LAW (§ 594*) — CONTINUANCE — RIGHT TO CONTINUANCE.

To entitle an accused to a continuance on the ground of the absence of witnesses, it must appear that the witnesses are really material, that the accused has been guilty of no negli-

gence, and that the attendance of the witnesses can be had at the time to which the trial is deferred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

2. CRIMINAL LAW (§§ 586, 1151*)—APPEAL—DISCRETION OF TRIAL COURT.

The question of continuance in criminal cases is always a matter within the sound discretion of the trial court, and, unless that tribunal abuses its power, its determination cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. §§ 586, 1151.*]

3. CRIMINAL LAW (§ 603*)—CONTINUANCE—ABSENT WITNESSES—DUE DILIGENCE.

An affidavit for a continuance on the ground of the absence of material witnesses, which alleged that subpoenas had been placed in the hands of the sheriff, shows the very slightest diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

4. CRIMINAL LAW (§ 603*)—CONTINUANCE—ABSENCE OF WITNESSES.

Where an affidavit for continuance on the ground of the absence of witnesses showed that there was another witness by whom the same facts could be proven, it was not an abuse of discretion on the part of the trial court to refuse the continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

5. CRIMINAL LAW (§ 603*)—CONTINUANCE—ABSENCE OF WITNESSES.

Where an affidavit for a continuance on the ground of the absence of material witnesses showed that the witnesses were out of the jurisdiction of the court, and failed to give any reasonable ground for the belief that their attendance could be procured at a subsequent term, the refusal of a continuance was not an abuse of discretion, particularly where the testimony at the trial showed that the names of the witnesses were not correctly stated in the affidavit, and that the facts could be proven by another disinterested witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

6. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

In a criminal prosecution, the improper admission of evidence of the description of the criminal, given to the arresting officer by a third person, was harmless, where it appeared that the officer received and acted on the description given directly to him by the prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3083, 3130, 3137-3143; Dec. Dig. § 1169.*]

7. CRIMINAL LAW (§ 331*)—DEFENSES—INSANITY.

Notwithstanding Rev. Laws, § 7163, providing that a defendant in a criminal action is presumed to be innocent until the contrary be proven, and in case of reasonable doubt as to his guilt he is entitled to be acquitted, an accused person, relying on the defense of insanity, has the burden of proof, and must satisfy the jury by a preponderance of the evidence that he is insane, there being a presumption of sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742-744; Dec. Dig. § 331.*]

8. RAPE (§ 53*)—PROSECUTION—EVIDENCE—ADMISSIBILITY.

In a prosecution for assault with intent to rape, evidence held sufficient to show that accused was the guilty person.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 78-81; Dec. Dig. § 53.*]

Appeal from District Court, Elko County; E. J. L. Taber, Judge.

Albert Nelson was convicted of assault with intent to rape, and he appeals. Affirmed.

R. H. Hairston, of Elko, for appellant. George B. Thatcher, Atty. Gen., for the State.

MCCARRAN, J. Defendant in this case was indicted by the grand jury of Elko county for the crime of assault with intent to commit rape. The crime with which the indictment seeks to charge the defendant is alleged to have been committed on the 12th day of September, 1912.

[1] As appears from the record, R. H. Hairston, Esq., was appointed by the court as attorney for the defendant, and on the 14th day of October the defendant, through his attorney, moved the court for a continuance of the trial of the cause, and in support of his motion filed his affidavit, setting forth in substance that he was the defendant in the above-entitled action; that he could not safely proceed to trial at the present term of the court on the ground that certain witnesses were absent, who resided in San Francisco, state of California; that the cause could not be tried with justice to affiant without the testimony of the said witnesses; that the said witnesses were material witnesses to the defendant; that the defendant would rely upon the defense of an alibi, and that the testimony of said witnesses was material in support of that defense; that the defendant had been in the company of the witnesses named, from the time of his arrival in the town of Elko until a few minutes before he was arrested; further setting forth as follows: "That affiant will prove by said George Fisher and Nap O'Grimes that he was never at or near the place where said crime is alleged to have been committed, and that affiant was at all times in their company. Affiant will prove by the said George Fisher and Nap O'Grimes that upon the day that said crime is alleged to have been committed, that he (affiant) and the said George Fisher and Nap O'Grimes were together, and were in Guldigar's saloon, and in a restaurant near Guldigar's saloon, the whole time, and affiant will corroborate said proof by the testimony of the bartender at Guldigar's saloon; that affiant has used due diligence to secure the testimony of the said George Fisher and Nap O'Grimes; he has caused counsel to place subpoenas in the hands of the sheriff of the county of Elko, state of Nevada, but same were returned unserved; * * * that affiant be-

leaves the attendance or the testimony of the said George Fisher and Nap O'Grimes will be procured at the next term of this court, and that the grounds for such belief are as follows: Affiant knows the address of friends and relatives of the said George Fisher and Nap O'Grimes in San Francisco, Cal., and through them will discover the whereabouts of the said George Fisher and Nap O'Grimes."

The motion for continuance having been denied by the trial court, and the cause regularly tried, and a verdict of conviction having been entered against the defendant, he thereafter moved the court for a new trial, setting up, as grounds in support of said new trial, the absence of material witnesses to establish the defense of an alibi. This motion having been denied, appeal is taken to this court from the judgment and from the order denying the motion for a new trial.

Appellant assigns error to the trial court for having overruled the motion for continuance, and in support thereof cites authorities. The question of continuance in criminal cases is one with which both text-writers and courts have variously dealt; and the rule laid down by Lord Mansfield in a very early case, setting forth three essential elements necessary to warrant a continuance, has been more or less generally adopted by courts in recent times. They are: First, that the witness is really material and appears to the court so to be; second, that the party who applies has been guilty of no negligence; and, third, that the witness can be had at the time at which the trial is deferred. *The King v. D'Eon*, 1 Blackstone's Rpts. 510; *People v. Vermilyea*, 7 Cow. (N. Y.) 369.

The general rule, embracing the three elements herein set forth, has been enlarged upon to some extent, but the fundamental principle remains the same. From the very earliest times courts, in considering the question of continuance in criminal cases as well as in civil cases, have kept in mind certain essential elements as guides to the proper exercise of their discretion. In some jurisdictions it is expressly provided by statute that where the proof, which the accused expects to make by the absent witness, is material and cannot be satisfactorily made by other witnesses, and he has used due diligence to procure their presence, a continuance must be granted, unless the state will admit the truth of such evidence. Where statutes of this kind are found, they serve as a guide to the court in exercising its discretion in allowing or disallowing a continuance. Where it is shown that the evidence of the absent witness is material and admissible, and that the testimony, in view of the established facts, is not probably untrue, and that the attendance of the witness can probably be procured at another term, and that the facts expected to be proven cannot be obtained from other disinterested witnesses, these elements, together with the

showing on the part of the moving party that he has exercised proper diligence to procure the attendance of the witness, have been generally accepted by the courts as essentials necessary to be established by the moving party, by reason of which the court would be authorized in granting the continuance. 9 Cyc. p. 172.

[2] The question of continuance in criminal cases is always a matter within the sound discretion of the trial court, and, unless the district court abused its discretionary power in refusing the continuance, its ruling upon that phase of the case must be sustained. By its spirit and its humanity the law means to afford every reasonable opportunity to defendants in criminal cases to obtain their witnesses. However true this may be, the moving party is bound to give at least a reasonable assurance of their attendance at the time proposed for the continuance, and, if he fails in this respect, it is not an abuse of discretion to deny the motion.

[3-5] The affidavit filed in support of the motion in this case, in our judgment, falls short of presenting the requisites necessary to authorize the court in granting the continuance prayed for. In paragraph 5 of the affidavit it is stated: "That upon the day that said crime is alleged to have been committed the affiant and the said George Fisher and Nap O'Grimes were together, and were in Guldigar's saloon and in the restaurant near Guldigar's saloon, the whole time, and affiant will corroborate said proof by the testimony of the bartender at Guldigar's saloon." Here it is disclosed that at least one other disinterested witness could have testified to the facts sought to be elicited from the witnesses Fisher and O'Grimes. Moreover, the affidavit of the bartender at Guldigar's saloon, referred to, might have been produced in support of the motion, if the same were made in good faith.

The affidavit, presumably with the view of showing due diligence, sets forth that subpoenas for the absent witnesses had been placed in the hands of the sheriff of Elko county. Diligence which amounts only to the issuance of a subpoena may well be regarded as of the very slightest. *State v. Chapman*, 6 Nev. 320.

The affidavit itself shows that neither the defendant nor his counsel had any knowledge or information as to the whereabouts of the absent witnesses. Moreover, the affidavit fails to give any assurance that might be considered reasonable that the attendance of the witnesses could be secured at any subsequent time. There was nothing stated in the affidavit from which the trial court could have even inferred that there was a reasonable probability that their attendance could be had within any proper time. The affidavit sets forth that the absent witnesses reside in San Francisco, state of California,

and, if this were true, they were beyond the power of the court to reach by process of subpoena, and it devolved upon the moving party to present some satisfactory showing that he had reason to believe that the absent witnesses could be produced at some definite time in the future. Moreover, the motion should be supported by the reasons for such belief. *People v. Francis*, 38 Cal. 183; *State v. Chapman*, 6 Nev. 320.

Appellant, in his own opening brief, relies on the case of *Baines v. State*, 42 Tex. Cr. R. 510, 61 S. W. 119, and, especially, to that part of the decision in that case as follows: "Where an application for continuance on account of the absence of material witnesses, coupled with an affidavit of such witnesses, showed due diligence in endeavoring to secure his presence and that his testimony, if true, would clearly prove an alibi for defendant, and showing absolutely that he would testify to the facts set up in the application, a continuance should be granted."

It is our judgment that, where such a set of facts is presented to the trial court, it would be an abuse of discretion, under such conditions, to deny a continuance at least for a reasonable time; but no such conditions present themselves in this case. In this case there is no affidavit of the absent witnesses, and no assurances as to what the absent witnesses would testify to if present. The affidavit of appellant in this case, filed in furtherance of his motion for continuance, sets forth the names of the witnesses desired as Nap O'Grimes and George Fisher, stating that these two men were fellow employes of his at the Peterson ranch, and left the ranch with him, coming to Elko. The witness Peterson, testifying in behalf of the defendant at the trial, stated that the defendant left his ranch with a man by the name of O'Brien and Fisher. From this it may be reasonably inferred that the appellant was in error as to the correct name of at least one of the witnesses sought, and hence it is out of all probability, in the light of this and other statements in the affidavit, that the attendance of the absent witness could ever be procured.

The affidavit of appellant, filed in furtherance of his motion for continuance in this case, is fatally defective in that it fails to show that there were not other persons by whom the defendant could prove the same facts that he expected to prove by the absent witnesses. Moreover, the affidavit sets forth that the testimony sought to be obtained from the absent witnesses could in fact be obtained from another disinterested witness, "the bartender at Guldigar's saloon." *State v. Marshall*, 19 Nev. 240, 8 Pac. 672.

In view of the defects presented in the affidavit of appellant, filed in support of his motion for continuance, already referred to, and, further, in view of the defendant's own

testimony at the trial and the testimony of other witnesses, presented in behalf of the defendant, as well as in behalf of the state, it is manifest that no injustice was done by denying the continuance asked for, and the trial court did not abuse its discretionary power.

[8] Appellant assigns error to the trial court in overruling his objection to the testimony of the witness Manley. The record discloses the following: "Q. I will ask you at that time if the officers got any description of the man? A. The officers? I described the man. I told the officers. Mr. Hairston (counsel for defense): I object, on the ground it is hearsay. The Court: I have been exceedingly liberal with the defendant, and I will allow the state to go into that. Mr. Hairston: Note an exception. The Court: Let an exception be noted. The Witness: I did. Mr. Dysart (district attorney): What description did you give as best you remember? A. Well, that this man had blue overalls, had on a light hat, something like the color of mine, and gave them the description the little girl gave me at the time."

Nels Ouder Kirk, the arresting officer, interrogated as to descriptions given him prior to the arrest, testified as follows: "Q. After you got to the house I will ask you whether or not you received any description of the man who was alleged to have committed this offense. A. Yes, sir; from the little girl. Q. I will ask you to relate that description as near as you can remember now. A. Well, the little girl tried to describe the man as near as she could. She said he had on a light-colored coat, as near as I can recollect. Mr. Harris was there—I think we got there—in there in a very few minutes. Q. I will ask you whether or not she gave you any description of the appearance of his face. A. Yes; he had a little mustache. Q. Did she—I will ask you if she described his hat. A. I think she said it was a slouch hat. I couldn't say what color the little girl said it was, but a slouch hat, light gray coat, and overalls. Q. Did she give you any description of his appearance—his personal appearance? A. She said he was thin in the face and with a light mustache. Q. I will ask you whether or not she said anything about his walk—his gait? A. The little girl tried to explain to me the style of the man's walk, that he was inclined to be stooped."

From the testimony of the arresting officer, herein set forth, it appears that, whatever may have been said to him by the witness Manley as to the description the little girl had given Manley, he in fact received the description from the little girl herself prior to the arrest, and apparently acted upon the description as given by her, rather than upon anything else. From this it appears, in our judgment, that though the testimony of the witness Manley, objected to, was not properly admissible in the trial and ought to have been excluded, nevertheless the error in its

admission appears to be harmless, and we fail to see where it could have played even the slightest part in bringing about the conviction in this case. As has been said heretofore by this court, errors which do not actually prejudice or injure the defendant do not justify a reversal. *State v. Williams*, 28 Nev. 421, 82 Pac. 353; *State v. Smith*, 33 Nev. 459, 117 Pac. 19.

Counsel for appellant contends that the admission of the testimony of Manley over his objection deprived him of the privilege of cross-examination of the arresting officer, Ouderkirk. This contention, however, is not sustained by the record, for it appears that the officer, Ouderkirk, took the stand as a witness in behalf of the state, and testified as to the description given him and as to matters attending the arrest of the appellant, and at that time ample opportunity was given appellant for cross-examination.

[7] Appellant assigns error to the trial court in refusing to give the following instruction: "The court instructs the jury that if any competent evidence is introduced by the defendant, tending to prove his insanity, that the state is bound to prove and establish his sanity, like all other elements of the crime, beyond a reasonable doubt." It will be observed that the court, in refusing the foregoing instruction, gave another in lieu thereof, which is as follows: "The defendant is presumed to be sane until the contrary is shown, and a doubt upon this question alone should not acquit, for insanity is an affirmative proposition, and the burden of proving it is upon the defense. It is not necessary, however, that the defendant show that he was insane beyond a reasonable doubt. With regard to the methods of proof by which the defense of insanity may be established, the law, from considerations of public policy, and the welfare of society, proceeds with great caution, and has adopted a certain standard by which the insanity of the party on trial may be proved where relied on. The burden of proving insanity, as I have said, rests upon the defendant, and to warrant you in acquitting him solely upon that ground, his insanity at the time of the committing of the offense, if you find that he did commit it, must be established by a preponderance of proof. The evidence of insanity must outweigh and overcome the presumption of and the evidence in favor of sanity in some appreciable degree, and render it more probable that he was insane, than that he was sane. The proof must be such in amount that, if a single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane."

In dealing with insanity as a defense to crime, four theories have been expounded as to the degree of evidence requisite to justify an acquittal. The first theory is that, where insanity is interposed as a defense, it being one of the nature of confession and avoid-

ance, it must be established beyond a reasonable doubt. This doctrine is adhered to in many jurisdictions. The second theory is that the jury are to be governed by a preponderance of evidence, and are not to require the insanity of the defendant to be made out by him beyond a reasonable doubt. It will be observed that this rule is adhered to more closely by the English courts. *The King v. Leighton*, 4 Cox, 149; *The King v. Higginson*, 1 Car. & K. 130. The same rule has been subscribed to in many of the states of the Union. *State v. Lawrence*, 57 Me. 574; *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; *Coyle v. Commonwealth*, 100 Pa. 573, 45 Am. Rep. 397; *Baccigalupo v. Commonwealth*, 24 Va. 807, 36 Am. Rep. 795; *State v. Strauder*, 11 W. Va. 747, 27 Am. Rep. 606; *State v. Felter*, 32 Iowa, 49; *People v. Walter*, 1 Idaho, 386. The third theory is that, where insanity is interposed as a defense to the commission of a crime, the prosecution must prove sanity beyond a reasonable doubt. This rule, generally speaking, has been followed with more or less uniformity by the federal courts. *Davis v. U. S.*, 160 U. S. 469, 19 Sup. Ct. 353, 40 L. Ed. 499; *German v. U. S.*, 120 Fed. 666, 57 C. C. A. 128. Under this general theory, adhered to by many courts, it has frequently been ruled that where there is a reasonable doubt as to the sanity the jury must acquit. The fourth theory holds to the effect that where the defense of insanity is set up, in the nature of a plea of confession and avoidance, if the evidence is equally balanced as to the sanity or insanity, the general presumption of sanity does not prevail, and if, from all the evidence, there is a reasonable doubt as to the sanity of the accused, he is entitled to an acquittal.

We do not deem it necessary, in this case, to discuss the relative merits of the four theories herein set forth. The able opinion rendered by Judge Hawley, speaking for this court in the case of *State v. Lewis*, 20 Nev. 334, 22 Pac. 241, established the rule, which has since been followed by this court in its several decisions, and we see no occasion to change that rule. By this decision this court placed itself in line with those other jurisdictions subscribing to the rule that the jury are to be governed by a preponderance of evidence, that the defendant is presumed to be sane until the contrary is shown, and a doubt upon this question alone should not acquit. The rule adhered to by other courts, especially in English jurisdictions, was modified by the rule laid down by this court in the *Lewis Case*, *supra*, in that it is not necessary that insanity be established beyond a reasonable doubt; but, insanity being an affirmative proposition, the burden of proving it is upon the defense, and he is required to establish his insanity by a preponderance of evidence. The instruction complained of in the case under consideration is one very simi-

lar to the instruction dwelt upon in the Lewis Case, *supra*, and the general proposition of law therein contained was approved in that decision. We see no good reason at this time for changing the rule.

Before a conviction can be had in a criminal case, before a jury can be warranted in bringing in a verdict of conviction, regardless of what defense may be interposed, the law lays down a standard that they must be satisfied beyond a reasonable doubt of the truth of the charge in its entirety. Section 7163, Rev. Laws. When a defense of insanity is interposed, proof of that defense is receivable by the trial court under the general rules of evidence applicable. It is for the jury, and not the judge, to say whether or not the defense is proven and the evidence of insanity, together with all the other facts and circumstances supported by the evidence in a case, go to the jury, and if the evidence as a whole, or any element of evidence, raises a reasonable doubt as to the guilt of the accused, he is entitled to the benefit of that doubt to the extent of an acquittal or reduction of degree. As heretofore laid down by this court in the several cases, and as approved by many courts throughout the land, it is not necessary for the accused, who relies upon a defense of insanity, to prove that condition of mind beyond a reasonable doubt, nor is it necessary for him to satisfy the jury of his insanity. To say that he must satisfy the jury of his insanity would be to require of him more than preponderance of evidence. To require the accused to satisfy the jury of his insanity would be to free the minds of the jury from the element of doubt upon that subject. This is not required. *Keich v. State*, 55 Ohio St. 146, 45 N. E. 6, 39 L. R. A. 737, 60 Am. St. Rep. 680. In other words, under the rule as laid down in the Lewis Case, *supra*, and approved by this court in later decisions, and commented upon and approved by courts of other jurisdictions, it is not required of a party interposing a defense of insanity to do more than establish that condition of mind by evidence which preponderates in favor of insanity; i. e., taking everything submitted into consideration, a belief of insanity is enforced by the evidence.

The decision of this court in the Lewis Case, *supra*, has been commented upon and cited approvingly by many of the courts of last resort. *Maas v. Territory*, 10 Okl. 716, 63 Pac. 960, 53 L. R. A. 814; *State v. Quigley*, 26 R. I. 263, 58 Atl. 905, 61 L. R. A. 322, 3 Ann. Cas. 920; *State v. Clark*, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006; *People v. Dillon*, 8 Utah, 97, 30 Pac. 150. In the case of *Maas v. Territory*, *supra*, the Supreme Court of Oklahoma paid a high tribute to the opinion written by Chief Justice Hawley in the case of *State v. Lewis*, but in refusing to concur that court said: "With the development of criminal law and the ad-

vancement of civilization, the rules which once governed the defense of insanity are being relaxed, so as to give defendants the fullest opportunity to present the truth to the court and jury, that full justice may be done; and while it is true that this defense is sometimes successfully manufactured and imposed upon courts and juries, the adjudicated cases show no greater abuse of this defense than of the defense of alibi or self-defense. The defense of insanity, when successfully made, appeals to the tenderest sentiments and mercies of the jury; but when feigned and detected it invites their utmost contempt, and, while juries are always ready to deal kindly with one who is so unfortunate as to be dethroned of his reason to such an extent that he cannot distinguish between right and wrong, they are also, as a rule, quick to punish a guilty defendant who tries to escape the consequences of his act through fraud and deceit. Therefore * * * we see no good reason why the defense of insanity should be singled out and governed by rules as to burden of proof, different from those applicable to other cases."

No science has advanced with more rapid strides and none has produced more fruitful results in recent years than that of medicine and surgery; and with the development of that science, and the disclosures brought about by its achievements, the veil has been lifted from many things tending to disclose the reasons for abnormal and peculiar acts and eccentric movements of beings. The darkness in which humanity groped in ages past, and by reason of which the world condemned the acts of the individual for the breach of the law, and especially for the abnormalities that appear prevalent in him, is being cleared away by the hand of science, and with the light of knowledge there comes the ever-increasing ray of human sympathy and a persistent study and research as to how this sympathy should best be applied. The great minds of the world, who keep abreast of the times and of development of science, are devising and advancing theories, means, and methods by which the great question of criminology can best be handled. The courts of the land, in dealing with this great subject, cannot stand by and hold a deaf ear to the march of science. The rules which once governed, according to the standards best considered, must not remain rigid; but their elasticity must be made commensurate and proportionate to human achievement and the definite results of scientific investigation.

[8] The identity of the defendant was amply established, not only by the prosecuting witness, the little girl on whom the crime is alleged to have been attempted, but by other witnesses, who by reason of their opportunity for observation, as disclosed in the transcript, established beyond a shadow of a doubt that it was the defendant who ac-

accompanied the little girl to the lonely excavation indicated by her in her testimony. The testimony of Mrs. Davis, who lived in the near proximity, was to the effect that she saw him put the little girl down into the excavation. Other parties saw her running from the place in a condition of excitement.

The evidence in this case discloses a most peculiar set of circumstances. The defendant, accompanied by the little girl, went to the lonely excavation north of the town of Elko. After arriving there, in so far as the record discloses, he did nothing in the way of an act of violence. The little girl appears to have run away from the place, and he did nothing to prevent her going; in fact, his entire conduct, as disclosed by the record in this case, bears out to some extent at least the testimony of those witnesses who testified that they regarded him as being of unsound mind. While it is our conclusion that the judgment in this case should not be reversed, yet the record discloses facts and evidence worthy of an investigation by those invested with the power of executive clemency.

From the foregoing reasoning and observations, we see no good reason for disturbing the judgment in this case. It therefore follows that the order denying defendant's motion for a new trial should be affirmed. It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

CUERTH et al. v. ARBOGAST.

(Supreme Court of Montana. Nov. 7, 1913.)

1. WITNESSES (§ 330*)—CROSS-EXAMINATION—SCOPE.

In claim and delivery to recover cattle which defendant claimed to have purchased from B., who had them in his possession, where plaintiff testified that, upon the security of \$300 left with him, he permitted B., a stranger to him, to take 50 head of cattle, valued at \$1,400, 40 or 50 miles away under an agreement amounting to a bailment, with an option to purchase, a question asked him on cross-examination as to whether he made any investigation as to B.'s standing or character was proper cross-examination, and was improperly excluded, as the answer might have reflected on the probability of his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

2. WITNESSES (§ 269*)—CROSS-EXAMINATION—SCOPE.

While, under the express provisions of Rev. Codes, § 8021, cross-examination must be confined to the material matters brought out on direct examination or connected therewith, and while mere excursions into matters foreign to the direct examination will not be permitted, this section is to be liberally construed, and the general rule extended, rather than restricted, and hence, in claim and delivery to recover cattle purchased by defendant from B., where one of the plaintiffs testified as to the negotiations between the other plaintiff and B., and that the cattle were not sold to B.,

cross-examination as to the details of the transaction was improperly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

3. PLEADING (§ 177*)—MATTERS TO BE PROVED—ADMISSIONS.

In claim and delivery to recover cattle which plaintiffs claimed to have let B. take under an agreement amounting to a bailment, with an option to purchase, an allegation of the answer that defendant purchased such cattle from B. while they were in his possession for their fair value, without notice of any outstanding claim, amounted merely to an argumentative denial of plaintiff's title, and hence a failure to reply thereto was not an admission of the truth of such allegation justifying the exclusion of evidence in its support.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 354, 355; Dec. Dig. § 177.*]

4. EVIDENCE (§ 158*)—CHECKS—ADMISSIBILITY.

In claim and delivery to recover cattle which defendant claimed to have purchased in good faith from B., who had possession thereof, the checks given by him in payment were erroneously excluded, as he was entitled to offer the best evidence he had of his purchase.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 158.*]

5. REPLEVIN (§ 71*)—EVIDENCE—TITLE AND RIGHT TO POSSESSION.

In claim and delivery to recover cattle which defendant purchased from B., where plaintiffs claimed that they let B. take the cattle under an agreement amounting to a bailment, with an option to purchase, and there was evidence that within two weeks after the cattle came into B.'s possession a mortgage thereon given by B. was filed for record, and remained of record uncanceled more than a month thereafter, when defendant purchased them from B., who then had possession, the note and mortgage should have been admitted in evidence to re-enforce the presumptions that a thing delivered by one to another belongs to the latter, that things which a person possesses are owned by him, and that a person is the owner of property from exercising acts of ownership over it or from common reputation of ownership, which are to be indulged under Rev. Codes, § 7962, subds. 8, 11, 12.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 285-291; Dec. Dig. § 71.*]

6. SALES (§ 480*)—CONDITIONAL SALES—NATURE OF TRANSACTION—INSTRUCTIONS.

In claim and delivery to recover cattle purchased by defendant from B., where plaintiffs claimed that they let B. take the cattle under an agreement amounting to a bailment, with an option to purchase, and it was uncontested that there was no contract reduced to writing, or filed, as Rev. Codes, § 5092, then in force, required in case of contracts for the transfer or sale of personal property, where the title was stipulated to remain in the vendor until the payment of the purchase price, the court should have defined an agreement to sell, and charged that, if the transaction between plaintiffs and B. amounted to such an agreement, and if defendant purchased the property from B. while in his possession, to find for defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439-1448; Dec. Dig. § 480.*]

7. ANIMALS (§ 10*)—MARKS AND BRANDS—EVIDENCE OF OWNERSHIP.

Under Rev. Codes, § 1791, providing that the general recorder of marks and brands must furnish to the owner of recorded brands a certified copy of the record thereof, which shall

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be prima facie evidence of the ownership of the brand, and section 1793, providing that every person selling cattle must vent or counterbrand such animals, and that the venting of the original brand shall be prima facie evidence of a sale or transfer of the animals so vented, a brand upon an animal, while a circumstance to be considered with others as tending to show ownership, is not prima facie evidence of the ownership thereof; there being no such rule of evidence, either under the statute or at common law.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 8-12; Dec. Dig. § 10.*]

8. TRIAL (§ 252*)—INSTRUCTIONS—ABSTRACT INSTRUCTIONS.

Instructions stating the abstract rules of law prescribed by Rev. Codes, § 7962, subds. 8, 11, 12, which provide that a thing delivered by one to another is presumed to belong to the latter, that things which a person possesses are presumably owned by him, and that a person is presumed to be the owner of property from exercising acts of ownership thereover, or from common reputation of his ownership, without any concrete application of such rules to the facts, were properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Appeal from District Court, Choteau County; Jno. W. Tattan, Judge.

Action by Henry Cuerth and others against John Arbogast. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed and remanded.

John Collins, of Harlem, and Stranahan & Stranahan, of Ft. Benton, for appellants. W. S. Towner, of Great Falls, for respondents.

HOLLOWAY, J. Action in claim and delivery to recover certain cattle or their value. Defendant appealed from an adverse judgment, and from an order denying him a new trial. The plaintiffs claim that they owned the cattle in dispute, and let them to one John D. Busch under an agreement which amounted to a bailment, with an option to Busch to purchase. The defendant alleges that he purchased the cattle from Busch while he was in possession of them, and for their fair value, without notice of any outstanding claim.

[1] 1. Plaintiff Henry Cuerth testified that Busch came to him a stranger, and that, upon the security of \$300 left with him, he permitted Busch to take 50 head of cattle, valued at \$1,400, 40 or 50 miles away under an agreement to keep them for three months, and to purchase them if Busch had the money to make payment. Upon cross-examination he was asked if he made any investigation as to Busch's standing or character. This was excluded as not proper cross-examination, and incompetent, and immaterial. The witness had given his version of his transaction with Busch. Whether it amounted to an absolute sale, a conditional sale, an agreement to sell, or a mere bailment with an option to purchase, depended upon the truth of Cuerth's statements. It was a vital question, and any evidence, otherwise proper,

which would reflect upon the probability of the story should have been received. The jury might have concluded properly that, if Cuerth did not make any inquiry into Busch's liability, it was because he then treated the transaction as a sale. In any event, the inquiry was proper, and the ruling erroneous.

[2] 2. Mrs. Cuerth, who claims to be interested in these cattle, testified on her direct examination to the negotiations between her husband and Busch, and that a sale to Busch was not made. On cross-examination the details of the transaction were sought; but practically every effort on the part of counsel for defendant to ascertain the facts was met by an objection that it was not cross-examination, and these objections were sustained. In fact, the rulings amounted practically to a denial of the right to cross-examine the witness. While it is the general rule that cross-examination must be confined to the material matters brought out on direct examination or connected therewith (section 8021, Rev. Codes; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778; *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609), and that mere excursions into matters foreign to the subject considered on direct examination will not be permitted, still the section above is to be liberally construed, and the general rule extended, rather than restricted (*Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Hefferlin v. Karlman*, 30 Mont. 348, 76 Pac. 757; *Knuckey v. Butte Electric Ry. Co.*, 45 Mont. 106, 122 Pac. 280). The declaration of this court upon the subject was tersely made in *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884, as follows: "Section 3376, Code of Civil Procedure (8021, Rev. Codes), permits a wide range for cross-examination, and the courts should incline to extend, rather than to restrict, the right. Properly understood, the right extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten the jury upon the question in controversy." In *State v. Biggs*, 45 Mont. 400, 123 Pac. 410, this was repeated, and in addition thereto we said: "The rule necessarily includes questions, the purpose of which is to bring out facts illustrative of the motives, bias, and interest of the witness, or as reflecting upon his capacity and memory. The right would be of little value if inquiry into these matters were not permitted."

[3, 4] 3. Defendant offered in evidence the checks which he had given for these cattle when he purchased them from Busch; but upon objection they were excluded, and erroneously so. In an attempted defense of the rulings, counsel for plaintiffs contends that, by failing to reply to the affirmative matter set forth in the answer, the purchase from and the payment to Busch were admit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig., Key-No. Series & Rep'r Indexes

ted; but with this we do not agree. The so-called affirmative matter amounted only to an argumentative denial of plaintiffs' title, and everything which could be proved under it could likewise be proved under a general denial. *Kaufman v. Cooper*, 38 Mont. 6, 98 Pac. 504, 1135; *Hickey v. Breen*, 40 Mont. 368, 106 Pac. 881, 20 Ann. Cas. 429. Defendant was entitled to show that he purchased the animals from Busch, and to offer the best evidence he had of that fact.

[§] 4. The trial court erred also in excluding defendant's offer in evidence of the note given by Busch to Fruchtbear, and a chattel mortgage upon these same cattle to secure the debt evidenced by that note. The mortgage was duly filed for record in Choctaw county, the home of these plaintiffs, on June 23d, within two weeks at most from the day upon which they had given the cattle into Busch's possession, and remained of record uncanceled on July 30th, when the defendant alleges that he purchased the cattle from Busch, who was then in possession of them. The evidence was competent for the purpose of re-enforcing the presumptions which the Codes declare: "8. That a thing delivered by one to another belonged to the latter. * * * 11. That things which a person possesses are owned by him. 12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership." Rev. Codes, § 7962.

[§] 5. At the time these transactions between plaintiffs and Busch and between Busch and the defendant occurred, section 5092, Revised Codes, was in force, as follows: "All contracts, notes and instruments for the transfer or sale of personal property where the title is stipulated to remain in the vendor until the payment of the purchase price, or some part thereof, shall be in writing, and the original or a true copy thereof certified by the county clerk and recorder shall be filed with the county clerk and recorder of the county wherein the property is situate, otherwise any such contract, note or instrument is void as to a purchaser or mortgagee of such property prior to such filing." The trial court should have defined an agreement to sell, and should have instructed the jury that, if they found that the transaction between plaintiffs and Busch amounted to such an agreement, and further found that defendant purchased the property from Busch while in his possession, then their verdict should be for the defendant, for it is uncontroverted in the evidence that there was not any contract reduced to writing, or any contract filed as required by section 5092 above.

[7] 6. The trial court instructed the jury "that a brand duly recorded with the recorder of marks and brands of this state is prima facie evidence of the ownership of an animal bearing such brand; in other words, that the owner of a duly recorded mark or brand

is prima facie the owner of an animal bearing such brand." Counsel for respondents contends that the instruction is justified by the rules of the common law, as well as by sections 1791 and 1793, Revised Codes, and cites *Queen v. Forsythe*, 2 N. W. Terr. 398, 4 Territories L. R. 398, wherein it was held, by a divided court, that proof that an animal bore John Lawrence's mark and brand, that it was a steer three years old, and that Lawrence had not sold or otherwise disposed of locally any steers, was sufficient proof of ownership to sustain a conviction for larceny. Nothing whatever is said by the court of any rule of the common law, and no authority whatever is cited for the holding; but much emphasis is laid upon the fact that identification of cattle by brands is a common custom in that territory. Upon a somewhat similar state of facts the like conclusion was reached by the Supreme Court of Oklahoma, in *Hurst v. Territory*, 16 Okl. 600, 86 Pac. 280, and in *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433; but in neither of these last two cases is there any mention made of a rule of the common law, and in neither is it asserted that a brand, or the record of a brand, is prima facie evidence of the ownership of the animal which bears the brand. We are satisfied that authority for the trial court's action based upon a rule of the common law cannot be found, and that such rule was never enforced except by virtue of some statute which promulgated the rule.

In *State v. Keeland*, 39 Mont. 506, 104 Pac. 513, and again in *State v. Trospen*, 41 Mont. 442, 109 Pac. 858, this court treated the brand upon an animal as evidence tending to identify the animal, and to show ownership in the one who owned the brand; while in *State v. De Wolfe*, 29 Mont. 415, 74 Pac. 1084, we said: "The fact that the O L brand belonged to Houk, and that the horses bore such brand, was not proof that they belonged to Houk at the time they were driven away, or that defendant was not rightfully in possession of them." In other words, we have said that the brand upon an animal is a circumstance to be considered with others as tending to show ownership, but in itself insufficient to prove ownership. *Territory v. Harrington* (N. M.) 121 Pac. 614.

It is doubtless true that in the early days, when the live stock industry was of commanding importance in this western country, common custom decreed that ownership of range animals should be determined by the brand, and that controversies over live stock should be settled by tribunals created by the owners of the herds; but, just as the *jueces del campo* gave way to legally constituted tribunals, so the rules and customs of the plains were superseded by positive legislative enactments. In probably every western state mark and brand laws have been enacted, and provision made for records. In many instances the statute declares in language unmistakable in its meaning that a recorded brand

or the certificate from the recorder shall be prima facie evidence that the person who owns the brand owns the animal which bears the brand (Compiled Laws, New Mexico, 1897, § 67; General Statutes, Colorado, 1883, § 3174; Revised Statutes, Idaho, § 1179; General Statutes, Nevada, 1885, § 761; Political Code, California, § 3172; Laws of Oregon, 1893, p. 52; Ordinances N. W. Territory [Can.] 1900, p. 42); but this is not true in all the western states. In Utah the statute merely provides that the recorder's certificate "shall be deemed evidence in law." Compiled Statutes, Utah, 1897, § 39. In 1887 the Arizona statute made the brand upon an animal prima facie evidence that the animal belonged to the owner of the brand (Rev. Statutes, Arizona, 1887, § 2788); but this was repealed, so far as the rule was applicable to civil cases, in the compilation of the laws with reference to live stock, approved March 1, 1897, which declares that the certificate of the recorded brand "shall be competent evidence of the registration of such brand, and prima facie evidence of ownership" (Laws of Arizona, 1897, p. 25, § 50). In *Brill v. Christy*, 7 Ariz. 217, 63 Pac. 757, there was involved the ownership of certain cattle. A certificate of the record of the brand was offered in evidence for the purpose of showing prima facie title in defendant, whose brand the cattle bore. The court, after quoting section 50 of the act of 1897 above, said: "If the ownership of the brand or the fact of its registration was in controversy, the provision quoted would be applicable. * * * Neither is the registration of the brand an issue in the case. Section 50 applies solely to the requirement for and the manner of the registration of brands, the proper evidence of such registration, and the ownership of the brands thus registered, and does not deal with the cattle that may be in such brands, the mode of their transfer, or the evidence of their ownership. * * * While, therefore, section 50 of the said act constitutes the certificate of the registration of a brand competent evidence of such registration, and prima facie evidence of the ownership of such brand, it does not make such certificate either competent or prima facie evidence for any other purpose."

The history of our own statute furnishes some insight into the legislative intention in passing it. By an act approved January 10, 1872 (Laws 1871-72, p. 563), provision was made for recording marks and brands, and for certificates to be delivered to the owners. Section 4 provided that such "certificates shall be deemed evidence in law." The same act required that upon a sale of branded live stock the brand should be vented, and section 8 declared: "The venting of said original brand shall be prima facie evidence of sale or transfer of said animal or animals." These provisions were carried into the compilations of 1871, 1872, 1879, and 1887, without change, and were the law up

to the adoption of the Codes in 1895. As the Political Code was reported, and as it first passed the House of Representatives, it contained, in lieu of the two sections above, first, a provision that a certified copy of the record of the brand shall be "prima facie evidence of the ownership of the brand," and, second, that "the venting or counterbranding is prima facie evidence of sale." In the Senate these provisions were stricken out, and in lieu thereof the language as found in the Codes to-day was substituted. These amendments were concurred in, and the act thus amended became the law which went into effect July 1, 1895, and provided that the general recorder of marks and brands must "furnish to the owners of recorded brands a certified copy of the record of the same, which certificates are prima facie evidence of the ownership of the brand or mark so recorded" (Pol. Code 1895, § 2941), and "every person who sells * * * cattle, must vent or counterbrand such animals, * * * and the venting of said original brand shall be prima facie evidence of sale or transfer of said animal or animals so vented" (Pol. Code 1895, § 2943). These provisions were carried into the Revised Codes of 1907, and are found in sections 1791 and 1793, respectively. It will thus be seen that, through all the changes which have occurred in our live stock statute since 1872 the Legislature, while asserting repeatedly that a vented brand is prima facie evidence of a sale of the animal bearing the brand, has studiously declined to say that the brand on an animal or a certificate of a recorded brand shall be prima facie evidence of ownership of the animal bearing the brand. On the contrary, while there may have been room for doubt as to the meaning of the original statute, which declared that the recorded certificate "shall be deemed evidence in law," the Legislature which enacted the Codes declined to approve the somewhat equivocal terms employed by the code commissioners, but cleared away all uncertainty by declaring, in language whose meaning cannot be questioned, that the certificate of a recorded brand "is prima facie evidence of the ownership of the mark or brand so recorded." Other state legislative bodies have had no difficulty in making a recorded brand, or a certificate of such brand, prima facie evidence of ownership of the animal bearing the brand, and doubtless our Assemblies could have done equally as well if they had chosen to do so; but their refusal to adopt a statute similar to those in force in sister states where conditions are similar, and their final adoption of the statute in its present form, furnish most persuasive evidence that it has been the policy of this state to go no further than to recognize a brand as evidence, just as a flesh mark or other distinguishing mark or characteristic is evidence. The purpose of the statute is to secure to any one who records his brand the exclusive use of the de-

sign adopted (*Stewart v. Hunter*, 16 Or. 62, 16 Pac. 876, 8 Am. St. Rep. 267), and the object sought in requiring a brand to be vented is to foreclose the vendor's claim to the animal sold (*Walden v. Murdock*, 23 Cal. 540, 83 Am. Dec. 135). The instruction given is erroneous. It provides a rule of evidence not warranted by statute or the common law.

[8] 7. Counsel for appellant requested the trial court to include in an instruction the provisions of subdivisions 8, 11, and 12, of section 7962 above; but the request was denied. It is not commendable practice to submit to jurors abstract rules of law, even though they are correct, and error cannot be predicated upon the action of the court in refusing defendant's request in this instance. *First Nat. Bank of Portland v. Carroll*, 35 Mont. 302, 88 Pac. 1012. If a concrete application of the rules to the facts of this case had been made, it would have been reversible error to refuse to submit the instruction.

Since this cause must be remanded for a new trial, the attention of counsel is directed to the fact that the verdict returned upon the trial of this case does not respond to all the material issues tried, and is insufficient to sustain a judgment. *Hickey v. Breen*, above.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

WINE v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana. Nov. 1, 1913.)

1. RAILROADS (§ 113*)—PROTECTING PROPERTY—INJURY TO ANOTHER—LIABILITY.

While a railroad company, as a common carrier, must exercise the highest degree of care to keep its track and roadbed safe, it in so doing, injuring the property of another, though necessarily, is liable for the damage.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.*]

2. WATERS AND WATER COURSES (§ 115*)—"FLOOD WATER"—RIGHT TO REPEL.

Water driven over the banks of a river by an ice gorge, which on disappearance of the gorge will return to the channel, is not surface water, which the owner of property, threatened thereby, may repel by breaking the gorge, without liability for injury thereby to lands further down the stream, but "flood water," so that for such injury from such act he is liable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 126; Dec. Dig. § 115.*]

3. WATERS AND WATER COURSES (§ 171*)—FLOOD WATER—LIABILITY FOR REPELLING.

For defendant to break an ice gorge in a river, thereby throwing the waters on the land of plaintiff, further down the stream, is a direct violation of plaintiff's rights, making defendant lia-

ble for the injury, without regard to the question of negligence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216-222; Dec. Dig. § 171.*]

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

Action by Joseph R. Wine against the Northern Pacific Railway Company. From an adverse judgment and order, defendant appeals. Affirmed.

Gunn & Rasch, of Helena, for appellant. J. R. Wine, Jr., of Helena, for respondent.

BRANTLY, C. J. Action for damages alleged to have been caused to the lands of plaintiff by the wrongful act of the defendant. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

The plaintiff is the owner of lands lying on both sides of the Missouri river, a short distance below the point where the defendant's line of railway crosses it, near Townsend, in Broadwater county. The general course taken by the river in this locality is from the southwest to the northeast. The course of the railway is from the southeast toward the northwest, crossing the river nearly at right angles. For the distance of more than a mile from the river to the southeast, the lands on either side of the railway are lowlands, elevated only a few feet above the stream at its ordinary stage. Beyond the river to the northeast the condition is the same. Plaintiff's residence, with appurtenant outbuildings, orchard, garden, and meadow, is situated on a portion of his lands lying on the southeast bank. The main body of his lands lies along the opposite bank. The line of the railway approaches the bridge from the southeast by means of an embankment, which increases in height, from a few inches near Townsend, to about eight feet where it reaches the bridge. This embankment was constructed many years ago when the railway was built. It has no substantial openings to permit the escape of water which may accumulate on the side toward the southwest from an overflow of the river or from precipitation. Such accumulations can escape only by following the line of the embankment to the river at the bridge. It is not unusual that, during the spring thaws when the ice leaves the river, gorges are formed which, varying in size and duration, impede the flow of the river causing temporary overflows of portions of adjacent lowlands. On March 4, 1910, such a gorge formed at a point about 350 yards above the defendant's bridge. At the same time a second gorge formed below the bridge nearly opposite the residence of the plaintiff. The upper gorge caused an overflow of water from above, which, being held in check

by the volume detained by the lower gorge, accumulated on the upper side of defendant's embankment, rising in places approximately to its crest and threatening its safety. The general level of the stream and the flood water was then stationary at about 5½ feet above the normal stage, but was not sufficiently high to flood any substantial portion of plaintiff's lands on either side of the river. On March 5th a strong wind began to blow from the west, driving the water against the embankment so that it began in places to wash out the material from under and between the ties. Having concluded that a removal of the upper gorge would permit most of the flood waters to escape by the main channel of the river and that the embankment would thus be relieved from danger, the employés of defendant, though they knew of the lower gorge, on the afternoon of March 6th blew it out with dynamite, with the result that the torrent of water thus released, being caught and in part detained by the lower gorge, raised the level of the stream below to a height of 10 feet, and caused it to overflow substantially all of plaintiff's lands to the depth of several feet, flooding plaintiff's residence, destroying his household effects, and depositing upon his orchard, garden, and meadows, in places, large amounts of boulders, sand, and drift timber, and in others washing away the soil to such an extent as to render these portions of them wholly useless. These facts are not controverted. There was also evidence tending to show that plaintiff's lands would not have been flooded at all but for defendant's interference with the upper gorge. There was some conflict in the statements of the witnesses upon the question whether on the morning of March 6th the flood water held by the embankment had so far subsided as to remove the threatened danger to the track, and thus the necessity for defendant to blow out the gorge as a protective measure. Under the rule of law applicable to cases of this character, as we shall see later, we think it wholly immaterial whether the necessity arose for action on the part of the defendant or not.

[1] At the trial counsel for the defendant assumed the position that when the defendant, engaged as it is in the performance of a public duty, was confronted with the emergency created by the gorge rendering its roadbed and track unsafe, and the necessity was thus created for it to act in order to remedy the dangerous condition and safeguard its passengers and freight, it had the right to adopt any means suitable to that end, and hence that the plaintiff could not recover for any damage suffered by him by reason of the course pursued by the defendant. This position is shown by special requests for instructions tendered by the defendant the theory of all of which is exemplified by the following: "The defendant railway company, as a common carrier of

persons and freight, was in duty bound to exercise the highest degree of care to protect its line of railroad from being injured or destroyed and to take all necessary precaution to prevent its line of railroad from becoming unsafe or dangerous for the movement and operation of its trains and cars over its said line of railroad. And if you find from the evidence in this case that the existence of the said upper ice gorge, and the accumulation of ice, water, and material caused thereby, made it necessary for the defendant company, in order to protect its bridge, roadbed, and tracks and to keep the same safe so as to enable it to operate its trains and cars with safety to passengers and freight carried over its line of road, to remove said gorge, and the said ice gorge was so removed by defendant company in order to protect its said bridge, roadbed, and tracks and keep the same safe for public travel, then the plaintiff cannot recover, and your verdict should be for the defendant." The court refused the instructions and submitted the case to the jury on the theory that, if the plaintiff would not have been damaged but for the act of the defendant in removing the gorge, he was entitled to recover. It is true that it is incumbent upon a common carrier, such as the defendant, to exercise the highest degree of care to keep its track and roadbed safe, and to this end make prompt and energetic use of every means at its command in every emergency to provide for the safety of the passengers and goods intrusted to its care, and that this duty is higher than that which it owes to landowners along the line of its road (*Louisville N. A. & C. Ry. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120); but the obligation to exercise the care and diligence exacted of it in this regard does not justify the postulate that it may under any stress of circumstances appropriate to its own use or injure the property of such landowner, without rendering itself liable to him for the injury thus done. As an owner of property it has the same rights as any other person, and is under the same obligation to so use its property as not to injure that of an adjoining owner. It has the unqualified right to operate its road in a reasonable and proper manner and to adapt its property to the use for which it was acquired; but it is subject to the same rules of law as are the adjoining proprietors, and, if in conducting its business it infringes upon the rights of others, it becomes liable for damages to the same extent as a natural person. *Staton v. Norfolk & O. R. Co.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. If it commits a trespass, it is liable in an action for trespass. If during the conduct of its business it creates a nuisance or suffers one to exist upon its own property, it is liable in an action on the case. In the one case no question of diligence or skill can arise;

liability will attach if the injury done is the result of the active agency of the defendant. In the other it will be liable if the injury is consequential or is the result of negligence or nonfeasance. *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. 962, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263.

The requested instructions assume that, inasmuch as a railway is for the benefit of the public, in the authority given by the Legislature to construct it, there is an implied subordination of the rights of the adjoining proprietors. This is true in so far as a railway company is given the privilege, by condemnation proceedings, to take or damage property necessary for the construction and operation of its road; but this power cannot be exercised except within the limitations and upon a fulfillment of the condition precedent attached: That no person can be deprived of his property without due process of law, and that just compensation must first be made to the owner. Constitution, art. 3, §§ 14, 27. The subordination of the rights of the private proprietors goes no further. Once the title has been acquired by the railway company, whether by purchase or condemnation, its use of it, as we have already said, must be governed by the same rules as that of private proprietors. Otherwise the guaranties of the Constitution would be of no avail. In *Staton v. Norfolk & C. R. Co.*, supra, it was well said: "It would be of small comfort to the ruined proprietor to be told that he must bear his loss for the benefit of the public, and it would not be unnatural if he answered that if the public good required the destruction of his property an enlightened sense of public justice should demand that he be compensated for his loss. In this he would be sustained by the words of Sir William Blackstone that 'the public good is in nothing more essentially interested than in the protection of every individual's private rights.' 1 Bl. Com. 138."

[2, 3] Counsel insist, however, that the water forced out of the main channel of the river was surface water, that the defendant had the right to treat it as a common enemy, and that any damage caused by its release by blowing out the gorge was *damnum absque injuria*. In view of the decision by this court in *Fordham v. Northern Pacific Ry. Co.*, 30 Mont. 421, 76 Pac. 1040, 66 L. R. A. 556, 104 Am. St. Rep. 729, it is somewhat surprising that this contention should be made. After a review of many of the decisions on the subject, and, recognizing the diversity of the views entertained by the courts as to what is and what is not flood water, the court, through Mr. Justice Holloway said: "Without attempting to reconcile the diverse decisions, we are of the opinion that the following rule furnishes the safest guide for the determination of a question which has vexed the courts of many of our

states as well as those of England, viz.: Whether the water from the overflow of streams is to be considered as still a part of the watercourse, or to be treated as surface water, shall depend upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current, or leaves the same never to return, and spreads out over the lower ground, it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, it is to be regarded as still a part of the stream." Further consideration of the subject has convinced us that the rule as here expressed is the only satisfactory one. Taking it as the criterion, the character of the water, and therefore the extent of the right to deal with it, must depend upon the facts as they are made to appear in the particular case. Mr. Farnum, in his work on Waters (sections 879, 880), discusses the subject and expresses, in substance, the same view. The following authorities support it: *Riddle v. C. & P. Ry. Co.*, 88 Kan. 248, 128 Pac. 195; *Uhl v. Railroad Co.*, 56 W. Va. 494, 49 S. E. 378, 68 L. R. A. 138, 107 Am. St. Rep. 968, 3 Ann. Cas. 201; *Clark v. Guano Co.*, 144 N. C. 64, 56 S. E. 858, 119 Am. St. Rep. 931; *Jefferson v. Hicks*, 23 Okl. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214; *Chicago, etc., Ry. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602; *Lewis on Eminent Domain* (3d Ed.) 566, 838; 40 Cyc. 639.

Under the facts presented in this case, the water which left the main channel above the gorge and finally rested against the embankment was flood water within the rule stated in *Fordham v. Northern Pacific Ry. Co.*, supra; for while it was spread over the country between the embankment and the river, covering a large area, as soon as the gorge was removed and the way was opened for it, it immediately returned to the channel and became a part of the torrent which swept over and inundated the plaintiff's land, causing the injury of which he complains. While it may be conceded that it was the imperative duty of the defendant to protect the embankment from injury or destruction, the necessity for action gave it no right to turn the water resting against it, upon the proprietors below to their injury. And though it may be said that the condition was created by natural causes—was the act of God—it was not in any respect different from an ordinary flood caused by melting snow or excessive rainfall, and, under the rule applied in the *Fordham Case*, the defendant must be held liable for the injury done. There is no question of negligence involved. The act of the defendant amounted to a direct violation of the plaintiff's proper-

ty rights. *Fitzpatrick v. Montgomery*, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622.

The judgment and order are affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

GREAT FALLS & T. C. RY. CO. v. GANONG et al.

(Supreme Court of Montana. Oct. 6, 1913.)

1. CORPORATIONS (§ 298*)—BOARD OF DIRECTORS—QUORUM.

A quorum of all of the members of a duly constituted board of directors may bind the corporation notwithstanding that vacancies at the time existed in the board.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.*]

2. CORPORATIONS (§ 298*)—BOARD OF DIRECTORS—VACANCY—"VACANT."

The failure to fill two of the offices in a board of directors of a railroad company, which consisted of five members, merely had the effect of making such offices vacant; an existing office without an incumbent being "vacant" whether it be a new or old office.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7254-7264.]

3. CORPORATIONS (§ 298*)—BOARD OF DIRECTORS—VALIDITY OF ACTION—QUORUM.

Under Rev. Code, § 3836, providing that a majority of the directors is a sufficient number to form a board for the transaction of corporate business, and every decision of a majority of the directors forming such board is valid as a corporate act, the failure of railroad stockholders to fill all of the directorates by electing five directors, as required by section 4274, would not prevent the three directors appointed from duly representing the corporation as against an objection by one not connected with it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.*]

Appeal from District Court, Teton County; J. B. Leslie, Judge.

Condemnation proceedings by the Great Falls & Teton County Railway Company against E. H. Ganong and others. From an order made in condemnation proceedings to condemn certain land for railroad purposes, defendants appeal. Affirmed.

Cooper & Stephenson, of Great Falls, and H. H. Field, of Chicago, Ill., for appellants. Veazey & Veazey, of Great Falls, and Phil I. Cole, of Choteau, for respondent.

HOLLOWAY, J. This is an appeal by the Chicago, Milwaukee & Puget Sound Railway Company and others from certain findings and an order of the district court made in a condemnation proceeding instituted by the Great Falls & Teton County Railway Company against E. H. Ganong and others, to condemn certain lands near the town of Choteau for railway purposes. The appel-

lants are the owners of the property sought to be condemned, and by this appeal they raise the question of the right of the Great Falls Company to exercise the power of eminent domain. The record discloses that, upon the receipt of the charter of the Great Falls Company as a Montana corporation, the stockholders selected three persons directors, and that these three directors qualified and organized as a board and constituted the only board of directors of the company at the time these proceedings were before the trial court. The articles of incorporation provide for a board of directors of five members, and section 4274, Revised Codes, fixes five as the minimum number of directors of a railroad corporation. It is urged upon us that, "where a minimum number of directors is fixed by statute or the company's regulations, the provision is mandatory, so that if the total number falls below such minimum no valid board meeting can be held although the prescribed quorum may attend." And 2 Machen's Modern Law of Corporations, § 1456, is cited as authority for the rule which appellants invoke. The author of the article quoted refers to but a single case to support his text. *Bottomley's Case*, 16 Ch. Div. 681. The decision in that case is reviewed at length by the Supreme Court of California, in *Porter v. Lassen*, 127 Cal. 261, 59 Pac. 563, and reference is had to the peculiarly worded English statute which influenced the decision in *Bottomley's Case*.

[1] The California court reaches the conclusion—and we think correctly—that there is not anything in the decision of the English case which militates against the general rule that a quorum of a duly constituted board may bind a corporation as the board with all its members present and acting in unison might do, and that vacancies on the board do not prevent the remaining directors—if they constitute a quorum—from holding lawful meetings and transacting the company's business.

[2] By the organization of the Great Falls Company five offices were created; three of these were filled and the other two simply remained vacant. "An existing office without any incumbent is vacant, whether it be a new one or an old one." *State ex rel. Buckner v. Mayor*, 41 Mont. 377, 109 Pac. 710; *Mechem's Public Offices & Officers*, § 131; *Throop on Public Officers*, § 431. "An office newly created becomes ipso facto vacant in its creation." *State ex rel. Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; *In re Board of Commissioners*, 4 Wyo. 133, 32 Pac. 850.

[3] Section 3836, Revised Codes, provides for the organization of the board of directors of every domestic corporation—including railroad corporations—and then proceeds: "A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the directors forming such board, made when duly assembled, is valid as a corporate act." If, then, a majority of the directors is sufficient to form a board, and such board can perform all corporate acts, vacancies cannot affect the legality of its proceedings so long as the legally constituted quorum is present and acting either unanimously or by a majority of such quorum. *Porter v. Lassen*, above. The failure of the stockholders of this corporation to fill all the offices by electing five directors does not invalidate the title of the three who were selected or prevent them from legally representing the corporation so long as they constitute a quorum. *Wright v. Commonwealth*, 109 Pa. 560, 1 Atl. 794; *In re Union Insurance Co.*, 22 Wend. (N. Y.) 591; *Schmidt v. Mitchell*, 101 Ky. 571, 41 S. W. 929, 72 Am. St. Rep. 427. This attack is from outside the corporation and presents a different question from the one which would arise if a minority stockholder or the state was complaining that the stockholders of this company had not discharged fully their duty and elected all the directors required by the articles of incorporation and the statutes of this state. In the present controversy, as between this corporation and a person from outside the corporation itself, the trial court properly held that the Great Falls & Teton County Railway Company was authorized to exercise the power of eminent domain. So far as the trial court's findings and order are involved in this appeal, they are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

GREAT FALLS & T. C. RY. CO. v. GANONG et al.

(Supreme Court of Montana. Oct. 6, 1913.)

1. EMINENT DOMAIN (§ 63*)—RIGHT OF WAY—SELECTION—PRIORITY OF RIGHT.

Mere mental selection of a particular tract of ground, wanted for railroad purposes, by the officers of a railroad company, is not of itself sufficient to give such company a preference right to acquire the ground by condemnation, as against the rights of another company.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 161-164; Dec. Dig. § 63.*]

2. EMINENT DOMAIN (§ 58*)—RIGHT OF WAY—SELECTION—WIDTH.

Rev. Codes, § 4275, subd. 4, provides that a railroad corporation shall have power to lay out its road, not exceeding in width 100 feet on each side of its center line, unless a greater width is required for excavation or embankment, and to construct the same with a single or double track and such appendages as may be necessary. *Held*, that the prescribed width is not a grant, but a limitation, and, in the absence of necessity for additional grounds for excavation or embankment, the 200-foot strip merely marks the utmost limits of the railroad right of way, and does not impose upon the company the duty to take the full amount per-

mitted and, in the absence of any necessity, does not permit it to do so against the will of the owner or the necessities of a competing railroad.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 147-160; Dec. Dig. § 58.*]

3. EMINENT DOMAIN (§ 63*)—RIGHT OF WAY—DEPOT GROUNDS—PRIORITY OF RIGHT.

A railroad company, projecting a branch line, in passing through an unincorporated town obtained a franchise from the supervisors to use all of G. street, which was 80 feet wide, on the conditions imposed. The railroad company thereupon set a row of stakes along the center of G. street, but the only evidence of use of property east of such street was that the railroad company's executive officer had selected land, including a strip in dispute, on the east side of the street for station grounds, and testified that the railroad company expected to locate elevators and industries of that character on such ground. Prior to any further act of selection, plaintiff, a rival railroad, instituted proceedings to condemn a right of way over the disputed strip. *Held*, that defendant, by its acts, had not appropriated the disputed strip to any public use so as to give it priority over plaintiff's right to condemn the same.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 161-164; Dec. Dig. § 63.*]

Appeal from District Court, Teton County; J. B. Leslie, Judge.

Action by the Great Falls & Teton County Railway Company against E. H. Ganong and others. From an adverse order in condemnation proceedings, plaintiff appeals. Reversed and remanded.

Veazey & Veazey, of Great Falls, and Phil I. Cole, of Choteau, for appellant. H. H. Field, of Chicago, Ill., and Cooper & Stephenson, of Great Falls, for respondents.

HOLLOWAY, J. This is an appeal from certain findings and an order made in a proceeding in eminent domain, instituted by the Great Falls & Teton County Railway Company against E. H. Ganong and others, to condemn certain lands for railway purposes. The facts disclosed by the record are: That in 1910 the Chicago, Milwaukee & Puget Sound Railway Company, which had by construction and purchase secured a main line of road from Mobridge, S. D., to Seattle and Tacoma, in Washington, duly authorized the construction of a branch line from its main line at Saugus, Custer county, through the cities of Lewistown and Great Falls, the town of Choteau, and on to the Canadian boundary. In August, 1912, the engineers of that company, acting under Charles A. Goodnow, assistant to the president, made a survey of the line and particularly that portion which passes through the town of Choteau; staked out the center line through the center of Grove street in the town of Choteau; made a map of the proposed route, which was submitted to Mr. Goodnow and by him approved on August 29, 1912, at which time he also

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

selected a strip of ground 400 feet wide and 2,600 feet long, lying immediately east of and adjoining Grove street, for depot grounds, yards, and other railway purposes. Thereafter options were taken for some of the lands wanted, and on September 6th the county commissioners of Teton county granted to the Puget Sound Company a perpetual franchise for the use of Grove street for railway purposes (Choteau being unincorporated) upon certain conditions mentioned in the resolution evidencing the grant, one of which conditions was that the company should by writing, filed with the county clerk within 30 days, indicate its acceptance of the grant upon the terms imposed. On September 12, 1912, the Great Falls & Teton County Railway Company received its charter as a Montana corporation, and on the same day, at a meeting attended by all the stockholders, the three persons named as incorporators were elected directors of the company, and, the directors having qualified, a meeting was held at which a line theretofore surveyed by engineers employed by the promoters and incorporators was adopted as the line of definite location of the road to be constructed, and authority was given to institute proceedings in eminent domain to obtain lands for right of way, depot grounds, and other railway purposes. On the same day this proceeding was instituted by the filing of the complaint and the issuance of summons. In so far as involved here, the line of definite location of the Great Falls Company runs parallel with the east boundary line of Grove street in the town of Choteau, and the lands sought to be acquired in this proceeding constitute a plot of ground, in general terms, 300 feet wide and about 2,000 feet long, lying immediately east of and adjoining Grove street and included within the plot of ground selected by Mr. Goodnow for station grounds, yards, etc. The Puget Sound Company appeared by answer and set forth that it had acquired the interests in the lands sought to be condemned theretofore owned by certain of the defendants named; and further alleged that it had taken the steps set forth above looking to the location and construction of its branch road from Saugus to the Canadian line. The trial court found, among other things, that all the lands sought to be condemned are necessary for the use of the Great Falls Company, but that a strip thereof 60 feet wide, lying immediately east of and adjoining Grove street (hereinafter called the disputed strip), had theretofore been appropriated by the Puget Sound Company for a public use of equal necessity. The order made by the court for commissioners to assess the damages includes all the land desired by the Great Falls Company except the disputed strip mentioned, and as to that strip the court dismissed the complaint and refused to include it in the order. The Great Falls Company appealed from the order and from the findings in so far as they deter-

mine that the disputed strip had been appropriated by the Puget Sound Company, and submits for our consideration the contention that the evidence is insufficient to support the findings or conclusion, so far as this disputed strip is concerned.

Upon this appeal we are not concerned with any question which might arise between a railroad company and the private owner of land sought for railroad purposes. Our concern is only with the question of the priority of right to acquire property for railroad purposes as between competing railroad companies themselves. In authorizing the Great Falls Company to condemn the land described in the order, the court impliedly found that the Puget Sound Company had not appropriated any ground for station purposes, yards, or terminal facilities, and of this conclusion complaint cannot well be made. So far as the land sought for these distinct purposes is concerned, nothing was done except that Mr. Goodnow selected it.

[1] Whatever rule may be adopted for determining the priority as between rival roads seeking the same property for railroad purposes when neither company has attached itself to the property by contract or condemnation proceedings, we think that no authority has ever gone to the extent of holding that the mere mental process of selecting a particular tract of ground wanted for railroad purposes is sufficient to give that company, whose authorized representative may conceal his selection in his own mind, a preference right to acquire the ground. But the trial court did find that, as to the disputed strip, an appropriation thereof had been made by the Puget Sound Company "in order to lay out its road, and the laying out of its road is the public purpose to which said property had already been appropriated."

[2] It will be observed that in this the trial court has followed the language of subdivision 4 of section 4275, Revised Codes. That section is entitled: "Powers of a Railroad Corporation." The introductory clause is: "Every railroad corporation has power." Then follow eleven subdivisions enumerating those powers. Subdivision 4 reads as follows: "To lay out its road, not exceeding in width one hundred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same."

In view of the language employed by the court above, and the facts that Grove street is 80 feet wide, that the center line of the Puget Sound Company is in the center of that street, and that this strip 60 feet wide is necessary to give the Puget Sound Company 100 feet on the east side of its center line, it seems reasonably clear that it was

the theory of the trial court that by making a survey of its center line, staking and mapping the same, and causing the survey to be approved, all prior to the commencement of this condemnation proceeding, the Puget Sound Company thereby acquired a preference right, as against its rival, to secure land over which to lay out its road, by virtue of subdivision 4 of section 4275 above, and that the acts which gave rise to such preference right effected an appropriation, to a public use, of a strip of ground 200 feet wide—100 feet on each side of the center line.

For the purposes of this appeal we may assume, without deciding, that in every contest between rival railroads, each seeking the same land for railroad purposes but neither having acquired an interest in it, the question of priority of right is to be determined by the equities of the particular case, and that in the instant case the acts enumerated above are sufficient, in effect, to give the Puget Sound Company a preference right. We then approach the important question presented by this appeal, viz.: What is the extent of the right acquired under subdivision 4 of section 4275 above, by the company which has the superior equities? While that subdivision contains a grant of power to lay out a roadway or right of way and to construct and maintain a single or double track thereon, it does not assume to grant such right of way or roadway. The language "not exceeding in width one hundred feet on each side of its center line" is not a grant but a limitation. In the absence of any necessity for additional grounds for excavation or embankment, the strip 200 feet wide simply marks the utmost limits of the extent of land which a railroad company may take in invitum for roadway or right of way purposes. But no obligation is imposed upon any company to take the full amount permitted, and in the absence of any necessity it cannot do so, either as against the will of the owner or the necessities of a competing road. The strip 200 feet wide is the utmost that it can take, but it may be content with any quantity less which is justified by its reasonable necessities. The line of stakes through the center of Grove street—the only outward, visible evidence of the center line of the Puget Sound Company's right of way—gave no indication of the extent of the land which that company desired or needed. But if we adopt the theory of those courts which indulge the presumption in such a case that the full amount allowed by law was intended to be claimed, we are still unable to agree with the conclusion of the trial court. So far as the extent of the right of way is concerned, subdivision 4, above, at most extends to a railroad company the privilege of taking a strip 200 feet wide, if necessary. The privilege may be accepted or it may be waived; and it is waived by taking a less amount. Joplin &

W. Ry. Co. v. Kansas City, Ft. Scott & M. R. Co., 135 Mo. 549, 37 S. W. 540. If the Puget Sound Company's preference right to acquire this disputed strip cannot be justified under subdivision 4 above, it cannot be justified at all. It was not in possession of that company; its exterior boundaries were not staked or even surveyed, so far as this record discloses. The right attaches, if at all, by virtue of surveying, staking, mapping, and adopting the line through the center of Grove street; and the trial court must have found that it was by virtue of these acts that the Puget Sound Company had availed itself of the privileges and powers granted by subdivision 4 above. No other reasonable construction can be given the trial court's findings. That subdivision 4 deals exclusively with land sought for right of way purposes, as distinguished from land needed for yards, depot grounds, terminal, and other railroad facilities, is apparent. That it was not the intention of the Legislature to limit a railroad company to a strip 200 feet wide for all railroad purposes is clearly indicated by the language employed. Subdivisions 3 and 7 of the same section provide for acquiring lands for other railroad purposes.

[3] Our inquiry, then, must be limited to the extent of the preference right which the Puget Sound Company acquired to secure land under subdivision 4 above for a right of way. In the first place, that company was not claiming a strip of ground 100 feet on each side of its center line. Beyond the west line of Grove street it was not claiming anything at all except one-half of blocks 4 and 11, and that was claimed only for the purpose of locating a passenger station. It secures a franchise for the use of all of Grove street if it chose to accept the conditions imposed by the county commissioners. But, furthermore, as if to set at rest the question as to the purpose for which all of the land lying east of Grove street, including this disputed strip, was wanted, Mr. Goodnow, who made the selections and who was the only person who assumed to represent or to speak for the Puget Sound Company, testified that on August 29, 1912, when the map of the survey was brought to him, he then selected the station grounds desired by his company—a plot of ground 400 feet wide and 2,600 feet long, lying immediately east of and adjoining Grove street and including the strip, 60 feet wide, now in dispute. Continuing, the witness said: "On the west side of Grove street I selected half of block 11 and a portion of the lots immediately north of that in block 4; that is to say, the east half of block 4. * * * That selection was made for the purpose of locating the passenger station. * * * The ground to the east of Grove street was selected for the ordinary purposes of station grounds. I selected 400 feet in width, because it would be necessary to straighten out Spring creek and

because I thought it would take some room from the station grounds in order to do that, probably 50 or 75 feet. We expect, of course, to locate elevators and industries of that character on this ground. * * * The west side of Grove street simply accommodates the passenger business. * * * We would propose to hold the land on the east side of Grove street entirely for industrial and passing tracks, etc." To our minds this seems conclusive that the Puget Sound Company was not claiming any ground east or west of Grove street for right of way purposes, but was content to use the street, 80 feet in width, for right of way. Counsel for that company drafted the franchise granting the use of that street, and the intention of his company is indicated, in a measure at least, by article 1, which reads as follows: "Article 1. That there be, and there is hereby granted, unto the Chicago, Milwaukee & Puget Sound Railway Company, * * * the perpetual right to use that certain street known as Grove street in the town of Choteau, and the additions thereto, for the purpose of laying down and maintaining thereon a railway track or tracks, together with the necessary switches, turn-outs and side tracks, and to operate a line of cars over and along the same for the purpose of conveying passengers, freight, express and mail matter, and carrying on such other business as is ordinarily carried on by a railway company." It cannot be claimed that any part of the strip 400 feet wide east of Grove street was wanted for right of way. The entire strip was selected for other purposes, and purposes recognized by the statute as altogether distinct from the right of way.

Under the most favorable view which can be adopted, the evidence fails to sustain the finding that the strip of ground 60 feet wide lying immediately east of and adjoining Grove street was appropriated for any public use at the time this proceeding in condemnation was instituted. There is not any evidence that the board of directors of the Puget Sound Company ever authorized Mr. Goodnow to adopt a line of definite location of its road, even assuming that so important a corporate act can be delegated. Neither is there any evidence of authority conferred upon the president of that company by the statutes of its parent state or the by-laws of the corporation. There is little, if anything, more than a bare scintilla of evidence that Mr. Goodnow acted by virtue of a common custom. There is not any evidence that the franchise granted by the county commissioners for the use of Grove street was ever accepted.

The order of the trial court is reversed, and the proceeding is remanded, with directions to eliminate the finding that the disputed strip was appropriated for a public use by the Puget Sound Company, and to modify

the order for commissioners so as to include such strip.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

McFARLAND v. WELCH.

(Supreme Court of Montana. Nov. 1, 1913.)

1. CONTRACTS (§ 337*)—ACTION FOR BREACH—PLEADING—PREVENTION BY WRONGFUL ACT OF OTHER PARTY.

Allegations of the completion of a contract, so far as its terms were to be performed by plaintiff to the date of the action, and that they would have been entirely performed had he not been prevented by act of defendant, were defective in not alleging the wrongful act of defendant; it being requisite that plaintiff, seeking to justify his failure to complete the contract, set forth the facts and circumstances constituting such excuse.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1682-1690; Dec. Dig. § 337.*]

2. CONTRACTS (§ 314*) — EXCUSES FOR NON-PERFORMANCE—RECOVERY OF DAMAGES.

Where the performance of a contract is prevented by the wrongful interference of the other party, plaintiff may treat such wrongful act as a breach of the contract, and immediately sue for damages from loss of the benefits which would reasonably have followed a complete performance on his part.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1446; Dec. Dig. § 314.*]

3. DAMAGES (§ 124*)—BREACH OF CONTRACT—PREVENTION OF PERFORMANCE—STATUTE.

Under the express provision of Rev. Codes, § 6048, the measure of recovery upon defendant's wrongful act preventing a complete performance of a contract is the difference between the contract price and the cost to plaintiff of doing the work; but, if plaintiff could not reasonably expect any profit from its completion, he was not damaged.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

4. DAMAGES (§ 163*)—PLEADING—AMOUNT OF DAMAGES.

Plaintiff, in an action to recover damages upon defendant's wrongful act preventing the completion of a contract, must show that he was injured thereby and the amount or extent of such injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

5. WORK AND LABOR (§ 14*)—SPECIAL CONTRACT—PREVENTION OF PERFORMANCE—RECOVERY UPON QUANTUM MERUIT.

Upon a wrongful act of defendant preventing the completion of a contract, plaintiff could treat the contract as at an end, and sue upon a quantum meruit for the work already done.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. § 14.* Contracts, Cent. Dig. §§ 1476, 1493, 1500, 1554.]

6. CONTRACTS (§ 314*) — PARTIAL PERFORMANCE—RECOVERY UPON CONTRACT.

Where plaintiff did not allege that the term of his contract had expired when his action for damages was begun, and his testimony showed that, according to his own theory, the contract had not expired, and that the time for performing a substantial part of it had not arrived, he could not stand by in readiness to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

perform until the term of the contract had expired, and then sue upon the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1446; Dec. Dig. § 314.*]

7. CONTRACTS (§ 322*)—SEVERABLE CONTRACT.

Where a contract is severable, a party seeking relief for the prevention of its complete performance must disclose the proportion of the work performed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1768; Dec. Dig. § 322.*]

8. CONTRACTS (§ 322*) — PARTIAL PERFORMANCE—ACTION FOR DAMAGES.

Under Rev. Codes, § 4926, providing that partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit is voluntarily retained, plaintiff, seeking relief after defendant's wrongful prevention of performance, must show the extent of performance and defendant's voluntary retention of the benefits.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1768; Dec. Dig. § 322.*]

9. CONTRACTS (§ 353*)—ACTION FOR BREACH—INSTRUCTIONS—AMOUNT OF RECOVERY.

Where it was impossible to determine from the amended complaint the theory of plaintiff's case or the amount to which he was entitled, if entitled to recover at all upon partial performance of a contract, the trial court's failure to instruct as to the measure of recovery was justified.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. § 353.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Ambrose McFarland against J. J. Welch. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Hall and Whitlock, of Missoula, for appellant. Wellington Napton and V. S. Kutchin, both of Missoula, for respondent.

HOLLOWAY, J. In plaintiff's complaint as originally presented he alleged that in May, 1910, he entered into a contract with defendant, by the terms of which he agreed to perform work and labor for defendant in skidding, hauling, and loading logs and ties, and in scaling the logs, for which defendant agreed to pay \$7 per thousand for the work so done upon the logs, 16 cents for each tie so handled, and \$25 per month for scaling, amounting in the aggregate to \$1,320; that he commenced work immediately, "and afterwards, to wit, on the 8th day of December, 1910, completed the contract so far as the terms and conditions were to be performed by plaintiff;" that no part of the contract price had ever been paid except the sum of \$420; and that there remained due \$900, for which amount judgment was demanded.

[1] The answer denies generally all the allegations of the complaint; pleads an entirely different contract, an abandonment of it by plaintiff, and a counterclaim for \$688.72 for goods, wares, merchandise, and cash furnished to plaintiff at his special instance and request. All of the affirmative allegations in

the answer and counterclaim were put in issue by reply. Upon the trial plaintiff amended his complaint by adding after the word "plaintiff" in the portion quoted above the following: "To this date, and would have entirely performed the same had he not been prevented by act of this defendant." The trial resulted in a verdict and judgment in favor of plaintiff for \$500, and defendant appealed.

The complaint as amended does not even charge that plaintiff was prevented from completing his contract by any wrongful act of defendant. If the act was rightful, plaintiff cannot complain upon any theory. If he seeks to justify his failure to complete the work under the contract, he must set forth the facts and circumstances constituting such excuse, to the end that the court may determine whether the acts of which complaint is made were wrongful, and therefore constitute an excuse, or whether they were rightful, and justify the defendant. These rules are elementary, and their enforcement necessary in order that issues may be framed for trial, and the defendant apprised of the charge he is called upon to meet.

[2-4] There is not any conceivable theory upon which the complaint, as it now stands, can be construed into the statement of a cause of action. If it be assumed that it was the purpose of the pleader to charge a wrongful interference by defendant, and that that was plaintiff's theory of his case, then he had at least two remedies available to him:

(1) He could treat the defendant's wrongful act as a breach of the contract, and sue at once for damages arising from his having been prevented from reaping all the benefits and advantages which would reasonably follow a complete performance on his part, and the measure of his recovery would be the difference between the contract price and the expense to him of doing the work. Section 6048, Rev. Codes. But plaintiff did not choose this alternative. He does not state what portion of the entire contract he had performed, what amount remained to be done, what, if anything, is due to him for the portion already performed, or what, if any, profits or advantages to him were within the reasonable anticipation of the parties when the contract was entered into. Of course, if plaintiff could not reasonably expect any profit or advantage from completing the enterprise, he was not injured by the interruption. He does not allege any breach by defendant; but, if he did, that of itself would not warrant recovery for more than nominal damages. *Jacobs Sultan Co. v. Union Mer. Co.*, 17 Mont. 61, 42 Pac. 109. He must disclose that he was injured as the consequence of such breach and the amount or extent of such injury. *Mergen-*

thaler Linotype Co. v. Kansas State Printing Co., 59 Pac. 1066.¹

[6] (2) He could treat the contract as at an end, and sue upon a quantum meruit for the work already done (Keyser v. Rehberg, 16 Mont. 331, 41 Pac. 74); but he did not do so. His failure to state what amount of the contract work he had performed renders it impossible to determine the extent to which he should recover.

[6] That a party who has been wrongfully prevented from completing his contract has his election between the two remedies just considered, the authorities all agree (3 Page on Contracts, § 1569; 9 Cyc. 688); but some go further, and add a third alternative, viz.: He may stand by in readiness to perform until the term of the contract has expired, and then sue upon the contract. This third rule is recognized in Isaacs v. McAndrew, 1 Mont. 437, in Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, and in some other authorities. Whatever may be said of it, plaintiff in this instance has not sought to invoke it. He does not allege that the term of his contract had expired when his action was instituted; on the contrary, the filing mark upon his complaint discloses that he commenced this proceeding immediately after the alleged interference. He never can invoke it, for his testimony discloses that, according to his theory, his contract had not expired—indeed, that the time for performing a substantial part of it had not arrived.

[7, 8] The foregoing observations presuppose an entire or indivisible contract, and, in so far as any theory of the plaintiff can be adduced from his complaint, it is that the agreement upon which he relies is an entire contract. Of course, if the contract was severable, or if plaintiff was seeking relief under section 4926, Revised Codes, he would be compelled, in the one instance, to disclose the proportion of the work performed, and, in the other, the matters contemplated by the section of the Code just mentioned.

[9] In its instructions the trial court failed altogether to advise the jury of the measure of plaintiff's recovery in the event that he prevailed. Ordinarily this would constitute reversible error, for it leaves the jury to determine the amount of their verdict by mere guesswork, and in this present instance the amount returned by the jury only serves to emphasize the fact that the jurors were at sea without chart or compass. There is not any evidence to justify a verdict for \$500. It does not respond to plaintiff's demand, nor to his proof; but the trial court's failure was fully justified, for it was impossible to determine from the amended complaint the theory of plaintiff's case or the

amount to which he was entitled, if entitled to recover at all. But we are disposed to afford plaintiff an opportunity to state a cause of action, if he can do so by amendment or otherwise.

The judgment and order denying defendant a new trial are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

ST. LOUIS, I. M. & S. RY. CO. v. LEWIS.

(Supreme Court of Oklahoma. Sept. 23, 1913.
Rehearing Denied Nov. 18, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 1*)—GROUNDS—STATUTE.

The causes for which a new trial shall be granted are specified in section 4196, St. 1893 (section 5033, Rev. Laws 1910); and these causes are exclusive.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 1-8; Dec. Dig. § 1.*]

2. NEW TRIAL (§ 127*)—GROUNDS—WAIVER.

A cause for a new trial is waived unless it be stated in a motion therefor.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 256-262; Dec. Dig. § 127.*]

3. NEW TRIAL (§§ 77, 128*)—GROUNDS—EXCESSIVE DAMAGES—SUFFICIENCY OF MOTION.

Excessive damages, appearing to have been given under the influence of passion or prejudice, is a cause for new trial, but not unless so great as per se to indicate such influence of passion or prejudice; and a motion for a new trial on the ground of excessive damages, which does not charge that same appears to have been given under the influence of passion or prejudice does not comply with the requirements of sections 4196, 4199, Stat. 1893 (sections 5033, 5036, Rev. Laws 1910), and is insufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 157-161, 257-262; Dec. Dig. §§ 77, 128.*]

4. CARRIERS (§ 286*)—PASSENGER—COLD WAITING ROOM—LIABILITY.

A railway company, failing to provide its 8 by 12 feet, in floor space, separate waiting room for negroes with the comfort of proper heat on a cold day, or with any heat or means thereof of whatever other than the inadequate heat of a red hot stove in a remote part of its agent's office room, which is 10 by 12 feet in floor space and separated by lattice work from such waiting room, is liable to a negro woman for damages because of pain and suffering from cold endured by her during her wait therein for 15 or 20 minutes before and more than an hour after its train, upon which she was to become a passenger, was due to arrive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

5. CARRIERS (§ 347*)—INJURY TO PASSENGER—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

The declaration of a negro woman, upon invitation given by defendant railway company's station agent at some undisclosed point of time during her wait, to leave its separate waiting room for negroes, which was not properly heated, nor otherwise than by the stove mentioned in paragraph 4 of this syllabus, and, passing

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 61 Kan. 860.

through its waiting room for white persons, to sit by a fire in his office on a cold day, cannot, as a matter of law, be said to be the sole proximate cause of her pain or suffering from cold during her wait in such waiting room for negroes.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.*]

6. APPEAL AND ERROR (§ 909*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Under section 6, art. 23 (section 355, Williams'), Constitution of Oklahoma, the defense of contributory negligence or of assumption of risk is, in all cases whatsoever, a question of fact, and must, at all times, be left to the jury; and the verdict of the jury is conclusive upon such question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.*]

7. APPEAL AND ERROR (§ 878*)—PRESENTATION FOR REVIEW—CROSS-PETITION IN ERROR.

This court will not consider whether, on the trial of a cause, there was error in a ruling against defendant in error, not involved in any error assigned by plaintiff in error, in the absence of a cross-petition in error.

(a) Necessity of motion for new trial by cross-petitioner to entitle him to assign such error is suggested, but not decided.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3573-3580; Dec. Dig. § 878.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Wagoner County; Chas. Bragg, Judge.

Action by Elzora Lewis against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Hemingway, Lovick P. Miles, Thos. B. Pryor, and Vincent M. Miles, all of Ft. Smith, Ark., for plaintiff in error. G. W. P. Brown and R. Emmett Stewart, both of Muskogee, for defendant in error.

THACKER, C. Plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

Plaintiff, a healthy negro woman, about 39 years of age, and the mother of two children, on January 8, 1909, when it was very cold and "spitting snow," accompanied by her husband, drove from her home, a distance of about four or five miles away in an open buggy, with a lantern or hot rock at her feet and well wrapped, to defendant's station at Inola, in Rogers county, to take its train to Wagoner, and go thence to Muskogee, arriving at the Inola station some 15 or 20 minutes before the train was due. The negro waiting room at this station was about 8x12 feet in floor space, and separated by lattice work from a 10x12 foot office room, in which there was a large desk, setting against said lattice work, and in a remote part thereof a stove, red hot from a burning fire therein; but there was neither heat nor a way provided in which same could be made in this negro waiting room, and the

same was cold; and a part of a panel in an outer door thereto was out. Upon arrival, plaintiff, accompanied by her husband, properly entered this room, and, providing herself with a transportation ticket from said station over defendant's line, awaited the arrival of its train, which was an hour or more late. Plaintiff was "cool" as a result of riding from her home to the station through the wind, but was not cold when she arrived, and her feet were then comfortable; but, while so waiting in said room, she became chilled, and her feet were "awfully cold." The aforesaid "office room" was occupied by defendant's station agent, and he, at some undisclosed point of the time of her waiting, invited plaintiff and her husband to come into the same and sit by the fire; but this invitation, without disclosed reason therefor, was declined.

[7] At the conclusion of the evidence, the trial court sustained a demurrer to the evidence offered for the purpose of showing subsequent illness resulting from the cold suffered by plaintiff while in the waiting room, and, by the instructions given the jury, limited her right of recovery to pain and suffering experienced by her during that time; but, although plaintiff accepted and at this time complains of this action of the trial court, she has not filed cross-assignment of errors here, and we are unable to consider whether there was error in this ruling. Board of County Commissioners v. Lemley, 23 Okl. 306, 101 Pac. 109, and Van Arsdale v. Olustee School Dist., 23 Okl. 894, 101 Pac. 1121. In Wheeler v. Caldwell, 68 Kan. 776, 75 Pac. 1031, it is held: "A party complaining by cross-petition in error must take preliminary steps giving him a right to assign error, and must present the errors to the trial court on a motion for a new trial."

In respect to errors occurring on the trial of a cause (*Hardwick v. Atkinson*, 8 Okl. 608, 58 Pac. 747; *Boyd v. Bryan*, 11 Okl. 56, 65 Pac. 940; *D. M. Osborne & Co. v. Case*, 11 Okl. 479, 69 Pac. 263; *Ahren-Ott Mfg. Co. v. Condon*, 23 Okl. 365, 100 Pac. 556; *Brown v. Western Casket Co.*, 30 Okl. 144, 120 Pac. 1001; *Stump v. Porter*, 31 Okl. 157, 120 Pac. 639; *Ardmore Oil & Milling Co. v. Doggett Grain Co.*, 32 Okl. 280, 122 Pac. 241), it appears that a cross-petitioner should lay a predicate for assignment of errors by a timely motion for a new trial in the trial court; and in respect to errors not occurring on the trial, but apparent upon the record proper (*Kellogg v. School Dist.*, 13 Okl. 285, 74 Pac. 110; *Dunn v. Claunch*, 15 Okl. 27, 78 Pac. 388; *Burdett v. Burdett*, 26 Okl. 416, 109 Pac. 922, 35 L. R. A. [N. S.] 964; *Manes v. Hoss*, 28 Okl. 489, 114 Pac. 698; *Healy v. Davis*, 32 Okl. 296, 122 Pac. 157), a motion for a new trial is apparently unnecessary, the well-settled rules of practice for the guidance of plaintiff in error in respect to as-

signments in error in this court apparently being applicable; but we deem it unnecessary in the present case to go further than to hold that this court will not consider whether there is error in a ruling against defendant, not involved in any error assigned by the plaintiff, in view of the fact that there has been neither motion for new trial nor cross-petition in error by the defendant. For a proper practice in presenting error by cross-petition to this court, see *Robinson Female Seminary et al. v. Campbell et al.*, 60 Kan. 60, 55 Pac. 276. If she and her husband had accepted the invitation of defendant's agent to sit by the fire in its office room, it would have been necessary for them to have entered the white waiting room, and go thence into the office; and also to have made their exit through that room. The jury returned a verdict for plaintiff for \$2,000; but, on a motion for a new trial assigning "excessive damages" as a ground therefor, the trial court "tendered plaintiff the alternative proposition of accepting a reduction of said verdict in the sum of \$1,000, or submitting to a new trial on the issues, whereupon, on the 18th day of October, 1910, the plaintiff filed her written acceptance of the verdict tendered by the court in the sum of \$1,000;" and the court thereupon ordered a remittitur of \$1,000, and overruled the motion for a new trial, to which defendant excepted.

[4] Section 26, art. 9 (section 244, Williams'), Constitution of Oklahoma, reads: "It shall be the duty of each and every railway company, subject to the provisions herein, to provide and maintain adequate, comfortable, and clean depots, and depot buildings, at its several stations, for the accommodation of passengers, and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public. * * *

In the Session Laws of 1907-1908, p. 202 (sections 861, 864 and 865, R. L. Ann.), it is provided:

"Every railroad company, * * * shall provide for and maintain separate waiting rooms at all their passenger depots for the accommodation of the white and negro races, which separate waiting rooms shall be equal in all points of comfort and convenience. * * * It shall be unlawful for any person to use, occupy or remain in any waiting room, * * * in any passenger depot in this state, set apart to a race to which he does not belong."

"Sec. 864. Any railway company, * * * which shall fail to provide * * * and maintain separate waiting room as provided herein, shall be liable for each and every failure to a penalty of not less than \$100.00 nor more than \$1000.00, to be recovered by suit in the name of the state, in any court of competent jurisdiction. * * *

"Sec. 865. If any passenger upon a railway train, * * * or shall remain in any

waiting room not set apart for the race to which he belongs, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than twenty-five dollars. * * * Should any passenger * * * or any other person not a passenger, for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room, said agent shall have the power and it is made his duty to eject such person from such room, and for such neither they nor the railroad company which they represent, shall be liable for damages, in any of the courts of this state."

See, also, *St. Louis, I. M. & S. Ry. Co. v. State*, 28 Okl. 372, 111 Pac. 396, 114 Pac. 1096; *St. Louis & S. F. Ry. Co. v. Sutton*, 29 Okl. 553, 119 Pac. 423; on rehearing, 29 Okl. 563, 119 Pac. 427; *Midland Valley Ry. Co. v. State et al.*, 29 Okl. 777, 119 Pac. 413; *St. L., I. M. & S. Ry. Co. v. State*, 31 Okl. 509, 122 Pac. 217.

It requires neither argument nor further citation of authorities to show that defendant was guilty of a breach of duty, imposed by the Constitution and statutory provisions we have quoted, proximately resulting in pain and suffering to plaintiff, and amounting to actionable negligence, for which she was entitled to recover damages, unless she was guilty of contributory negligence in declining timely invitation to sit by fire in the agent's office or such declination was the sole proximate cause of her pain and suffering.

[5, 6] As repeatedly held by this court, in deference to section 6, art. 23 (section 355, Williams'), Constitution of Oklahoma (C., R. I. & P. Ry. Co. v. Duran, 134 Pac. 876, not yet officially reported; *St. Louis & S. F. Ry. Co. v. Long*, 137 Pac. —, not yet officially reported; *St. Louis & S. F. Ry. Co. v. Model Laundry*, 137 Pac. —, not yet officially reported; *Dewey Portland Cement Co. v. Blunt*, 132 Pac. 659, not yet officially reported; C., R. I. & P. Ry. Co. v. Hill, 129 Pac. 13, 43 L. R. A. [N. S.] 622; *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191; *Independent Cotton Oil Co. v. Beacham*, 31 Okl. 384, 120 Pac. 969; C., R. I. & P. Ry. Co. v. Beatty, 27 Okl. 844, 116 Pac. 171; if not in other cases), the verdict of the jury is conclusive as to the defense of contributory negligence; and we are unable to say, as a matter of law, that the plaintiff, entitled to a comfortable separate waiting room, in declining the invitation to sit by the fire in the office of defendant's agent, was guilty of such an independent intervening act or omission proximately causing the pain and suffering for which she was awarded damages as would break the causal connection between the negligence of defendant in failing to provide such a room for her accommodation and such pain and suffering, so as to constitute the sole proximate cause thereof. And it should not be forgotten that

¹ Rehearing pending.

there is no evidence whatever as to the time at which she was so invited. It appears that she would have violated no law in passing through the "white" waiting room in making her entrance into and exit from the office, in accord with said invitation; but, we cannot say, as a matter of law, that she was in duty bound to have done so.

[3] Section 4196, Stat. 1893 (section 5033, R. L. Ann.), provides the "causes, affecting materially the substantial rights" of the party aggrieved, for which a new trial shall be granted; and "excessive damages, appearing to have been given under the influence of passion or prejudice," is one of these "causes." Defendant here contends that a new trial should be granted for this "cause"; but neither passion nor prejudice has been alleged, and it thus appears that this "cause" was not specifically assigned, either in motion for a new trial or petition in error, and same is urged for the first time in plaintiff's brief. "Excessive damages," to constitute a cause for new trial, must be such as per se to indicate the influence of passion or prejudice. Muskogee Electric Traction Co. v. Reed, 35 Okl. 334, 130 Pac. 157; M., K. & T. Ry. Co. v. Weaver, 16 Kan. 456; U. P. Ry. Co. v. Hand, 7 Kan. 380; U. P. Ry. Co. v. Milliken, 8 Kan. 647; U. P. Ry. Co. v. Young, 19 Kan. 488; Clark v. Baldwin, 25 Kan. 120; A., T. & S. F. R. Co. v. Brown, 26 Kan. 443; A., T. & S. F. R. Co. v. Frazier, 27 Kan. 463; K. P. Ry. v. Peavey, 29 Kan. 170, 44 Am. Rep. 630; A., T. & S. F. Ry. Co. v. Moore, 31 Kan. 197, 1 Pac. 644. We deem it unnecessary to determine whether passion or prejudice appears in the present case, in view of what we shall say hereinafter.

Neither passion nor prejudice can be found by implication in the words "excessive damages"; and we cannot here assume that, in passing upon the motion for new trial, the court considered whether passion or prejudice was indicated by the excessive amount of the verdict. It may be urged, with some degree of plausibility, that when passion and prejudice at once appears in the amount of the verdict, as an unavoidable conclusion from its excessiveness, it should be deemed charged by implication from the charge of excessiveness, and it should not be necessary to allege more; but we do not believe that such contention is sound. The charge of excessiveness is not the equivalent of the charge of passion or prejudice; and we are of opinion that the motion for new trial, to be sufficient, must, in some form or manner, specifically charge that passion or prejudice does appear, so as to bring this precise question to the attention of the trial court.

Mere error in the judgment of dispassionate and unprejudiced jurors in fixing the amount of the damages in cases of this character, where the amount cannot be determined by mathematical calculation, nor any

other precisely accurate mode of ascertainment, but must be estimated by the exercise of judgment, has not been made a "cause" for new trial by our statutes, although the same may be somewhat excessive (City of Argentine v. Bender, 71 Kan. 422, 80 Pac. 935); and, although the excess might be so great as to present the appearance of passion or prejudice to us, the statute appears to require that a new trial be demanded upon that specific ground in the trial court as a condition precedent to a review here of alleged errors in refusing same.

[1, 2] The statutory enumeration of grounds for a new trial is, in this jurisdiction, exclusive; and any matter for which a new trial may be granted is waived if not embraced in a motion therefor. Butts v. Anderson, 19 Okl. 387, 91 Pac. 906; St. Louis, etc., R. R. Co. v. Werner, 70 Kan. 170, 78 Pac. 410; S. F. Nesbit v. M. O. Hines, 17 Kan. 316; Rice v. Harvey, 19 Kan. 148; Holland v. Mudenger, 22 Kan. 733; Atchinson v. Byrnes, 22 Kan. 65; Clark v. Imbrie, 25 Kan. 425; Greenwell v. Greenwell, 28 Kan. 413; Decker v. House, 30 Kan. 616, 1 Pac. 584.

For the reasons hereinbefore stated, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

SHIVES v. FROHBURG.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 502*)—MOTION FOR NEW TRIAL—NECESSITY.

Syllabus same as State v. Poor, 33 Okl. 376, 125 Pac. 726.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2306-2309; Dec. Dig. § 502.*]

Error from Superior Court, Pottowatomie County; George C. Abernathy, Judge.

Action by W. E. Shives against Amells Frohberg. Judgment for defendant, and plaintiff brings error. Dismissed.

Crump & Skinner, of Holdenville, and Blakeney & Maxey, of Muskogee, for plaintiff in error. J. H. Woods and S. A. Sheldon, both of Shawnee, and J. H. Miley, of Wewoka, for defendant in error.

PER CURIAM. This proceeding in error is brought to reverse a judgment rendered upon a demurrer to the evidence, and the errors complained of consist only of errors alleged to have occurred on the trial. The record fails to disclose that a motion for a new trial was filed in the trial court, which motion is necessary in order to review the errors complained of. State v. Poor, 33 Okl. 376, 125 Pac. 726; Stump v. Porter et al., 31 Okl. 157, 120 Pac. 639; State v. Adams,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

31 Okl. 775, 123 Pac. 1127; *Campbell v. Lane*, 31 Okl. 757, 123 Pac. 1061.

The motion to dismiss is sustained. All the justices concur.

PETERS v. HOLDER.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002*)—FORCIBLE ENTRY AND DETAINER (§ 24*)—COMPLAINT—SUFFICIENCY.

The complaint states a cause of action under section 5508, Rev. Laws 1910. Where there is evidence tending to support the same, this court will not weigh the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002; * Forcible Entry and Detainer, Cent. Dig. §§ 107-111, 114-120, 146; Dec. Dig. § 24.*]

2. LANDLORD AND TENANT (§§ 114, 118*)—TENANCY—TERM.

A tenant in possession under a void or defective lease for a term of years creates a tenancy at will, and, if periodical rent be paid, the tenancy becomes one from year to year. *Tate v. Gaines*, 25 Okl. 141, 105 Pac. 193, 26 L. R. A. (N. S.) 106; 24 Cyc. 1031.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 373-381, 402-415; Dec. Dig. §§ 114, 118.*]

3. JUSTICES OF THE PEACE (§ 173*)—APPEAL—TRIAL DE NOVO.

Williams' Const. Okl. art. 7, § 14: "Until otherwise provided by law * * * in all cases, civil and criminal, appealed from justices of the peace to the county court, there shall be a trial de novo on questions of both law and fact"—citing 8 Words and Phrases, p. 7108.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 660-664; Dec. Dig. § 173.*]

(Additional Syllabus by Editorial Staff.)

4. JUSTICES OF THE PEACE (§ 173*)—REVIEW OF PROCEEDINGS—"TRIAL DE NOVO."

"Trial de novo" as used in Williams' Const. art. 7, § 14, providing for a trial de novo in cases on appeal from justices of the peace to the county court, means trial of the entire case anew, as if no action had been instituted in court below—a second time—citing 8 Words and Phrases, p. 7108.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 660-664; Dec. Dig. § 173.*]

Error from Grady County Court; N. M. Williams, Judge.

Action by George W. Holder against Ed Peters. Judgment for plaintiff, and defendant brings error. Affirmed.

William Stacey, of Chickasha, for plaintiff in error. F. E. Riddle, of Chickasha, for defendant in error.

LOOFBOURROW, J. George W. Holder, defendant in error, plaintiff below, commenced this action for forcible entry and detainer in the justice of the peace court, Chickasha township, Grady county, Okl., by filing therein a complaint, the substance of which

is as follows: "That the plaintiff, George W. Holder, complaining of the defendant herein, represents to the court that he is the owner and entitled to the immediate possession of the following described land and premises situated in Grady county, Oklahoma, to wit: S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ section 12, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ and W. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ section 13, township 6 N., range 7 W., containing 200 acres, more or less—that the defendant is in the unlawful and wrongful possession of said premises after his time for which he had a right to keep said premises has expired; that said defendant went into possession of said premises under plaintiff's tenant, and that the right and time of plaintiff's said tenant to said land and premises has expired, and said defendant is now in the unlawful and wrongful possession of said land and premises; that plaintiff has caused written notice to be served upon said defendant demanding him to vacate and deliver possession of said premises to this plaintiff, which said notice has been served more than three days, and gave said defendant more than three days' notice to vacate said premises; that the reasonable rental value of said premises would be about \$300 per year. * * *

The case was tried to the court, and the court rendered judgment in favor of Holder for 25 acres, and judgment in favor of Peters for 175 acres. From this judgment, the defendant below, Peters, appealed to the county court, where a trial was had to a jury, the jury finding a verdict in favor of defendant in error, Holder, for the entire tract of 200 acres, and judgment entered thereon. A motion for a new trial was overruled, and the case is now before this court on appeal.

The record discloses that the defendant in error, George W. Holder, in January, 1906, leased the 200 acres of land in controversy for a period of five years from one Mary Crowder, an Indian allottee; that in 1908 defendant in error placed one Jenkins in possession of the premises, who farmed and occupied the same until November, 1909, at which time the said Jenkins abandoned the place; one witness states "he ran away and left the country," leaving thereon corn and hogs and other property belonging to the defendant in error, Holder, and some personal effects which he turned over to one Cox; that in the meantime Mary Crowder deeded the land to one Champion, Champion deeded to Noble, and Noble deeded to Vaughn, the last deed being executed and delivered in July, 1909; that within a short time after Jenkins vacated the premises Peters, the plaintiff in error, moved into the house on the land, Peters claiming to rent from Vaughn, Holder claiming Peters rented from Jenkins. Within ten days after Peters mov-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed into the house on the premises Holder commenced this action.

[1] The assignments of error upon which plaintiff in error relies in his brief are, first, error of the trial court in refusing to grant a new trial. Under the second, third, fourth, and fifth assignments of error counsel states: "The complaint in this case alleges a peaceable and lawful entry, but charges a forcible detention after the expiration of the time which the defendant had a right to hold the premises. It is well established in this class of cases that evidence of an unlawful entry cannot be admitted where the complaint sets up a peaceable and lawful entry; that, where the complaint alleges a peaceable entry, plaintiff is estopped from denying it; and that, where the owner in fee of land acquires peaceable possession, he cannot be proceeded against in this summary action—citing *Farmer et al. v. Hunter* [45 Mich. 337], 7 N. W. 904; *Preston v. Kehoe et al.*, 15 Cal. 315. * * * In the case at bar the defendant is conceded by the plaintiff to have gained the peaceable and lawful entry. He was there as a tenant of Vaughn. His possession was Vaughn's possession, and Vaughn was the owner in fee of the entered tract." With reference to this contention of plaintiff in error, see Rev. Laws 1910, under forcible entry and detainer, section 5508: "Complaint. The summons shall not issue herein until the plaintiff shall have filed his complaint in writing under oath, with the justice, which shall particularly describe the premises so entered upon or detained, and shall set forth either an unlawful or forcible entry and detention, or an unlawful and forcible detention after a peaceable or lawful entry of the described premises." See *Schlegel v. Link*, 25 Okl. 263, 105 Pac. 652. On this proposition there is a conflict in the testimony; a part of the testimony tending to support the allegations and theory set forth in the complaint, and a part tending to support the theory of the plaintiff in error. The jury passed upon that question, and it is not for this court to weigh the evidence.

[2] The plaintiff in error further contends that the defendant in error was a mere trespasser on the land, for the reason he failed to prove a valid lease from the allottee, and it is admitted that the lease was defective; but the testimony is undisputed that Holder paid the rent each year for the years 1906, 1907, 1908, and 1909. The law is: "An entry under a void or defective lease for a term of years creates a tenancy at will, and if periodical rent be paid the tenancy becomes one from year to year." *Tate v. Gaines*, 25 Okl. 141, 105 Pac. 193, 26 L. R. A. (N. S.) 106; 24 Cyc. 1031—citing a long list of authorities in support of that proposition. Therefore Holder held as a tenant from year to year, and until his tenancy

was terminated by three months' notice in writing. Section 3784, Rev. Laws 1910.

[3, 4] The sixth assignment of error is based on the holding of the county court that the appeal from the judgment against him for possession of 25 acres of the land also carried up the judgment in his favor for possession of 175 acres; the plaintiff not having appealed. There is no merit in this contention. See *Williams' Const. of Okl.* art. 7, § 14: "Until otherwise provided by law, the county court shall have jurisdiction of all cases on appeals from judgments of the justices of the peace in civil and criminal cases; and in all cases, civil and criminal, appealed from justices of the peace to such county court, there shall be a trial de novo on questions of both law and fact." "Trial de novo" means trial of entire case anew, as if no action had been instituted in court below—a second time. 8 Words and Phrases, p. 7108.

The tenth assignment of error complains of instruction No. 5 given by the court, which is as follows: "That if the jury find from the evidence that the plaintiff, George W. Holder, paid the allottee, Mary Crowder, the rent on the land in controversy for the year 1909, and that he was in possession of said land through his tenant Jenkins, then in that event the plaintiff, Holder, would be a tenant from year to year, or until the tenancy was terminated by a three months' notice in writing given prior to the expiration of said year, and would be entitled to the possession of said premises until said notice was given." Such instruction correctly states the law applicable to this case.

We find no reversible error in the record, and the judgment of the lower court is affirmed. All the Justices concur.

HOWARD et al. v. DAVIS.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER (§ 12*)—RIGHT OF ACTION—PERSON DISPOSSESSED.

An action may be maintained against any person who commits a forcible entry and ouster, even though the latter is the owner of the property and entitled to the immediate possession, if the plaintiff had, at the time of the ouster, the actual and peaceable possession thereof.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 57–63; Dec. Dig. § 12.*]

2. FORCIBLE ENTRY AND DETAINER (§ 29*)—EVIDENCE—TITLE.

Deeds or other muniments of title may be offered in evidence in a forcible entry and detainer suit for the purpose of showing the character of a party's entry and possession, and to uphold the possession when once peaceably obtained.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 134–140, 147; Dec. Dig. § 29.*]

Error from County Court, Love County; R. A. Keller, Judge.

Action by Annis Davis against Ben Howard and another. Judgment for plaintiff, and defendants bring error. Affirmed.

A. Eddleman and J. C. Graham, both of Marietta, for plaintiffs in error. Wm. Pfeiffer, of Ardmore, for defendant in error.

LOOFBOURROW, J. This case involves the right of possession to a certain tract of land consisting of 40 acres, the same being about 16 miles southeast of Ardmore. There is no conflict in the testimony, and the evidence discloses: That in January, 1910, Frank Wilson and Annis Wilson were in possession of the tract of land in controversy, and had been for a number of years. That the tract was cultivated land, and that there was a house and some other improvements thereon. That on the 10th day of January, 1910, said parties executed a deed to the land to one J. C. Graham. That Frank and Annis Wilson were to retain possession of the property and be entitled to the rents and profits therefrom for that year, and were to surrender possession to Graham in January, 1911. That Frank Wilson and Annis Wilson ceased to be husband and wife, and Annis Wilson became Annis Davis. That she leased the premises to Frank Wilson for the year 1910. That in September, 1910, Graham deeded the land to Hardy Grant. That Annis Davis remained in possession of the land through her tenant, Frank Wilson, until about the 9th day of January, 1911. That the house on the premises was unoccupied, and Wilson boarded up the windows and nailed up the door. That on the 6th day of January, 1911, Hardy Grant served notice on Wilson to vacate the premises. That on the 9th day of January Ben Howard, as the lessee of Hardy Grant, moved into the house against the protest and over the objection of Wilson; Wilson then being in actual, peaceable possession and having corn in the field. That on January 13, 1911, Annis Davis commenced this action for forcible entry and detainer against Ben Howard and Hardy Grant. The case was tried in the justice court, and appealed to the county court. The jury returned a verdict in the county court in favor of the defendants Ben Howard and Hardy Grant, and judgment rendered thereon, and on the same day the plaintiff below, defendant in error, Annis Davis, filed motion for new trial, and on the 30th day of June, 1911, the judge of the county court granted a new trial, reciting in the order granting a new trial, "that the court erred in permitting testimony, over the objection of plaintiff, which placed in issue the title to the lands in question," which appears to have been the sole reason for granting the new trial. To the court's granting a new trial, the defendants excepted, and appealed from such order to this court.

Counsel for plaintiffs in error, in their brief, rely upon the following assignment of error for a reversal of this case: "Second. That the court erred in setting aside the verdict of the jury and judgment of the court and awarding defendant in error a new trial."

[2] Under the laws of this state neither justices of the peace courts nor county courts have jurisdiction to try cases involving the title or boundaries to land, and such issue cannot be litigated in a forcible entry and detainer proceeding, but it is a well-settled fact that "deeds or other muniments of title may be offered in evidence in a forcible entry and detainer suit for the purpose of showing the character of a party's entry and possession and to uphold the possession when once peaceably obtained." *Conaway v. Gore*, 27 Kan. 122; *West v. Comeaux*, 73 Kan. 271, 85 Pac. 138; *McDonald v. Stiles*, 7 Okl. 327, 54 Pac. 487; *City of Oklahoma City v. Hill*, 4 Okl. 521, 46 Pac. 568; *Chisholm v. Weise*, 5 Okl. 217, 47 Pac. 1086; *Vansellous v. Huene*, 26 Okl. 243, 108 Pac. 1102; *Anderson v. Ferguson*, 12 Okl. 307, 71 Pac. 225.

[1] In this case, however, it was error to admit the deeds in evidence, for the reason that the undisputed testimony discloses that the possession of Howard and Grant was not obtained peaceably and without force. They went upon the premises and moved into the house while Wilson, the tenant of Davis, was objecting and protesting against their doing so. Our statute is taken from Kansas, and that court, in the case of *Peyton v. Peyton*, 34 Kan. 624, 9 Pac. 479, states: "An action may be maintained against any person who commits a forcible entry and ouster, even though the latter is the owner of the property, and entitled to the immediate possession, if the plaintiff had at the time of the ouster the actual and peaceable possession thereof" (citing *Campbell v. Coonratt*, 22 Kan. 704; *Conaway v. Gore*, 27 Kan. 127; *Burdette v. Corgan*, 27 Kan. 275; *Emsley v. Bennett*, 37 Iowa, 15).

In the case of *Brown v. Feagins*, 37 Neb. 256, 55 N. W. 1048, is held: "An action for the forcible detention of real property may be maintained by one whose complete possession thereof has been ended by the wrongful entry of another, even though such entry was made under claim of a paramount title." See, also, *Iron Mountain v. Johnson*, 119 U. S. 608, 7 Sup. Ct. 339, 30 L. Ed. 504.

These cases were cited and the doctrine followed in an opinion by Justice Bierer in the case of *City of Oklahoma City v. Hill et al.*, 4 Okl. 521, 46 Pac. 568, which was quoted with approval in the case of *Chisholm et al. v. Weise*, 5 Okl. 217, at page 220, 47 Pac. 1086, at page 1087. In the latter case the following language is used: "The general purpose of the statute does not regard the actual condition of the title of the property,

but where any person is in the peaceable and quiet possession of it, he shall not be turned out by force, by violence, or by terror. The party so using force and acquiring possession may have a superior title, or may have the better right to the present possession; but the policy of the law is to prevent disturbances of the public peace and to forbid any person righting himself by his own hands and by violence, and requiring that the party who has obtained possession in this manner shall restore it to the party from whom it has been so obtained. The party out of possession must resort to legal means to obtain possession if he be entitled thereto." Applying this rule to the evidence in this case it is clear that the motion for a new trial was properly granted.

The judgment of the lower court is affirmed. All the Justices concur.

GREAT WESTERN COAL & COKE CO. v. MALONE.

(Supreme Court of Oklahoma. Sept. 23, 1913.
Rehearing Denied Nov. 18, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 512*)—OPINIONS—SAFE PLACE TO WORK.

It frequently happens that a witness is qualified to testify as an expert because of his experience and observation with reference to the matter under investigation.

(a) Evidence of witnesses examined, and held competent under the foregoing rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. § 512.*]

2. TRIAL (§ 280*)—REPETITION OF INSTRUCTIONS.

It is not error to refuse a requested instruction, where it has already been given in substance by the court in another instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 280.*]

3. MASTER AND SERVANT (§ 103*)—SAFE PLACE TO WORK—DELEGATION OF DUTY.

It is the duty of the master to furnish his servant with a reasonably safe place to work and with reasonably safe tools and appliances with which to work, taking into consideration the nature and character of the work to be performed, and the dangers therefrom, and this duty cannot be delegated by him so as to relieve him of liability for injuries resulting from its violation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

4. MASTER AND SERVANT (§ 291*)—INJURIES TO MINE EMPLOYE—INSTRUCTIONS.

Various instructions examined, and held not erroneous under the facts of this case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.*]

(Additional Syllabus by Editorial Staff.)

5. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

Where, in a mine employee's action for injuries from the derailment of a coal car on which he was riding, plaintiff relied, not only upon defects in the track, but upon the excessive speed of the cars, the court properly re-

fused to instruct that plaintiff could not recover unless the defective condition of the track was the proximate cause of his injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

6. MASTER AND SERVANT (§ 286*)—INJURY TO MINE EMPLOYE.

In a mine employee's action for injuries from the derailment of a coal car upon which he was riding, due to a defective track and excessive speed, the question whether the engineer was negligent was for the jury, and did not depend merely upon whether the engineer was drawing the cars at a speed which would have been unsafe over a properly constructed track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

7. MASTER AND SERVANT (§ 136*)—INJURY TO MINE EMPLOYE—DEFENSE—KNOWLEDGE OF DEFECTS.

Where a mine employee was injured from the derailment of a coal car on which he was riding, due to the defective condition of the track, together with excessive speed of the cars, the fact that the engineer may not have known the condition of the track could not relieve the employer from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 272; Dec. Dig. § 136.*]

8. TRIAL (§ 256*)—INSTRUCTIONS—DEFINITIONS—REQUESTS.

In a mine employee's action for injuries from the derailment of a coal car on which he was riding, an instruction that he did not assume the risk of injury from defects which did not appear to be imminently dangerous was not erroneous for failure to define the word "imminently," where no request was made for such definition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 623-641; Dec. Dig. § 256.*]

9. MASTER AND SERVANT (§ 265*)—INJURY TO MINE EMPLOYE—BURDEN OF PROOF.

In a mine employee's action for injuries from the derailment of a coal car on which he was riding, due in part to a defective track, the burden was on defendant to prove that plaintiff assumed the risk of injury in working upon the track after its defective condition had been discovered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

10. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—"REASONABLY SAFE PLACE TO WORK"—"REASONABLE CARE IN PROVIDING A SAFE PLACE."

As applied to a master's duty to a servant, the two terms "reasonably safe place" and "reasonable care in providing a safe place," as a general rule, are used interchangeably; and an instruction embodying the former phrase will not be held erroneous as prescribing too high a degree of care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

Commissioners' Opinion. Division No. 1. Error from District Court, Latimer County; Malcolm E. Rosser, Judge.

Action by Forest Malone against the Great Western Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Stuart, Gordon & Liedtke, of McAlester, and Jones & Lester, of Wilburton, for plaintiff in error. Andrews & Day, of McAlester, for defendant in error.

ROBERTSON, C. This is an action for damages for injuries received by the plaintiff, Forest Malone, while employed as a switchman by defendant in its mine. There was a judgment for plaintiff in the sum of \$2,500, and defendant appeals and assigns 18 specifications of error as grounds for reversal.

[1] The first alleged error is that the court erred in permitting witnesses A. C. Williams and G. O. James to testify as to whether or not the place where the accident occurred was a dangerous place to work. In order to understand the objection urged it will be necessary to quote from the testimony of the witnesses.

A. C. Williams testified as follows:

"I am 28 years old. I am a miner; was employed by the Great Western Coal & Coke Company. I saw the trip going up the slope. That he noticed the rope strike the frog pretty heavy, and the fire flying out of it. At the time of the occurrence he was digging coal. Prior to that time he was on the slope of this same mine switching; that he had been switching on this particular slope 15 or 18 months; that he had been working on the other slopes for five years; that he could judge from his experience as to whether a trip of coal cars was being pulled up that slope at a rate of speed that was safe or unsafe; that when the speed of cars is fast, they are more likely to jump the track than when they are slow; that he had known the condition of the switch in controversy for about two months; that the lower bridle holding the throw rail was too loose; the bridle would slip downhill if you did not keep it wedged, and that would allow the flange of the wheel to ride the ball of the rail. Q. From what you know of the condition of the track at this place, at the east eighth entry, would you say that the track was imminently dangerous in its condition for ordinary use in pulling cars of coal over it, or that it would be safe for a person to stay there under the promise that it would be repaired within a short time?

"Defendant: We object; he is asking for the conclusion of the witness, and it is for the jury to determine whether or not he was justified in remaining there.

"The Court: He can ask him whether or not, from his experience as a miner, this was an imminently dangerous place.

"Defendant: But not whether he was justified in remaining there?

"The Court: Of course not.

"Q. I'll ask you to state, in your judgment, whether that was an imminently dangerous place.

"Defendant: We object.

"The Court: He may answer the question.

"Defendant: We except.

"Q. Please answer the question. A. It was dangerous, but still a man could work there under promise that it would be fixed. I worked under it for a while under the promise that they would fix it, but they claimed they did not have the material to fix the bridle with. I noticed it very carefully, and had a hammer and kept a spike there to hold the bridle in its place. That he had been working in this particular mine for four years; went to work at riding the rope; that he had been crippled on the same slope 44 days before. That he was working there at the time of this trial. That the company had promised him they would fix the bridle, but that they did not have the material with which to fix it. That he had had cars off the track at this same point prior to the time the plaintiff was hurt, owing to the condition of the track. That they would often get off the track; sometimes they would ride the rail and some times would be thrown on the off side. That at the ordinary speed going up the slope a trip could be stopped in 10 or 15 feet distance, and that at the ordinary speed, when cars run off, he could get off the cars and ring the bell and stop the trip before injury could be done."

G. O. James testified, in substance, as follows: "He was 24 years of age; had been a miner about 8 years; was riding the rope on the trip in which plaintiff got injured; that just as the trip started up the slope, when they were nearing the 10th entry, witness was sitting on the first hitch, holding on to the first car with his left hand, and his right hand on the second car; just as he got to the low rock he had to stoop, and he seemed like he was going to jerk the trip away from under me and slid me back on the second car, and when we got to the eighth it wrecked." He never thought about getting off; it was running too fast. He has been working on different slopes for two, three, or four years; had been a rope rider pretty well all of the time; had worked on this particular slope for six or eight months; this trip was lots faster than the trips before; under ordinary conditions, a trip would stop in 15 feet; there was a bell rope to bell the trip down; the trip was going too fast to attempt to reach it; it took both hands to hold on. From my experience as a rope rider, I can say that the speed of that trip was dangerous. When a trip is going at a very rapid rate of speed, it is more likely to jump the track than when it is going slow."

There was testimony to the same effect by other witnesses.

In the 5 Ency. Evidence, 535, is found the following text: "It frequently happens that a witness is qualified to testify as an expert because of his experience and observation with reference to the matter under investigation."

The speed of the cars at the time of the accident was a material fact in the consideration of this cause. There was no positive

method of ascertaining the same save by the testimony of men who used them, or were in a position to see and were familiar with the same. These witnesses were men of wide experience in mining, and knew, as a fact, whether the place was, or was not, dangerous. In other words, they were witnesses of such character and possessed of such knowledge that their opinion in matters such as were inquired about was competent to go to the jury, especially in view of their qualifications as disclosed by the record. Counsel for plaintiff, at page 13 of their brief, make some observations on this phase of the case that seem to us worth setting out; they are as follows: "We must remember that these men were testifying about facts and conditions surrounding an occupation or business of which the ordinary man knows nothing. It is hard for the ordinary mind to perceive that lightless tunnel, some 4 or 5 feet high, some 8 or 10 feet wide, plunging 1,700 feet below the face of the earth, down which this track ran; hard for them to understand the construction necessary to adapt this track to the uses of a coal mine; hard for them to know what is safe or unsafe under those conditions. These employes were men having special knowledge of the things as to which they testified, and about which an ordinary juror knew nothing, and it seems to us not inadmissible for them to state whether or not, in conducting the operations of the mine, the pulling of a certain trip which they saw, under conditions and speed which were known to them as no evidence could make it known to any other man, it was safe or otherwise."

It is the duty of a trial court to get at the truth of the controversy; sometimes the only way the truth can be ascertained is by the opinion of witnesses. Such is the question under consideration. Mr. Chamberlayne in his *Modern Law of Evidence*, vol. 3, p. 2424, well states the rule as follows: "In the fact that verbal description is necessarily ill adapted for the presentation of reciprocally interacting phenomena, it is probable that, even should the witness succeed in giving to the jury an exact representation of many commingled phenomena, the tribunal would still fail to receive an accurate impression of the situation as a whole."

Defendant has not pointed out to us any better method of ascertaining the truth relative to the subject inquired about. Had there been a more satisfactory or practical method of proving this issue the objection might be considered meritorious, as it is, we cannot see how the defendant has been harmed by this testimony.

[2] The fifth assignment of error is the refusal of the court to give the following instruction offered by defendant: "It is claimed by plaintiff in his petition that he knew of the defective condition of the tracks and of switch No. 8, at which the car upon which he was riding was wrecked, and that he

made complaint of said dangerous condition to the defendant on or about the day prior to his injury. You are instructed that the making of the complaint to the defendant or its officers did not absolve the plaintiff from the use of some degree of care in performing his work after such complaint had been made, and if it would have appeared to the ordinary man that his riding upon the cars over and along said track and switch at the time plaintiff rode upon the same and was injured was dangerous and hazardous, plaintiff assumed the risk of injury by reason of riding upon the cars over said dangerous track." This question was fairly covered by instruction 8 of the court's general charge, to which no exceptions were taken, and the error complained of, if any, is of no consequence, inasmuch as it is the rule that it is not error to refuse a requested instruction if it has been given in substance by the court in another instruction.

The same disposition may be made of the next assignment, which complains of the failure of the court to give requested instruction No. 11, which deals with the same subject, and no further consideration need be given it.

[5] The giving of instruction No. 12, which reads as follows: "In order for the plaintiff to recover in this action you must believe by a preponderance of the evidence that the defective condition of the track or of the switch at or near the place set out in his petition was the proximate cause of the plaintiff's injury"—was properly refused for the reason that the defective condition of the track was not charged to be the proximate cause of the injury; the reckless manner of running the cars, the high speed at which they were conveyed, was the principal cause of the accident, although its happening was aided by other reasons, among which, doubtless, was the defective condition of the track. The instruction as requested did not state the law applicable to the facts, and there was no error in refusing to give it.

[6] So, too, the same fault is seen in requested instruction No. 13. It requires the jury to find that the engineer was not negligent unless they found by a preponderance of the evidence that he drew the cars over and along the track at a rate of speed which would have been unsafe over a track properly constructed and placed. This is not the law. The engineer's negligence, like that of any other person, is to be determined by the jury from all the facts and circumstances in evidence.

[7] So, too, the same fault can be charged against requested instruction No. 14. Simply because the engineer may not have known the condition of the track would not relieve the principal of that knowledge, or enable it to escape responsibility for failure to perform its plain duty.

[3] It is next urged that the court erred in

giving the following instructions: "It was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work, reasonably safe appliances and machinery with which to work, and a reasonably safe track over which the cars were to be hauled, and a failure to furnish such a place, appliances, and track, if there was such a failure, was negligence on the part of the defendant, and if the injuries complained of were the result of such failure, your verdict should be for the plaintiff, unless you shall find that he assumed the risk of injury on account of such failure." It is insisted that this instruction places altogether too high a duty on the master; that all the master is required to do is to exercise ordinary or reasonable care and diligence to provide his servant with a reasonably safe place in which to work, with reasonably safe tools and implements with which to work, with reasonably safe material upon which to work, and suitable and competent fellow servants, and that this instruction requires defendant to furnish a reasonably safe place to work, etc., and imposes upon the master an absolute duty in this respect, and does not give him the privilege of using ordinary and reasonable diligence in the furnishing of such place, tools, etc. The criticism offered to this instruction is unwarranted; and, while it is true that many of the cases go to the extent of saying that the master is bound to exercise reasonable care and diligence to provide his servant with a reasonably safe place in which to work, etc., as was said by Mr. Justice Williams in *Dewey Portland Cement Co. v. Blunt*, 132 Pac. 659, yet we do not think it was the intent of the court in that case to emphasize the necessity of the use of such language, or to overrule or criticize the holdings of *Neely v. S. W. Cotton Seed Oil Co.*, 13 Okl. 356, 76 Pac. 537, 64 L. R. A. 145; *Coalgate v. Hurst*, 25 Okl. 588, 107 Pac. 687; *C. v. R. I. & P. Co. v. Wright*, 134 Pac. 427, not yet officially reported; *Choctaw Elec. Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; or *Frederick Cotton Oil & Mfg. Co. v. Traver*, 129 Pac. 747.

[10] In the last-named case Commissioner Harrison's treatment of this question is so satisfactory that we feel it to be our plain duty to follow and approve the same. It follows: "There is one other assignment which plaintiff in error urges at considerable length, which, in order to prevent its arising in a future trial, it might be well to settle here, viz., that the court erred in the following instruction: 'You are instructed that, under the law, it is the duty of the master to provide a servant with a reasonably safe place to work and with reasonably safe tools or appliances with which to work.' It is contended by the plaintiff in error that this instruction is erroneous and vicious, in that it instructs the jury that the master must furnish a place reasonably safe, where-

as his duty is only to use reasonable care in furnishing such a place. The materiality of this distinction has not been generally recognized by the courts. The two terms, 'reasonably safe place' and 'reasonable care in providing a safe place,' as a general rule, have been used interchangeably. Some of the standard text works use the term 'reasonably safe place' as the adopted rule. Others use the two terms interchangeably. In 20 Am. & Eng. Enc. of Law (2d Ed.) 55, we find the following text supported by more than 200 decisions from 37 different states, and from the United States Supreme Court and the courts of Canada and England, viz.: 'In accordance with the rule that reasonable care must be taken to protect one's servants from injury, masters owe to their servants the duty of providing them with a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required, and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and is not one of the perils or risks assumed by a servant in his contract of employment; and the servant is entitled to rely upon the assumption that the master has performed the duty imposed on him by law, of providing a reasonably safe place to work.' In 26 Cyc. 1097, the following rule is stated: 'It is the positive duty of a master to furnish his servants with reasonably safe instrumentalities wherewith and place wherein to do his work, and, in the performance of these obligations imposed by law, it is essential that regard should be had, not only to the character of the work to be performed, but also to the ordinary hazards of the employment; and the servant may assume that the master has performed his duty.' This rule is supported by decisions from 48 states and from the United States Supreme Court and the courts of England and Canada. Our own court in the case of *McCabe & Steen Construction Co. v. Wilson*, 17 Okl. 355, 87 Pac. 320, uses the two terms interchangeably, or treats the terms as having the same legal effect. In the course of the opinion the court quotes from *Ruemmel-Braun Co. v. Cahill*, 14 Okl. 422, 79 Pac. 260, as follows: 'It is the positive duty of the master to use reasonable care in providing safe tools, machinery, and appliances to work with, a safe place to work in, safe materials to work on. * * * And, after quoting the above language, the court says: 'As above stated, it is now the fundamental and well-settled law of the land that it is the duty of the master to furnish the servant safe tools, materials, and structures to work with and upon; and to keep them in proper repair.' In view of the overwhelming recognition of the interchangeable use of the terms 'duty to provide a

reasonably safe place,' and 'duty to exercise reasonable care in providing a safe place,' we cannot be constrained to treat this objection of itself reversible. However, we believe the rule might be stated with more exact correctness by saying: 'It is the duty of the master to provide a servant with a reasonably safe place to work and with reasonably safe tools and appliances with which to work, taking into consideration the nature and character of the work to be performed and the dangers and hazards ordinarily arising therefrom.'

In *Choctaw Elec. Co. v. Clark*, 28 Okl. 399, 114 Pac. 730, Mr. Justice (now Chief Justice) Hayes, speaking on this subject said: "It is well-settled doctrine that it is the duty of the master to furnish the servant or the employé a reasonably safe place in which to work, reasonably safe appliances with which to work, reasonably safe material and reasonably competent fellow servants to work with; and this duty cannot be delegated by him so as to relieve him of liability for injuries resulting from its violation."

These authorities to our minds, furnish a satisfactory answer to defendant's objection to the instruction given. Besides, no instruction was offered by defendant covering the objection urged, and it was the duty of defendant to submit to the court such an instruction as in its opinion would have correctly stated the law.

[4] The objection urged against instruction No. 5 of the court's general charge cannot be sustained. It is charged that in this instruction the failure of the court to use the word "reasonably" results in making defendant the insurer of its servants, and that the positive duty is imposed on it to provide safe tools and place. This instruction, in our opinion, is a fair statement of the law on this phase of the case, and is not subject to the charge that the employer is thereby made the insurer of its servants. Read in connection with the balance of the court's general charge, it states in a fair manner the duties and requirements of both parties.

As to the twelfth assignment of error, it is sufficient to say that, having held the testimony of Jones, Harris, Elliott, and others competent under assignments 2, 3 and 4, the objection made that there is no evidence supporting the theory that the cars upon which plaintiff was riding were running at a high and dangerous rate of speed, such as would probably have caused a wreck though the track was in good condition, cannot be sustained.

[8] Complaint is made, also, that the thirteenth instruction, which reads as follows: "But if, though he knew of the condition of the track and saw that it was unsafe, yet it did not appear to be imminently dangerous, and he made complaint to the pit boss and coal rustler, and they, or one of them, promised to have the defect remedied within a short time, and from the nature of their em-

ployment plaintiff had a right to rely on these promises, and he proceeded to work on the trip as usual, relying on the promise that it would be repaired, and not believing that it was imminently dangerous, then he did not assume the risk of injury on account of the defective condition, even though he may have known that the track was unsafe"—does not contain a definition of the word "imminent," and that such omission is prejudicial to defendant's interests, for that the jury should have been told that plaintiff was entitled to rely upon the promise to repair and to continue in his work, unless the risk of so doing was so apparent as that no ordinarily careful and prudent man would have continued to work under the conditions. We fail to see any merit in this contention. The word "imminently," with the average man, needs no detailed definition, and if such is the case, it was defendant's duty to either make the same to the jury in the argument, or request the court to define it by an additional instruction. If this was not done at the trial by defendant, it is too late to complain now.

[9] The next assignment deals with instruction No. 11, which reads as follows: "The burden of proof is upon the plaintiff to show, by a preponderance of the evidence, negligence on the part of the defendant, either as to the condition of the track or switch, or as to the rate of speed at which the cars were being hauled, or both concurring, and the burden of proof is upon the defendant to show that plaintiff assumed the risk of injury in working upon the track after its defective condition had been discovered, if it was defective." It is urged that where the plaintiff in his own proof and by his own testimony shows a condition of affairs from which it must be deduced that there was contributory negligence or assumption of risk, the burden of proof cannot be held to be upon the defendant, and that in the case at bar plaintiff assumed the risk incident to the employment, but attempts to avoid the result by pleading the promise to repair on the part of defendant, and that therefore the burden is upon the plaintiff, by his pleadings and proof, to show that by reason of the promise to repair he has successfully avoided the assumption of risk as it would have existed under an ordinary contract of employment. But the record, in our opinion, fails to disclose such condition. Had the defect in the track been in itself the proximate cause of the injury, defendant might possibly, with some degree of reason, urge this contention, but, as is shown by the record, the condition of the track in itself was not alone responsible for the injury; the unwarranted speed of the trip and the negligence of defendant, or its servants, in permitting such speed, together with its failure to repair, combined with other circumstances in evidence to cause the accident which resulted in the injury. See as instructive cases on this subject: *Dewey Portland Cement Co. v. Blunt*, *supra*; *Curtis & Gart-*

side Co. v. Pribyl, 134 Pac. 71, not yet officially reported; C., R. I. & P. Ry. Co. v. Duran, 134 Pac. 876, not yet officially reported. Neither the pleadings nor the proof in this case will warrant us in holding that the burden was upon the plaintiff to show that by reason of the promise to repair he successfully avoided the assumption of risk, as it would have ordinarily existed. The trial court instructed the jury that the burden of the case was upon plaintiff to show a preponderance of the evidence on all the material allegations of his petition, before he would be entitled to recover. The defendant interposed as an affirmative defense the question of assumption of risk, and the trial court properly held that the burden of proving same was upon it.

The remaining assignments, dealing with the assessment of damages, the rendition of the judgment on the pleadings and the evidence, and the action of the court in overruling defendant's motion for a new trial, in our opinion, are without merit. The record discloses a meritorious cause of action and a fair trial in which the rights of all the parties were jealously guarded by the learned trial judge. We have carefully examined the numerous assignments of error, and feel that substantial justice has been done by the judgment, and that the same should therefore be affirmed.

PER CURIAM. Adopted in whole.

HOLMES et al. v. DILLARD.

(Supreme Court of Oklahoma. Oct. 7, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 334*) — DISMISSAL — DEATH OF PARTY.

Proceedings in error will be dismissed where, at the expiration of the statutory period for the institution of proceedings in error, it appears from the record that, intermediate to final judgment and the filing of proceedings in error in this court, a party to the judgment sought to be reversed died and no order of revivor of the judgment in her favor appears in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1848, 1851-1863; Dec. Dig. § 334.*]

Appeal from Carter County Court; W. F. Freeman, Judge.

Action between Edward R. Holmes and others and Gill Dillard. From an adverse judgment, the parties first named appeal. Dismissed.

J. B. Moore, of Ardmore, for plaintiffs in error. Sigler & Howard, of Ardmore, for defendant in error.

KANE, J. This cause comes on to be heard upon the motion of the defendant in error to dismiss the appeal, upon the ground that the order appealed from was entered

on the 28th day of February, 1913, and the petition in error with case-made attached was filed in this court on the 11th day of August, 1913; that intermediate to the judgment and filing of the petition in error, one of the plaintiffs in error, against whom the judgment was rendered below, and one of the persons who prayed the appeal, died, and his death has not been suggested, and the cause has not been revived in the name of his personal representative.

The motion to dismiss must be sustained upon the authority of *Nye v. Jones et ux*, 35 Okl. 96, 28 Pac. 112, and *Skilern et al. v. Jameson et al.*, 29 Okl. 84, 116 Pac. 193, wherein it was held that: "Proceedings in error will be dismissed where, at the expiration of the statutory period for the institution of proceedings in error, it appears from the record that, intermediate to final judgment and the filing of proceedings in error in this court, a party to the judgment sought to be reversed died, and no order of revivor of the judgment in her favor appears in the record."

The motion to dismiss is therefore sustained.

FIRST NAT. BANK OF STRATFORD v. WALKER.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 466*)—PROPERTY OF CORPORATION—NOTE—INDORSEMENT.

A note naming the payee as follows, "I promise to pay to the order of directors of F. U. Gin & Mill Co. of Stratford, I. T.," the same being a corporation, is in law made payable to the corporation, and the title to same may be passed by an indorsement thereon of the name of the corporation, by the secretary and treasurer thereof, in obedience to a resolution of its board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1827-1830; Dec. Dig. § 466.*]

(Additional Syllabus by Editorial Staff.)

2. EVIDENCE (§ 117*)—ADMISSIBILITY—PRELIMINARY SHOWING.

In an action on a note by a transferee thereof, defendant cannot introduce evidence as to fraud and failure of consideration until he first substantiates his allegation challenging plaintiff's claim of a bona fide purchase for value before maturity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 136; Dec. Dig. § 117.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Pontotoc County; Conway O. Barton, Judge.

Action by the First National Bank of Stratford against R. L. Walker. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

W. C. Edwards and Crawford & Bolen, all of Ada, for plaintiff in error. Stone & Maxey, of Ada, for defendant in error.

BREWER, C. The plaintiff bank sued defendant on a promissory note for \$90 in a justice of the peace court and obtained judgment. On appeal to the county court the court refused to admit the note in evidence, and gave judgment for defendant on a demurrer to plaintiff's evidence. These rulings of the court present the errors complained of.

The evidence shows that the defendant was one of the original incorporators of a co-operative gin company, and executed the note in part payment for his subscription to the capital stock of the corporation; that the note was dated June 15, 1907, and payable December 31, 1907; that on August 6, 1907, the corporation borrowed from plaintiff \$2,000 by order of the directors, and received the money and used it for corporate purposes, with the knowledge and assent of all the directors; that to secure the obligation to the bank the note in suit, together with other notes, were on the date of the loan transferred and delivered by the board of directors to the bank. It is not claimed that either the original loan or the note in suit have been paid. The defendant, after having denied that plaintiff was an innocent purchaser for value before maturity, then set up the defenses of fraud and deceit and failure of consideration. The note was ruled out when offered as evidence, upon the following objection from defendant: "We object to the offering of the note in evidence for the reason that the note has not been properly indorsed, etc." This objection was based on the fact that the note recited: "I promise to pay to the order of directors of F. U. Gin & Mill Company of Stratford, I. T., etc." And the transfer to plaintiff when it was delivered as collateral was by signing the name of the corporation by G. W. Merrill, secretary and treasurer.

[1] The question then is: Does the language used in the above note make the unnamed directors the payee, or does it make the corporation named payee? If the corporation is the payee, then the transfer by the secretary and treasurer, in the name of the corporation, was certainly proper and passed the title of the corporation. In *McBroom v. Corporation of Lebanon*, 31 Ind. 268, it is said: "A note made payable to the treasurer of what purports to be a corporation, without giving the name of the treasurer, is, in effect, payable to the corporation, and shows that the corporation is the party in interest; and a suit on the note is properly brought in the name of the corporation." In *Nave et al. v. Hadley*, 74 Ind. 157, the court says: "It is well settled that a note payable to the cashier of a bank is to be deemed payable to the bank, and that the bank may sue thereon as payee"—citing, "*Baldwin v. Bank, etc.*, 1 Wall. 234 [17 L. Ed. 534]; *Garton v. Union Bank*, 34 Mich. 279; *First National Bank, etc., v. Hall*, 44 N. Y. 395 [4 Am.

Rep. 698]; *Pratt v. Topeka Bank*, 12 Kan. 570; *Fisher v. Ellis*, 3 Pick. [Mass.] 322. This is the doctrine of the case of *Bank, etc., v. Wheeler*, 21 Ind. 90." In *Esley v. People of Illinois*, 23 Kan. 510, where a note was payable to "the order of the people of the state of Illinois," and the parties to the suit had proceeded on the theory that the payee was in fact "the state of Illinois," the Supreme Court sustained the judgment. In the case of *Darby v. Berney Nat. Bank*, 97 Ala. 643, 11 South. 881, the note in suit was payable on its face to "J. B. Cobbs, Cashier," and the court in discussing the right of the bank to maintain the suit as payee says: "There was no indorsement of the paper by Cobbs; and the point is taken by demurrer that the complaint shows the legal title to the note to be in Cobbs, and hence that plaintiff was without right to maintain this action. The authorities are opposed to this position, and the law may be said to be well settled that in a case like this the legal title is in the bank, and it may sue in its own name, averring either that the promise was made to its agent for it, or that the agent's name was used by adoption for that of the principal. The demurrer was properly overruled"—citing authorities. See, also, *Daniel's Neg. Paper*, vol. 1, § 101; *Teldeman on Com. Paper*, § 17, and cases cited; *E. L. P. Co. v. Farmers' Nat. Bank*, 130 Ind. 387, 30 N. E. 411, 30 Am. St. Rep. 246; *Nave v. First Nat. Bank*, 87 Ind. 204; *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29.

We believe that, as a matter of law, the note in this case shows the corporation which negotiated it to have been the real payee and owner, and that it therefore had the legal title and could transfer the same by an indorsement in the name of the corporation. Besides in this case if it needed, or the case admitted of evidence, as to the intentions of the parties, it is abundantly shown that it was in fact the property of the corporation. The court therefore erred in refusing to admit the note in evidence; but for this error the plaintiff would have furnished evidence showing a right to recover, which the defendant would then have had the right to overcome if he could by his evidence.

[2] As this case must be returned for a new trial, we think it proper to observe that, before defendant is entitled to introduce evidence as to the fraud and failure of consideration alleged, he must first substantiate his allegation challenging plaintiff's claim of innocent purchaser for value before maturity. While the defenses urged would be good as between the maker and payee, they are not good as against an innocent purchaser for value in good faith before maturity.

The cause should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

MOORE v. ADAMS.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 757*)—BRIEF—SUFFICIENCY.**

Where the brief of plaintiff in error fails to contain an abstract statement of the facts, and such other matters required by rule 25 of this court (125 Pac. viii), the judgment of the trial court having been superseded, a motion to affirm the judgment will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

Error from Harmon County Court; C. W. King, Judge.

Action by W. N. Adams against A. A. Moore. Judgment for plaintiff, and defendant brings error. Affirmed.

Madden & Fowler, of Hollis, for plaintiff in error. A. M. Stewart, of Hollis, and Gray & McVey, of Oklahoma City, for defendant in error.

PER CURIAM. This cause comes on to be heard on motion of defendant in error to affirm the judgment of the trial court. There judgment was rendered against plaintiff in error for a certain sum, whereupon he superseded the same and commenced proceeding in error in this court. As counsel for plaintiff in error has not complied with that part of our rule 25 (95 Pac. viii) which requires: "The brief of the plaintiff in error in all cases except felonies shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court"—the judgment of the court below is affirmed. *Berry v. Woodward*, et al., 133 Pac. 1127; *McKain v. J. I. Case Threshing Mach. Co.*, 35 Okl. 164, 128 Pac. 895; *Merchants' & Planters' Ins. Co. v. Crane et al.*, 31 Okl. 713, 123 Pac. 1126.

TULSA ST. RY. CO. v. JACOBSON.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§§ 1002, 1005*)—REVIEW—QUESTIONS OF FACT.**

Where a cause is tried before a jury and a general verdict returned and judgment rendered on the verdict, and the evidence is conflicting and contradictory, and there is competent evidence to sustain the verdict, this court will not undertake to weigh the evidence or to determine where the preponderance lies, but will sustain the verdict of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937, 3860-3876, 3948-3950; Dec. Dig. §§ 1002, 1005.*]

2. NEW TRIAL (§ 148*)—VERDICT—IMPEACHMENT—TESTIMONY OF JURORS.

Upon grounds of public policy, jurors will not be heard by affidavit, deposition, or other sworn statement to impeach or explain their verdict, or show on what ground it was rendered, or that they made a mistake, or misunderstood the law or the result of their finding, or to show what items entered into the verdict, or how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when same is attempted to be impeached.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by Carrie Ila Jacobson against the Tulsa Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hainer, Martin, Bush & Murry, of Tulsa, for plaintiff in error. Woodson E. Norvell, of Tulsa, for defendant in error.

HAYES, C. J. This proceeding in error is prosecuted to reverse a judgment of the district court of Tulsa county, awarding to defendant in error damages which she alleges she received because of the negligent acts of plaintiff in error while she was a passenger on one of its street cars in the city of Tulsa.

[1] Two assignments of error are urged for reversal of the cause. By the first assignment plaintiff in error complains that the verdict is not sustained by the evidence. In support of this assignment, counsel for plaintiff in error in their brief have not directed their argument to showing that there was no evidence reasonably tending to support the verdict, but that the verdict is against the preponderance of the evidence. Under the rule in this jurisdiction, this court is not permitted to weigh the evidence to ascertain where the preponderance is. If there is any evidence reasonably tending to support the verdict, it must be sustained. An examination of the record in this case discloses that there is evidence to sustain the verdict, which evidence is very strongly controverted, and had the verdict been for plaintiff in error, this court could not disturb it. But by the verdict of the jury the weight of the conflicting evidence and credibility of the witnesses were determined, and, when approved by the trial court by its refusal to grant a new trial, it should not be disturbed by this court. *Kuhl v. Supreme Lodge Select Knights & Ladies*, 18 Okl. 383, 89 Pac. 1126; *Grant v. Milam*, 20 Okl. 672, 95 Pac. 424; *Wade v. Cornish*, 23 Okl. 40, 99 Pac. 643.

[2] The second assignment urged complains of the action of the trial court in refusing to admit as evidence in support of plaintiff in error's motion for a new trial the affidavits of certain of the jurors to show that in arriving at the amount of their verdict the jurors concurring therein agreed that each would set down upon a piece of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

paper the amount which he thought defendant in error was entitled to recover, and that said amounts should then be added together and divided by the number of jurors concurring, and that the amount thus ascertained should be the amount for which the verdict would be rendered and was rendered. That the trial court committed no error in refusing to admit these affidavits of the jurors for the purpose of impeaching their verdict is settled by *Colcord v. Conger*, 10 Okl. 458, 62 Pac. 276; *Barnes v. Territory*, 19 Okl. 373, 91 Pac. 848; *Pitchlynn v. Cherry*, 32 Okl. 77, 121 Pac. 196.

In *Colcord v. Conger*, supra, the rule of law governing this question is stated in the following language: "Upon grounds of public policy, jurors will not be heard by affidavit, deposition, or other sworn statement to impeach or explain their verdict, or show on what ground it was rendered, or that they made a mistake, or misunderstood the law or the result of their finding, or to show what items entered into the verdict or how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when same is attempted to be impeached." This doctrine is supported by the decided weight of authority (2 Thompson on Trials, 2618), and no good reason has been suggested to us why it should be overturned.

There being no error assigned requiring a reversal of the cause, the judgment of the trial court is affirmed. All the Justices concur, except WILLIAMS, J., absent, and not participating.

GEINNE v. STEWART.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. INDIANS (§ 13*)—LANDS—POWERS OF NATURAL GUARDIAN.

The father of an Indian minor allottee has no right, merely because he is its natural guardian, to make any contract concerning his minor child's land.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

2. LANDLORD AND TENANT (§ 291*)—HOLDING OVER—NOTICE TO QUIT.

Where defendant occupied and paid rent for a minor's land one year, under a contract made with such minor's father, but remained on the land another year, without consent, or the payment of rent to the father, such defendant was merely holding over wrongfully, and was only entitled to the statutory notice to vacate required in such cases.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1241, 1243-1269; Dec. Dig. § 291.*]

Commissioners' Opinion, Division No. 2. Error from Pontotoc County Court; Conway O. Barton, Judge.

Action in forcible entry and detainer by Mattie J. Stewart, by her next friend, S. P. Steward, against Paul Geinne. Judgment

for plaintiff, and defendant brings error. Affirmed.

F. P. Lieuallen and W. F. Schulte, both of Ada, for plaintiff in error. Bullock & Kerr, of Roff, for defendant in error.

BREWER, C. This action in forcible entry and unlawful detainer was tried in the county court of Pontotoc county on appeal from a justice of the peace court. At the conclusion of the evidence the jury was instructed to find for plaintiff and did so by its verdict.

This suit is for possession of a 700-acre allotment, consisting of about 23 acres in cultivation with houses and outhouses; the remainder being pasture lands. Geinne rented the house and land in cultivation for the year 1908 from the father of the allottee, who is a child eight years of age. He remained on the place during the years 1909 and 1910. The pasture land, within the inclosure of which the house and little farm are situated, was rented to other parties. It seems that Geinne during the years 1909 and 1910 was making use of the pasture, by letting certain stock, including about 250 goats, run in the pasture. There was no claim of any agreement with the father of the allottee that would permit this. Suit was brought for all the allotment on the theory that Geinne was in the unlawful possession of it all. Geinne, the appellant, claims that his relations with the father of the allottee created a tenancy, either at will or by the year, and that, if such was the case, the three days' notice prior to filing the suit was insufficient, and for this reason the case of the plaintiff failed and the cause should be reversed.

[1] It is freely admitted that the father of the allottee had no right in the sole capacity of natural guardian to make any contract concerning the minor's land. This is true under the law. *Capps et al. v. Hensley*, 23 Okl. 311, 100 Pac. 515, discusses this question and reviews the authorities.

[2] But it is contended that as no one objected to his remaining on the land from year to year, after having entered under the contract with the father, he became a tenant either by will or by the year. This question is an important one and beset with difficulties we do not care to undertake, unless it is necessary to a proper decision of this case, and, after a careful reading of the entire record, we do not think the question is involved, for the reason that there was no proof introduced or offered that any payment of rents was either offered or accepted by the natural guardian for the years 1909 or 1910. The positive and uncontradicted proof is that there were no dealings or transactions between the parties relative to these lands for those years. The situation of appellant then is simply this: He was on the

place for 1909 under a contract the father had no legal right to make, and paid rent for that year. After that time, so far as the record shows, he has continued to hold over, without paying anything in the way of rentals. In other words, he is holding over without right, and a mere delay of this nature, upon the part of the allottee to oust him, cannot be taken advantage of by him. So it is unnecessary to consider whether any, and if so what, rights might grow out of an occupancy of a minor's land, under agreements with its natural guardian, where the occupancy had continued from year to year and rentals had been paid, and converted to the child's use.

PER CURIAM. Adopted in whole.

SULLIVAN v. BRYANT.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 53*) — VERBAL LEASE—COMMENCEMENT OF TERM.

Section 941, Rev. Laws 1910: "Following contracts are invalid, unless the same * * * be in writing: * * * First. An agreement that, by its terms, is not to be performed within a year from the making thereof. * * * Fifth. An agreement for the leasing for a longer period than one year * * * of real property. * * * Held, that subdivision 1 applies to agreements other than those relating to land, and subdivision 5 governs with reference to agreements concerning real estate, and, if such parol agreement is for the lease of real property for a longer period, term, or duration than one year, then it is within the statute of frauds; but, if such parol agreement is for the leasing of real property for the term, duration, or period of one year or less, it does not come within the statute of frauds, regardless of whether the term of lease commences in presenti or in futuro.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 69, 80, 92; Dec. Dig. § 53.*]

2. FRAUDS, STATUTE OF (§ 53*) — VERBAL LEASE—COMMENCEMENT OF TERM.

A verbal lease of real estate for one year to commence in the future is valid.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 69, 80, 92; Dec. Dig. § 53.*]

Error from County Court, Cleveland County; F. B. Swank, Judge.

Action by Annie M. Sullivan against R. S. Bryant. Judgment for defendant, and plaintiff brings error. Affirmed.

Hutchin & Burke, of Lexington, for plaintiff in error. J. B. Dudley, of Norman, for defendant in error.

LOOFBOURROW, J. This is an action in forcible entry and detainer commenced in the justice of the peace court of Cleveland county, Okla., and appealed to the county court of that county, where a judgment was rendered in favor of the defendant, from which judgment plaintiff appeals to this court.

The sole question involved in this case is whether or not a verbal lease of real estate for one year, commencing in futuro, is within the statute of frauds.

[1, 2] The plaintiff assigns as error the giving of the following instruction: "You are further instructed that a verbal lease of farming lands for one year, to commence in the future, is valid and binding, and, if you find from the evidence in this case that in July, 1910, the defendant made a verbal contract with the plaintiff, by and through John Sullivan, for the possession of said premises for the year 1911, for a share of the crop, then your verdict should be for the defendant."

The English statute of frauds, from which similar statutes have been enacted by the various states of the Union, was first introduced in Parliament at its first session in 1673; the same being St. 29 Car. II, c. 3. The statute itself is clear and explicit; but slight variances in the phraseology in the different state statutes, together with the varied conditions which may arise and call for an application of the same, have resulted in an irreconcilable conflict in the authorities. Our own statute is found practically verbatim in the statutes of California and Dakota; but the Supreme Courts of those states, in construing and applying the same, have arrived at conclusions directly in conflict upon the question involved in this case.

Counsel for plaintiff and defendant each cite a great many authorities in support of his contention.

The Oklahoma statute of frauds was adopted from Dakota by the Statutes of 1890, § 847 (section 780, Willson's Rev. & Ann. St. 1903; section 1089, Comp. Laws 1909; section 941, Rev. Laws 1910), and is as follows: "Statute of frauds. The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: First. An agreement that, by its terms, is not to be performed within a year from the making thereof. * * * Fifth. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Section 1236, Dak. (section 1087, Comp. Laws Okla. 1909; section 939, Rev. Laws Okla. 1910), provides: "All contracts may be oral, except such as are specially required by statute to be in writing."

The case of *Paulton v. Kreiser*, 18 S. D. 487, 101 N. W. 46, reported in 5 Ann. Cas. 827, notes: "In some jurisdictions a parol lease for one year to commence in the future is held void under a clause of the statute of frauds prohibiting oral agreements not to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes

performed within a year 'from the making thereof,' though a subsequent clause of the statute relating to leases omits the words 'from the making thereof'; the rule being that the time is computed from the making of the contract, and not from the commencement of the performance thereof"—citing Alabama, California, Illinois, Minnesota, and Oregon. "In other jurisdictions one year parol leases to commence in the future are held to be void, though the lease clause of the statute precedes the general agreement clause containing the words 'from the making thereof'"—citing Kentucky, Kansas, Florida, and Montana. "In Massachusetts there is no express provision as to leases for one year; but an oral lease to commence in futuro is held void under a clause of the statute relating to agreements not to be performed within one year from the making thereof."

The authorities holding that a parol lease for one year to commence in the future is valid, and not within the statute of frauds, where the words "from the making thereof" are omitted from the provision of the statute applying to leases, notwithstanding the statute contains another clause making void all agreements not to be performed within a year "from the making thereof," as in the Oklahoma statute, for the reason that the latter clause has no application to contracts or agreements concerning real estate, are Arkansas, Colorado, Iowa, Michigan, Mississippi, New York, and Texas; the reason for the above rule being found in *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356, followed in many of the above cases: "The time between the making of the lease and its commencement in possession is no part of the term granted by it. The term is that period which is granted for the lessee or tenant to occupy and have possession of the premises. It is the estate or interest which he has in the land itself by virtue of the lease from the time it vests in possession. When, therefore, our statute speaks of a lease for a period not longer than one year, * * * it has reference to the time for the tenant to possess and occupy the premises, and does not include any previous or intermediate time. A lease, therefore, for the term of one year may as well be made to commence at a future date, as at the date of making it."

In the Dakota case the court says: "As section 1236 of the act expressly declares that 'all contracts may be oral except such as are specially required by statute to be in writing,' and the manifest purpose of subdivision 5, § 1238, was to remove from the operation of the invalidating provision leases which do not exceed a term of one year's duration, the interpolation of the phrase 'from the making thereof' would be wholly unwarranted, and contrary to the intention of the Legislature. Hence an essential requisite of an oral agreement for the leasing of land is that the duration of the specified term shall not exceed

one year from the time the tenure is to begin, and that such a lease cannot be fully performed within one year from the time it was made and entered into by the parties has no tendency to render the same nugatory and void. Manifestly, the expression 'for a longer term than one year' relates to the duration of the term, and the omission of the phrase 'from the making thereof' shows an intention not to invalidate a parol lease of land for a term of one year to commence at a date subsequent to the making thereof."

Counsel for plaintiff in error lays particular stress upon the case of *Wickson v. Monarch Cycle Co.*, 128 Cal. 156, 60 Pac. 764, 79 Am. St. Rep. 36, and argues that, since the California statute of frauds is identical with the Oklahoma statute, the construction placed thereon by the California courts should be followed in this jurisdiction. The court in that case held that: "The two subdivisions (1 and 5) are to be read and construed together, and, as so read, a parol lease is valid for one year, but must be for no longer than one year from the time it is made." The reasoning of the California court and other courts following that line does not appeal to us so strongly as that of the New York and Dakota courts and other courts supporting the latter decisions.

Legislative bodies should and, no doubt, do enact rules of action for the protection and benefit of the people they represent, and they have in mind the customs and usages of the people for whom they legislate, and it is a fact that, but for the confidence which men have in each other, business, as now conducted, would be impossible. Men, every day and in every section of this state, hold possession of real estate by parol lease, for one-year term; the agreement therefor being made before the term of lease begins to run. The doctrine that a "man's word is as good as his bond" is abroad in the land, and we do not believe the Legislature intended to enact a law that would render such leases void.

In the case of *Turner v. Trail et al.*, 24 Okl. 135, 103 Pac. 575, in an opinion by Justice Dunn, this court practically committed itself to the doctrine that such a lease is valid, although the writer of the opinion expressly states that he is not discussing this subject under the Oklahoma statute. In that case the statutes of Indian Territory and of Arkansas, which are substantially the same as the Oklahoma statute, were construed, and the court followed the case of *Higgins et al. v. Gager*, 65 Ark. 604, 47 S. W. 848, quoting at length therefrom, wherein appears the following language: "According to the familiar canons of construction, we are not to conclude that different parts of a statute mean and include the same thing, when they are susceptible of different and independent meanings, and may embrace different subjects." Following this rule of construction, subdivision 1, "an agreement that by its terms is not to be performed within a year

from the making thereof," refers to all contracts other than those embraced in subdivision 5, and subdivision 5 governs with reference to agreements concerning real estate, and, if such agreement is for the lease of real property for a longer period, term, or duration than one year, then it is within the statute of frauds; but, if such agreement is for the leasing of real property for the term, duration, or period of one year or less, it does not come within the statute, regardless of whether the term of lease commences in presenti or in futuro. We therefore hold that the instruction was proper, and that the lease was valid.

The judgment of the trial court is affirmed. All the Justices concur.

BILBY v. JONES.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION (§ 40*)—EVIDENCE—SUFFICIENCY.

The evidence sufficiently supports the verdict.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

2. JUSTICES OF THE PEACE (§ 86*)—ATTACHMENT—SERVICE BY PUBLICATION—SALE OF PROPERTY ATTACHED.

A sale of chattels taken under a writ of attachment, where there has been no personal service of summons on the defendant, and no appearance by him in the suit, and the case is not one allowing service by publication, is void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 280-294; Dec. Dig. § 86.*]

3. EXECUTION (§ 457*)—WRONGFUL ATTACHMENT—LIABILITY OF PURCHASER AT SALE.

Corn belonging to plaintiff having been taken and sold under a void judgment and writ of attachment, the purchaser at such sale is liable in conversion for the value of the corn, and especially where such purchaser was the plaintiff and moving cause in the void proceedings in which the sale was made.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 457.*]

4. TROVER AND CONVERSION (§ 1*)—DEFINITION—"CONVERSION."

"Conversion," is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1562-1570; vol. 8, p. 7618.]

5. TROVER AND CONVERSION (§ 9*)—NECESSITY OF DEMAND.

In a suit for the conversion of personal property, where the possession was taken and at the time of suit maintained wrongfully, no demand is necessary before bringing suit. The wrongful taking and conversion is an assertion of ownership.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 58-83; Dec. Dig. § 9.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Wagoner County; Leon B. Fant, Judge.

Action by James M. Jones against John S. Bilby. Judgment for plaintiff, and defendant brings error. Affirmed.

F. B. Righter, of Broken Arrow, for plaintiff in error. Judson J. Hughes, of Ames, for defendant in error.

BREWER, C. This suit was brought by the defendant in error, as plaintiff below, against the plaintiff in error, as defendant, to recover the value of something over 900 bushels of corn alleged to have been converted by the defendant and alleged to have been of the value of \$478.12, and also for the recovery of additional damages to cover the expense of time and money expended in pursuing the property.

The defendant Bilby answered with a general denial. The facts out of which the suit arose may be briefly summarized as follows: The plaintiff Jones cultivated 40 acres of land belonging to the defendant Bilby during the year 1909 and agreed to give as rental for said land one-third of the crop of corn grown thereon. After the maturity of the crop, a portion of it had been gathered and a portion of it was ungathered in the field. The defendant on November 6, 1909, procured the issuance of a writ of attachment out of a justice of the peace court to cover rents of the land alleged to be due him in the sum of \$200. This writ was levied upon all the corn upon the place, both gathered and ungathered. The return of the officer showed the amount of the corn to be 922 bushels; the appraisal showing it to be of the value of \$431. The corn was sold under two orders of sale issued by the justice of the peace and based on a judgment by default. The plaintiff in the justice court and defendant in this suit being the purchaser thereof at both sales. The contention of the plaintiff here is that the judgment of the justice of the peace, together with the proceedings had, and the sale made thereunder, were absolutely void and unlawful for the reason that no summons was issued by the justice of the peace or served upon him in the suit, and that he had not entered his appearance or been advised of the day set for trial. The defendant undertook to show by testimony that a summons had in fact been issued and served. The question of whether or not a summons was issued and served seems to have been the pivotal issue in the case. The jury returned a verdict in favor of the plaintiff, allowing him \$315 as the actual value of the corn converted and \$185 additional damages for the trouble and expense he had been put to in relation to the same. On plaintiff's own motion the court permitted him to remit this last item of damage and

rendered judgment in his favor on the verdict for the value of the corn.

The defendant, as appellant here, raises a number of questions, only a limited number of which, however, will require our consideration.

[1] The first point, which goes to the sufficiency of the evidence, cannot be sustained. The justice of the peace who issued the attachment, together with his docket and files, and the constable who made the levy and the sale, were all before the court and jury. The docket of the justice failed to show the issuance or return of a summons, or even the date of the supposed trial, nor was a summons found in the jacket containing the papers or in the office of the justice, nor could it be produced. The justice stated, when pressed and with some apparent hesitancy, that he had issued a summons. The constable testified to making the levy and the sale, gathering and caring for the corn, but could not be induced to say that he served a summons in the case. The evidence, fairly considered, impresses us, and must have so impressed the jury, that in fact he did not have or serve a summons. The defendant testified positively that no summons was served upon him; that when the constable made the levy on his corn he tried to learn when he could appear in court, having the constable read the second time the order of attachment, which contained no summons or notice of a day set for trial. Defendant also testified that he sought out the justice of the peace, finding him in his field, and sought to learn if his case had been set for trial, and when, but could get no satisfaction or information from the justice. There was therefore, to our minds, an ample showing made that no summons was issued or served or other notice given the plaintiff of a time when he might appear and defend his rights. A reading of the entire record so impresses us.

Under this evidence the court instructed the jury in substance that if it should find, from a preponderance of the evidence, that no summons had been served in the justice of the peace court, and that defendant had purchased the corn under a sale made in such suit, then the sale and the defendant's possession of the corn, under such sale, was unlawful, and that if they so found the facts the plaintiff would be entitled to recover the value of the corn, at the time it was so taken, after making allowance and deducting the value of the corn that was going to the defendant for his rents for the land.

[2] This squarely presents the question: Is a sale of chattels under an attachment absolutely void, in a case wherein there has been no service of summons personally and no appearance of the defendant has been entered and the case is not one in which service may be made by publication? In such

situation we think the proceedings in attachment and a sale thereunder were void.

Section 5359, Revised Laws 1910, provides that actions before justices of the peace are commenced by summons or by appearance and agreement of the parties. If commenced by summons, the action is deemed commenced upon delivery of the same to the officer. If commenced by appearance and agreement of the parties, the action is deemed commenced at the time of docketing the case. Section 5361, Revised Laws 1910, provides that the summons shall be dated the day it is issued, signed by the justice, directed to the proper officer, must contain the name of the defendant, if known, and must command the officer to summon the defendant to appear before such justice at his office, at a time specified therein, and must describe the plaintiff's cause of action sufficiently to apprise the defendant of the nature of the claim against him. It must show the amount for which the plaintiff will take judgment if the defendant fail to appear. Section 5366, Revised Laws 1910, provides that the plaintiff in a civil action may have an attachment against the property of the defendant, upon certain grounds mentioned, "at or after the commencement thereof."

In the case of *Ballew v. Young et al.*, 24 Okl. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084, the question of the validity of an attachment and the proceedings and judgment therein, where the defendant was a nonresident, and the affidavit to procure service by publication was invalid, was before the court; and the effect of such invalid service upon the proceedings was exhaustively considered, in an opinion by Mr. Justice Hayes, and it was held that a judgment rendered in such case was not merely voidable but void and subject to collateral attack. Sections 5 and 6 of the syllabus follow:

"(5) A judgment rendered in an attachment proceeding, wherein the service was by publication which was so defective as to be not merely voidable but void, is void upon collateral attack, and one who intervenes in an attachment proceeding and claims the real estate attached may attack such judgment after it is rendered or may attack such service before the rendition of judgment by motion to vacate and set aside such judgment or such service.

"(6) In an action against a nonresident, in which an order of attachment was issued at the time of the filing of the petition, and on the same date an affidavit for service by publication was filed, and the first publication was made within 60 days from the date of the filing of the petition, but the affidavit for service by publication and the publication notice were so defective as to be absolutely void, held, that a motion to dissolve and discharge the attachment and dismiss the action, made more than eight months after the filing of the petition, levy, and return of the order of attachment, was properly sus-

tained for the reason that the action had not been commenced."

A reading of that case clearly shows, and it must necessarily follow, that, if the judgment obtained upon a fatally defective affidavit for publication against a nonresident defendant is void, the judgment must be void against a resident defendant living within the jurisdiction of the court, where no summons has been issued and placed in the hands of the officer or served upon the defendant, if for no other reason, because, under the statute, no action has been commenced against him.

It is true as pointed out in *Ballew v. Young*, supra, that there is a conflict of authorities on the question of whether or not an attachment issued and levied in a case, where there has been no proper service, is void or merely voidable, but this court is committed to the proposition that such proceedings are void. In the last-mentioned case it is said: "Commenting upon the conflict among the authorities upon this question, it is said in 4 Cyc. p. 814: 'In some jurisdictions it has been held that the court acquires jurisdiction over the property by a valid levy thereupon, and its judgment in regard thereto is binding until reversed on appeal or set aside in some direct proceeding for that purpose, but the weight of authority, if not of reason, is to the effect that the jurisdiction acquired by the seizure of the property is not to pass absolutely upon the rights of the parties but only to pass upon such right after defendant has been given an opportunity to appear and defend; and, where this view is maintained, a judgment, rendered without the notice prescribed by law against a defendant who has not appeared, is deemed absolutely void and open to collateral attack'"—citing authorities. The doctrine of the Kansas cases is in harmony with this expression of the rule in Cyc., and they are controlling upon us.

[3] The corn having been taken and sold under a void judgment an attachment, the purchaser at such sale is liable in conversion, and especially where such purchaser was the plaintiff and moving cause in the void proceedings in which the sale was made.

[4] Conversion has been defined by this court in *Aylesbury Merc. Co. v. Fitch*, 22 Okl. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573, as follows: "Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein."

[5] In a suit for conversion of personal property, where the taking possession and conversion is wrongful, no demand is necessary before bringing suit, for the wrongful taking and conversion is an assertion of ownership. *Purcell Cot. S. Oil M. v. Bell*, 7 Ind. T. 717, 104 S. W. 945; *Clinton Natl. Bank v. McKennon*, 28 Okl. 839, 110 Pac. 649; 28

A. & E. Ency. Law (2d Ed.) 686, and note; 38 Cyc. 2032, and note 79; *Id.* 2035, and note 87.

In considering what amounts to conversion, 38 Cyc. 2022, says: "And so is the taking of property by virtue of a void writ." And in the same volume at page 2023 it is said: "The appropriation to one's use of property purchased at an invalid public sale is a conversion, even if the purchase was made in good faith."

In *Jones v. Buzzard et al.*, 2 Ark. 415, a section of the syllabus reads: "An unlawful levy upon property, as under a void writ of attachment, is such a tortious taking and conversion as will support trover."

In a recent Texas case (*Crawford et al. v. Thomason et al.*, 53 Tex. Civ. App. 561, 117 S. W. 181) it is said in the syllabus: "The moving of a building and its contents from a strip of land, under a writ of sequestration void because issued before judgment, is a conversion of the property."

And in the case of *Baldwin v. Whittier*, 16 Me. 33, the court ruled: "A writ, unlawfully sued out in the name of another by the defendant, and irregularly served by his procurement, can afford him no protection in taking the property of another under color thereof."

In *Ward v. Carson R. W. Co.*, 13 Nev. 44, the syllabus declares: "The taking of personal property under an invalid sale, with the intent to convert it to one's own use, amounts to a conversion, and the true owner of the property can recover its value in an action of trover, without making any demand, notwithstanding the fact that the purchaser purchased the property in good faith, believing his title to be valid." See, also, *Harrell v. Harrell*, 75 Ga. 897.

The instructions are complained of, but they were in harmony with the views herein expressed and we think fairly stated both the issues and the law. The further contention of appellant that the petition failed to state a cause of action is not well taken, under the authority of *Capps v. Vasey Bros.*, 23 Okl. 554, 101 Pac. 1043. The claim that plaintiff is estopped is equally unavailing. This is based on the claim that the illegal sale of the crop was made on the farm where plaintiff resided, and that he did not interfere or object. Under the facts it is not necessary to discuss this question and whether or not an estoppel would lie in any event under the circumstances, for the reason that plaintiff was not present at the sale, although he may have seen the constable and men out in the field on his premises on the day it occurred.

This disposes of all the points necessarily involved, and convinces us that the cause should be affirmed.

PER CURIAM. Adopted in whole.

TURNER HARDWARE CO. v. JOHN DEERE PLOW CO.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*) — DISMISSAL — FAILURE TO FILE BRIEF.

Where plaintiff in error fails and neglects to file brief, as required by rule 7 of this court (95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar McCain, Judge.

Action by the John Deere Plow Company against the Turner Hardware Company. Judgment for the plaintiff, and defendant brings error. Dismissed.

Chas. Bagg, of Muskogee, for plaintiff in error. John H. Mosler, of Muskogee, for defendant in error.

GALBRAITH, C. The petition in error and case-made were filed in this court on November 13, 1911, and the cause regularly set for submission on September 15, 1913. The plaintiff in error has failed to file and serve brief, as required by rule 7 of this court (95 Pac. vi). In fact, neither party has filed briefs in this case. Apparently the appeal has been abandoned. In any event, it should be dismissed for want of prosecution. *Streeter v. McCoy*, 34 Okl. 490, 126 Pac. 216; *Streeter v. Huene*, 34 Okl. 491, 126 Pac. 216; *Thompson v. Murray*, 34 Okl. 521, 125 Pac. 1133; *Reliable Ins. Co. v. Newcomer*, 34 Okl. 759, 127 Pac. 260; *M. O. & G. R. Co. v. Johnson*, 34 Okl. 818, 127 Pac. 386; *First Nat. Bank v. Baldwin*, 34 Okl. 825, 127 Pac. 260; *Snow v. Frye*, 34 Okl. 826, 127 Pac. 422.

PER CURIAM. Adopted in whole.

BONDIES v. PORTER.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

(Syllabus by the Court.)

DIVORCE (§ 324*)—EFFECT—SUPPORT OF CHILD —COMPENSATION OF RELATIVE.

Rev. Laws Okl. 1910, § 4367, provides that the parent entitled to the custody of the child must give him support; and section 4376, that if a parent neglects to provide necessities for his child "who is under his charge," a third person may supply them and recover the reasonable value thereof from the parent; and section 4377, a parent is not bound to compensate the other parent or a relative for necessities furnished his child without an agreement. *Held*, that where a divorce decree gave the custody of an infant child to the mother, her father, who voluntarily furnished necessities to the child while in her custody, in the

absence of an agreement, cannot recover compensation therefor from the father of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. § 324.*]

Error from District Court, Bryan County; A. H. Ferguson, Judge.

Action by W. Porter against William Bondies. Judgment for plaintiff, and defendant brings error. Reversed.

J. M. Crook, of Durant, for plaintiff in error. E. G. Senter, of Dallas, Tex., and Utterback, Hayes & MacDonald, of Durant, for defendant in error.

TURNER, J. On January 6, 1911, in the district court of Bryan county, W. Porter sued Wm. Bondies on account for necessities furnished to his minor son, in a sum certain. After issues joined by a general denial there was a trial by a jury and judgment for plaintiff, and defendant brings the case here. He assigns that the judgment is contrary to law. There is no dispute as to the facts. The evidence discloses that the defendant is the father of a minor child nine years old, named Walter Bondies; that Helen Bondies is the mother of the child, born in lawful wedlock with defendant; that they were divorced on or about July 31, 1902, at which time she was decreed the custody of the child; that the decree made no provision as to its maintenance; that plaintiff is the father of Helen; that the child was born in his home; that after the decree Helen and the child continued to live with her father in Dallas, Tex., until the date of the trial, plaintiff supporting them both voluntarily and without the request of either parent; that plaintiff never advised defendant of his doing so or that he would hold him liable for the value therefor; and that defendant never agreed to pay for the same.

Rev. Laws Okl. 1910, § 4367, reads: "The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability."

Section 4376: "If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities and recover the reasonable value thereof from the parent."

Section 4377: "A parent is not bound to compensate the other parent or a relative for the voluntary support of his child without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause."

Sections 4367 and 4376 came to us from California by way of the Dakotas and are identical with the Civil Code (Cal.) §§ 196 and 207. Sections 196 and 207, supra, were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—27

under construction by the Supreme Court of California in *Selfridge v. Paxton et al.*, 145 Cal. 713, 79 Pac. 425. The facts in that case were that some time prior to September 17, 1894, defendants were married to each other and that during that time their child Roma was born; that on said date they were divorced by a decree of the court which gave to the wife, Bessie, the care and custody of Roma, but made no provision as to her maintenance. After that the father resided in Sonoma and the mother in San Francisco. After that Roma, still a minor, became ill, and, at the request of the mother, plaintiff attended her professionally and performed a certain necessary and valuable surgical operation on her, of which the father was informed by plaintiff, who replied that he would be obliged if plaintiff would advise him of any change in the patient's condition, at which time plaintiff knew of the divorce decree and that Roma had been living several years in the care and custody of her mother under the decree. Speaking to sections 196 and 207, *supra*, the court, in reversing the judgment for plaintiff, said: "By these sections, the duty to support a child, and the liability to the third party for necessities furnished it, are clearly confined to a parent 'entitled to the custody' of the child and having it 'under his charge'; and no such liability attaches to a parent who has been deprived of such custody and charge. In the opinion delivered by the learned judge of the court below, for whose judgment we have the highest respect, much weight is given to the consideration of the injustice which might follow if a father could escape liability to support his children on account of a decree of divorce founded on his misconduct; and counsel for respondent also urge that consideration. But strong views have been expressed the other way to the point that a father deprived of the custody, control, and services of his child is not justly liable to third persons who choose to furnish it supplies. In *Ex parte Miller*, 109 Cal. 648, 42 Pac. 428, Justice Temple, in a concurring opinion, says: 'When a parent is deprived of the custody of his child, and therefore to the right of its services and earnings, by a summary proceeding, he is no longer liable for its support and education. This is true as a general proposition of law, and it is recognized by our Code. Section 196 of the Civil Code provides that a parent entitled to the custody of a child must give him support and education suitable to his circumstances, plainly implying that the parent does not owe that duty to a child when he is not entitled to its custody.' And he further refers to section 207, as providing that, when a parent neglects to provide necessities for a child 'who is under his charge,' then third persons may do so, and recover the value; and he further says that in no instances ex-

cept those specially provided for in the Code 'has the court power to deprive the parent of his authority, and yet hold him liable for the maintenance of his child.'"

As we take this to be a proper construction of these statutes, we follow this case. See, also, *McKay v. McKay*, 125 Cal. 65, 57 Pac. 677; *Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; *Burritt v. Burritt*, 29 Barb. (N. Y.) 124; *Harris v. Harris*, 5 Kan. 46; *Finch v. Finch*, 22 Conn. 411; *Brown v. Smith*, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680; *Hall v. Green*, 87 Me. 122, 32 Atl. 796, 47 Am. St. Rep. 311; *Fulton v. Fulton*, 52 Ohio St. 229, 39 N. E. 729, 29 L. R. A. 678, 49 Am. St. Rep. 720; *Johnson v. Onsted*, 74 Mich. 437, 42 N. W. 62; *Hancock v. Merrick*, 10 Cush. (Mass.) 41; *Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107; *Schouler's Dom. Rel.* § 237, p. 371.

We are therefore of the opinion that the judgment should be reversed and rendered. It is so ordered. All the Justices concur, except WILLIAMS, J., not participating.

THIGPEN v. RISBY.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT.

Where a case is tried by the court without the intervention of a jury, upon controverted questions of fact, and there is evidence reasonably tending to support the findings of the trial court, such findings will not be disturbed on the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Commissioners' Opinion, Division No. 2, Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by Lizzie Risby against J. H. Thigpen for cancellation of deed. Judgment for the plaintiff, and defendant brings error. Affirmed.

J. H. Sutherland, of Wagoner, and Bailey & Wyand, of Muskogee, for plaintiff in error. Murphey & Noffsinger, of Muskogee, for defendant in error.

GALBRAITH, C. The petition filed in the district court by the defendant in error, omitting the caption, was in the form following:

"That she was formerly the owner of the northeast quarter of section 7, township 18 north, range 16 east of the Indian base and meridian in Wagoner county, Okla., and that the same was her allotment as a Creek freed-man citizen, and was duly allotted and patented to her as a member of said Creek Tribe of Indians.

"II. That heretofore, to wit, on the 6th day of June, 1904, when she was of full age, and competent to convey, and after the re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

strictions on her said land had been removed by act of Congress, she sold and conveyed the east half of the northeast quarter of section 7, township 18 north, range 16 east, containing 80 acres, more or less, in Wagoner county, Okl., to one Julius Deutsch. Her husband, Tom Risby, joining with her in the conveyance to the said Julius Deutsch on said date, and that she received from the said Julius Deutsch as the purchase money from said land the sum of \$1,080, and that afterwards, to wit, on the 24th day of September, 1904, she sold and conveyed the northwest quarter of the northeast quarter, of section seven, township 18 north, range 16 east, containing 40 acres, more or less, in Wagoner county, to the said Julius Deutsch, for the purchase price of \$500, and on said date executed to him, her husband, Tom Risby, joining therein, a warranty deed to said land, and received from him the full purchase price thereof, to wit, the sum of \$500.

"III. That at the time of the making of both of said conveyances, the said plaintiff herein was of full age, and competent to convey said land, and represented to the said Julius Deutsch that she was of full age, and received from him the sum of \$1,580 in full for her said surplus allotment in the same and conveyance of said land to him.

"IV. That subsequently, to wit, on the — day of —, 1907, this defendant came to plaintiff and falsely and fraudulently represented to her that her former deeds to said land were void and of no force and effect, for the reason that she was not of full age, and had not at that time attained the age of 18 years, and represented to plaintiff that she was mistaken about her age at that time, and that he would be able to prove, by a number of witnesses who knew the facts, that she was, at that time, under age, and if she would convey the land to him, and also her homestead, he would set aside the title made by her conveyances to Julius Deutsch, and would convey to her 40 acres of said land, and would then deed her 40 acres in exchange of her homestead 40, and pay her a difference of \$140.

"V. Plaintiff says that she is an ignorant woman, unused to doing business, and that she protested at that time that she was of age at the time she made the conveyance to the said Julius Deutsch, and that it was not true that she was under age, nor did she, the plaintiff, believe he could make proof to that effect.

"VI. Plaintiff says that the defendant persisted in his representations and statements as to her age and as to the fact that he could make proof that she was a minor at the time of the conveyance aforesaid, and finally induced the plaintiff to make conveyance to him of her homestead, to wit, the southwest quarter of the northeast quarter of section 7, township 18 north, range 16 east,

by reason of said representations, upon his agreement to convey to her the southeast quarter of the northeast quarter of section 7, township 18 north, range 16 east, in Wagoner county, Okl., which he represented to plaintiff that he had a good title to, and that he would pay her, the said plaintiff, \$150 difference between said trade, to represent the value of improvements on the homestead 40.

"VII. That plaintiff did execute the deed to her homestead, and also made a conveyance to her surplus allotment theretofore conveyed to Julius Deutsch, to the said defendant, relying on his representations and believing the same to be true, and thereupon the said defendant executed a quitclaim deed to the southeast quarter of the northeast quarter of section 7, township 18 north, range 16 east, in Wagoner county, Okl., to this plaintiff.

"VIII. Plaintiff alleges that defendant further agreed and bound himself to execute a warranty deed to the latter tract of land, and thereby conveying, with a deed of full covenant of warranty, full title to said land, but that after plaintiff had executed the deed to him of her allotment, she discovered that the deed he had executed was not a warranty deed, but was a quitclaim deed, and she since discovered that the plaintiff had no right or title to said land, or no interest therein at the time of his conveyance of said land to her, and in that respect the consideration for the deed to her homestead land to the defendant has failed.

"IX. Plaintiff alleges that she is in possession of said premises, and has been occupying the same, to wit, the southeast quarter of the northeast quarter of section 7, township 18 north, range 16 east, for the last two years.

"X. Plaintiff has recently learned that all the statements and representations made by the defendant to her that induced her to make the conveyance to him were and are false and fraudulent; that she was not under the age of 18 at the time of her conveyance of her surplus land to the said Julius Deutsch; that the plaintiff cannot prove by said relatives, or any of them, that she was not of the full age at that time; that the defendant did not have title to the 40 acres conveyed to her out of her surplus allotment; and that all of said statements were known by the defendant to be false and said representations to be untrue at the time they were made to him.

"XI. Plaintiff alleges that she is ready and willing to pay into the court the amount she has received from said J. H. Thigpen in consideration of said exchange of said lands, and prays the court that her conveyances to him heretofore described may be set aside and held for naught; that her conveyance to the said Julius Deutsch of her surplus allotment may be, in all things, confirmed and that the court decree that the defendant

reconvey to her her homestead, and upon failure of the defendant to do so that the court appoint a commissioner to make said conveyance, that she may have her costs and all other proper relief in the premises."

The plaintiff in error answered by general denial. Said cause was tried to the court without a jury. The court found as follows: "Now on this the 27th day of April, 1911, the above-entitled cause came on to be heard before the court, and was submitted to the court for trial, and the court, after hearing the evidence and being fully advised in the premises, finds the allegations of the petition of the plaintiff to be true, and that the plaintiff is entitled to the relief prayed for in her petition, and that the conveyance for the southwest quarter of the northeast quarter of section 7, township 18 north, range 16 east in Wagoner county, Okl., should be, and the same is hereby, canceled and set aside upon the payment into court of the sum of \$200 by the plaintiff for the defendant, and that said sum shall constitute and be a lien upon said real estate until the sum is paid, and that upon the payment of said sum into court the title to said premises shall revert to and be vested in plaintiff, and her title in all things be quieted and confirmed, and that the defendant's interest and apparent title therein shall be held for naught"—and decreed accordingly.

The plaintiff in error argues but one proposition in his brief, and that is that the decree of the court is not sustained by sufficient evidence, and asks the court to review and weigh the evidence and reverse the decree of the trial court on account of insufficient evidence to support the same.

In *Patterson v. Meyer*, 28 Okl. 304, at page 306, 114 Pac. 256, at page 257, it is said: "This court has, time and again, declared that: (a) Where a cause is tried by the court without the intervention of a jury, upon controverted questions of fact, and there is evidence reasonably tending to support the findings of the trial court, such findings will not be disturbed on the weight of the evidence; and (b) where the testimony is oral and conflicting, and the finding . . . is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon this court upon all doubtful and disputed questions of fact. *McCann v. McCann et al.*, 24 Okl. 264, 103 Pac. 694; *Seward v. Casler et al.*, 24 Okl. 275, 103 Pac. 740."

Again in *McCann v. McCann*, supra, Mr. Justice Williams, speaking for the court, said: "In this case there is competent evidence reasonably tending to support the issues on the part of the defendant, although the preponderance thereof on some of the material issues may have been in favor of the plaintiff. Yet all of the evidence having been oral, and the trial court having had an

opportunity to see the witnesses face to face, to observe their demeanor and manner of testifying, their frankness, candor, and sincerity, or want of such, their opportunity, or want of opportunity, to be conversant with the facts about which they gave evidence, and, in fact, to weigh under his personal scrutiny everything that goes to determine the fact of the credibility of the witnesses, under such circumstances this court will not invade the prerogative of the lower court, when there is competent evidence reasonably tending to support the issues and set aside its findings." See, also, *Harrill v. Parkinson*, 27 Okl. 526, 112 Pac. 970; *Smith v. Stewart*, 29 Okl. 28, 116 Pac. 182; *Bohart v. Matthews*, 29 Okl. 315, 116 Pac. 944; *Bank v. Harrison*, 29 Okl. 302, 116 Pac. 789; *Patterson v. Meyer*, 28 Okl. 304, 114 Pac. 256; *Jeffers v. Hensley*, 28 Okl. 519, 114 Pac. 1101.

While all of the evidence in the instant case was not oral, the record evidence was not controverted, and from a careful reading of the entire record we have no hesitancy in saying that there was abundant testimony to support the finding of the court below.

Since the only questions presented by the record are those which would require this court to weigh the evidence and determine where the preponderance lay, and as this cannot be done under the well-established rule in this jurisdiction, it follows that the judgment appealed from ought to be affirmed.

PER CURIAM. Adopted in whole.

GOODMAN v. BROUGHMAN et al.
(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 770*)—BRIEFS—DISPOSITION OF CAUSE.

Where no briefs are filed by defendant in error and the errors presented in plaintiff in error's brief are reasonably borne out by the record, the contention as to such errors will be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3106, 3107; Dec. Dig. § 770.*]

2. PLEADING (§ 343*)—JUDGMENT ON PLEADINGS.

Where an answer contains a statement of facts constituting a defense to plaintiff's cause of action and plaintiff files a verified reply alleging facts which put in issue the existence of the facts constituting the answer, it is error to render judgment on the pleadings.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Custer County; J. W. Lawter, Judge.

Action by J. R. Goodman against A. H. Broughman and another. Judgment for defendants, and plaintiff brings error. Reversed.

Andrew J. Welch, of Clinton, for plaintiff in error.

HARRISON, C. This was an action by J. R. Goodman against the Clinton & Oklahoma Western Railway Company for work and labor done for said company under the direction of its agent and contractor. The defendant moved to dismiss the action because of plaintiff's failure to give security for costs. The court overruled the motion to dismiss but directed plaintiff to file a cost bond or pauper oath in lieu thereof within 30 days. Plaintiff being unable to make the cost bond within the 30 days, and not being able to make the statutory pauper's affidavit because of inability to give the required notice to defendant, dismissed his action; the same being docket No. 67. He then proceeded to give the required notice to defendant and thereafter refiled his action; the new action being No. 162. Defendant filed answer in cause No. 162, the second action, alleging that the questions involved in No. 162 had been determined and plaintiff's right of action concluded by the order of the court in dismissing No. 67 with prejudice. Plaintiff thereupon filed a motion to modify such order, alleging that the order of dismissal with prejudice had been procured by fraud and misrepresentation and deception upon the court, without the knowledge of plaintiff and without plaintiff being present at the hearing, and that such order was obtained 48 days after plaintiff had dismissed his action and 17 days after he had refiled the second action. Defendant filed demurrer to the motion to modify the order of dismissal, which was sustained and excepted to by plaintiff. Plaintiff then filed verified reply to defendant's answer in No. 162, in which he denied the facts set up in the answer showing the order in cause No. 67, and further alleged that same was procured through fraud and irregularity and that it was granted without the knowledge of plaintiff and without power of the court to make it. Thereupon defendants moved for judgment on the pleadings. The motion was sustained and action No. 162 dismissed on the ground that the rights of the parties to the action had been determined by the order of dismissal of cause No. 67.

The cause comes here on the two propositions: First, that the court erred in sustaining the demurrer to motion to vacate or modify the order of dismissal with prejudice in cause No. 67; second, that it erred in rendering judgment on the pleadings in cause No. 162.

[1, 2] There have been no briefs filed nor appearance made by defendant in error, and the proposition urged in brief of plaintiff in error seems to be well taken. It is unnecessary, however, to determine the proposition

whether the court erred in sustaining demurrer to plaintiff's motion to modify the order of dismissal made in action No. 67 for the reason that, after the demurrer was sustained, then plaintiff filed a verified reply to defendant's answer. Defendant had answered by setting up the order of dismissal as constituting a bar to plaintiff's right of action because it had been dismissed with prejudice. Plaintiff filed verified reply that the order of dismissal in No. 67 had been obtained through fraud and deception and without his knowledge at an ex parte hearing some 48 days after plaintiff, upon his own motion, had dismissed his action in No. 67 and 17 days after he had been able to comply with the court's order as to costs and had refiled his second action. The allegations in the reply were sufficient, if true, to constitute a replication to defendant's answer, and we think the court erred in rendering judgment upon the pleadings in favor of defendant and denying plaintiff a right to a trial of his case upon the merits.

We think the judgment should be reversed, and the cause remanded, with instructions that the action be reinstated and plaintiff be given an opportunity to have his cause of action tried upon the merits.

PER CURIAM. Adopted in whole.

JOINER et al. v. COBB.

(Supreme Court of Oklahoma. Nov. 11, 1913.)
APPEAL AND ERROR (§ 773*) — DISMISSAL — FAILURE TO FILE BRIEF.

Where plaintiff in error fails to file his brief as required by rule 7 (95 Pac. vi), the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 8108-8110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by Sampson Cobb against C. M. Joiner and others. Judgment for plaintiff, and defendants bring error. Dismissed.

C. M. Fechheimer, of Chickasha, and C. S. Arnold, of McAlester, for defendant in error.

HARRISON, C. The petition in error and transcript of the record below were filed in this court August 3, 1911. October 1, 1911, defendant in error filed motion to dismiss for failure to comply with rule 7 of this court (95 Pac. vi). The cause was assigned for submission at the June term, 1913.

No briefs having been filed, the motion to dismiss is sustained, and the appeal dismissed.

PER CURIAM. Adopted in whole.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BOYD v. WEBB QUEENSWARE CO.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 773*)—DISMISSAL—FAILURE TO FILE BRIEF.**

Where plaintiff in error files no brief as required by rule 7 of this court (20 Okl. viii, 95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error from District Court, Johnston County; Nick Wolfe, Judge.

Action by the Webb Queensware Company against A. Boyd. Judgment for plaintiff, and defendant brings error. Dismissed.

Cornelius Hardy, of Tishomingo, for plaintiff in error. Bledsoe & Treadwell, of Oklahoma City, for defendant in error.

HAYES, C. J. This appeal is prosecuted from a judgment of the court below against plaintiff in error upon an account. Since the institution of the appeal, plaintiff in error has filed a plea in abatement. Defendant in error, before the cause was reached for submission, filed a brief in opposition to the plea in abatement and upon the merits of the case, urging that the same should be affirmed. Plaintiff in error, on the other hand, has failed to file any brief in support of his plea in abatement, or upon the merits of his cause.

Since he has failed to comply with rule 7 of this court (95 Pac. vi) by filing briefs, his appeal should be and is dismissed for want of prosecution. *Baker v. Forrest*, 26 Okl. 12, 108 Pac. 407; *Bohanan v. Wilson*, 27 Okl. 753, 117 Pac. 209; *Rice v. Jones*, 32 Okl. 734, 124 Pac. 67. All the Justices concur, except **WILLIAMS, J.**, absent and not participating.

MOORE v. JOHNSON.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.**

Where all the material issues in a cause are fairly and fully submitted to the jury in the instructions of the court, the findings of the jury under all the testimony, the facts, and circumstances, where the testimony is conflicting, will not be disturbed if there is sufficient evidence reasonably tending to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. APPEAL AND ERROR (§ 1001*)—REVIEW—QUESTIONS OF FACT.

And in an action for personal injuries, where the issue of negligence and contributory negligence are involved, and such issues are fairly and fully submitted to the jury, their findings,

if reasonably supported by the evidence, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

3. APPEAL AND ERROR (§ 1004*)—REVIEW—EXCESSIVE DAMAGES.

Likewise, where the question of the extent of the injuries and the amount which would fairly compensate the injured party for same are properly submitted in the charge of the court, the verdict will not be set aside because of excessive damages, where, under all the facts and circumstances, the amount of such verdict does not appear unreasonable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

*(Additional Syllabus by Editorial Staff.)***4. NEGLIGENCE (§ 113*)—PLEADING—NEGATIVES CONTRIBUTORY NEGLIGENCE.**

In an action for injuries resulting from the falling of a water tank constructed by defendant in plaintiff's kitchen, an allegation in the petition that, before defendant had left the premises, plaintiff called their attention to the condition of the tank, and they told her that the same was properly erected and safe and that no danger could be apprehended therefrom, was not defective in that it confessed knowledge of the defect and assumption of risk of injury therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 186-193; Dec. Dig. § 113.*]

5. TRIAL (§ 280*)—INSTRUCTIONS—REPETITION.

Requested instructions covered by those given are properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 280.*]

6. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DEFECT.

The fact that plaintiff called the attention of defendant to what plaintiff believed to be a defect in a tank placed by defendant in plaintiff's kitchen did not show contributory negligence as a matter of law precluding recovery by plaintiff for injuries subsequently received by the falling of the tank, where defendant, on the making of such complaint, showed plaintiff that the tank was safe and assured her that no danger could arise therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Oklahoma County; Charles H. Garrett, Special Judge.

Action by Bessie Johnson against A. H. Moore. Judgment for plaintiff, and defendant brings error. Affirmed.

Bolen & Adkins, of Oklahoma City, for plaintiff in error. **J. W. Laws** and **Claud Stringer**, both of Oklahoma City, for defendant in error.

HARRISON, C. This action was begun in the superior court of Oklahoma county in August, 1909, by Bessie Johnson against A. H. Moore for injuries alleged to have been sustained by a falling water tank on April 19, 1909. The tank in question was a hot water tank holding about 30 gallons, about 5 feet long by 1 foot in diameter, which defendant had constructed for plaintiff in the kitchen.

en of plaintiff's residence. It was constructed about 6 inches from the wall and set about 18 inches above the floor upon three divergent legs. While plaintiff was moving about at her kitchen work, the tank fell over on her, bruising her and injuring her hip and foot, for which injuries the action was brought because of the negligent construction of the tank and the defective condition in which it was left by defendant at the time the work was completed.

The cause was tried in January, 1911, resulting in a verdict in favor of plaintiff in the sum of \$500. From the judgment upon such verdict defendant appeals upon 13 assignments of error. The first assignment that the court erred in overruling the motion for a new trial is presented with and included within the other assignments. The second assignment is that the court erred in not rendering judgment for plaintiff in error on the pleadings. This contention cannot be sustained. The petition stated a cause of action and, if sustained by the evidence, was sufficient upon which to base a judgment.

[4] Plaintiff in error contends, however, that the petition on its face showed that plaintiff below was not entitled to recover because of the following allegation: "On the 19th day of April, 1909, and before the defendants had left the premises, that she called the attention of the employees of the defendant to the condition of said tank, and that they told her that said range, boiler, and tank were properly erected and safe and no danger need be apprehended." Plaintiff in error contends that this allegation shows on its face that she knew the defective construction of the tank and assumed the risk thereof. With this contention we cannot agree. The foregoing allegation, on its face, no more tends to show that she assumed the risk of the defective tank than that she implicitly relied upon the experience and expert knowledge of the builder and upon his representations that it was safe and that no danger need be apprehended therefrom. We cannot agree that the petition discloses a confession of assumption of risk which on its face would justify the court in assuming such fact to be true and rendering judgment on the pleadings on the assumption of such fact.

[5] The third assignment is based upon the refusal of the court to give certain instructions offered by defendant numbered a, b, c, d, e, f, g. We have examined the instructions offered and the charge given by the court and find that such of the instructions offered by defendant as correctly state the law were sufficiently covered in the court's charge and that it was not error for the court to refuse to give them.

The fourth proposition presented is that

the court erred in overruling the demurrer to the petition. This proposition is disposed of in determining that there was no error in denying judgment on the pleadings.

[3] The fifth proposition urged is that the damages are excessive because they appear to have been given under the influence of prejudice and passion. The question of the extent of plaintiff's injuries and the pain and suffering caused thereby and the amount which under all the facts and circumstances of the case would reasonably and fairly compensate her for such injuries was very fairly and fully submitted to the jury by the court, and we do not feel authorized to disturb the verdict reached by the jury under such facts and circumstances.

[1, 2] The sixth proposition is that the verdict is not sustained by the evidence and is contrary to the evidence and against the weight of the evidence. But under the charge of the court the jury was properly made exclusive judges of the credibility of the witnesses and the weight to be given their testimony; and, having considered such testimony and determined its weight under fair instructions from the court, we cannot say that they reached an erroneous conclusion; nor can we say, from a reading of the record, that they were influenced by passion or prejudice in reaching such conclusion.

[8] The next proposition presents the question of contributory negligence. Plaintiff in error assumes that because of the fact that defendant in error called attention to the defective condition in which the tank was set up and expressed some doubt as to its safety, notwithstanding the fact that she was assured that it was perfectly safe and that there need be no danger, the court as a matter of law should have found her guilty of contributory negligence. Some 12 to 15 pages of the brief are devoted to a discussion of this proposition and a great many authorities cited. But this proposition is settled by the provisions of our Constitution which makes the question of contributory negligence or assumption of risk a question of fact to be determined by the jury. See section 6, art. 23, of the Constitution. Also *C. v. R. I. & P. Ry. Co. v. Baroni*, 32 Okl. 540, 122 Pac. 926; *C. v. R. I. & P. Ry. Co. v. Beatty*, 34 Okl. 321, 118 Pac. 367, 126 Pac. 736; *C. v. R. I. & P. Ry. Co. v. Hill*, 129 Pac. 13, 43 L. R. A. (N. S.) 622; *Frederick Cotton Oil & Mfg. Co. v. Traver*, 129 Pac. 747.

As the question was fully submitted to the jury under the instructions of the court, their finding will not be disturbed. We find no material error in the record and are of the opinion that the judgment should be affirmed.

PER CURIAM. Adopted in whole.

STATE ex rel. OKLAHOMA CITY v. SUPERIOR COURT OF OKLAHOMA COUNTY.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 42*)—SUPERIOR COURTS—STATUTORY PROVISIONS.

Section 6 of an act of the Legislature approved March 22, 1913, entitled "An act amending section 1 of article 7 of chapter 14 of Session Laws 1909, etc." (Sess. Laws 1913, p. 123), applies to superior courts continued by said act until January, 1915, as well as to those courts continued indefinitely by said act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.*]

2. COURTS (§ 185*)—TRANSFER OF CAUSES—TIME FOR FILING MOTION.

Where a party in a civil action pending in any such superior court seeks by virtue of said statute to have the same removed to the district court, he must, by reason of section 1 of the act of the Legislature approved March 22, 1911, entitled "An act amending section 10, article 7, chapter 14 of Session Laws of Oklahoma 1909, etc." (Sess. Laws 1910-11, c. 121), file his motion for such transfer before the cause is set for trial in the superior court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 185.*]

(Additional Syllabus by Editorial Staff.)

3. STATUTES (§ 159*)—REPEAL BY IMPLICATION.

Repeals by implication are never favored, and courts will not hold an earlier statute repealed by a later one unless the conflict between the two acts is irreconcilable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

4. STATUTES (§ 161*)—REPEAL BY SUBSTITUTION.

A repeal by substitution is effected where the latter of two acts covers the whole subject of the first act, contains additional provisions, and plainly shows it was intended as a substitute for the first act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

Mandamus by the State, on the relation of the City of Oklahoma City, against the Superior Court of Oklahoma County; Edward Dewes Oldfield, Judge. Peremptory writ denied.

J. W. Johnson, of Oklahoma City, for plaintiff. Harris & Nowlin, W. H. Zwick, and James S. Twyford, all of Oklahoma City, for defendant. Shartel, Keaton & Wells, of Oklahoma City, amici curiæ.

HAYES, C. J. Relator brings this action originally in this court to compel by mandamus the superior court of Oklahoma county to transfer a certain suit now pending in that court, wherein one Kate Vetter is plaintiff and relator is defendant, from that court to the district court of Oklahoma county. There is no controversy about the facts. After the case had been set for trial in the superior court, relator filed its motion therein, requesting the court to transfer the same to the district court. This motion was

overruled by respondent, upon the ground that, since it was not filed until after the cause was set for trial, the motion was too late. Respondent has not questioned that mandamus is a proper remedy for relator. We shall therefore assume this to be a proper remedy, and shall dispose of the case upon the questions briefed and presented by counsel for the respective parties.

[1] Section 6 of an act of the Legislature approved March 22, 1913 (Sess. Laws 1913, p. 123), reads as follows: "In all counties where said superior courts are, by this act, continued, the judges of the said superior courts shall, upon motion * * * in any cause within the jurisdiction of the district court, transfer such cause or causes, by order, to the district court, and upon such transfer being made, such cause shall stand for trial in said district court as if it had been originally filed therein, and in such cases the clerk of the superior court shall transfer the original files to the district court." It is upon the authority of this section that relator asserts its right to have the cause against it, pending in the superior court, transferred at any time upon its motion to the district court. Defendant, on the other hand, contends: First, that the foregoing statute does not apply to the superior court of Oklahoma county, because said court was not continued by the act of which said statute forms a part; and, second, that said statute must be construed in connection with a certain act of the Legislature approved March 22, 1911 (section 1, c. 121, Sess. Laws 1910-11), by which act it is provided that the judges of the district courts in which superior courts exist shall, upon motion of a plaintiff in any civil action, transfer the cause to the superior court; and the judge of any superior court, upon motion of the plaintiff in any cause pending in such court, shall transfer the same to the district court of the county having jurisdiction thereof; but that no transfer shall be made if the motion is not filed before the setting of the cause for trial in the court in which the cause is pending at the time of the filing of such motion. Respondent contends that, under the provisions of this statute, the superior court was not authorized to make the transfer upon relator's motion filed after the cause was set for trial in the superior court.

The first contention of respondent is without merit. The original statute creating superior courts in certain counties of the state was approved on March 6, 1909 (Sess. Laws 1909, p. 181). Under this statute a superior court was established in Oklahoma county and in several other counties of the state. The act of 1913, of which section 6, supra, forms a part, amends the original act which created the superior courts in such counties, by providing for the abolishment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of some of said courts; for the continuation of some of them, and by providing for the transfer of causes, records, and papers in the courts abolished and for the transfer of certain causes in the courts continued. This act effects the abolishment of some of the courts theretofore created and in existence at the time of its passage immediately upon said act's becoming effective. Some of the courts not abolished immediately upon the act's becoming effective are continued until 1915, and others are continued indefinitely. Section 6 applies to courts that are continued, without reference to whether they are continued temporarily or for an indefinite period. The superior court of Oklahoma county belongs to that class which ceases to exist after the first Monday in January, 1915, but it is continued until that time; and we think it was clearly the legislative intent that section 6 should apply to all such courts, so long as they continue in operation. Section 4 provides for the transfer and disposition of causes pending in the court at the time of its dissolution. Section 6 provides that a transfer of a civil cause shall be made either upon the motion of plaintiff or defendant from the superior court in which it is pending to the district court; but the act is silent as to when such motion shall be filed. So far as may be ascertained from this statute alone, such motion may be filed at any time before the completion of a trial in the superior court. It might be filed after the cause is set for trial, after the jury is impaneled, or after any other stage in the proceeding, when either defendant or plaintiff becomes dissatisfied with the prospect of a successful termination of his suit. The language is mandatory that, upon the filing of the motion, the court shall make the transfer. The indefiniteness of this statute, standing alone, presents a similar condition to that existing under the original act of 1909 as to causes authorized by that act to be transferred from the district courts and to the superior courts created thereby, for section 10 of the act of 1909 provides that a transfer of any cause pending in a district court of the county in which a superior court is by the act created shall, upon motion of plaintiff, be transferred to the superior court; and, in like manner, civil causes pending in the county court of which the superior court has jurisdiction are required to be transferred to the superior court. That statute is silent as to when the motion by plaintiff for such transfer may be filed. It was, no doubt, the purpose of the act of 1911 to cure this indefiniteness and uncertainty of the statute of 1909 by requiring that the motion for transfer shall be filed before the setting of such case for trial in the court wherein it is pending.

[2] The foregoing section 6 of the act of 1913 cannot be said to repeal the act of 1911, for the reason that it contains no specific repeal thereof, and for the further reason that

it is not in conflict with said act. The two acts are in *pari materia*, and should be construed together, so as to permit both to stand; or, as some of the courts have said of acts that are in *pari materia*, they should be construed as if they constituted parts of one and the same act. *People v. Aichinson*, 7 How. Prac. (N. Y.) 241; *Plummer v. Murray*, 51 Barb. (N. Y.) 201. If section 6, *supra*, of the act of 1913, is to be construed as an independent statute, wholly providing within itself for a transfer of cases from the superior court to the district court upon motion of either plaintiff or defendant, and to require that such transfers shall be made when the motion is filed at any time by either the plaintiff or the defendant, then it must repeal that portion of the act of 1911 which requires that, in order for plaintiff to have such a cause transferred from the superior court to the district court, he must file his motion therefor before the cause is set for trial.

[3] Repeals by implication are never favored; and courts will not hold an earlier statute repealed by a later one by such method, unless the conflict between the two statutes is irreconcilable.

[4] Nor can the contention that the statute of 1913 repealed the statute of 1911 by substitution be sustained. A repeal by substitution is effected where the latter of two acts covers the whole subject of the first act, contains additional provisions, and plainly shows it was intended as a substitute for the first act. *Fritz v. Brown*, 20 Okl. 263, 95 Pac. 437; *Smock v. Farmers' Union State Bank*, 22 Okl. 825, 98 Pac. 945; *Hine v. Gokey et al.*, 23 Okl. 870, 102 Pac. 77. The act of 1913 does not cover the entire subject-matter of the act of 1911. Some of the things provided for by the former act which are omitted from the latter are: The transfer of cases from a district court to a superior court, the transfer of cases from the county court to the superior court, and the transfer of cases from the superior court to the county court; all of which, under certain contingencies, are authorized to be done upon motion of the plaintiff by the act of 1911, and none of which are prohibited by the act of 1913. When it is recalled that the purpose of the act creating the superior courts in certain counties of the state was to relieve the congested condition of the docket of the district courts and the county courts in such counties as they then existed, or as they might become in the future, it is not manifest from the statute under consideration that it was the intent of the Legislature to defeat the principal purpose for which superior courts were created. We do not think the legislative intent of the later act in this instance difficult to ascertain. It was intended to give to defendant in any civil cause, as well as to plaintiff, the right to transfer a cause from the superior court to

the district court; but such transfer was to be made in the manner that had theretofore been prescribed by the statute relating generally to transfer of causes from one court to another. Owing to the mandatory character of the statute, the wisdom of such a requirement is manifest, for without it the plaintiff might in a cause set for trial make no effort to prepare therefor, watch his adversary make costly preparation for trial by subpoenaing witnesses and by procuring their attendance, and then at the moment that the cause is reached upon the docket for trial, compel the court by motion filed therefor to transfer it to the district court; or defendant might in a similar manner perpetrate the same injustice upon the plaintiff, or they might even go further and wait until the jury is impaneled and one or the other becoming dissatisfied with the panel before him, or apprehensive because of some other reason that he would not have so favorable an opportunity of securing a verdict as he first anticipated, thereupon compel his cause to be transferred. That there ought to be some limitation upon this right of transfer to relieve the court of the mandatory duty to make the transfer at all times is apparent; and the court ought not to strike down that provision of the statute of 1911, requiring the motion to be filed before the cause is set for trial, unless it is obvious that such was the intent of the Legislature; and to our minds no such result was contemplated by the act of 1913.

It is therefore the judgment of the court that the peremptory writ be denied, and relator's petition therefor be dismissed. All the Justices concur.

GERMAN STOCK FOOD CO. v. MILLER. (Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 397*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACT.

In the absence of fraud, accident, or mistake, parol evidence is not admissible to change, add to, or vary the terms of a written contract. [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

2. EVIDENCE (§ 441*)—PAROL EVIDENCE—CONTEMPORANEOUS AGREEMENT.

In an action on a written contract for the purchase of goods, wares, and merchandise, a contemporaneous, parol agreement to give the defendant the exclusive agency for the sale of such merchandise in a particular community, and that such agreement was the moving cause inducing the purchase of the goods, cannot be shown by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Comanche County; Jas. H. Wolverton, Judge.

Action by the German Stock Food Compa-

ny against J. E. Miller. Judgment for the defendant, and plaintiff brings error. Reversed and remanded.

Spriggs & Skipper, of Idabel, for plaintiff in error. Hudson & Whalin, of Lawton, for defendant in error.

GALBRAITH, C. This is an appeal from the judgment of the county court of Comanche county in favor of the defendant in error and against the plaintiff in error.

The action was commenced before a justice of the peace on a written contract in words and figures following:

"Temple, Okla., 8—, 1910.

"German Stock Food Co., Minneapolis, Minn.: Please ship by freight the herein specified amount of goods which I promise to pay for in 180 days from date of invoice without any reduction for exchange, refund of freight, or collecting charges. It is hereby agreed by the undersigned purchaser that this order is not subject to countermand, and that nonacceptance or return of this shipment shall not release said purchaser from payment in full. It is also agreed that this bill becomes due upon insolvency, suit brought by other creditors, or sale of business, and that verbal agreements will not be allowed.

"The original signed order mailed or delivered to said company covers all agreements between the parties hereto.

"A discount of 5% will be allowed if paid within ten days of receipt of goods.

"We give enough free goods figured at retail prices to cover freight charges to destination on all orders weighing 100 lbs. or over. Please state what you want.

| | | |
|---|--------|----------------|
| 1/4 Doz. \$1.00 size Pkg. German Stock Food @ | \$3.00 | |
| 2 Doz. 50¢ size Pkg. German Stock Food @ | \$4.00 | 8 00 |
| 2 Doz. 25¢ size Pkg. German Stock Food @ | \$2.00 | 2 00 |
| 2 Doz. 50¢ size Pkg. German Stock Food @ | \$4.00 | 8 00 |
| 2 Doz. 25¢ size Pkg. German Stock Food @ | \$2.00 | 4 00 |
| 1 Doz. 25¢ size Pkg. German Stock Food @ | \$2.00 | 2 00 |
| 1 Doz. 25¢ size Pkg. German Stock Food @ | \$2.00 | 2 00 |
| | | <u>\$36 00</u> |

"Free goods in 25¢ stock for freight.

"I hereby expressly agree that no representations or promise, either verbal or written, have been made by the salesman or in behalf of the German Stock Food Company, which are not herein expressed. I hereby acknowledge receipt of a duplicate of this order and agreement.

"This order is subject to the approval of the German Stock Food Company.

"[Signed] J. E. Miller.

"Business, harness. P. O. address, Temple, Okla. Ship to Temple, Okla. Salesman, H. R. Butler."

The defendant in his answer admitted the purchase of the goods, as alleged, but attempted to escape liability on the ground that the plaintiff had breached a certain contemporaneous, oral contract whereby it had been agreed that the defendant should have the exclusive agency for the sale of plaintiff's goods in the town of Temple, and that this was the moving cause that induced him to make this purchase; that when he discovered that his competitors in Temple were handling plaintiff's goods, under similar contracts of purchase as his own, he returned these goods to the plaintiff and thereby discharged his liability, if any, on account of said purchase.

A general demurrer was filed to that part of the answer setting up the affirmative defense and was sustained, and the defendant refused to amend, and judgment was rendered for the plaintiff as prayed in its bill of particulars. The defendant appealed to the county court, and when the cause came on for hearing that court overruled the demurrer to the affirmative defense set out in the answer, and, the plaintiff electing to stand on its demurrer, judgment was rendered for the defendant for costs, and plaintiff has perfected an appeal to this court.

The question presented by the appeal is: Did the allegations of the affirmative defense in the answer aver facts sufficient to constitute a defense to plaintiff's cause of action? In other words, would the defendant, under the law, be permitted to prove the contemporaneous, oral agreement set out varying the terms of the written contract?

[1, 2] The general rule is well established that, in the absence of fraud, accident, or mistake of fact, parol evidence is inadmissible to vary the terms of a written agreement. Section 942 of the Civil Code (Rev. Laws 1910) is declaratory of the general rule and reads: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its" terms and subject-matter "which preceded or accompanied the execution of the instrument."

Mr. Justice Kane, who wrote the opinion of the court in *McNinch v. Northwest Thresher Co.*, 23 Okl. 388, 100 Pac. 524, said: "The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of fact; and any representations made prior to or contemporaneous with the execution of the written contract are inadmissible to contradict, change, or add to the terms plainly incorporated into and made a part of the written contract. *Liverpool, London & Globe Ins. Co. v. Richardson Lumber Co.*, 11 Okl. 585, 60 Pac. 936; *Guthrie & W. R. Co. v. Rhodes*, 19 Okl. 21, 19 Pac. 1119 [21 L. R. A. (N. S.)

490]; *Garrison v. Kress et al.*, 19 Okl. 433, 91 Pac. 1130." This case is also reported in 138 Am. St. Rep. 803, and is followed there by an exhaustive note by the editor.

In *Miller Bros. v. McCall Co.*, 37 Okl. —, 133 Pac. 183, this court, in passing upon a similar defense, held that a contemporaneous, parol agreement for an exclusive agency of the sale of the goods purchased could not be shown by parol in an action on the written contract of purchase.

It does not appear that the facts alleged in that part of the answer challenged by the demurrer can be said, by any reasonable interpretation of them, to constitute accident, fraud, or mistake of fact so as to take this attempted defense out of the operation of the general rule above stated. Not being sufficient to take this defense out of the operation of the general rule that parol evidence is not admissible to vary, add to, or change the terms of a written contract, it follows that the facts alleged were not susceptible of proof, and that they were insufficient to constitute a defense to plaintiff's cause of action, and that the county court committed error in overruling the demurrer thereto.

On account of this error the judgment appealed from should be reversed, and the cause remanded to the county court, with directions to set aside the order overruling the demurrer, and to enter an order sustaining the same, and to take such further proceedings in the cause as may be proper, not inconsistent with the law as above declared.

PER CURIAM. Adopted in whole.

KNISLEY v. HAM.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. SEARCHES AND SEIZURES (§ 3*)—LIABILITY FOR WRONGFUL SEARCH—PROBABLE CAUSE.

The determination of the existence of "probable cause" for the issuance of a search warrant under Rev. Laws 1910, § 3615, and the issuance of a warrant under section 3616 of the statutes, are questions for the determination of the judge or magistrate before whom complaint is filed.

[Ed. Note.—For other cases, see *Searches and Seizures*, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

2. SHERIFFS AND CONSTABLES (§ 98*) — WRONGFUL SEARCH—WRIT AS PROTECTION TO OFFICER.

It is the duty of a ministerial officer to whom a search warrant is directed to execute the writ as therein commanded, provided the same is issued by an officer having authority to issue it, and it is regular upon its face. Such a writ is a protection to the officer, and he is not liable as a trespasser for executing the same in an orderly manner.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 143-157; Dec. Dig. § 98.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. SHERIFFS AND CONSTABLES (§ 138*)—LIABILITY FOR EXECUTING SEARCH WARRANT—BURDEN OF PROOF—INSTRUCTIONS.

In an action against a deputy sheriff for trespass in executing a search warrant, directed to him, and regular upon its face, and issued by a justice of the peace upon a sworn complaint, it is error to instruct the jury that the burden is upon the defendant to prove that the facts set out in the complaint upon which the warrant was issued are true, even though such officer swore to the complaint.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 290-296; Dec. Dig. § 138.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Payne County; A. H. Huston, Judge.

Action by W. F. Ham against W. T. Knisley. Judgment for plaintiff, and defendant brings error. Reversed.

J. W. Reece, of Stillwater, for plaintiff in error.

GALBRAITH, C. This action was commenced in the district court of Payne county by W. F. Ham against W. T. Knisley for trespass in searching his residence. The defendant justified on the ground that he was at the time of the wrong complained of a duly appointed and acting deputy sheriff of Payne county, and was executing a legal and valid search warrant. The cause was tried to the court and jury, and a verdict rendered in favor of the plaintiff in the sum of \$100. From that judgment, the defendant has prosecuted an appeal to this court.

One of the errors complained of is the giving to the jury by the court the following instruction: "It is recited in the search warrant under which the defendant claims that he acted that the building on lot 24, block 38, town of Glencoe, Payne county, Oklahoma, was a place of public resort, and a place for the storage of spirituous, vinous, fermented, and malt liquors. You are instructed that the defendant in the case would have no right to make a search of the plaintiff's dwelling house, if you find that it was his dwelling house, even by virtue of his search warrant, unless the house was either a place of public resort or a place for storage. Ordinarily the warrant which an officer holds would protect him, even if all the things recited therein were not true; but, where he himself applies for the warrant, and makes the complaint upon which the warrant issues, then he cannot be protected by the mere warrant, unless the things therein recited are true. And in this case, if he made a search of the premises against the will or consent of the plaintiff, and the premises were his dwelling house, unless it is shown that the dwelling house was a place of storage or a place of public resort, the defendant cannot be protected by the mere warrant. If you find from the evidence that these premises or the house in controversy

was the dwelling house of the plaintiff, that it was not a place of storage, and that it was not a public resort, and that the defendant forcibly and against the will of the plaintiff entered upon the premises, and made a search thereof, then your verdict should be for the plaintiff, and the measure of his damages would be such sum as would reasonably compensate him for any pain, disgrace, or humiliation that you may find he has suffered."

It is complained that the giving of this instruction was error, inasmuch as it submitted to the jury a false issue, in this, that it placed upon the defendant the burden of showing that the facts alleged in the affidavit filed with the justice of the peace, who issued the search warrant, were true, and required the jury to determine whether or not the search warrant was duly issued. Section 3612 of the statute (Rev. Laws 1910) makes it "the duty of the judge of the district or county court, or a justice of the peace to issue a search warrant whenever it is made to appear that there is probable cause to believe," etc. Section 3615 provides that: "No such warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched, and the person or thing to be seized." And section 3616 provides that: "No warrant shall be issued to search a private residence, occupied as such, unless it, or some part of it, is used as a store, shop, hotel, boarding house, place for storage, or unless such residence is a place of public resort." The complaint upon which the warrant was issued, as introduced in evidence on the trial, was filed with a justice of the peace of Payne county, and set out, as to the "buildings and rooms on lot 24 of block 38, town of Glencoe, Payne county, Oklahoma, that said place is a public resort, and a place of storage of spirituous, vinous, fermented, and malt liquors." The search warrant was issued by the magistrate before whom the complaint was filed, and was directed to W. T. Knisley, deputy sheriff, and it appears upon its face to be regular and in compliance with the statutes authorizing the issuance of a search warrant in such cases. The Criminal Court of Appeals of this state, speaking by Presiding Judge Furman, in construing section 39, art. 2, of the Constitution, relative to search warrants and seizures, says: "This necessarily makes the issuance of a warrant of arrest a judicial act, to be exercised by the officer who is clothed by law with the power and authority to determine as to whether or not the warrant should be issued, and this discretion must rest upon facts verified by oath or affirmation. The question of probable cause and of reasonable ground to believe that an offense has been committed are addressed alone to the judgment of such officer, and their de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

termination cannot, by statute, be vested in the person who verifies the facts from which these opinions, conclusions, or deductions are drawn. Any other construction would reduce this constitutional guaranty to an absurdity, and would violate its letter and spirit, and defeat its purpose." *De Graff v. State*, 2 Okl. Cr. 527, 528, 103 Pac. 541.

[1, 2] It is the judge or magistrate before whom the complaint is filed who determines the question of the existence of "probable cause" for the issuance of the search warrant, and not the person who files or verifies the complaint, and asks for the issuance of the same. The statute does not authorize the district court to sit in review or as a court of appeal upon the action of the judge or magistrate in determining the question of the existence of "probable cause," in an action against the officer to whom the writ is directed for trespass in executing it. Ordinarily the writ, when issued by an officer having authority to issue it, and regular upon its face, is full protection to the ministerial officer executing it.

"By the great weight of authority a ministerial officer is protected by his warrant, which he is in duty bound to execute, even if he knows it has been irregularly or improperly issued." 29 Cyc. 1442.

It seems that under the above authorities, when the affidavit was filed before the magistrate, and the magistrate determined there was probable cause for the issuance of a search warrant against the premises described, and a warrant was issued, and it was regular upon its face, it was the duty of the officer to whom the warrant was delivered to execute it as therein commanded, and he is not liable as a trespasser for executing the writ. The fact that the officer to whom the writ was delivered filed the complaint can make no difference in the trial of this action for trespass. The district court had no right to submit to the jury the question of whether or not the warrant had been regularly issued, or whether or not the facts alleged in the complaint were true. The statute made it the duty of the magistrate to pass upon these facts. The district court had no right to sit in review of the action of the magistrate in issuing the warrant in this instance. If the facts set out in the complaint on which the warrant was based were not true, the plaintiff had his remedy by proper action against the party filing the complaint; but those questions cannot be tried in this case.

The Supreme Court of Connecticut, in a well-considered opinion, say on this question: "The next inquiry regards the conduct of Phelps, the defendant. The writ was put into his hands, as an officer, to serve, and he accordingly served the same by replevin the before-mentioned horse. The first objection to this act of his is founded on a fact proved at the trial of the cause, to wit: That he knew the said horse had not been

distrained or impounded. From this the plaintiff infers that he ought not to have served the replevin, and that in thus doing he becomes a trespasser. I reply to this objection that, the defendant, Phelps, being a legal officer, it becomes his duty, regardless of any knowledge or supposed knowledge of his own that there existed no cause of action, to serve the writ committed to him promptly, unhesitatingly, and without restraint from the above-mentioned cause. This I consider so firmly established as to render the proposition self-evident. The facts on the face of the writ constitute his justification, because he was obliged to obey its mandate, nor was it any part of his duty to determine whether the allegations contained in the replevin were true. The proof of these positions results, incontrovertibly, from his relative condition. He was an executive officer, whose sole duty it is to execute and not to decide on the truth or sufficiency of the processes committed to him for service. He has no portion of judicial authority, nor the means of inquiry into the causes of action, contained in the writs and declarations put into his hands for service. Obedience to all precepts committed to him to be served is the first, second and third part of his duty, and hence, if they issue from competent authority, and with legal regularity, and so appear on their face, he is justified for every action of his, within the scope of their command. 'It is incomprehensible,' said Lord Kenyon, in *Belk v. Broadbent et ux.*, 3 T. R. 183, 185, 'to say that a person shall be considered a trespasser who acts under the process of the court.' In *Grumon v. Raymond et al.*, 1 Conn. 40, 6 Am. Dec. 200, it is said by C. J. Reeve that, where it does not appear on the face of the warrant that it is illegal, it is the officer's duty to obey. *Milles v. Davies et al.*, Com. 590. The ground of these principles is simply this: That to the magistrate is confided the issuing of writs, and to the sheriff and other executive officers is confided the duty of serving them. It is easy to see what widespread mischief might result from permitting an executive officer to decide, on his own knowledge, that he ought not to serve a precept or warrant put into his hands for service, and to consider what justly must follow from such doctrine; that is, that his return of the fact would be a justification for his omission. In short, the executive officer must do his duty, which is to obey all legal writs, and must not arrogate to himself the right of disobeying the paramount commands of those to whose mandates he by law is subjected." *Watson v. Watson*, 9 Conn. 143, 23 Am. Dec. 324.

The Supreme Court of New York also say, speaking by Chief Justice Nelson, *Webber v. Gay*, 24 Wend. 487: "I think the learned judge erred as to the officer. I am not aware the court has ever looked beyond the process

with a view to see if he was cognizant of the irregularity. The point was thrown out by the Chancellor in *Parker v. Walrod*, 16 Wend. 519, but no definite opinion expressed. The general rule as there admitted is, if the justice has jurisdiction of the subject-matter, and if the process is regular upon its face, he is protected. To go beyond this would lead to a new and troublesome issue, which would tend greatly to weaken the reasonable protection to ministerial officers. Their duties, at best, are sufficiently embarrassing and responsible; to require them to act or not, at their peril, as they may be supposed to know or not the technical regularity of the party or magistrate, seems to be an innovation upon previous cases, and against the reasons and policy of the rule."

[3] Under the foregoing authorities it is clear that the search warrant, directed to the plaintiff in error, as a ministerial officer, being regular upon its face, and having been issued by an officer duly authorized to issue it, was a protection to him in executing the writ in an orderly manner. It also appears from these authorities that the trial court was wrong in giving the instruction complained of, and that it was prejudicial error to instruct the jury that the burden was upon the defendant to prove the truth of the facts set out in the complaint upon which the search warrant was issued.

It follows that the judgment appealed from should be reversed, and a new trial ordered.

PER CURIAM. Adopted in whole.

SECURITY INS. CO. v. DROKE.
(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—BRIEFS—SCOPE OF REVIEW.

Where plaintiff in error has prepared, served, and filed a brief as required by the rules of this court, and there is no brief filed and no reason given for its absence on the part of defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error from County Court, Coal County; R. H. Wells, Judge.

Action between the Security Insurance Company and A. J. Droke. From the judgment, the insurance company brings error. Reversed and remanded, with directions.

Scothorn, Caldwell & McRill and Burwell, Crockett & Johnson, all of Oklahoma City, for plaintiff in error.

HAYES, C. J. This proceeding in error is prosecuted to reverse an order of the trial court refusing to vacate and set aside a default judgment rendered by said court in favor of defendant in error and against plaintiff in error. Plaintiff in error, within the time prescribed by the rules of this court, has filed its brief, wherein it has set out the facts and has cited numerous authorities to sustain its contention that the trial court abused its discretion in refusing to sustain the petition of plaintiff in error to vacate and set aside the judgment rendered against it upon default; the ground upon which said motion was made being that the judgment was obtained by the fraud of plaintiff and by unavoidable casualty which prevented defendant from defending the action. Defendant in error has chosen not to file any brief in this court in answer to the brief of plaintiff in error, or in support of the judgment of the trial court. The brief of plaintiff in error appears to sustain fully its contention. It has been held repeatedly by this court that where plaintiff in error has prepared, served, and filed his brief as required by the rules of the court, and there is no brief filed or no reason given for its absence on the part of defendant in error, the court is not required to search the record to find some theory upon which the judgment below may be sustained; but, where the brief filed by plaintiff in error appears reasonably to sustain his assignments of error, the court will reverse the judgment in accordance with the prayer of the petition in error. *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170; *Ellis v. Outler*, 25 Okl. 469, 106 Pac. 957; *Flanagan v. Davis*, 27 Okl. 422, 112 Pac. 990; *Missouri, K. & T. Ry. Co. v. Long*, 27 Okl. 456, 112 Pac. 991.

The judgment of the trial court is, accordingly, reversed, and the cause remanded, with direction to grant a new trial. All the Justices concur, except **WILLIAMS, J.**, not present and not participating.

WOODY v. STATE.

(Criminal Court of Appeals of Oklahoma.
Nov. 22, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1086*)—APPEAL—PRESENTATION BELOW—ARGUMENT OF COUNSEL—INSTRUCTIONS.

(a) Before this court will review errors in the instructions of the trial court or objections to remarks made by the county attorney in his argument to the jury, unless such errors are fundamental, it must appear from the record that proper objections and exceptions were reserved to them during the trial.

(b) It is the duty of counsel for a defendant to call the attention of the trial court to what they consider to be errors committed during the trial and give the court an opportunity to correct the same at the time that they occur. Counsel for a defendant cannot remain silent and thereby acquiesce in the commission of er-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rors and afterwards be heard to complain thereat, unless such errors are fundamental.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2769, 2770, 2772, 2794; Dec. Dig. § 1086.*]

2. JUDGMENT (§ 751*)—ACQUITTAL OF CODEFENDANT—RES JUDICATA.

Where a man and a woman are jointly prosecuted for adultery, one of the defendants may be acquitted and the other may be lawfully convicted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 751.*]

3. CRIMINAL LAW (§ 1168*)—HARMLESS ERROR—EVIDENCE.

Where the legal evidence in a case conclusively shows that a defendant is guilty, and where the jury could not rationally arrive at any other conclusion, ordinarily errors committed by the trial court in the introduction or rejection of evidence will become immaterial and will not constitute grounds for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3125, 3129-3136, 3144; Dec. Dig. § 1168.*]

4. ADULTERY (§ 14*)—EVIDENCE TO SUSTAIN CONVICTION—SUFFICIENCY.

For a statement of evidence which conclusively establishes the guilt of the defendant of the crime of adultery, see opinion.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 27, 31, 32; Dec. Dig. § 14.*]

5. CRIMINAL LAW (§ 564*)—VENUE—SUFFICIENCY OF EVIDENCE.

For evidence which fully sustains the allegation of venue in a case of adultery, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277-1284; Dec. Dig. § 564.*]

6. CRIMINAL LAW (§ 1134*)—APPEAL—ABSTRACT QUESTION.

Where the record clearly shows that a defendant is guilty as charged, and where the defendant has not been deprived of some substantial right to his injury, this court will not discuss and decide matters of law merely for the purpose of settling abstract questions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.*]

7. CRIMINAL LAW (§ 1186*)—APPEAL—GROUNDS FOR REVERSAL.

The effect of a conviction upon the family of a defendant cannot be ground for a reversal. Men with families should think of such things before they commit crimes.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

(Additional Syllabus by Editorial Staff.)

8. JUDGMENT (§ 751*)—"VERDICT OF NOT GUILTY"—RES JUDICATA.

A "verdict of not guilty" is simply a verdict of not proven in the particular case tried and is not a verdict of innocence, and hence is not conclusive against the state in favor of any other person than the defendant who was actually acquitted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 751.*]

9. ADULTERY (§ 11*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for adultery, evidence of a trip made to Kansas by defendant and the prosecuting witness' wife was properly admitted where such trip was a part of the general plan of the parties to have sexual intercourse and tended to explain the purpose of their be-

ing together in Oklahoma under suspicious circumstances.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 20, 23; Dec. Dig. § 11.*]

Appeal from District Court, Major County; James B. Cullison, Judge.

W. A. Woody was convicted of adultery, and he appeals. Affirmed.

John V. Roberts, of Fairview, and George W. Connell, of Clinton, for appellant. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. [1] First. In their brief counsel for appellant complain at a number of the instructions given by the court and also complain of remarks alleged to have been made by the county attorney in his closing argument to the jury. Upon an examination of the record, we fail to find that any exceptions were reserved at the trial to the instructions of the court. We also fail to find that counsel for appellant during the closing argument of the county attorney, in any manner, objected to the remarks complained of in the brief and alleged to have been made by the county attorney. We find no fundamental errors in the instructions of the court or in the remarks of the county attorney; and, in the absence of proper objections and exceptions, we cannot consider the matters presented. See *Hayes v. State*, 4 Okl. Cr. 377, 111 Pac. 1020; *Johnson v. State*, 5 Okl. Cr. 13, 113 Pac. 552; *Ford v. State*, 5 Okl. Cr. 240, 114 Pac. 273; *Crump v. State*, 7 Okl. Cr. 535, 124 Pac. 632; *Bethel v. State*, 8 Okl. Cr. 61, 126 Pac. 698; *Ryan v. State*, 8 Okl. Cr. 623, 129 Pac. 685.

Counsel should have promptly brought the matters complained of to the attention of the court at the time of their occurrence and thereby have given the court an opportunity to correct any errors, which may have been made, before they could have possibly harmed appellant. Counsel, being silent, thereby acquiesced in the commission of the errors complained of, even if it is admitted that they were errors. Unless errors committed during the trial are fundamental, counsel will not be heard to complain of that which, with reasonable diligence on their part, they could have prevented or properly incorporated in the record. Convictions in criminal cases will not be reversed upon afterthoughts unless for fundamental errors. It would be unfair to the trial courts and ruinous to the administration of justice to reverse convictions upon alleged errors which were not properly presented to the court below.

[2] Second. Appellant and Anna Boyd were jointly charged by information with the commission of the crime of adultery. Anna Boyd was first tried and acquitted, and the contention is now made that this acquittal

operated to discharge appellant as a matter of law. In their brief counsel say: "We insist that where two parties are jointly charged with the commission of an act of adultery, the one with the other, it is impossible for one to be innocent and the other guilty, and for that reason, where the one is first tried separately from the other and found not guilty, it is the duty of the court to discharge the other. This may differ from the ordinary rule, but there is a reason for this being an exception. It is as impossible for the one to be guilty and the other innocent as it is for A. to be guilty of murdering B. and B. still living." No authorities were cited by counsel for appellant in support of this proposition. It is true that the Supreme Court of North Carolina did so hold in the case of *State v. Mainor & Wilkes*, 28 N. C. 340, and also in the case of *State v. Parham*, 50 N. C. 416. We think that these decisions are not supported by the reason of the law, and they were in effect repudiated by the same court in the later case of *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

[8] A verdict of not guilty is not a verdict of innocence. It is simply a verdict of not proven in the particular case tried, and it is not conclusive against the state in favor of any other person than the defendant who was actually acquitted. The state might not be able to make proof of the offense in the trial of one party for many causes yet might be able to make proof on the trial of the other. Because there may have been a miscarriage of justice as to one joint offender is no reason why there should also be a miscarriage of justice as to the other joint offender. Again it is true that to constitute adultery there must be a joint physical act, but it is not necessary that there should be a joint criminal intent. The bodies must concur in the act but the minds may not; one may be guilty and the other innocent. A few illustrations will demonstrate this conclusively. Namely, if A., being a married man, should have sexual intercourse with B., a single woman, who was so drunk or demented as to be unable to give her consent, such woman could not be convicted, but A. may be prosecuted and convicted either for adultery or rape. Or if A., being a married man, should marry B., a single woman, who had no knowledge of A.'s previous marriage, B. would not be guilty of any offense but A. might be prosecuted and convicted either for bigamy or adultery. The following cases support the conclusion at which we have arrived: *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321; *State v. Caldwell*, 8 Baxt. (Tenn.) 576; *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207; *Watson v. State*, 13 Tex. App. 76; *State v. Sanders*, 30 Iowa, 582; *State v. Donovan*, 61 Iowa, 278, 16 N. W. 130; *Commonwealth v. Bakeman*, 131 Mass. 577, 41 Am. Rep. 248; *State v. Eggleston*, 45 Or. 346, 77 Pac. 738; *State v. Carrol*, 30 S. C.

85, 8 S. E. 433, 14 Am. St. Rep. 883; *Solomon v. State*, 39 Tex. Cr. R. 140, 45 S. W. 706.

Mr. Wharton says: "One defendant may be acquitted without involving the acquittal of the other."

Mr. Bishop says: "As every offense to be punishable must be voluntary, so in particular must be adultery. But alike in adultery, and it is believed in fornication and incest, where the crime consists of one's unlawful carnal knowledge of another, it is immaterial whether the others participated under circumstances to incur guilt or not, just as sodomy may be committed with a responsible human being, or an irresponsible one, or a beast. Therefore the same act of penetrating a woman, who, for example, is too drunk to give consent, may be prosecuted either as a rape, or as adultery, at the election of the prosecuting power. There are cases which deny this and hold that adultery, fornication, and incest can be committed only with consenting persons, and what is rape cannot be one of the others. But they are believed to proceed partly, and perhaps entirely, on special terms of statutes. Certainly in principle they can have no other just foundation." *Bish. Stat. Crimes*, § 660.

[3] Third, Objections were made to the action of the trial court in the introduction and rejection of evidence, but, in the light of the testimony in this case, we do not believe that an intelligent and honest jury could be impeached who, with a due regard for their oaths and the testimony, could legitimately come to any other conclusion than that the appellant was guilty. This being the case, errors committed by the trial court, which could not have altered the verdict, became immaterial, and it would be a waste of time for us to discuss them. A conviction will not be reversed except for errors which affected the substantial rights of the defendant. See *Ostendorf v. State*, 8 Okl. Cr. 360, 128 Pac. 143.

[4] Fourth. What are the facts in this case? In the case of *Ex parte Burris*, 133 Pac. 1139, this court said: "In determining the sufficiency of testimony in any case, the nature of the subject-matter under inquiry must be considered. It is but seldom, indeed, that direct and positive evidence of adultery can be produced, for persons who have illicit sexual intercourse with each other ordinarily do not commit adulterous acts in the presence of witnesses. Therefore in such cases we cannot reasonably expect to have other than circumstantial evidence as to the commission of adultery."

A more complete cable of circumstances could not be shown, short of proving by eye-witnesses the physical act of intercourse, than is presented in this case. The prosecuting witness was Walter M. Boyd. He was a man 33 years old; was a clerk in a hardware store in Fairview. His wife, to whom he had been married several years, was 27 years of age. They had born to them

one child, a girl three years old at the time of this trial. The defendant was a married man who came to Fairview in May, 1911, and was engaged in the general merchandise business. The defendant's wife spent only a portion of the time in Fairview with her husband. Defendant occupied a room over his store during his wife's absence. Boyd's house was within a few blocks of the defendant's store; the latter adjoining the Citizens' State Bank. Many merchants and officers of the bank testified that defendant often came to the bank corner, waved toward Mrs. Boyd's house, and in a few minutes Mrs. Boyd would appear. It was proved by witness that Mrs. Boyd often went up the front stairs leading to the floor on which defendant had his room and about the same time defendant went up the back stairs. It was proved that Mrs. Boyd and defendant were seen together after dark in front of defendant's store; at one time defendant was locking or unlocking the door. It was proved that defendant and Mrs. Boyd went driving together in a top buggy with the curtains drawn on warm days. It was proved that a friend of defendant advised defendant that his conduct would likely get him into trouble, to which defendant replied, "They can't prove anything." It was proved that defendant was seen at Mrs. Boyd's house, in the absence of Mr. Boyd, on several occasions; that he took a veil and hair braid to Mrs. Boyd. It was proved that on one occasion defendant went to Mrs. Boyd's. Mr. Boyd's suspicions were aroused. He got a bucket and went to his home ostensibly to get a bucket of water. As he went in the front door defendant ran out the back door. On one occasion in the evening defendant was walking in front of his store. A man came up to him and sought to talk to defendant about some business. Defendant said to him, "Come Monday, I haven't time this evening." In a few minutes Mrs. Boyd appeared and met defendant. It was proved that the defendant visited Mrs. Boyd four or five times in Mr. Boyd's absence. On one occasion, when Mrs. Boyd's sister (Mrs. Clough) was at Mrs. Boyd's, defendant told Mrs. Clough he did not want her "butting in." This was in answer to Mrs. Clough's request that defendant stay away from Mrs. Boyd's. About 8 o'clock one evening defendant and Mrs. Boyd were together by the Citizens' State Bank corner, standing close together. Mrs. Boyd said to defendant, "I will go if you think best, but I would rather not."

The date of the offense alleged in the information was September 23, 1911. The state proved that on that day Mrs. Clough, who was Anna Boyd's sister, and Anna Boyd were going to Carmen. They went down in town, spent some time in defendant's store buying various articles. They left defendant's store and went to the Bates' store. After being at

the latter place for a while, Mrs. Boyd told her sister, Mrs. Clough, that she wanted to go back to the defendant's store to purchase other articles. She went there, taking with her the little baby girl three years old. Mrs. Clough waited at the Bates' store for her sister. The latter not returning, Mrs. Clough went to defendant's store in search of Mrs. Boyd. She did not find either. At the time Mrs. Clough and Mrs. Boyd were in the defendant's store before going to the Bates' store defendant was there. Upon returning to defendant's store and not finding either Mrs. Boyd or the defendant, she went upstairs looking for her sister. Defendant's room on the second floor adjoined the rooms of a Mrs. Myers, who lived up there. Mrs. Clough went to Mrs. Myers, saw Mrs. Boyd's baby girl there, and inquired for her sister. What Mrs. Myers said is not in the record, but Mrs. Myers tapped upon the partition wall between her room and the defendant's room, and in a few minutes after this occurred Mrs. Boyd came into the room where she had left her baby girl. This occurred on September 23d. It was proved that Mrs. Clough and Mrs. Boyd went away that day on the train to Carmen. Mrs. Boyd got off there. Mrs. Clough went on to Winfield, Kan. The defendant the next day went to Carmen. On the train going there, he told a man who was riding with him that he was to meet a friend there. When the train got to Carmen, defendant got off, went in the station, joined Mrs. Anna Boyd, who was at the station. They got on the train together and went north. Defendant and Mrs. Boyd did go to Kansas for witnesses saw them together on the streets of Wichita on the 25th and 26th of September, 1911. They remained in Kansas several days. They were seen at Anthony, Kan. About the 28th or 29th of September, 1911, they got on the train together at Anthony and came south into Oklahoma. Mrs. Boyd got off the train at Carmen. Defendant did not get off the train.

The information in this case was filed March 29, 1912. On the 15th day of March the defendant, while at Oklahoma City, called Mrs. Boyd by telephone. The telephone operator at Fairview knew the voice of both defendant and Mrs. Boyd. In that conversation defendant asked Mrs. Boyd if she had received a registered letter which he had sent her. She said: "No. I have not, but I think that I will to-day." He also wanted to know how everything was, to which she replied, "Everything seems to be at a standstill." On the 16th, the day after the first conversation, defendant called Mrs. Boyd by telephone from Oklahoma City and wanted to know if she had received the registered letter. She replied she had not. Defendant told her to come to Oklahoma City. She replied, "I am afraid to because I am being watched here." Defendant then told her to go north and then come south. She then

said, "I will meet you there at the depot at Oklahoma City." It was proved that she did go to Geary. She got off there, got a ticket to El Reno, and went there. The witness who testified to these facts was going to Ft. Worth. He got off at El Reno. The train he got off of went to Oklahoma City. Mrs. Boyd did not get off.

It was proved that defendant kept a keg of cider in his room, and there were empty whisky bottles. Mrs. Boyd often went upstairs and went back towards defendant's room. It was proved that the day before defendant's preliminary hearing the defendant and Mrs. Boyd met at the Citizens' Bank corner. This was before Mrs. Boyd was arrested.

There was in this case no semblance of a defense made. The material facts showing familiarities and illicit conduct were not in the least denied. We have asserted that certain facts were proved. We do this because the defendant did not controvert them nor did he endeavor to do so. The witnesses were responsible and reputable men engaged in business at Fairview.

It is inconceivable that a man would be guilty of such conduct and yet hope a jury would be led to conclude that his constant familiarities with Anna Boyd were from a proper and good motive. Men of common sense were on the jury. For defendant to say that this line of conduct was not the gradual approximation to the ultimate end in view is to assume that the jurors who tried him were unable to look to facts and circumstances and reasonably conclude that his various acts were those of a destroyer of homes and the betrayer of his own wife and the degradation and moral pollution of the wife of Walter Boyd. Why would a man engaged in such a large and thriving business take such familiarities with the wife of his friend unless he did so for the gratification of his lust? Why would he go to Boyd's home in his absence and, when Boyd approached, run out the back door, if his conduct was that of an innocent man? Why would he plan trips to Oklahoma City and to Kansas? Was it because of his pleasures in the association with Anna Boyd? No man of enough sense to be on a jury would believe that defendant was a victim of Anna Boyd and that she was exercising a hypnotic influence over him in order to secure from him such trivial gifts as veils and hair braids. Would an innocent man every day leave his business during business hours, go to the Citizens' Bank corner, and by signal secure the presence of Anna Boyd? Is it a coincidence that when Anna Boyd went up the front stairs toward his room he also went up the back stairs? Would this happen dozens of times without some prearrangement? Why would he say to Anna Boyd's sister to quit "butting in" unless he were engaged in the violation of the sanctity

of the home of Walter Boyd? Where was Woody during the time Mrs. Boyd was in his room on the 23d day of September? It is true no witness swore that he was in the room. But he had been in his store a short while before. Anna Boyd went upstairs to the room adjoining the room of defendant. She left her baby girl with Mrs. Myers. Upon the arrival of Mrs. Boyd's sister and an inquiry as to her whereabouts, Mrs. Myers tapped on the partition wall between defendant's room and Mrs. Myers' room. Anna Boyd appeared. Where had she been? No sensible juror would believe she was not in the defendant's room at that very time with the defendant. And it is urged that the corpus delicti was not proved. When have men become so insane that, if they are going to engage in such conduct, they commit such crimes in the open or where they are likely to be detected?

In prosecutions for adultery, evidence that the parties have been riding together frequently, that defendant paid frequent visits to the home of the woman when her husband was away, that the adulterous inclination existed, and that an opportunity for illicit intercourse occurred are facts which may lead the guarded discretion of a reasonable and just man to the conclusion of guilt. Greenleaf, Ev. (15th Ed.) vol. 1, par. 40: *People v. Gridler et al.* (Mich.) 31 N. W. 624; *State v. Briggs*, 68 Iowa, 416, 27 N. W. 358; *State v. More*, 115 Iowa, 178, 88 N. W. 323; *State v. Leek*, 152 Iowa, 12, 130 N. W. 1063; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110.

In the last case cited the court says: "The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove it, except by circumstantial evidence. The circumstances must be such, indeed, as 'to lead the guarded discretion of a reasonable and just man to the conclusion of guilt.' But, when an adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place. The intent and disposition of the parties towards each other must give character to their relations and can only be ascertained, as all moral qualities are, from the acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. The rules which govern human conduct and which are known to common observation and experience are to be applied in these cases, as in all other investigations of fact."

This court in *Nettie V. Brown v. State*, 132 Pac. 359, No. A866, said: "We are not will-

ing to establish the doctrine in Oklahoma that there can be no conviction for murder in any case unless the body of the deceased is recognized and identified by direct and positive evidence. Such a rule would make murder safe and would place a premium upon the most vile and brutal kind of assassination. All that the murderer would have to do to escape punishment would be to so mutilate and disfigure the body of his victim, which could be easily done, as to make identification and recognition impossible. Whatever the law in other states may be, this court will never consent to the establishment of a doctrine in Oklahoma which would result in such monstrous consequences. The only just and logical position consistent with the safety of society and the sanctity of human life which courts can assume is that the corpus delicti may be proven by circumstantial evidence."

In *Ex parte Harkins*, 7 Okl. Cr. 464, 483, 124 Pac. 931, 939, this court said: "This is a case depending entirely upon circumstantial evidence. While, to a limited extent, a false consistency of circumstances may be constructed, yet experience teaches that this is almost impossible where there are a considerable number of circumstances involved. A single circumstance, standing alone, might amount to but little and be entirely consistent with innocence, yet, when this circumstance is considered in connection with other circumstances, they are to be taken and combined together and may result in an irresistible conclusion of the guilt of the accused."

And, in this connection with this phase of the case, it ought to be borne in mind that the defendant could easily, if it were true, have proved that no crime was committed. It is of course true that the burden is upon the state, but as said by Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. (Mass.) 316, 52 Am. Dec. 727: "When pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge."

From the evidence in this record the defendant is a guilty man. He has wrecked two homes and has brought shame and disgrace upon Anna Boyd's only child. Such an offender ought not to receive leniency at the hands of any jury or court.

[5] Fifth. In their brief counsel for appellant say: "There is much doubt as to the sufficiency of the proof as to the venue of the alleged crime, and, if so, the error is fatal. *Brunson v. State*, 4 Okl. Cr. 467 [111 Pac. 988]. There is nothing in the record in this

case or the authority cited supporting this statement. It was proved beyond question that Walter M. Boyd, with whose wife appellant has been convicted of adultery, resided in the town of Fairview in Major county. The jury were justified by the evidence in believing that appellant committed adultery, not only in the home of said Walter M. Boyd, but also in a room over the store of appellant, both of which places were in Major county, Okl.; but, even if there was any doubt upon the subject of the proof of venue, this could not avail appellant unless there was an absolute want of proof on this subject. In the very case cited by appellant this question is stated decisively in the following language: "Only those allegations in an indictment which involve the guilt of a defendant are to be proved beyond a reasonable doubt. The venue of an offense does not come within this class, but there must be some proof of venue. See *Fuller v. Territory*, 2 Okl. Cr. 86, 99 Pac. 1098."

[9] The evidence of the trip of appellant and the wife of the prosecuting witness to the state of Kansas, and what happened there between them, was competent and admissible in evidence because it was only a part of the general plan or conspiracy of said parties to have sexual intercourse with each other. It tended to explain the purpose of appellant and said Anna Boyd in being together under suspicious circumstances in Major county, Okl.

[6] Sixth. We do not desire to be understood as indorsing every ruling made by the court in the trial of this cause. From an experience of 40 years in the practice and on the bench, the writer doubts if such a thing as an absolutely flawless trial, from a technical standpoint, was ever had, where the defendant in a criminal case was represented by able counsel. Where it is clearly proved that a defendant is guilty as charged, a conviction should not be reversed unless it affirmatively appears from the record that the defendant was deprived of some substantial right, to his injury, upon the trial. To require perfection in all of the rulings of the trial court would simply be to render it impossible to enforce the law. The supreme question on an appeal is as to whether or not the material rights of the appellant were respected in the trial and as to whether or not the appellant is guilty as charged, and if this be clearly established, as is done in this case, immaterial errors, which, in the light of the entire record, could not have contributed to his conviction, should not be ground for reversal. The record fails to show that appellant was deprived of his substantial rights. There is but one construction in the light of human experience and human nature that can be placed upon the undisputed legal evidence in this record, and that is that appellant is guilty as charged. It would therefore be a useless expendi-

ture of labor and consumption of time to consider the matters presented merely for the purpose of settling abstract questions of law.

[7] Seventh. In their brief counsel for appellant say: "The conviction of Mr. Woody may mean the ruination of two families." Appellant should have thought of these things when he was trying to seduce the wife of his neighbor. It is this and not his conviction that has ruined two families. The most sacred place this side of heaven is the home. There is nothing that is more ennobling to mankind than pure and virtuous homes. There is nothing more degrading to society than the pollution of the home. In such cases society inexorably punishes the woman. Not so with the man. Unless her father, brother, or husband personally inflict summary vengeance upon him, nothing but the strong arm of the law can make him atone for the crime which he has committed. It is probable that considerations of this sort induced the jury to find the woman in this case not guilty. They doubtless realized that she was already more severely punished by society than she could possibly be by the law and therefore followed the divine example in a similar case and said to her, "Go thou and sin no more." But what possible punishment could be inflicted upon the appellant if not convicted by the jury? He would be absolutely at liberty to hunt for other victims to gratify his beastly lusts. While we do not indorse the acquittal of the woman, there was an element of justice in it; but, even if this be not true, appellant should not be freed because there was a miscarriage of justice in the case of the woman. There is no doubt in the world about his guilt. Society must have protection against such characters. The very life of society is involved in this question; and, if the law does not punish such conduct, who can blame the father, husband, or brother for taking the law into his own hands and defending the sanctity of his home with a shotgun. The only way to stop murder in such cases is for the law to firmly punish the offending party. The conviction of appellant meets our entire approval. We feel that justice has overtaken and marked its own. No country can rise superior to the purity of its homes; and, where any man for the purpose of gratifying his animal passions lays the unhallowed hands of lust upon the altar of marital purity, he thereby becomes a traitor to society and an enemy to the human race. This court has time and time again called attention to the fact that illicit love is the most prolific source of crime among men. Nearly every week the people are shocked by the publication of accounts of ruined homes and the commission of the crime of assassination

caused by illicit love. This court is not going to condone such conduct. Leniency to these parties is a crime against society.

The greatest error in this record committed by the trial judge was that he allowed the kindness of his heart to cause him to fix the punishment of appellant at one year's imprisonment in the penitentiary and \$500 fine, when in justice appellant should have been sent to the penitentiary for five years, which is the limit of the law. This is the most flagrant case of its kind that has ever come before us.

Judgment of lower court is in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

SHAWVER v. SHAWVER et al.

(Supreme Court of Idaho. Nov. 3, 1913.)

1. FINDINGS SUSTAINED.

Evidence examined in this case, and held sufficient to support findings.

2. TRIAL (§ 397*)—FINDINGS—NECESSITY.

It is not necessary for a trial court to make findings on collateral or immaterial issues, where a finding either for or against the losing party could not change the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

3. FINDINGS—JUDGMENT.

Held, that the findings in this case support the judgment.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Martha Shawver against Albert O. Shawver and another. From a judgment for defendants, plaintiff appeals. Affirmed.

C. H. Edwards, of Boise, for appellant. Karl Paine, of Boise, for respondents.

AILSHIE, C. J. [1] In this case the evidence is sufficient to support the findings. The findings in turn substantially comply with the requirements of the statute and cover all the material issues. *Sandstrom v. Smith*, 12 Idaho, 446, 86 Pac. 416; *Brown v. Macey*, 13 Idaho, 451, 90 Pac. 339.

[2] It was not necessary for the court to make findings on immaterial or collateral issues, or on any issue, where a finding either way could not have affected or changed the judgment that was entered in the case. *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490; *State v. Baird*, 13 Idaho, 126, 89 Pac. 298.

[3] The findings in this case are sufficient to support the judgment. The judgment should be affirmed, and it is so ordered.

No costs awarded.

SULLIVAN and STEWART, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

MELLEN v. GARRETT et al.

(Supreme Court of Idaho. Nov. 7, 1913.)

1. MORTGAGES (§ 417*)—ASSIGNMENT—EFFECT—FORECLOSURE.

Where G. held the promissory note of T. and wife for \$3,000 and a mortgage to secure the payment of the same, and thereafter hypothecated them for the payment of a debt of \$602.44, and delivered such note and mortgage to the bank as collateral security, and thereafter made an assignment of such note and mortgage to M. to secure the payment of borrowed money from him, and thereafter, while such note and mortgage were in the hands of the bank, G. made an assignment of whatever interest he had in said note and mortgage to M. and S., on an agreement that they pay G.'s indebtedness to the bank, and M. thereafter brought an action to foreclose said mortgage, in which action M. and S. intervene and claim to be the owners of said note and mortgage, and ask in their complaint in intervention to have said mortgage foreclosed on their behalf, held, that the court erred in holding that M. and S. were the absolute owners of said note and mortgage, and in giving them a judgment and decree foreclosing the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1227-1236; Dec. Dig. § 417.*]

2. MORTGAGES (§ 417*)—ASSIGNMENT—EFFECT.

Held, that M. and S. were not the owners of said note and mortgage, but held the same as collateral security for the balance due on the debt for which they were hypothecated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1227-1236; Dec. Dig. § 417.*]

3. MORTGAGES (§ 417*)—ASSIGNMENT—EFFECT.

Held, that G.'s equity in said note and mortgage was assigned to M., and that M. was entitled to recover on said note and mortgage the balance remaining after paying the debt for which said note and mortgage were hypothecated to the bank.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1227-1236; Dec. Dig. § 417.*]

Appeal from District Court, Elmore County; Edward A. Walters, Judge.

Action by Thomas Mellen against John H. Garrett and others, in which Benjamin Moyses and another intervened. From judgment for interveners, plaintiff appeals. Reversed on rehearing.

J. G. Watts, of Mountainhome, for appellant. E. M. Wolfe and W. L. Harvey, both of Mountainhome, and Cavanah, Blake & MacLane, of Boise, for respondents.

SULLIVAN, J. This case was decided by this court on May 8, 1913, and the judgment of the district court affirmed. A rehearing was thereafter granted, and the following are the conclusions of the court on rehearing, and this opinion will supersede the former opinion:

[1-3] This action was brought by the appellant, Mellen, to foreclose a mortgage against the respondents Hall and Childs and wife. It is alleged in the complaint that on the 4th of June, 1907, John H. Garrett, one of the defendants, borrowed from the appellant, Mellen, the sum of \$2,000, and gave as security therefor a written assignment of a note and mortgage for \$3,000 executed by

Elisha B. Turner and wife. After the execution of said mortgage, Turner sold the mortgaged premises to Hall and Childs, and they assumed and agreed to pay the mortgage. Before the trial of the case, Benjamin Moyses and Charles B. Smith intervened, and filed an answer and cross-complaint, in which they claimed to be the owners and in the possession of the note and mortgage in controversy.

It appears from the evidence that the appellant had loaned Garrett \$2,000, and had taken a written assignment of the Turner note and mortgage as security; that he had immediately placed said assignment on record in the office of the county recorder of Elmore county, but has never had the actual possession of said note and mortgage. It also appears that Garrett was owing the Citizens' State Bank of Mountainhome a considerable sum of money; that his indebtedness to the bank was in the form of notes and overdrafts, and that he always kept a large amount of collateral and other security on deposit in that bank to secure the payment of his notes and overdrafts; that the note and mortgage sued on had been hypothecated for a part of that specified indebtedness to the extent of \$602.44. On the back of said promissory note is the following indorsement: "I hereby assign the within note, together with the mortgage securing the same, to the Citizens' State Bank as security for \$602.44 this day borrowed, as evidenced by the annexed note. Dated May 6, 1907. [Signed] John H. Garrett."

Smith and Moyses, interveners, had agreed with Garrett to pay his indebtedness and the indebtedness of the Great Western Beet Sugar Company to the bank, and the securities of whatever nature and description deposited by Garrett in said bank, upon the payment of said indebtedness to the bank, were to be turned over to Smith and Moyses. At the time appellant loaned Garrett \$2,000 and took an assignment as collateral security of said notes and mortgage, he had not obtained possession of either note or the mortgage, and had not obtained such possession up to the time of the trial of this case in the district court. Garrett had informed him that they were in the Citizens' State Bank; but the appellant was in a hurry the day he loaned the \$2,000 to Garrett, and failed to call and get them, and he never did call for them. It appears that, upon the payment by the interveners of Garrett's indebtedness to the bank, the bank turned over to them said note and mortgage, with other securities that Garrett had left with the bank, and that Smith and Moyses have had possession of them ever since.

It clearly appears from the record that said note and mortgage of \$3,000 were hypothecated for the payment of \$602.44 only, and the interest arising thereon, and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Moyses and Smith, by the assignment of the bank, only obtained said note and mortgage as security for the payment of said \$602.44 indebtedness, and no more. Since they stepped into the shoes of the bank, so far as said security was concerned, they were entitled to hold said note and mortgage for the security of the payment of said \$602.44 and interest, the sum for which said \$3,000 note was hypothecated to the bank, and no more.

The trial court, therefore, erred in holding that said interveners, Moyes and Smith, were the owners of said \$3,000 note and mortgage. The judgment is therefore reversed, and the cause remanded, with instructions to the trial court to make findings of fact and enter judgment in favor of Moyes and Smith for whatever amount the court may find due them on the \$602.44 indebtedness, for the payment of which said \$3,000 note was hypothecated to the Citizens' State Bank, and in favor of Mellen for the balance due on said \$3,000 promissory note, and to enter a decree of foreclosure directing the property covered by said mortgage to be sold as provided by law, and that the sheriff or officer making the sale distribute the proceeds of such sale as follows: (1) Pay all legal costs of this action and the sale of said property under the foreclosure decree; (2) pay to Moyes and Smith the balance due them on the \$602.44 debt, with interest, for which they hold said note and mortgage as security; (3) pay the balance due to the appellant Mellen.

Costs of this appeal awarded to the appellant Mellen.

AILSHIE, C. J., and STEWART, J., concur.

On Motion to Modify.

SULLIVAN, J. There has been a motion filed by the attorney for defendant Hall to modify the decision of this court in this case. The motion is based on the findings of the lower court to the effect that George Hall and C. C. Childs and wife were always ready, willing, and able to pay the mortgage referred to in the original opinion, but that they did not know to whom payment should be made; and counsel further suggests that all of the costs in this case have been brought about because of the contention between the plaintiff, Mellen, and the defendants Moyes and Smith as to the ownership of said note and mortgage, and contends that the costs of that suit should be borne by the loser, and not by said defendants Hall and Childs.

Had the defendants Hall and Childs desired to relieve themselves from further liability as to costs, when this suit was brought they ought to have paid the money into the court to abide the result of the contest between Mellen, Moyes, and Smith. It is true, the main contention in this case has

been between Mellen, Moyes, and Smith as to the ownership of said note and mortgage, and therefore the costs of appeal are awarded against Moyes and Smith. Since the cause must be remanded, the trial court will see that the costs of the trial and the attorneys' fees are properly and equitably adjusted.

AILSHIE, C. J., and STEWART, J., concur.

FALL CREEK SHEEP CO., Limited, v. WALTON.

(Supreme Court of Idaho. March 17, 1913.
On Rehearing, Nov. 20, 1913.)

1. PUBLIC LANDS (§ 106*)—HOMESTEAD ENTRY—LAND OFFICE RECEIPT—PROBATIVE EFFECT.

Where a homestead entry has been made and the land office has issued a certificate to the applicant and such entry is recognized as valid by the government, such certificate, under the provisions of section 5983, Rev. Codes, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein, but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

2. PUBLIC LANDS (§ 108*)—OWNERSHIP OF HOMESTEAD ENTRY—DETERMINATION.

In an action where two persons claim the title and right of possession of certain lands under entries made under the laws of the United States, one a mining location, the other a homestead entry, and the contest is solely between the two parties, and the government is not a party, and the evidence shows that a certificate has been issued upon the homestead entry, and it is further shown that said entry was recognized as legal by the Secretary of the Interior in a contest between the respective parties, this court will follow such decision, and hold, as between the parties to the suit, that the homestead entryman has the right to protect his possession and occupancy of the land as against trespass upon the same.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 304, 306; Dec. Dig. § 108.*]

3. ANIMALS (§ 91*)—CONSTITUTIONAL LAW (§ 293*)—DUE PROCESS.

Section 1280, Rev. Codes, is not repugnant to section 13, art. 1, of the Constitution of the state, in that it provides for the taking of property without due process of law.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 329; Dec. Dig. § 91; Constitutional Law, Cent. Dig. §§ 812-814; Dec. Dig. § 293.*]

4. ANIMALS (§ 91*)—CONSTITUTIONAL LAW (§ 293*)—DUE PROCESS.

Sections 1279-1281, Rev. Codes, provide that where a hog is found trespassing, the occupant or proprietor may take up the animal at the expense of the owner of such hog and hold the same until the payment of the expense and damages, and that a lien is given upon the hog, and sale is provided for upon due notice, and the procedure for the foreclosure of the lien;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the proceedings are complete in themselves, and such provisions are not repugnant to the Constitution or in conflict with any other statute of the state, and in no way deny to the owner of such hog the right to pursue such legal proceedings as he may desire for the purpose of protecting and enforcing his rights and in contesting such claim or lien in a proper proceeding.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 329; Dec. Dig. § 91;* *Constitutional Law*, Cent. Dig. §§ 812-814; Dec. Dig. § 293.*]

5. ANIMALS (§ 95*)—TRESPASSING—ACTION BY OWNER—SUFFICIENCY OF EVIDENCE.

Evidence in this case examined, and held that it supports the verdict of the jury.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 390-396, 402-408, 415; Dec. Dig. § 95.*]

Allshie, C. J., dissenting.

Appeal from District Court, Cassia County; C. O. Stockslager, Judge.

Action by the Fall Creek Sheep Company, Limited, against Thomas E. Walton. From judgment for defendant, plaintiff appeals. Affirmed.

S. T. Lowe, of Burley, for appellant. D. C. McDougall, of Pocatello, J. T. Fisher, of Rockland, and T. D. Jones, of Malad, for respondent.

STEWART, J. This is an action of claim and delivery of certain hogs of the value of \$995. The plaintiff claims to be the owner and entitled to the possession of the property, and that the defendant wrongfully and unlawfully seized and took possession of the same. The defendant in his answer admits the taking of the hogs, and that plaintiff was the owner of the property at the time of the taking, but denies that the seizure was unlawful, and alleges that he is in possession and entitled to possession by virtue of a homestead entry to certain lands in Cassia county, Idaho, and that said hogs were trespassers thereon, and were taken up by defendant pursuant to the provisions of chapter 12, art. 1, of the Revised Codes of Idaho. The defendant also alleges that the title of said property has been vested in the defendant under chapter 12, art. 1, and that notices were given as required by section 1280, Rev. Codes. The cause was tried with a jury and a verdict was rendered in favor of the defendant, that the defendant was entitled to the ownership and possession of the hogs or the value thereof, \$995, together with costs. Judgment was rendered accordingly, and this appeal is from the judgment.

The first and main question urged for reversal by appellant is based upon the order of the trial court in overruling a motion for an instructed verdict for the plaintiff. The grounds of the motion, in substance, are: First, that the land upon which the defendant claims the hogs trespassed had been withdrawn from settlement and occupancy

prior to the 9th day of September, 1909, and was not subject to settlement or occupancy at any subsequent date, and that the acts of the registrar and receiver of the Halley land office in accepting the defendant's homestead entry were contrary to law and void; second, that the record does not show any actual damages were sustained by the defendant by reason of the trespass of the hogs, nor any presentation by the defendant to plaintiff of any proper claim for charges in accordance with section 1280, Rev. Codes; third, that the claim of ownership of the hogs, through forfeiture by plaintiff by reason of its failure or refusal to pay the sum demanded for damages, irrespective of whether the same was reasonable, just, or proper, is the taking of plaintiff's property without due process of law, and that if sections 1279, 1280, 1281, and 1282 of the Revised Codes are to be construed as authorizing such taking of the property of another, said sections are unconstitutional and in violation of section 13, art. 1, of the Constitution of the state.

[1,5] This motion presents the question whether the defendant at the time he seized the hogs, on October 4, 1911, October 15, 1911, and October 24, 1911, had such ownership or occupancy of the lands where the hogs were taken as to give the defendant the relief provided for by chapter 12, art. 1, of the Revised Codes.

Section 1278 of said chapter provides: "The owner or occupant of premises is not required to fence against hogs."

Section 1279 provides: "If any hog is found trespassing, the occupant or proprietor of the premises may take up and safely keep, at the expense of the owner thereof, such hog, and hold the same until the payment of the expense and damages by the owner, and shall be allowed fifty cents per head additional for each animal so taken up."

Section 1280 provides for notices to be given by the person taking up such animal, and section 1281 provides that if the owner and taker-up of such hog cannot agree to the amount of damage, they must select a disinterested person, who must hear the facts from both parties and fix the amount of damages to be paid, and that such damages are a lien upon the hog and other personal property, and then follows the time of payment, the amount of damages to be paid, and such amount is declared a lien; and if the same is not paid, the taker-up shall notify the constable, and levies shall be made and the property sold to pay the fees and the keeping charges and the damages.

Section 1282 provides, also, that if the owner does not appear and substantiate his title and pay the charges within 30 days after the notice, the absolute ownership of the hogs shall be vested in the person taking up the hogs, provided he shall keep a copy of the notices posted, which shall be indorsed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with the date and manner of posting and the places where posted, and such notices shall have the same force and effect as a bill of sale of such hogs.

Under the provisions of the foregoing sections, the defendant's rights and claim of ownership or right of possession of the hogs seized and sold depend entirely upon the question whether the defendant has shown facts to justify the verdict. That is, was the defendant's ownership or occupancy of the land where the hogs were trespassing established and proven in this case, and did the defendant comply with the statute in making the seizure and the sale of said property?

Thomas E. Walton made homestead filing, serial No. O6825, September 7, 1909, for the south half of the northeast quarter, the northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter of section 15, township 9 south of range 29 E. B. M., and established his residence thereon on the 15th day of September, 1909, and has resided there with his family ever since said date up to the trial, farming and cultivating the same. The record also shows that the hogs were trespassing upon the land above described, eating and destroying crops planted and cultivated by the defendant, and on October 4, 1911, he shut up 3 head, on October 15, 1911, 36 head, and on October 20, 1911, 46 head, and on each of the foregoing dates posted notices of the taking up of such hogs. After these notices were posted an attempt was made to arbitrate the damages, but no arbitration was effected.

It appears that the defendant's entry allowed by the registrar and receiver of the local land office was in part withdrawn from entry, under the reclamation of June 17, 1902, on January 27, 1904, and the remainder was withdrawn on September 17, 1909, and by reason of such withdrawal the commissioner of the General Land Office held the defendant's entry for cancellation December 27, 1909, and the defendant was so notified. The defendant appealed to the Secretary of the Interior and the action of the commissioner in canceling such entry was affirmed on September 7, 1910. A motion was made for a review, which was denied on the 30th of March, 1911, and on July 5, 1911, the commissioner canceled the entry.

A mineral protest was also filed against such entry by R. B. Greenwood, but was not considered by the commissioner of the General Land Office further than that the department held the cancellation of the defendant's homestead entry rendered action on the protest unnecessary. After the Secretary of the Interior had affirmed the action of the commissioner the defendant applied to the department for further relief, and the reclamation service made an investigation and had certain surveys made, and on the 28th of December, 1911, the Assistant Secretary of the Interior finally decided and held, after reciting the facts as to the defendant's

homestead entry above stated, and the mining location of R. B. Greenwood, that Greenwood's protest against the defendant's entry was unfounded and was without merit and did not warrant rejection of the defendant's homestead claim, and ordered a dismissal of the same, and further ordered that "the reclamation service will then recommend the annulment of so much of the withdrawal order as affects the portion of Walton's claim above the contour of the line so marked upon the ground. * * * This will enable Walton to secure title to the part so freed from the withdrawal order by application for reinstatement of his entry, accompanied by his own affidavit showing that he has not alienated, conveyed, or contracted to convey, any portion of the lands involved, and that he has not since the date of cancellation of his said entry made any other homestead entry, or became otherwise disqualified to take lands under the homestead law." This order and decision of the Assistant Secretary of the Interior is dated December 28, 1911, and clearly recognizes the existence at that time of the homestead entry of the defendant.

The foregoing is the record title claimed by the respondent to the lands included within the homestead entry. The appellant's title is a mining location and a lease from the locator for the same land, from Greenwood, who had made the mineral location.

It appears from the evidence that after the defendant made his homestead entry he immediately went into the possession of the same and built a house and made improvements upon said homestead, and remained in possession and control of said homestead thereafter up to the time of the trial. The evidence also shows that at the time the hogs went upon said homestead the defendant had about 30 acres of wheat, and that the said wheat had been stacked and this was eaten by the hogs; that in figuring the damages he sustained he estimated the rate per bushel at sixty cents; that he had cultivated and produced 150 sacks of potatoes in the garden. The defendant also testified that he had 148 bushels of grain, which he fed to the hogs after he had them taken up, and that such grain was worth \$1.16 a hundred; that the damages as a whole was estimated at \$663.

There is evidence also in the case that the plaintiff was in possession at different times of portions of the homestead, and that sheep were grazed thereon.

Upon these issues the court fully instructed the jury upon the law, and they found for the defendant.

Section 5983, Rev. Codes, which was incorporated in the Revised Statutes in 1887, and incorporated in the Revised Codes in the 1908 edition, was in force and effect at the time the defendant's homestead entry was made and continued in force at the time of the trial; it reads as follows: "A certificate of purchase, or of location, of any lands

in this state, issued or made in pursuance of any law of the United States, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes."

This court construed the foregoing statute in the case of *Johnson v. Oregon Short Line R. Co.*, 7 Idaho, 355, 63 Pac. 112, 53 L. R. A. 744, and said: "The laws of this state recognize such entry [that is, homestead entry] as private property, and make the certificate of entry primary evidence that the holder thereof is the owner of the lands therein described. See Rev. Stats. § 5983. The words 'private property' in section 2679 of the Revised Statutes, quoted above, have no reference to the title as between the private owner and the government of the United States, but relate solely to the railroad corporation and the private owner. As between the railroad company and the homestead entryman, the latter, after entry, is the owner, and the homestead entry is private property."

[2] Applying this rule to the facts in this case, it is apparent that the respondent, having made his homestead entry, and the land office having issued to such entryman a certificate, and the government having recognized the validity of such entry in the decision rendered on December 28, 1911, this court will be governed by the decision, and will not discuss or decide what title or right the defendant has or will secure from the government, neither will we consider or determine what right or title was obtained by Greenwood, a locator of a mining claim upon said land. We shall be governed entirely by the laws of this state, which recognize the certificate of location, issued and made in pursuance of the laws of the United States, as prima facie evidence that the holder of such certificate has an inchoate right and title to the land described therein, in the absence of proof that the land at the time of location was in the adverse possession of an adverse party, or a person under whom he claims, or that the adverse party is holding the land for mining purposes.

It is apparent that the title and the right of possession of both the plaintiff and the defendant depend upon a right and title acquired by each upon application under the laws of the United States, and that the government has not asserted any right to said lands in the present controversy. Under such a state of facts, as between the parties to the suit, we are satisfied that the defendant has the right to protect his possession and occupancy of the land, and had a right to seize and take up, under the laws of the

state, hogs grazing and trespassing upon the same, and that the court did not err in his instructions to the jury upon that question, and the jury did not err in their verdict in finding that there was a trespass upon the occupancy and ownership of the defendant by the hogs owned by the plaintiff.

It is also argued in this case that the finding of the jury and the judgment are void as to what, if any, actual damages were sustained by the defendant by reason of said alleged trespass. There is nothing in this contention. There was evidence as to the damage, and the jury found the amount, and the evidence tends to prove actual damages as found by the jury.

It is also argued that the verdict and judgment are void because the defendant did not present to the plaintiff any proper claim for charges in accordance with section 1280 of the Revised Codes, from which the jury could find a refusal of the plaintiff to pay the same as by said section required. This section provides: "Any person taking up a hog under this article, must immediately thereafter write out three notices in a plain, legible hand, giving a correct description thereof with the marks and brands, if any, on said hog, and the time and place of taking up, and at once post up said notices in a good and substantial manner in three conspicuous places in the precinct in which said hog was taken up." The evidence shows that the defendant gave the notices as required by the statute, describing the marks and brands on the hogs and the time and place of taking up and posted such notices in proper manner, and that the plaintiff had full knowledge of the same, and this is evidenced further by the statements made by an employé of plaintiff, who testifies that negotiations were had with the defendant about settling such damages.

[3, 4] It is also argued that sections 1279, 1280, 1281, and 1282, being the various sections heretofore referred to in this opinion, are unconstitutional, and provide for the taking of property without due process of law.

Under the provisions of section 1279, where a hog is found trespassing, the occupant or proprietor may take the animal up at the expense of the owner of such hog and hold the same until the payment of the expense and damages by the owner, and he shall be allowed 50 cents per head additional for each animal so taken up. This section of the statute creates a lien upon the animal taken up for the keep and expense of the animal trespassing; and section 1281 provides that, if the owner and taker-up cannot agree, a disinterested person must, after hearing all the facts, fix the amount of damages, and the same are a lien upon said hog, and if said amount is not paid within five days, together with costs of keeping said hog, the taker thereof notifies the constable, who levies upon the hog, and the same is sold, aft-

er giving notice, and if the owner does not appear and substantiate his title and pay the charges within 30 days after the notice has been given, then under the provisions of section 1282 the ownership shall be vested in the person taking up the hog.

This chapter, of which these different sections are a part, was enacted for the purpose of creating a lien upon hogs committing trespass, and the lien thus created may be enforced and satisfied to the extent of the damages, as provided in section 1281. In the present case there was no arbitration. The plaintiff refused to arbitrate upon the ground that there was no liability, and refused to pay the expenses or the 50 cents per head allowed by the statute, and in such a case section 1282 provides that if the owner or person entitled to the possession of such hogs does not appear and substantiate his title thereto and pay the charges thereon within 30 days after notice has been given as provided, absolute ownership of such hogs shall be vested in the person taking up the same. The charges referred to are the charges specified in section 1279, and are as follows: If a hog is found trespassing it may be taken up and safely kept until the payment of the expense and damages by the owner, and the taker-up shall be allowed 50 cents per head additional for each animal so taken up. These expenses and damages, thus specified, were not paid in this case, although the defendant demanded a specific sum of \$663, neither did the plaintiff tender any sum whatever for the damages, or for the taking up of said property, or the expense of keeping the same, and at the time demand was made for the possession of said hogs by plaintiff no offer was made to pay any damages or expenses whatever. Under the provisions of section 1279 the statute gave him a lien upon said property for such expenses and damages, and the plaintiff had no right to maintain an action for claim and delivery without satisfying such claim by proper arbitration or by agreement as provided in section 1281. The refusal after full notice to arbitrate, and the refusal to agree upon the damage and expenses, and the failure to appear and substantiate the title of plaintiff, vested the title of said property in the person taking up said property.

The Supreme Court of California has had under consideration in two different cases certain legislative acts with reference to trespassing animals upon private lands and the constitutionality of the same. While the statutes enacted in California and considered in the cases hereafter cited are not in all respects the same as the statute now being considered, yet we think the principles announced in those cases clearly apply to the questions involved in the present case. We refer to *Rood v. McCargar*, 49 Cal. 117, and *Wigmore v. Buell*, 122 Cal. 144, 54 Pac.

600. In the latter case the court said: "The obvious purpose of the act is to afford the owner of land trespassed upon a speedy and somewhat summary remedy by giving an action both against the owner, if known, and against the animals if he is not known, and the attachment against the property may be given in both cases. * * * An act should be given a construction, if it can be done within the rules of law, to carry out its obvious purpose. The right to distrain is an option given to the landowner which he may exercise for two days without instituting any legal proceedings whatever, the declared purpose being to enable the landowner during that period to ascertain the owner of the animals and to determine which remedy given by the act the landowner will resort to." The court also in that case refers to the contention of the appellant, and says: "Appellant's contention would compel the landowner, where the owner of the animal is known as well as where not, to personally hold in his possession the trespassing animals under the distraint or lose his lien, which we do not think comports with the purpose of the language of the act."

So, in the present case, under the provisions of section 1279, the owner or proprietor of land where a hog is found trespassing may take the animal up at the expense of the owner and hold the same until the payment of the expense and damages by the owner, and he shall be allowed certain amounts, and is given a lien upon the animal taken up and the expense of the animal trespassing. The respondent in this case took possession of the hogs in question under this statute, and there can be no question under the authorities but that such section is constitutional and clearly within the power of legislative enactment.

Section 1281, which is a part of the same chapter, which provides for arbitration and assessment of damages, was not and could not be complied with in this case, because the appellant refused to arbitrate, and the remedy left to respondent was that provided in section 1282.

In volume 2, p. 360, Am. & Eng. Ency. of Law, the author lays down the rule of law which seems to have been followed by this court in the case of *Sifers v. Johnson*, 7 Idaho, 798, 65 Pac. 709, 54 L. R. A. 785, 97 Am. St. Rep. 271, and says:

"Statutes which provide for the seizure of animals damage feasant, and their sale if not redeemed within the proper time, are generally considered as a police regulation, and properly within the scope of governmental powers, and not in violation of the constitutional provision that no person shall be deprived of life, liberty, or property but by due process of law.

"(c) Where statutes provide for the taking of trespassing animals damage feasant, all proceedings must be strictly in conformity

thereto, or the distrainer will be liable as a trespasser ab initio."

In 10 Am. & Eng. Ency. of Law, p. 299, the author in discussing what notice is guaranteed, said:

"Due process of law does not necessarily require that a person whose property is sought to be affected should have personal notice of the proceeding. The notice may be either actual or constructive, and it is sufficient if a notice is provided by which it is reasonably probable that the person to be affected will be apprised of the proceedings against him.

"6. Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen had an opportunity to be heard and to defend, protect, and enforce his rights, by establishing any fact which, under the law, would be a protection to him or to his property. It has been said that it matters not that it may be difficult for him to defend under the law, so long as it is not impracticable for him to do so by the use of such reasonable efforts as the owners of property may generally be supposed to be capable of. His opportunity to defend, however, must not be merely colorable and illusory."

We think under the authorities that the seizure of the respondent was lawful; that the statute gave him the lien upon the property seized; that the appellant had notice of such seizure; that the appellant had in no way paid, or offered to pay any damages; neither did the company offer to settle or pay the charges or expenses of keeping the animals seized by the respondent, nor appear and substantiate its title under the provisions of section 1282, Rev. Codes.

This court, in the case of *Sifers v. Johnson*, 7 Idaho, 798, 65 Pac. 709, 54 L. R. A. 785, 97 Am. St. Rep. 271; had under consideration the recovery of damages by trespass of sheep upon the premises and within two miles of the same, and in discussing the right of recovery in that case the court referred to the different sections of chapter 12 of the Revised Codes (sections 1340-1344, Rev. Stats.) which are involved in the present case, and said: "These statutes, like those in question here, were enacted to protect the farmers from annoyance and injury caused by the trespassing of hogs, and to save them expense in fencing against hogs. * * * It is evident that in passing the statutes cited, relative to the running at large of hogs, and the herding and grazing of sheep within two miles of dwelling houses, the Legislature intended to further the public good and preserve the peace, by preventing those conflicts which would naturally result from the herding of sheep about the dwellings of settlers. The statutes were intended to promote the public good and avoid danger and injury to the citizens; * * * and, as those questions are of legislative discretion,

and not judicial, we are not authorized to hold the statutes unconstitutional."

Under the facts in this case there were no damages fixed by arbitration, and the respondent, the taker-up of the property, was not required to notify the constable to make levy and sale as provided by section 1281. The respondent was forced to rely upon his lien conferred by section 1279, and the title conferred upon him by the provisions of section 1282 as a defense to the plaintiff's claim to the possession of said hogs, and we think that the jury were justified in finding for the defendant on the right of possession.

We are inclined to think that chapter 12 is a plain and speedy method of promoting the public good and of protecting lands where hogs and other animals are permitted to run at large in violation of law, and is clearly within the power of legislative enactment, and that it is sufficient in its provisions and gives sufficient notice to pass title to the taker-up upon compliance therewith, and is not in violation of the provisions of section 13, art. 1, of the Constitution of the state.

Counsel for appellant assign as error the giving of a certain instruction embracing the part of section 1281 which relates to arbitration. Referring to the instruction given, we find that the court told the jury "that when one takes up stock as trespassers or strays, notices shall be posted up in at least three conspicuous places in the precinct wherein the alleged trespassing was committed, and that if no one claims the trespassing animals or pays for the damage actually sustained by the party taking them up, they become his property." That instruction is in accordance with section 1282, and as a part of said instruction the court also said: "It seems in this case, gentlemen of the jury, that efforts were made by both plaintiff and defendant to settle or arbitrate their differences as to the alleged trespass of the animals, and that it is your duty to determine from the evidence who is to blame, if any one, that no settlement was made." This latter part of the instruction is in accordance with the evidence that while parties to the action had conversations and talked about arbitration, they never did agree, and never had any arbitration, and the court recognized that condition. The damages not being paid for, therefore section 1282 applied as the law to the facts in the case, and this instruction was correct.

While counsel for appellant devotes some attention in his argument to the fact that the evidence does not sustain the verdict of the jury as to the amount of damages, we are unable to find any specific error assigned covering this question; neither is there any instruction in the record excepted to wherein the court instructed the jury upon this question. For this reason we will not consider this question.

We have carefully gone over the record in

this case and find no error which warrants a reversal of the judgment. The judgment is affirmed. Costs awarded to respondent.

SULLIVAN, J., concurs.

AILSHIE, C. J. (dissenting). - I think the majority opinion is somewhat misleading both as to the law and the facts. In this case the trial court held that the defendant, who was the taker-up of the animals, had acquired absolute title to the property under the statute. It should also be remembered that he makes no pretense of having acquired that title under the provisions of section 1281. Section 1281 provides for the appointment of appraisers or arbitrators to fix the amount of the damage sustained by reason of the trespass, and it prescribes the procedure to be pursued for the collection of the amount thus assessed in the event the owner of the animals does not pay. Notice is given to the constable by the taker-up of the animals, and the constable thereupon levies upon the property and sells it at public sale in a manner very similar to that of sale on execution. But no pretense is made in this case that the respondent acquired title to these hogs through the procedure prescribed by section 1281. On the contrary, any title he acquired was acquired under the provisions of sections 1279, 1280, and 1282, and those sections alone. Sections 1279, 1280 and 1282 read as follows:

Section 1279: "If any hog is found trespassing, the occupant or proprietor of the premises may take up and safely keep, at the expense of the owner thereof, such hog, and hold the same until the payment of the expense and damages by the owner, and shall be allowed fifty cents per head additional for each animal so taken up."

Section 1280: "Any person taking up a hog under this article, must immediately thereafter write out three notices in a plain, legible hand, giving a correct description thereof with the marks and brands, if any, on said hog, and the time and place of taking up, and at once post up said notices in a good and substantial manner in three conspicuous places in the precinct in which said hog was taken up."

Section 1282: "If the owner or person entitled to the possession of such hog does not appear and substantiate his title thereto, and pay the charges thereon within thirty days after the notice has been given, as above provided, the absolute ownership of such hog shall be vested in the person taking up such hog: Provided, he shall keep a copy of the notices posted, as prescribed by this article, which shall have indorsed thereon the date and manner of posting and the places where posted, which shall have the same force and effect as a bill of sale of such hog."

Under the provisions of section 1280, the taker-up of the animals confiscated in this

case posted the following notices in three public places:

"Notice of Stray Hogs.

"October 4, 1911.

"I have in my possession three (3) hogs, color black and white, no marks or brands visible.

"Owner please call within 30 days from date and pay damages and take hogs.

"T. E. Walton."

"County of Cassia, State of Idaho.

"Oct. 15, 1911.

"To Whom It may Concern—Notice.

"Notice is hereby given that I, Thos. Walton, of Cassia county, Idaho, have this day taken up 36 hogs, described as follows: All black with white markings, ranging in size from sucking pigs, to full grown hogs, there are as far as I can discern, no brands or marks on the said hogs. The said hogs were taken up for trespass on the place occupied by me, known as the Tom Walton place, and for damage done to garden and stacked grain on the said place.

"The said hogs were taken up on the 15th day of October, about 4 o'clock p. m. and the owners or owner is hereby notified that I hold the said hogs for damages they have done, as in the statutes of Idaho for such cases made and provided.

"T. E. Walton."

"County of Cassia, State of Idaho.

"Oct. 20, 1911.

"To Whom It may Concern—Notice.

"Notice is hereby given that I, Thos. Walton, of Cassia county, Idaho, have this day taken up 46 hogs, described as follows: All black with white markings, ranging in size from sucking pigs to full grown hogs, there are, as far as I can discern, no brands or marks on said hogs. The said hogs were taken up for trespass on the place occupied by me, known as the Tom. Walton place, and for damage done to garden and stacked grain on the said place.

"The said hogs were taken up on the 20th day of October, about 10 o'clock a. m., and the owners or owner is hereby notified that I hold the said hogs for damages they have done as in the statutes of Idaho for such cases, made and provided.

"T. E. Walton."

The act from which section 1282 is taken was first adopted by the Territorial Legislature January 22, 1881 (1880-81, Sess. Laws, p. 434). Whoever drew that act, however, was evidently familiar with the provisions of the fourteenth amendment to the federal Constitution, and had some appreciation of its purpose and significance, and so he did not provide that the taker-up of a trespassing hog might write his own bill of sale for the

hog and keep it. He evidently believed that a property right, even in a trespassing hog, was entitled to some semblance of protection. He provided that after a 10 days' notice the animal should be sold by the sheriff or constable of the county at public auction, and that from the proceeds of the sale he should pay the fees and expense of the sale and the charges due to the taker-up of the animal and turn the balance over to the county treasurer. It was further provided that the lawful owner of the animal might at any time within six months thereafter file his claim with the county commissioners for the proceeds paid in to the treasurer, and that the same should thereupon be returned.

The distinguishing feature, however, between section 4 of that act and section 1282 here under consideration is that the act of 1881 provided for a public sale by an officer of the law, and that public notice of such sale shall be given by such officer. The act of January 22, 1881, was amended by the act of February 7, 1889 (Laws 1888-89, p. 38), and was thereby reduced to the present arbitrary, confiscatory, and unconstitutional condition in which section 1282, Rev. Codes, is now found, providing for the unceremonious forfeiture of a man's title to property simply because it happens to stray upon another man's possession, and that man sees fit to post a notice prepared by himself, at such place as he may select, and at the expiration of 30 days write himself a bill of sale. The man who drew the amendment of February 7, 1889, made swine an exception in the laws of Idaho from all other kinds of trespassing animals. So now when that cloven-footed quadruped of ancient notoriety goes foraging beyond the protecting care of the swineherd, he at once loses his character as a domestic animal, and becomes an animal *feræ naturæ*, subject to capture by any one on whose possession he may, at an indiscreet moment, find himself. Of course, the hog does not care much about his character—he would ordinarily just as soon be treated as a wild animal as to be treated as if he had been domesticated for centuries. His fate is generally about the same either way, but it makes a difference with his owner, and while the hog may not see the "notices posted in three public places in the precinct," and may not know or care whether he has been dealt with by "due process of law," still his owner and master grieves to part with him in such an informal and primitive manner. Sections 1291 to 1301, inclusive, Rev. Codes, deal with estrays and trespassing animals generally, but those statutes provide for notice and sale by an officer and a return of such sale, but the despised hog is made an exception to this statute, and he is not accorded either a private or public sale. He is just confiscated as contraband of war.

No objection is urged against the validity

of the provisions of sections 1279 and 1280. These sections clearly authorize the occupant of the premises to take up and safely keep any trespassing hogs, and gives the taker-up a lien upon such animals for his damages and costs. Section 1280 provides a notice to be given of the taking up of such animals, and section 1281 provides a method of appraisement or arbitration and the procedure for the collection of the amount found due. This statute only provides for the appointment of two appraisers, one to be appointed by the owner and the other by the taker-up of the animal. That procedure was pursued in this case, but the thing happened with these arbitrators that might be expected to happen with only two men comprising such a board or body—they disagreed. After hearing the evidence, the arbitrators executed and delivered to the parties a statement, of which the following is a copy: "Bonanza Bar, Nov. 9, 1911. At a meeting for the purpose of arbitrating the question of damages claimed by T. E. Walton on hogs taken up by him, we, the arbitrators, are unable to fix the amount of damages. [Signed] Fred Schiene. Wm. Campbell." This left the parties where they started in the matter of arbitration, and the taker-up of the stock now relies for title on the provisions of section 1282. The latter section, which is really the objectionable section, purports to afford an alternative remedy which the taker-up may pursue in the event no appraisement or arbitration is had. This section undertakes without ceremony to vest the absolute and unqualified ownership of the property in the person taking up the same, provided no appraisement or arbitration has been had and the owner of the animals fails to pay the charges thereon within 30 days after the notice has been given, as provided by section 1280. It further provides that he may write his own bill of sale to the property by simply indorsing on a copy of the notice "the date and manner of posting and the places where posted." This statute authorizes a man who takes up another man's property to post his notice for 30 days and thereafter write a bill of sale in favor of himself, vesting title in himself to some other man's property. It is really difficult for me to understand why this section does not amount to taking a man's property without due process of law and in violation of section 12, art. 1, of the state Constitution, and also in violation of the fourteenth amendment to the federal Constitution. This statute, section 1282, makes no pretense at giving the owner of the property a hearing, nor does it prescribe any procedure of a judicial or quasi judicial nature whatever for the sale of the property or the vesting of title in the taker-up of the property. The taker-up is allowed to assess his own damages, and the owner of the trespassing animal has no remedy or method

of hearing unless he gets notice in time to arbitrate. No sale is provided for, no method is prescribed for fixing the amount of damages, no hearing is given, and no procedure whatever is had, except that the taker-up of the property writes out three notices, each as above indicated, and posts them in three places within the precinct, and he has the selection of the places himself, and finally writes his own bill of sale to another man's property.

The serious objection to these statutes is not directed against 1279, 1280, and 1281, as taking property without due process of law, but the fatal objection is directed against section 1282. That is the section that divests a man of his property without due, or any, process of law, and in my judgment is violative of both section 13, art. 1, of the state Constitution and of the fourteenth amendment to the federal Constitution.

I have been unable to find any decision which deals with a statute such as ours that arbitrarily vests the title to a trespassing animal in the captor without any notice and sale or judicial proceeding of any kind. I take it that no other statute has ever attempted to authorize such a thing. The authorities, however, are abundant that deal with the constitutionality of legislative acts relating to trespassing animals, and which attempt to provide some procedure for the sale of the property and the payment of damage and costs.

One of the oldest, best-considered, and most extensively cited cases on the subject in this country is *Rockwell v. Nearing*, 35 N. Y. 302. In that case a trespassing cow had been seized and sold under a trespass statute of New York adopted in 1862. The statute, among other things, authorized any person to take into his custody "any animal which may be trespassing upon his lands." The captor of the animal was required to immediately give notice to some justice of the peace or commissioner of highways, who was in turn required to post notices that the animal would be sold at public sale. The officer was thereupon required to sell the animal, retaining a dollar for his fees and paying half a dollar to the captor for taking up the animal, together with a "reasonable compensation for keeping the animal." The surplus was required to be paid to the owner of the animal. The Supreme Court of New York held that this statute did not afford due process of law, and for that reason was in conflict with the Constitution. The opinion reviews the authorities at great length, and treats this subject in a very interesting way. Among other things, the court says: "In view of the foregoing exposition by the courts of the design and effect of the constitutional restriction, the Legislature has no authority, either to deprive the citizen of his property for other than public purposes, or to authorize its seizure, without process or warrant, by persons other than

the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to the owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and without even the form of judicial proceedings, an animal in which he has no interest, by way either of title, mortgage, pledge, or lien; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of 50 cents for his services as an informer. He levies without process, condemns without proof, and sells without execution."

One of the late cases on the subject is that of *Greer v. Downey*, decided in 1903 by the Supreme Court of Arizona and reported in 8 Ariz. 164, 71 Pac. 900, 61 L. R. A. 408. This case cites and approves *Rockwell v. Nearing*, supra. The Legislature of Arizona provided that the constable of each precinct should be the poundmaster of that precinct, and that any one might take up a trespassing animal and deliver it to the poundmaster, who might thereupon post notices containing a description of the animals and the amount of damages claimed, and at the time fixed for the sale might sell the property, retaining his fees and paying the damage and expenses over to the captor of the trespassing animal, and that any proceeds remaining in his hands should be paid to the county treasurer, and that the same might be claimed by the owner of the animal within six months. The Supreme Court of Arizona cites a large number of authorities on this question and holds the act violative of the Constitution of the United States, in that it deprives the owner of his property without due process of law. The court concludes its consideration of the question as follows: "The objectionable feature of the act is that, independent of any proceeding contemplated by section 3, the poundkeeper is authorized by subsequent sections of the act, without any judicial proceedings for the purpose of ascertaining either the amount of the damages or whether the animal was in fact running at large within the meaning of the act, to sell to satisfy the private claim of the landowner for damages for the trespass. We have no doubt that the portion of the act which authorizes a seizure and sale and a payment of damages claimed for the trespass without judicial process or proceedings other than as provided for in the act is a deprivation of property without due process of law, and as such is repugnant to the Constitution."

Between the rendition of the decision of the Supreme Court of New York in *Rockwell v. Nearing*, in 1866, and that of the Supreme Court of Arizona in *Greer v. Downey* in 1903, a great many and variety of decisions have been announced in the several states on similar and kindred statutes. Among this multitude of authority, not a single, solitary decision can be found upholding such a statute as section 1282 of our Revised Codes. In this list of authorities and announcing views as to the unconstitutionality of such statutes much stronger and more pronounced than above expressed are to be found. *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208; *Poppen v. Holmes*, 44 Ill. 362, 92 Am. Dec. 186; *Armstrong v. Traylor*, 87 Tex. 598, 30 S. W. 440; *East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 175; *St. L., I. M. & S. R. Co. v. Wynne*, 224 U. S. 354, 32 Sup. Ct. 493, 56 L. Ed. 799, 42 L. R. A. (N. S.) 102.

Some reliance seems to be placed on *Rood v. McCargar*, 49 Cal. 117, and *Wigmore v. Buell*, 122 Cal. 144, 54 Pac. 600, and other authorities along the same line and to the same effect. I take it no fault may be found with the rule of law announced by these authorities. The whole difficulty lies in this: That neither the facts nor the law considered in either of the California cases even approach a parallel with this case. In *Rood v. McCargar*, the statute was practically the same as our statute was when first enacted in 1881. It provided for a sale by the constable of the precinct at public auction after five days' notice, and that the amount of damages should be assessed, either by arbitrators appointed by the owner and taker-up of the animals, or in case of their failure to do so, then by three disinterested persons to be appointed by the constable. It will therefore be seen at once that the statute discussed in *Rood v. McCargar* provided for assessing the damages by a disinterested tribunal, for notice and sale by a public officer, and all the procedure and safeguards usually understood as going to constitute due process of law.

In *Wigmore v. Buell*, the court was considering an act of March 7, 1878 (Statutes of 1877-78, p. 176). An examination of that act will disclose at once that it provided judicial procedure for assessing the damages and penalties and for attaching and levying upon the property and its sale to compensate the taker-up for such damage and costs. The court held that when these things were done the owner of the property had been accorded his day in court, and that his property had been taken by due process of law. The failure of our statute to provide a like or similar remedy is the very objection I find to it and is the very reason which to my mind renders it obnoxious to both the state and the federal Constitution.

For the foregoing reasons, I dissent from the opinion of my Associates.

On Rehearing.

SULLIVAN, J. A rehearing of this case was granted, and after a reargument it is clear to the writer of this opinion that the defendant Walton had a lien on the hogs involved, for the damages done by them and for caring for them for a period of 30 days or more, leaving out of consideration any title to them acquired under the provisions of section 1282, Rev. Codes. It is also clear that the appellant had full notice of the defendant's possession of said hogs and of the damage they had done him. The respondent tried to settle the matter with appellant, and negotiations extending over several days were carried on and arbitrators were finally appointed under the provisions of section 1281, Rev. Codes. It was afterwards ascertained that said arbitrators were not residents of the precinct in which said hogs were taken up, and other arbitrators were appointed in their place, and the two appointed could not agree. The position taken by the manager of the Fall Creek Sheep Company in said arbitration was that the Fall Creek Company owned the land on which said trespass was committed, and that they would not pay anything whatever for the damages done, and that ended the efforts of the second attempt at arbitration.

Three trespassing hogs were taken up by the defendant on October 4, 1911. The ranch of the Fall Creek Sheep Company adjoined or was near the ranch of defendant. The appellant corporation had notice of the taking up of said three hogs, and instead of going and getting them, they turned loose 36 more hogs to trespass on the defendant, on or about October 15, 1911. And again on October 20, 1911, they turned loose on the defendant 46 more hogs. They did this on the claim that the appellant was the owner or had the right to the possession of the land claimed by the defendant as a homestead.

The record discloses the following facts: That the appellant turned loose a large number of hogs upon the farm of the respondent, knowing that they would eat up his grain and destroy his crops; that the appellant received actual notice that said hogs were doing damage to the defendant; that the defendant offered at one time to return the hogs without compensation if the appellant would only agree to restrain them until his crops were harvested; that the appellant declined to receive the hogs upon those terms, claiming that it had a right to turn its hogs loose on said land. The appellant refused to arbitrate the matter, denying that there was any trespass or damage done to respondent. Appellant refused to pay any damages, on the ground that it had the right to turn its hogs on to respondent's premises.

From all of the facts of the case, it is clear that after defendant had taken said trespassing hogs up, he had a lien on them for the damages they had done. The hog

is an animal of peculiar disposition, tastes, and habits. They are not permitted to run at large in this state, and if an owner turns his hogs loose to prey upon his neighbors' property, he is liable in damages therefor.

The question of the amount of damages sustained by respondent was thoroughly gone into on the trial. In order to settle this matter, we have carefully gone over the evidence in regard to the amount of damages sustained by the defendant. After a careful examination of the evidence, we are satisfied that he has sustained damages in the sum of \$600. This includes caring for the hogs for the time defendant had them in his possession. The defendant testified on the trial that he had offered to compromise at one time with the appellant for \$663, but that a good part of said sum was for the worry the hogs had given him. The evidence further shows that the hogs were taken from him on replevin about two weeks after said offer to compromise.

We have concluded to modify and reduce the judgment to \$600, and the cause is remanded, with instructions to the trial court to reduce said judgment to the sum of \$600, and to make findings and enter judgment in accordance with the views herein expressed. Said judgment shall be a lien upon said hogs. Costs of this appeal are awarded to the respondent.

STEWART, J., concurs.

AILSHIE, C. J. (dissenting). I am at a loss to know just what conclusion has been reached by the majority of the court in this case, and I apprehend that the trial court will experience similar difficulty. The judgment entered in the district court from which this appeal was prosecuted adjudges and decrees that the defendant, Thos. E. Walton, is the owner of the hogs described in the complaint over which this litigation arose, and that they be delivered to him, and that "in case a delivery cannot be had" he have a personal judgment against the plaintiff for "the sum of \$995, the value thereof." The judgment entered by the majority of the court on the original hearing herein was a straight affirmance of the judgment of the lower court. I dissented from that opinion and stated the reasons of my dissent, and still adhere to what I then said. A rehearing was subsequently granted, and the opinion of the majority of the court on rehearing concludes as follows: "We have concluded to modify and reduce the judgment to \$600, and the cause is remanded, with instructions to the trial court to reduce said judgment to the sum of \$600, and to make findings and enter judgment in accordance with the views herein expressed. Said judgment shall be a lien upon said hogs." This would indicate that the majority of the court are now of the opinion that Walton, the respondent herein,

did not acquire title to the hogs under the provisions of section 1282, Rev. Codes, for if they do so conclude there would be no object in giving him a lien on his own property. On the other hand, they do not appear to reverse the judgment of the lower court, which decrees that the respondent is the owner of the property and entitled to the return thereof. The primary question presented to this court by the judgment of the trial court is whether the property in question belongs to the appellant or the respondent, and the incidental question growing out of the primary one is the value of the property. I adhere to the views expressed by me upon the original hearing of this case.

I am not unmindful of "the peculiar disposition, tastes, and habits" of the hog to which my Associates refer, but whatever his tastes and habits may be, they of themselves are not sufficient to deprive the owner of the hog of his right of property therein. I take it that the "due process of law" provision of the fourteenth amendment is sufficient to protect the owner of a hog in his right of property therein, notwithstanding the "peculiar disposition, tastes, and habits" of the hog. The man who took these hogs up and whose property was destroyed by them should be remunerated, and if it is to be determined, as I think it should, that these hogs belong to the appellant, then I agree that the respondent should have reasonable compensation for the damages he has sustained.

MILLER v. DEL RIO MIN. & MILL. CO., Limited, et al.

(Supreme Court of Idaho. Nov. 5, 1913.)

1. BILLS AND NOTES (§ 518*)—INDORSERS—SUFFICIENCY OF EVIDENCE—NOTICE OF DISHONOR.

Held, under the facts of this case, that the promissory note for \$812 was not given at the request of the defendants McRae and Schultz and one Mockler and was not given for their benefit or their accommodation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1816-1820; Dec. Dig. § 518.*]

2. BILLS AND NOTES (§ 426*)—PAYMENT BY INDORSER—RIGHT TO REISSUE.

Where a promissory note is paid by one of the indorsers and thereupon delivered to the person paying the same, and treated by the bank as canceled and paid, the indorser who pays such note is not authorized to reissue the same without the consent of the other parties thereto.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1223-1232; Dec. Dig. § 426.*]

3. BILLS AND NOTES (§ 527*)—ACTION ON REISSUED NOTE—SUFFICIENCY OF EVIDENCE.

Held, under the facts of this case, that T. W. Smith, the person to whom said note was reissued, took the same without recourse on the indorsers of said note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847-1855; Dec. Dig. § 527.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. BILLS AND NOTES (§ 129*)—CONSTRUCTION—MATURITY.

When a promissory note is payable on demand under the provisions of section 3528, Rev. Codes, it becomes due and is payable within a reasonable time after its execution.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. § 129.*]

5. BILLS AND NOTES (§ 348*)—TRANSFER—DEFENSES.

The plaintiff having purchased said promissory note on May 4, 1911, nearly four years after the same was executed, it being payable on demand, he took it subject to all defenses which the original maker of the note would have.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 870-877½; Dec. Dig. § 348.*]

6. BILLS AND NOTES (§ 426*)—"PAYMENT"—"SALE"—SUFFICIENCY OF EVIDENCE.

The Bank of Nez Perce owned said note, Schultz was an indorser thereon, and paid it. There was no contract for the sale of said note between the bank and Schultz; the transaction being simply a payment of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1223-1232; Dec. Dig. § 426.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5247-5253; vol. 8, p. 7749; vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

7. BILLS AND NOTES (§§ 310, 425*)—PAYMENT—"SALE"—"PURCHASE."

The payment of the note is the discharge of the debt; the purchase of the note is a contract of purchase and sale.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 742, 743, 1278-1285; Dec. Dig. §§ 310, 425.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5853-5857; vol. 8, p. 7775.]

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by Curtis J. Miller against the Del Rio Mining & Milling Company, Limited, a corporation, and others. From the judgment, defendants McRae and Schultz appeal. Reversed in part and affirmed in part.

F. E. Fogg, of Nez Perce, for appellants. Geo. W. Tannahill, of Lewiston, and S. O. Tannahill, of Nez Perce, for respondent Miller. Eugene O'Neill, of Lewiston, for respondent Bank of Nez Perce.

SULLIVAN, J. This is a separate appeal taken by the defendants McRae and Schultz from a judgment entered on a promissory note against them and from the order of the court overruling their motion for a new trial.

The action was brought to foreclose a mortgage upon unpatented mining claims, executed by the Del Rio Mining & Milling Company, a corporation, securing two promissory notes, one for \$812 dated July 1, 1907, payable on demand to the defendants B. J. McRae and J. A. Schultz and one T. M. Mockler, now deceased. The other promissory note was for \$700, dated July 3, 1907, payable on demand to the Bank of Nez Perce. The said first-mentioned note was transferred by indorsement to the Bank of Nez Perce by McRae, Schultz, and Mockler

on or about July 1, 1907, the date of the note. On October 12, 1907, the Bank of Nez Perce, as owner of said notes, procured from the said Del Rio Mining Company the execution of a mortgage on the company's mining claims, which mortgage is sought to be foreclosed in this action. Both of said notes were expressly made payable at the Bank of Nez Perce. The mortgage was at the request of the bank executed in favor of its assistant cashier, P. J. Miller. There is no contention that Miller ever had any beneficial interest in either of said notes or mortgage. After the execution of the notes and mortgage, the notes remained continuously in the Bank of Nez Perce and were carried as an asset of the bank until October 22, 1908, nearly 16 months after the execution of the \$812 note, during which time it is conceded the bank made no effort to enforce payment against said principal defendant, nor did the bank during this time ever present the said notes to the said payor, the Del Rio Mining Company, nor give to the indorsers any notice of dishonor of the notes. In the original complaint the essential facts of presentment and demand on the maker and payor, the Del Rio Mining Company, and notice of dishonor to the indorsers, are not alleged. In the amended complaint, after a demurrer had been filed against the original complaint, an attempt is made to allege the fact of presentment, demand, etc. However, no date or circumstances of such demand or notice is alleged, nor when, by whom, how, where, or on whose behalf the presentment and demand was made. The defendants in their answer to the amended complaint specifically deny that such demand or notice has been made or given at any time or place. The Bank of Nez Perce also filed a separate answer, alleging, among other things, that said notes had been paid by said Schultz to the said bank. Upon the issues thus made the cause was tried by the court, and findings of fact were made and judgment entered against the Del Rio Mining Company for the full amount of both of said notes, with interest, etc., and a decree for the foreclosure of said mortgage. A separate judgment was entered against McRae and Schultz on the \$812 note for the sum of \$1,546, principal, interest, and attorneys' fees.

The court found, among other things, as follows: "That the said note bearing date July 1, 1907, for \$812 was given at the request of B. J. McRae, T. M. Mockler, and J. A. Schultz and for their benefit and their accommodation. The court further finds that B. J. McRae was an officer, stockholder, and director of the Del Rio Mining & Milling Company, Limited, and that the said T. M. Mockler, J. A. Schultz, and B. J. McRae were interested in the success of said mining corporation, and that the money advanced by the Bank of Nez Perce, for which the said \$812-

note was given, was advanced at the request of B. J. McRae, T. M. Mockler, and J. A. Schultz, and that by reason thereof the said B. J. McRae, T. M. Mockler, and J. A. Schultz were not entitled to notice of presentment of the said promissory note to the said Del Rio Mining & Milling Company, Limited, and of its dishonor."

[1] The trial court evidently considered said two findings as vital and controlling in its decision against McRae and Schultz. It found that said note of \$812 was given at the request of McRae, Mockler, and Schultz and for their benefit and accommodation, and for that reason they were not entitled to notice or presentment of said promissory note to the Del Rio Mining Company and of its dishonor.

The decision of the trial court, no doubt, was largely based upon said findings and upon the ground that under the facts of the case McRae and Schultz were not entitled to demand or notice of dishonor to fix their liability. The court, however, does find that on or about the 12th of October, 1907, one T. W. Smith demanded payment of said note from the Del Rio Mining Company, and that McRae and Schultz had full notice of said demand. The record shows that T. W. Smith was not the owner of said notes in 1907 and did not become the owner until October 22, 1908. The court also found that said mortgage was assigned to Smith on October 22, 1908, and that the notes were at all times held in the Bank of Nez Perce up to the time of the assignment to T. W. Smith. The evidence does not support said finding.

The record shows, among other things, the following facts: Some time prior to 1907, the Del Rio Mining Company was indebted to the defendant Bank of Nez Perce. The defendants Schultz and Mockler at that time were officers or stockholders of said bank. The defendant McRae was a small stockholder in said mining company. For the purpose, apparently, of protecting the bank as such creditor, Mockler and Schultz requested said McRae to see that the annual assessment work was performed upon the mining claims of said company. Mockler and Schultz were absent from the city at the time it became necessary to have this work done to prevent a forfeiture, and it was accordingly arranged that McRae should make arrangements with one Leach to perform said assessment work, and said Leach was to draw drafts upon the Bank of Nez Perce in payment therefor. Under that arrangement the assessment work was performed for the Del Rio Mining Company, and the drafts given in payment therefor were duly paid by said bank and charged to the Del Rio Mining Company as an overdraft. The indebtedness thus created by the Del Rio Mining Company was afterwards formally ratified by the stockholders, and it is alleged in the complaint that the Del Rio Mining Company actually received full benefit of the note executed by the said Del Rio

Mining Company in payment of said indebtedness. So it is left beyond controversy that the original claim of the bank was an indebtedness against the Del Rio Mining Company and not in any sense against Schultz, McRae, and Mockler, who merely acted on behalf of the Del Rio Mining Company in ordering the work done.

The Del Rio Mining Company, at the request of the bank, on July 1, 1907, to take up said overdrafts, executed a note of \$812 in favor of McRae, Schultz, and Mockler. This matter was arranged between the bank and the Del Rio Mining Company without any consultation with the defendant McRae, and the note was made out in favor of McRae, Mockler, and Schultz for the reason that Leach, who had performed the assessment work, had filed the proof of labor in the name of McRae, Mockler, and Schultz, and it is a fair inference that its officers had in mind the securing of a voucher to show that they had reimbursed the parties in whose name said proof of labor was filed. However, whatever may have been the object, the fact is undisputed that the note was made without McRae's request and that he was afterwards requested to indorse it for the purpose of transferring the apparent legal title of the note to the bank. There is no dispute that the proceeds of that note went exclusively to the use and benefit of the Del Rio Mining Company and was used to take up the existing indebtedness of that company to the bank, and that the note was not in any degree for the benefit of either McRae, Mockler, or Schultz; and there is no evidence in the record that warrants the conclusion that any money, credit, extension of time, or other due consideration was advanced by the bank on the strength of said note. There is no evidence of any understanding of any agreement, express or implied, that said notes so made payable on demand should be permitted by the bank to run for any length of time. To the contrary, it appears that said note was taken as evidence of an existing indebtedness, long past due, from the Del Rio Mining Company to the bank, so the court's finding that said note of \$812 was given at the request of said McRae, Schultz, and Mockler and for their benefit and accommodation is not supported by the evidence, and the undisputed proof is precisely the reverse, viz., that the defendant McRae was requested by the bank to indorse the note and that Mockler and Schultz were mere accommodation indorsers of the Del Rio Mining Company.

There is absolutely no evidence sustaining the finding of the court above quoted, to the effect that the \$812 note was given at the request of McRae, Mockler, and Schultz and for their benefit and accommodation. The note was given for the accommodation and benefit of the Del Rio Mining Company in payment of assessment work done on the claims owned by that corporation. As a matter of fact, Schultz and Mockler, being offi-

cers of the bank and also of the Del Rio Mining Company, made arrangements with the bank for the Del Rio Mining Company for the payment of certain assessment work to be done upon said company's mines, and the \$512 represented by said promissory note was paid out and expended for that purpose, and not for the benefit and accommodation of McRae, Mockler, and Schultz. The promissory note was taken in the name of McRae, Mockler, and Schultz as payees because the notice and affidavit of the performance of the assessment work stated that it was done for McRae, Mockler, and Schultz, and the bank suggested that the note be taken in their names for that reason, and that they indorse it over to the bank, which was done. Schultz thereafter paid said note in full to the bank and subsequently sold and reissued the note to one Smith, or traded it for some real estate, with the distinct agreement and understanding that Smith should take the note and the mortgage securing its payment without recourse on the indorsers, which he did after having examined the mining claims and come to the conclusion that the mining claims were of as much or more value than said promissory note, or that they were sufficient security for the payment of said note. The mortgage was taken in the name of P. J. Miller, the assistant cashier of the bank, and on instructions from Schultz he assigned that instrument to Smith without recourse, and it was Smith's understanding and agreement with Schultz that he took said note and mortgage without recourse on either of the indorsers. Said note not having been given for the benefit and accommodation of said parties, the finding of the court that for that reason McRae, Mockler, and Schultz were not entitled to notice of presentment of said promissory note to the said Del Rio Mining Company and of its dishonor, is not supported by the evidence, and it is not a proper conclusion to be drawn therefrom.

Said Smith purchased said note and mortgage on the 22d day of October, 1908, and thereafter transferred it to the plaintiff in May, 1911, nearly four years after said note was executed. Plaintiff made no inquiry about the note, so far as the record shows, until after he had purchased it or traded a block of land for it. Said note was executed on July 1, 1907, and made payable on demand. The general rule is that a note payable on demand is payable within a reasonable time, and, under all of the facts of this case, it is clear that such reasonable time had long passed and expired when the plaintiff purchased the note and he stood in the position of the Nez Perce bank, so far as enforcing it against the indorsers is concerned, said bank being the real owner of the note from the time it was paid and taken up by Schultz as above set forth, and all defenses that could be set up against a note purchased after the same became due were available to McRae and Schultz.

[2, 3] It also conclusively appears that said note for \$812, upon which judgment was rendered against the appellants, as well as said \$700 note, was fully paid by appellant Schultz while the bank was the owner and holder thereof, on October 22, 1908, and that said notes were thereupon delivered to said Schultz and treated by the bank as canceled and paid. The trial court found that the defendant Schultz, after paying said promissory notes to the bank, reissued them to T. W. Smith. It is clear from the evidence that McRae had no notice of such reissuance and never consented thereto. The evidence shows that it was understood between Schultz and Smith, at the time Smith purchased said notes, that he was to take them without recourse and that the notes were to be assigned to him without recourse. At the time the trade occurred, Smith stated that he had examined the mines and considered them good for the amount of the notes and Schultz agreed to assign the notes to Smith without recourse. The mortgage was assigned without recourse, but evidently through some oversight the notes were delivered to Smith without so assigning them.

[4, 5] Smith received said notes on October 22, 1908, and did not transfer them until May 4, 1911, and during all of that time did not present them for payment of interest or principal, and the plaintiff took the notes not as a bona fide purchaser in due course under the law. That being true, it was his business to know what he was purchasing, as a note payable on demand is payable within a reasonable time after its execution. Section 3528, Rev. Codes.

[6] Under all of the facts of this case, the plaintiff was not a purchaser in due course, and certainly could have no better rights thereunder than the original payee of the notes. He took them as a speculation and took his chances on forcing said indorsers, who had received no benefit therefrom whatever, to pay them. Schultz paid the bank the amount due on the notes, and Dowd, the cashier of the bank, testified that they were delivered to him for the purpose of cancellation. If that be true, that ended the transaction. There was no contract with reference to the transfer of the notes at that time, and Schultz says he does not remember that there was anything said about his right to transfer the notes. Schultz, being an indorser on the notes and having paid them, would have had the right to call on his coindorsers for their pro rata share; but under the facts of this case he had no right to reissue them without the consent of the other indorsers.

[7] Payment of the note means a discharge of the liability. A sale of a note implies a contract, and a sale cannot occur without a contract between the parties—the owner of the note and the one desiring to purchase it. The bank owned the note, Schultz was an indorser thereon, and he paid it. In or-

der to form a valid contract, the minds of the contracting parties must meet.

In the case of the *Citizens' Bank v. Lay*, 80 Va. 436, the court held that the payment of a note at a bank is either a sale or a discharge thereof. A sale cannot be made without the bank's consent, and, where the note is paid by one bound for its payment at maturity, the note is thereby actually discharged and cannot be reissued by him so as to bind the parties thereto or to keep alive a trust deed executed to secure it, except with the knowledge and consent of those parties.

Schultz as an indorser on the \$812 note had the right to protect his own indorsement by the payment of the note. Such payment extinguishes the note as to the payee and the indorsers upon the note. A right of contribution between the indorsers was the only remedy left him.

It was held in *Blinford v. Adams*, 104 Ind. 41, 3 N. E. 753, as follows: "There is an important difference between the payment of a note and the purchase of it from the owner. Payment is the discharge of a debt. The purchase of a note is a contract of sale. The sale of a note, in order to be valid, must be made by a buyer to a seller; there must be mutual assent, and there must also be a consideration."

The evidence of Dowd and Schultz and the books of the bank clearly show that the transaction was a payment of the said notes. That transaction ended the liability of the Bank of Nez Perce and McRae and Schultz so far as said notes were concerned, up to the time Schultz reissued them to Smith. The reissuance of the notes to Smith is a matter with which the Bank of Nez Perce and McRae had nothing to do, as neither gave his consent nor knew of that transaction. Neither took any part whatever in the transaction. The reissuance of said note by Schultz is a matter that interests only Schultz and the plaintiff. Schultz testified that the notes were given to Smith with the express understanding that they were to be taken without recourse upon any indorser, that Smith had examined the mines and was willing to take the notes merely for the value he saw in the mines, and that the transfer to him was with that express understanding.

This virtually disposes of this case in favor of the appellants McRae and Schultz. Under all of the facts in the case, the court erred in entering judgment against McRae and Schultz, and the judgment against them must be reversed, and it is so ordered, and the cause is remanded, with instructions to the trial court to make findings of fact in accordance with the views expressed in this opinion, and to enter judgment in favor of McRae and Schultz. The judgment is affirmed as to the Bank of Nez Perce and the

Del Rio Mining & Milling Company. Costs are awarded to the appellants.

AILSHIE, C. J., and STEWART, J., concur.

MILLER v. DEL RIO MIN. & MILL. CO. et al.

(Supreme Court of Idaho. Nov. 5, 1913.)

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by Curtis J. Miller against the Del Rio Mining & Milling Company and others. From the judgment, plaintiff takes a cross-appeal. Reversed and remanded.

F. E. Fogg, of Nez Perce, for appellant. Geo. W. Tannahill, of Lewiston, S. O. Tannahill, of Nez Perce, and Eugene O'Neill, of Lewiston, for respondents.

SULLIVAN, J. A cross-appeal was taken by the plaintiff, Curtis J. Miller, from the judgment rendered on the \$700 promissory note, and on the authority of the decision in this case on the appeal of McRae and Schultz, in the case of *Miller v. Del Rio Mining & Milling Co.*, decided at the October, 1913, term of this court, and reported in 136 Pac. 448, the judgment of the trial court is reversed and the cause remanded for a modification of said judgment in so far as it holds or renders judgment against said McRae and Schultz for any part of the indebtedness on either of said promissory notes. The costs of this appeal are awarded to the respondents McRae and Schultz.

AILSHIE, C. J., and STEWART, J., concur.

STATE v. SMART.

(Supreme Court of Wyoming. Nov. 17, 1913.)

1. INTOXICATING LIQUORS (§ 101*)—LICENSES—EFFECT.

Comp. St. 1910, §§ 2832, 2838, providing for the licensing of the business of selling intoxicants, merely protects the licensee from punishment for an act which would otherwise be unlawful.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 105-107; Dec. Dig. § 101.*]

2. INTOXICATING LIQUORS (§ 46*)—LICENSES—COUNTY LICENSES.

A city is not given any power as to the issuance of a county license for the sale of intoxicants, either by Laramie City Charter, Comp. St. 1910, § 1440, giving the city council power to license and regulate the sale of intoxicants within the city limits, in addition to the county license therefor, and requiring it to collect a license fee, or by Comp. St. 1910, §§ 2832, 2838, requiring a county license for the sale of intoxicants.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 48; Dec. Dig. § 46.*]

3. INTOXICATING LIQUORS (§ 101*)—LICENSE—EFFECT.

A county liquor license is issued subject to the general law of the state and does not protect the licensor from violations of such law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 106-107; Dec. Dig. § 101.*]

4. STATUTES (§ 77*) — LOCAL AND SPECIAL STATUTES.

Laws 1888, c. 86, § 1, making it a misdemeanor for one having a liquor license to dispose of liquor on Sunday, is not a local or special law within the Springer Act (Act July 30, 1886, c. 818, 24 Stat. 170), prohibiting territorial Legislatures from passing local or special laws for the punishment of misdemeanors.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

5. CONSTITUTIONAL LAW (§ 240*) — EQUAL PROTECTION OF LAW—LIQUOR REGULATION.

Laws 1888, c. 86, § 1, making every person having a license to sell intoxicants guilty of a misdemeanor who disposes of any such liquor on Sunday, etc., does not violate Const. U. S. Amend. 14, § 1, relating to the equal protection of the laws.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. § 240.*]

6. STATUTES (§ 64*)—PARTIAL INVALIDITY.

Laws 1888, c. 86, § 1, makes every person guilty of a misdemeanor who, having a license to sell liquors, shall keep open his place of business or shall dispose of intoxicants therein on Sunday, and section 2 makes it unlawful to keep open any barber shop, etc., or other place of business for the transaction of business therein on Sunday, provided that the section shall not apply to hotels, drug stores, etc. Held, that any invalidity in section 2 would not affect the validity of section 1, which is complete in itself and relates to an independent subject.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 61.*]

7. SUNDAY (§ 2*)—STATUTORY REGULATION—POWER OF LEGISLATURE.

The Legislature has plenary power to designate the Sabbath and require its observance.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 2; Dec. Dig. § 2.*]

8. CONSTITUTIONAL LAW (§ 46*)—RESERVED QUESTIONS—CONSTITUTIONAL QUESTIONS—NECESSITY OF ANSWER.

A reserved question as to whether a certain statute was so changed in its original terms in certain sections of the Revised Statutes as to render the same void, and whether such statute was included in a subsequent revision of the statutory law, or was repealed thereby, does not raise any constitutional question, so that the Supreme Court has no power to answer it.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

9. STATUTES (§ 61*) — ENACTMENT — BURDEN OF SHOWING INVALIDITY.

Where the journals of the Legislature showed prima facie that a statute was legally enacted, the burden was on one asserting the contrary to show affirmatively that the proceedings were so defective as to invalidate the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 56, 196; Dec. Dig. § 61.*]

10. STATUTES (§ 16*)—ENACTMENT—PROCEEDINGS—RECITALS IN LEGISLATIVE JOURNALS.

The fact that the council journal recited the receipt of a proposed act from the House of Representatives immediately after it recited its own concurrence in a House amendment to the act will not be taken to show that the council did not have the bill before it when it concurred in the amendment, where the journal also recited that the bill was taken from the table on motion and the amendment made by the House concurred in.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 14-16; Dec. Dig. § 16.*]

11. STATUTES (§ 37*)—ENACTMENT—LEGISLATIVE JOURNALS—CONSTRUCTION.

The fact that the council journal, after reciting, under date of March 9th, that the chair announces the signing of "Council Enrolled Acts No. 29," etc., also recited the receipt of a message from the House of the passing of the act and the reporting back of the bill correctly enrolled, was not sufficient to show that the president of the council signed the bill before it was enrolled; the journal stating that the act signed was enrolled.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 39, 40; Dec. Dig. § 37.*]

12. STATUTES (§ 286*) — ENACTMENT — EFFECT OF LEGISLATIVE JOURNALS.

The recitals of the legislative journals showing the date on which various proceedings in connection with the enactment of a statute were done import absolute verity.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 42, 386; Dec. Dig. § 286.*]

13. STATUTES (§ 61*)—ENACTMENT—PRESUMPTION OF REGULARITY.

It is presumed that the proceedings taken in the enactment of a statute are regular, which presumption is only overcome where it affirmatively appears from the legislative journals to the contrary.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 56, 196; Dec. Dig. § 61.*]

14. CONSTITUTIONAL LAW (§ 23*)—RETROACTIVE EFFECT.

Const. art. 3, § 24, providing that, if any subject is embraced in any act which is not expressed in the title, such act shall be void only as to the part thereof not so expressed, was not retroactive, and hence did not apply to territorial statutes.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 20; Dec. Dig. § 23.*]

15. CONSTITUTIONAL LAW (§ 208*) — CLASS LEGISLATION—LIQUOR REGULATION.

Laws 1888, c. 86, § 1, providing that every person or corporation having a liquor license who shall keep open his place of business or shall dispose of intoxicating liquors therein on Sunday shall be guilty of a misdemeanor, and fined not less than \$25, or more than \$100, or imprisoned in jail not exceeding three months, was not discriminative so as to invalidate it.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

Reserved Questions from District Court, Albany County; Charles E. Carpenter, Judge.

Peter Smart was prosecuted for illegally selling on Sunday. On reserved questions from the District Court. Questions answered.

D. A. Preston, Atty. Gen., for the State. H. V. S. Groesbeck and S. C. Downey, both of Laramie, for defendant. Hugo Donzelmann, of Cheyenne, amicus curiæ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SCOTT, C. J. This case was prosecuted under the provisions of chapter 86, Session Laws 1888 of Wyoming, approved March 9, 1888, entitled "An act relating to the proper observance of the first day of the week, commonly called Sunday." Said act as originally passed reads in its entirety as follows:

"Be it enacted by the Council and House of Representatives of the territory of Wyoming:

"Section 1. Every person or persons, company or corporation, having license to sell liquors under the laws of Wyoming territory, who shall keep open, or suffer his or their agent or employé to keep open, his or their place of business, or who shall sell, give away or dispose of or permit another to sell, give away or dispose of, on his or their premises, any spirituous, malt, vinous or fermented liquors, or any mixtures of any such liquors, on the first day of the week, commonly called Sunday, or upon any day upon which any general or special election is being held, shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than twenty-five dollars, or more than one hundred (100) dollars, or imprisonment in the county jail not to exceed three months.

"Sec. 2. It shall be unlawful for any person or persons, company or corporation, to keep open any barber shop, store, shop or other place of business for the transaction of business therein, upon the first day of the week, commonly called Sunday: Provided, this section shall not apply to newspaper printing offices, railroads, telegraph companies, hotels, restaurants, drug stores, livery stables, news depots, farmers, cattlemen and ranchmen, mechanics, furnaces or smelters, glass works, electric light plants and gas works, the vendors of ice, milk, fresh meat and bread, except as to the sale of liquors and cigars. Any person, company or corporation who shall violate the provisions of this section, shall, on conviction thereof, be fined in a sum of money not less than twenty-five dollars, nor more than one hundred dollars, for each offense.

"Sec. 3. So much of section ten hundred thirty-four (1034) of the Revised Statutes of Wyoming as conflict with this act and other acts and parts of acts inconsistent with this act, are hereby repealed.

"Sec. 4. For the purpose of this act the first day of the week, commonly called Sunday, shall begin at midnight Saturday and terminate the following midnight.

"Sec. 5. This act shall take effect and be in force from and after its passage.

"Approved March 9, 1888."

The case was before this court on reserved questions and remanded without answering the questions; the decision being handed down on September 12, 1910. 18 Wyo. 436, 110 Pac. 715. The information was thereafter amended and filed in that court on

March 13, 1911, and it was thereafter carried on the docket of the lower court as No. 1,032. On November 7, 1911, defendant demurred to the information on the ground that the facts stated therein do not constitute an offense punishable by the laws of the state of Wyoming. The demurrer was argued and submitted to the court on May 11, 1912, and the court upon consideration on that day overruled the demurrer as to all statutory grounds, but deeming certain difficult constitutional questions, affecting the validity of the statute under which the prosecution is sought to be maintained, involved, reserved those questions, ten in number, to this court for its decision. The questions stripped of their verbiage may be stated as hereinafter set forth:

1. The first, second, eighth, and tenth questions may be discussed and considered together. They are as follows:

"1. Was said act in violation of the provisions of section 1 of the fourteenth amendment to the Constitution of the United States, and particularly the provisions therein, 'Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws,' and therefore void?

"2. Was said act of March 9, 1888, known as the Sunday Law, in violation of any of the provisions of the act of Congress known as the 'Springer Act,' the same being chapter 818 of volume 24 of the U. S. Statutes at Large, page 170, and particularly of the following provisions thereof: 'That the Legislatures of the territories of the United States now or hereafter organized shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For the punishment of crimes or misdemeanors. * * * Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases, where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial Legislatures thereof—and therefore void?'

"8. Does said act discriminate unconstitutionally and unlawfully against liquor sellers as to the penalty fixed in the original act?"

"10. Does said act unconstitutionally and unlawfully discriminate against liquor sellers and in favor of others permitted to do business therein on Sunday?"

[1] The act had to do with the regulation and sale of intoxicating liquors. It was, in so far as it referred to the sale and keeping open on Sunday a saloon or place where intoxicating liquors were exposed for sale, a law in the nature of a police regulation, and applied uniformly to all persons within the state who had procured and were lawfully engaged in the business of keeping a saloon under a license so to do. Under the general law it is unlawful to sell, give away, or dispose of liquor without having first obtained a

county license as required by law. Sections 2832, 2838, Comp. Stat. 1910. The law is a regulation of a licensed business and which business is unlawful at any time without such license. It protected the licensee from punishment for an act which would be otherwise unlawful. 23 Cyc. 110, 111, 112. It is provided by special charter of the city of Laramie (section 1440, Comp. Stat.) as follows: "Said city, in its corporate capacity, is authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by this chapter: * * * Fourth. To restrain, prohibit and suppress tippling shops, and all places where intoxicating liquor is sold, * * * desecrations of the Sabbath day, commonly called Sunday, and all kinds of public indecencies. * * * Thirty-ninth. The city council of said city shall have the power to license, control and regulate the sale of spirituous and intoxicating liquors within said city, in addition to the county license therefor, and for that purpose shall collect a license fee or tax from each dealer in spirituous or intoxicating liquors of not less than one hundred dollars nor more than five hundred dollars, payable annually in advance, and the council shall annually fix the amount to be paid for such licenses. Each license shall be issued for one year and no less period, and shall clearly state upon its face such conditions as the council may impose upon issuing the same, but such shall be transferable by consent of the council."

[2, 3] It was not the intention, as evidenced by the provision of the charter nor by the general statute, that the local municipal government should have any power over the issuance of a county license to keep a saloon, though indirectly the refusal to issue a city license would operate in preventing the carrying on of such business within the corporate limits even though a county license had been obtained therefor. The saloon keeper takes his county license subject to the general law of the state. His business is restricted to the provisions of the law, and the grant in the license is restricted to and must be considered within the provisions of the law (23 Cyc. 113), and, when he violates the law with reference to such business, it is apparent that his license cannot protect him. 23 Cyc. 191.

[4] The act is not in conflict with the provisions of the Act of Congress, chapter 818, volume 24 of the U. S. Statutes at Large, page 170, known as and commonly called the "Springer Act," because the act under consideration was neither local nor special. The defendant here is prosecuted under a general law applicable to a particular class, not local, but as wide in its application as the then territory, now state. The Springer Act was not violated for it prohibited the territorial Legislatures from passing any local or special law "granting to any corporation,

association or individual any special or exclusive privilege, immunity or franchise whatever." The defendant is prosecuted under a general law.

[5] Nor was the enactment in violation of the provision of section 1 of the fourteenth amendment to the Constitution of the United States that "nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws." There was no discrimination in the act under which the defendant procured his license. The amount thereof was a fixed amount applicable to all equally alike who obtained such a license. 23 Cyc. 80. The Constitution clearly lodged in the Legislature the right to enact appropriate laws in aid of its police power to regulate the liquor traffic.

[6] As to whether section 2 of the act is or is not constitutional as an exercise of the police power of the state need not be here considered, for whether it is or not cannot affect the validity of the first section of the act, which is complete in itself and treats of a subject of separate and independent legislation in itself. We may assume in a sense that the legislation was class legislation, but the law does not discriminate between different members of that class; that is to say, those engaged in the business of a licensed liquor dealer. Any one who chooses to engage in such business must obtain and pay a license so to do and submit to the regulations and restrictions placed upon such business by the statute. It was said in *Borck v. State* (Ala.) 39 South. 580: "If the state can prohibit the sale as to all persons, it certainly has the power to prohibit it as to a class that the state deems unfit to engage in the business—to such as will not observe and obey the laws of the state made in regard to the traffic." *Ex parte Burke*, 59 Cal. 6, 43 Am. Rep. 231; *Sherman v. Paterson*, 82 N. J. Law, 345, 82 Atl. 889. In *State v. Grossman*, 214 Mo. 233, 113 S. W. 1074, it was held that prohibiting the keeping open of a dramshop or the selling, giving away, or otherwise disposing of any liquor on Sunday is not invalid as class legislation.

[7] The legislative power to designate Sunday and require its observance is supreme and conclusive. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; 1 A. R. C. 554; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259; *Dist. of Columbia v. Robinson*, 30 App. D. C. 283, 12 Ann. Cas. 1094. It has been held that the Legislature may select any day of the week and require that all business should be suspended on such day; works of necessity and charity being excepted. Indeed, in the act under consideration it is declared unlawful for any saloon keeper to keep his place of business open or sell intoxicating liquors on election days. To each of the questions numbered 1, 2, 8, and 10 we answer, "No."

2. Questions 5 and 6 are as follows:

[8] "5. Was said Sunday law, so changed in its terms and original language in sections 2642, 2643, and 2644 of the Revised Statutes of Wyoming, 1899, as to render the same nugatory and void?"

"6. Was said act included in said revision of 1899 or repealed thereby?"

It is apparent that these questions go only to the construction of the statute and do not raise any constitutional question, and for that reason this court is without jurisdiction to answer them and returns the same unanswered.

3. Question No. 7 is as follows:

"7. Was said act lawfully passed as disclosed by the journals of the two Houses of the tenth legislative assembly of the territory claiming to pass the same?"

[9] It is urged that the law never legally passed by the Legislature, and therefore failed to become a law. It is conceded that the enrolled act filed in the office of the Secretary of State bears the signature of the President of the Council, the Speaker of the House, and the approval and signature of the then Governor of the territory. The legal enactment of the law appears at least prima facie, and the burden is upon the defendant to show not only that there is a doubt as to whether the act regularly passed the Legislature, but to make an affirmative showing from the journals of both or either branch of the Legislature that there was such a defect in the proceedings as to vitiate the purported enactment. The history of the bill as gleaned from the House and Council Journals shows that on February 20, 1888, the bill was first introduced in the Council and all proceedings were regular, and with a few amendments the bill passed the Council on March 9th following as Council File No. 41, entitled, "A bill for the proper observance of Sunday." On the same day, as appears from the House Journal at page 310, the bill reached the House and was read the first time, and after an amendment was under suspension of the rules passed to the third reading, read, placed upon its final passage, and regularly passed by an aye and nay vote, 14 of the members voting aye, 6 voting no, absent 3. In the Council Journal, at page 258, appears the following: "March 9, 1888, C. F. No. 41 was then taken from the table on motion of Mr. Holliday and the amendments made by the Honorable House concurred in." Immediately following this recital, and on the same page, as a part of the day's proceedings, the following entry appears to wit: "The chair announced signing Council Enrolled Acts Nos. * * * 29. * * *" Then follows the recital of the receipt of the following message from the House, to wit: "Hall of the House, Cheyenne, Wyo., March 9, 1888. Hon. President of the Council: Sir: I have the honor to inform your honorable body that the House

has this day passed C. F. No. 41 'relating to the proper observance of Sunday' as amended in section 2 (rider attached) and the said bills are herewith respectfully inclosed. Very respectfully, H. Glafcke, Chief Clerk." On page 259 of the Council Journal the following appears: "Cheyenne, March 9, 1888. Mr. President: Your committee No. 12 beg leave to report back Council Files Nos. 41 and 47 correctly enrolled. Robert Smith, Chairman." Under date of March 9, 1888, House Journal 312, "The Speaker announced he had signed Council Enrolled Act No. 29 relating to the proper observance of Sunday. * * * On motion a recess was taken for ten minutes. House reconvened at 5:20 p. m." The enrolled act was then officially delivered to the Governor, who officially approved and signed it, and by separate message to each so notified the Council and the House of his approval and the affixing of his signature thereto.

[10] It is here urged that the council did not have the bill before it when it concurred in the amendment. It is also urged that the President of the Council signed the bill before its enrollment. That the Council did not have the bill before it at the time it concurred in the amendment can be inferred, if at all, from the fact that the journal recites the receipt of the communication from the House immediately after the recital of its concurrence in the amendment. But the journal also recites that the bill was taken from the table on motion of Mr. Holliday and the amendment made by the House concurred in. It is a self-evident fact that the bill could not have been taken from the table unless it was there; and the recital that it was so taken from the table, and the further fact that it contained an amendment of which the Council could have had no knowledge in the absence of the bill, to our minds outweighs the circumstance of the order in which the business of the day appears on the journal.

[11] The same is true of the order of the recitals of the journal on which it is urged that the bill was signed before it was enrolled. The journal recites that the enrolled act was signed, and it so appears on file in the office of the Secretary of State (then territory), and if the journal speaks the truth in that matter it was enrolled before it was signed, notwithstanding the order of the recitals of the day's business in the journal. *Goff v. Rickerson, Sheriff*, 61 Fla. 29, 54 South. 264. The recitals of the journals cannot be here disputed, and they recite that the President of the Council and the Speaker of the House respectively did sign the enrolled act, and thereafter such Enrolled Act was sent to the Governor for his approval, and such enrolled act as it appears on file in the office of the Secretary of State bears the signature of the President of the Council, the Speaker of the House,

and the signature and approval of the Governor. Taking the journal entries in their chronological order, there may be some doubt as to the validity of the act.

[12, 13] The journals show the date on which these various acts were done, and we think in that respect the recitals purport absolute verity. Further, the presumption obtains that such proceedings were regular, and such presumption is only overcome when it affirmatively appears from the journals to be otherwise. Upon the recitals of the journals there arises at most only a doubt as to the validity of the act assailed, and, that being so, it is the duty of the court to maintain the law. To question number 7 we answer, "Yes."

4. Questions Nos. 3 and 4 are as follows:

"3. Was said act a valid law in force at the time of the adoption of the Constitution of this state of Wyoming?

"4. Was said Sunday law repugnant to the Constitution of Wyoming and void for that reason?"

The act, having been legally enacted, continued in force under the provision of section 3, art. 21, of the Constitution of the state unless repugnant thereto, and which is as follows: "All laws now in force in the territory of Wyoming, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the Legislature." Section 15, art. 5, of the Constitution, also provides that "all prosecutions shall be carried on in the name and by the authority of the state." The territorial Legislature was not limited by the provision of the Constitution of the state (section 24, art. 3) to the effect that, "if any subject is embraced in any act which is not expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The state of Wyoming was not then in existence, and there was no limitation upon the territorial Legislature in that respect. The law was continued in force as a law of the state of Wyoming by virtue of the provisions of the Constitution.

[14] Section 24, art. 3, was not retroactive, but was intended to and did provide a rule and guide for the Legislature in the future. *Ex parte Burke*, 59 Cal. 6, 43 Am. Rep. 231. We therefore hold that the act was not repugnant to the provisions of the Constitution of the state of Wyoming and answer, "Yes," to question No. 3, and, "No," to question No. 4, respectively.

5. Question 9 is as follows:

"9. Is such penalty intelligible, lawful, constitutional, and enforceable against licensed liquor sellers?"

[15] In so far as this question seeks a statutory construction independent of the constitutionality of the act, it need not be discussed or answered. That the Legislature

had the right to fix a penalty is conceded, and as to whether the act discriminates against licensed liquor dealers is discussed in another part of this opinion, in which we held adversely to defendant's contention. Independent of the construction of the act, we answer that the penalty fixed in the original act was not discriminative in such sense as to render the act void, and, limiting our answer to this phase of the question, we answer, "No."

The answers to the respective questions as herein made will be certified to the district court of Albany county, except as to questions 5 and 6, which, for the reasons stated, we return to the trial court without answering.

BEARD, J., concurs. POTTER, J., being ill, did not participate in this opinion.

GERMAN AMERICAN TRUST CO. v. NATIONAL SURETY CO.

(Supreme Court of Colorado. Nov. 3, 1913.)

EXECUTORS AND ADMINISTRATORS (§ 228*)—CLAIMS—EXHIBITION—JUDGMENTS.

The claim of the surety on the appeal bond of deceased, who pays the amount due under his obligation, on the appeal being dismissed, and files a claim therefor against the estate; with the transcript of the judgment docket, bearing the written assignment to him of the judgment, attached, is not on a judgment, with Rev. St. 1908, § 7212, requiring in such case the claim to be exhibited by filing an exemplification of the record; the transcript and assignment merely showing for what the advancement was made.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 819-826, 827½; Dec. Dig. § 228.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Claim by the National Surety Company against the estate of Paul E. Tarbel, deceased, was contested by the German American Trust Company, executor. Judgment of the county court for claimant was affirmed by the district court, and the executor brings error. Affirmed.

Stokes & Sherman and Whitfor & May, all of Denver, for plaintiff in error. George Q. Richmond, of Denver, for defendant in error.

GARRIGUES, J. This action involves the presentation and allowance of a claim against the estate of Paul E. Tarbel, deceased.

1. Dennis Sullivan began an action in the county court, which resulted in a judgment against Tarbel in the sum of \$630. Tarbel appealed the case to the district court, and the National Surety Company, defendant in error here, at his request became surety on the appeal bond. Tarbel died during the pendency of the appeal, and the German American Trust Company, plaintiff in error,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was appointed executor of his estate and substituted as defendant in the district court. Thereafter the case was dismissed for want of prosecution, and a writ of procedendo issued to the county court, directing it to proceed on the judgment. Sullivan then presented a transcript of the judgment docket to the surety company, and demanded from it the amount due under the judgment, on the appeal bond. The surety company, after investigating the matter of its liability, and being satisfied that the claim was legal and valid, paid the amount to Sullivan, and took an assignment of the judgment, which was written on the back of the transcript. The surety company then filed a claim with the county court on the usual blank form provided for that purpose, for the amount of money so paid Sullivan, to which claim was attached the transcript of the judgment docket bearing the written assignment. The executor contested this claim, but on the trial of the issue it was allowed against the estate. On appeal to the district court judgment was again entered in favor of the surety company, and plaintiff in error brings the case here for review.

2. The only objection urged against the allowance of the claim is that it was not exhibited in the county court in the manner provided by section 7212, R. S. 1908, within one year. The executor contends the claim is founded upon a judgment against the deceased, and that the manner of exhibiting it was by filing in the county court an exemplification of the record of the judgment. In support of this contention, we are referred to *Hobson v. Hobson*, 40 Colo. 336, 91 Pac. 929, and *Alvater v. National Bank*, 45 Colo. 531, 103 Pac. 378. The letters of administration were issued February 21, 1910. The claim was filed in the county court October 28, 1910, and an order entered February 20, 1911, setting it for hearing March 3, 1911, so there can be no question about the time if it was properly exhibited. We do not agree with the contention of plaintiff in error that this claim is founded upon a judgment, within the meaning of the statute requiring an exemplification of the record; therefore the cases cited, are not in point. In *Hobson v. Hobson*, the claim was based upon a promissory note which had not been filed with the court. In the *Alvater Case*, the claim was founded upon a judgment rendered against the deceased, which the judgment creditor was seeking to collect against the estate. The court held in such a case a transcript of the judgment docket did not comply with the statute, requiring an exemplification of the record on which the claim was founded to be exhibited. That case would be controlling here if Sullivan was seeking to enforce his judgment against Tarbel as a claim against the estate. In this case defendant in error became surety for deceased during his lifetime, and as such paid the amount due under

the obligation, which it presented as a claim against the estate. It is not seeking to enforce a judgment against Tarbel, but to recover the money paid out under its obligation as surety. The transcript of the judgment docket and the assignment of the judgment thereon were not the claim, but were evidentiary, attached to inform the executor for what purpose the money had been advanced.

The judgment of the lower court will be affirmed.

Affirmed.

MUSSER, C. J., and SCOTT, J., concur.

PEOPLE ex rel. ROCKY MOUNTAIN NAT. BANK et al. v. COURT OF APPEALS OF STATE OF COLORADO.

(Supreme Court of Colorado. Nov. 3, 1913.)

1. APPEAL AND ERROR (§ 14*)—FORM OF REMEDY—DISMISSAL OF APPEAL—ENTRY AS ON ERROR.

Court of Appeals Act (Laws 1911, p. 267) § 3, gives the Court of Appeals jurisdiction to determine all judgments in civil causes now pending in the Supreme Court, or wherein appeals were perfected before the act took effect, and section 4 requires all appeals to be immediately transferred by order of the Supreme Court to the docket of the Court of Appeals. Mills' Ann. Code, § 388a (Code Civ. Proc. 1908, § 423), provides that, whenever the Supreme Court or Court of Appeals shall dismiss an appeal for lack of jurisdiction, and it appears that it would have jurisdiction had the action come up on writ of error, the court shall order the entry of the action as pending on writ of error, and all proceedings shall be as if the action had originally been brought up on writ of error. Laws 1911, p. 9, entitled "Appeals and Writs of Error," by section 25 repealed certain sections of the Civil Code including section 423, but provided that the act should not affect any cases in which an appeal had been perfected or writ of error sued out before the act took effect. *Held*, that pending causes transferred to the Court of Appeals should be determined by it as though they had remained on the docket of the Supreme Court, and hence a cause pending on appeal transferred to the Court of Appeals when section 25 was enacted should, on dismissal by that court of the appeal as not involving appealable questions, be entered as pending on error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 58-60; Dec. Dig. § 14.*]

2. APPEAL AND ERROR (§ 14*)—METHOD OF REVIEW—ENTRY AS ON ERROR.

Mills' Ann. Code, § 388a (Code Civ. Proc. § 423), requiring a cause dismissed by the Supreme Court or Court of Appeals as not appealable to be entered as pending on error, does not require the issuance of a writ of error or scire facias, where appellees joined in the error, and appeared in the Supreme Court, and the case was afterwards transferred to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 58-60; Dec. Dig. § 14.*]

En Banc. Action by the California Milling & Mining Company, Limited, and others against the Rocky Mountain National Bank and others. Plaintiffs' appeal from adverse

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment on demurrer was dismissed; but the case was redocketed as pending on writ of error, whereupon defendants petitioned for certiorari and prohibition. Proceeding dismissed.

The California Milling & Mining Company, Limited, and others commenced an action in the district court of Gilpin county against the Rocky Mountain National Bank and others. To the amended complaint of plaintiffs, separate demurrers were interposed by the defendants and sustained. Plaintiffs elected to stand by their complaint, and their action was dismissed. From this judgment, they prayed an appeal to this court, which was perfected before the act creating the present Court of Appeals took effect. Such proceedings were had and steps taken that the cause was at issue in the Supreme Court some time prior to the date when the Court of Appeals Act went into effect. When this act became effective, and the court thereby created was organized, the Supreme Court, by virtue of the mandate of the Court of Appeals Act, transferred the case with others to the Court of Appeals. Such proceedings were thereafter had in that tribunal that the appeal at the instance of the appellees was dismissed, for the reason that the cause was not appealable; but at the request of the appellants the case was entered as pending on error. *California Milling & Mining Co., Ltd., v. Rocky Mountain National Bank*, 22 Colo. App. 237, 124 Pac. 590.

Thereafter the appellees filed in this court their petition for writ of certiorari and prohibition. In their petition they narrated the facts above stated; their contention being that under the Court of Appeals Act, when a cause was dismissed upon the ground that it did not involve any questions which the plaintiffs in the trial court could have reviewed on appeal, the Court of Appeals was without authority to enter and determine the case as pending on error. The respondent was ruled to show cause why the writ should not issue. To this petition the Court of Appeals and the plaintiffs, the real parties in interest, filed their separate demurrers, based upon the ground that the petition did not state facts which entitle the petitioners to the writ prayed for.

Section 3 of the Court of Appeals Act (Session Laws of 1911, p. 267) is as follows: "Said Court of Appeals shall have jurisdiction to review and determine all judgments in civil causes now pending upon the docket of the Supreme Court, or wherein appeals were perfected prior to the taking effect of this act or that may hereafter and during the life of the Court of Appeals be taken to the Supreme Court for review, save and except writs of error to county courts." Section 4 of the act provides, *inter alia*: "All such appeals shall, immediately upon organization of the Court of Appeals or thereafter and upon the docketing thereof, be transfer-

red by order of the Supreme Court to its docket for hearing and determination." Section 388a, Mills' Code, being section 423 of Revised Code of 1908, is as follows: "Whenever the Supreme Court or Court of Appeals shall dismiss an appeal for lack of jurisdiction to entertain the same, and it appearing that the court would have jurisdiction if the action had come up on writ of error, the court shall order the clerk, without additional fees, to enter the action as pending on writ of error, and thereupon all the proceedings shall be such as if the action had originally been brought to the court on writ of error; and in such case the court may, upon proper showing, order a superseas bond to be filed in place of the appeal bond." At the same session that the Court of Appeals Act was passed there was also enacted an act entitled "Appeals and Writs of Error." Session Laws 1911, p. 9. Section 25 of this act repealed certain designated sections of the Civil Code, among which was section 423, but with a saving clause that this act "shall in no manner affect any cases in which an appeal has been perfected or a writ of error has been sued out before the time when this act takes effect."

C. W. Waterman and H. A. Hicks, both of Denver, for petitioners. Henry J. Hersey, Arthur Ponsford, Wm. E. Hutton, and Dayton & Denious, all of Denver, for respondent.

GABBERT, J. (after stating the facts as above). [1] The only question presented for determination is the authority of the Court of Appeals to enter and consider as pending on error an appealed case transferred to it by the Supreme Court, which was not appealable, where the appellee has joined in error. The determination of this question depends upon whether section 388a, Mills' Code, confers this authority.

When the former Court of Appeals was in existence, questions frequently arose under the act defining the jurisdiction of that tribunal on the subject of the jurisdiction of the Supreme Court and the Court of Appeals to review a case on appeal or on error. To obviate the results which would follow the mistake of a party in taking a case to either of these courts by appeal, when on investigation it was found that the cause was not appealable, but the court to which it was taken had jurisdiction to consider it on error, the section of the Code mentioned was enacted. It was repealed by the act of 1911, because thereby appeals were abolished, and the Court of Appeals was no longer in existence, but with the saving clause that it should not in any manner affect any cause in which an appeal had been perfected prior to the time the act took effect. The object of this proviso was to save to parties who had appealed causes to the Supreme Court, which it did not have jurisdiction to con-

sider on appeal, the right theretofore given to have such causes entered and reviewed as pending on writ of error.

The act creating the present Court of Appeals was passed at the same session. Nothing was said in that act relative to the saving clause in the section of the act repealing section 388a. That clause stood unchanged.

The sole purpose, however, of the act creating the Court of Appeals was to establish an auxiliary tribunal to aid in the disposition of causes pending in the Supreme Court. To accomplish this, the act vested the Court of Appeals with jurisdiction to hear and determine all judgments in civil causes pending in the Supreme Court, or wherein appeals had been perfected prior to the date the act took effect, with certain exceptions which are not material in the present case, and made it obligatory upon the Supreme Court to at once transfer to the Court of Appeals for hearing and determination all such appeals when that court was organized. Nothing appears in the act which deprives litigants of any rights they could have exercised had their causes continued on the docket of the Supreme Court for final disposition instead of being transferred to the Court of Appeals. On the contrary, when the purpose and scope of the act are considered, the necessary logical conclusion is that causes pending on appeal in the Supreme Court when transferred to the Court of Appeals were to be heard and determined by the latter tribunal, so far as any question in this case is involved, precisely as though such causes had remained on the docket of the Supreme Court, and hence section 388a, and the proviso in repealing it, must be read in pari materia with the Court of Appeals Act. Thus read and construed, authority is conferred upon the Court of Appeals, in the circumstances of this case, to enter as pending on error a cause which was not appealable, and likewise determine it as thus entered on its merits. *Western Lumber & Pole Co. v. City of Golden*, 22 Colo. App. 209, 124 Pac. 584.

On behalf of petitioners it is urged that, because the jurisdiction of the Court of Appeals is derivative only, it is without authority to issue a writ of error, and therefore does not have jurisdiction to enter an appeal as pending on error. That question is not involved.

[2] The Code section requiring a cause not appealable to be entered as pending on error does not necessitate the issuance of a writ of error or scire facias when so entered, where the appellees have joined in error; but jurisdiction of defendants in error is conferred by their appearance as appellees. *People v. Horan*, 34 Colo. 304, 86 Pac. 252; *Bowling v. Chambers*, 20 Colo. App. 113, 77 Pac. 16. Jurisdiction of appellees attached by their appearance in the Supreme Court, and continued when the appeal to which they

were parties was transferred to the Court of Appeals.

What the authority of the Court of Appeals may be where the appellees have not appeared and joined in error is not involved, and upon a case presenting that fact we do not express any opinion.

The rule to show cause is discharged, and the proceedings dismissed.

Rule discharged, and proceedings dismissed.

SCOTT, J., not participating.

FIRST NAT. BANK OF IOWA CITY v. SMITH.

(Supreme Court of Colorado. Nov. 3, 1913.)

1. APPEAL AND ERROR (§ 896*) — TRIAL DE NOVO—COUNTY AND DISTRICT COURTS.

Under Rev. St. 1908, § 1539, providing that proceedings appealed to the district court shall in all respects be de novo, and that the court shall enter all orders and the case be conducted as if it was originally brought there, it is within the discretion of the district court to permit amendments or the filing of new pleadings in an action appealed from the county court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3655-3658; Dec. Dig. § 896.*]

2. JURY (§ 92*)—CHALLENGES—GROUND.

That defendant was the family physician of a number of the veniremen is not a positive disqualification, but they may sit as jurors, in the discretion of the trial court.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 420-422; Dec. Dig. § 92.*]

3. BILLS AND NOTES (§ 503*)—ACTIONS—EVIDENCE.

In an action by an indorsee of a note for the purchase price of goods, in which the defense was want of consideration and that plaintiff took with notice thereof, evidence was admissible of the fraudulent misrepresentations of the seller's agent as to the character of the goods.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1733-1739; Dec. Dig. § 503.*]

4. BILLS AND NOTES (§ 509*) — BONA FIDE PURCHASER—EVIDENCE.

In an action by an indorsee of a note for the purchase price of goods, in which the defense was want of consideration and that plaintiff took with notice thereof, evidence that plaintiff had had ample experience in prior litigation, growing out of similar transactions of the seller, was admissible on the issue of plaintiff's good faith.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1740-1745; Dec. Dig. § 509.*]

Error to District Court, Phillips County; H. P. Burke, Judge.

Action by the First National Bank of Iowa City against F. M. Smith. From a judgment for plaintiff in the County Court, defendant appealed to the district court, and from a judgment there for defendant, plaintiff brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Philip Zimmerman, of Holyoke, for plaintiff in error. Allen & Webster, of Denver, for defendant in error.

GARRIGUES, J. 1. Action was begun in the county court, where defendant elected to stand upon his demurrer to the complaint which was based on defendant's promissory note given to the Equitable Manufacturing Company and indorsed by it to the bank, and judgment was entered against him. In the district court on appeal defendant answered, pleading failure of consideration, plaintiff's notice thereof, and that it was not a bona fide purchaser for value in due course. There was a reply, the issues were tried to a jury which returned a verdict for defendant, and plaintiff brings the case here on error.

2. In March, 1909, a traveling representative of the manufacturing company called upon and solicited defendant to purchase a bill of jewelry, regarding which the salesman made certain false representations. Relying upon these representations, defendant signed a contract for the purchase of jewelry, and a promissory note attached to the contract. Thereafter he received the jewelry and sold a few of the articles, amounting to about \$39. These sales were so unsatisfactory that some of the articles were returned. Defendant then discovered that the whole lot was worthless and unsalable; thereupon he notified the manufacturing company that he rescinded the contract and held the balance of the goods subject to its order, he having theretofore remitted it \$50 to apply on the note. The bank knew the character of the business and nature of the transactions of the manufacturing company. It had had ample experience in prior litigation growing out of notes given upon similar transactions to this company. In March, 1909, plaintiff loaned the manufacturing company, on its note, \$975 and took as collateral security \$1,200 in notes, of which the defendant's was one, which, on his refusal to pay, was turned over for collection to one of the attorneys for the manufacturing company, who was not an attorney for the bank.

[1] 3. It is urged in the first assignment of error that, when defendant elected in the county court to stand upon his demurrer, he was precluded thereafter from filing an answer and proceeding to trial on the merits in the district court. Section 1539, R. S. 1908, provides that the proceedings, not the trial, in the district court on appeal shall be in all respects de novo; that the court shall enter all orders; and the case shall be conducted in the same manner as if it was originally brought in that court. It was entirely within the discretion of the district court to permit any amendment or the filing of new pleadings.

[2] 4. It is next urged that the court erred

in refusing to sustain plaintiff's challenges for cause to three jurors, because each answered on examination that defendant was his family doctor. This is not included in any disqualifying ground against jurors, mentioned in the statute, and, being wholly within the discretion of the trial court, we decline to accept plaintiff's contention on this assignment.

[3, 4] 5. The remaining assignments relate to rulings on the admission of evidence and the instructions to the jury. They are disposed of by determining the real questions involved, viz., the admission of the parol statements of the traveling salesman regarding the character of the jewelry, evidence tending to show the bank's knowledge of the fraudulent character of the transaction, and the failure of consideration. The evidence concerning the false representations of the traveling salesman was part of defendant's case, tending to establish failure of consideration. The testimony concerning other similar suits was admissible as tending to show the bank's knowledge of the fraud in question. *Savings Bank v. Gregg*, 51 Colo. 363, 117 Pac. 1003; *Savings Bank v. Rapp*, 47 Wash. 30, 91 Pac. 382; *Bank v. Brenner*, 82 Conn. 29, 72 Atl. 582; *Savings Bank v. Chase*, 151 N. C. 110, 65 S. E. 745.

Finding no error in the record which would warrant a reversal of the judgment, it is affirmed.

Affirmed.

MUSSER, C. J., and SCOTT, J., concur.

ANDERSON v. DAILEY.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. CORPORATIONS (§ 340*)—OFFICERS—PERSONAL LIABILITY.

Assurances by an officer and stockholder of a corporation in charge of its operations to its employes that it would be in funds and pay them did not create any personal liability against him.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1473, 1474, 1476-1478; Dec. Dig. 340.*]

2. CORPORATIONS (§ 361*)—OFFICERS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a corporation and one of its officers and stockholders who was in charge of its operations to recover compensation for services, evidence held to show that plaintiff was employed by the corporation, and was working for it, and not for such officer.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1506; Dec. Dig. § 361.*]

3. CORPORATIONS (§ 360*)—OFFICERS—ACTIONS—PLEADING—VARIANCE—COMMON COUNTS.

In an action against a corporation and one of its officers to recover compensation for services, where the complaint was upon the common count, and charged a joint liability on the part of the defendants, plaintiff could not recover against such officer on proof that there was no

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

employment by him, and that he was at most a guarantor only.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1503, 1505; Dec. Dig. § 360.*]

4. FRAUDS, STATUTE OF (§ 152*)—PLEADING AS DEFENSE—NECESSITY OF PLEADING.

Where plaintiff sues on the common count, and therefore does not disclose the foundation of his case until he puts in his evidence, defendant is not required to plead the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363-366, 371, 372; Dec. Dig. § 152.*]

Morgan, J., dissenting.

Appeal from District Court, Teller County; James Owen, Judge.

Action by E. C. Dailey against Phillip Schuch, Jr., and another. From a judgment for plaintiff, Clarence R. Anderson, administrator of the defendant named, who died after judgment, appeals. Reversed.

Henry Trowbridge and Stokes & Sherman, all of Denver, for appellant. Chauncey W. Blackmer and Thornton H. Thomas, both of Cripple Creek, for appellee.

CUNNINGHAM, P. J. Dailey, the appellee, filed his suit in the district court against the Friday Mining & Leasing Company and Phillip Schuch, Jr., to recover for services which he alleged that he had performed for the defendants at their special instance and request. The mining company made no appearance. Schuch answered a general denial. Judgment went against the mining company for \$678, and against Schuch for \$535; a verdict having been rendered for these amounts. After judgment was rendered by the lower court, Schuch died, and Anderson, his administrator, was substituted as appellant.

[1] There is but a single question presented for our determination, viz.: Was Dailey employed by Schuch, or was the latter simply a guarantor? If a guarantor, Schuch cannot be held liable under the pleadings, since it is conceded, as indeed it must be, that the complaint was upon the common count, and charges a joint liability on the part of the defendants, and the trial court instructed that: "To entitle the plaintiff to recover a verdict at your hands against the defendant Schuch, he must satisfy you by a preponderance of the evidence that the defendant Schuch employed him and agreed to pay him, and not that the defendant Schuch guaranteed the payment of the indebtedness of the Friday Mining & Leasing Company." There can be no question but that the services rendered by plaintiff were performed upon mining property belonging to the mining company, a corporation, and operated by it. Schuch was an officer and stockholder of the company, and appears to have had gen-

eral charge of its mining operations. It is also certain that Schuch frequently, from time to time, urged Dailey to remain at work on the property, and assured him that he (Schuch) would see that he got his money—his wages. These assurances were made orally and by letters, and were couched in language, at times, indicating that he (Schuch) would see that the company paid, and at other times indicating that he (Schuch) would pay from his own funds. Schuch's assurances that the company would be in funds and pay cannot, of course, create any personal liability against him.

[2] But two witnesses were called, Dailey and Schuch. Schuch's testimony was unequivocal that he (Schuch), acting as the representative of the mining company, employed Dailey for that company, and that he never employed him personally. While there are certain phrases or sentences in Dailey's testimony which might bear the construction that he was employed by Schuch to work for him personally, still, when fairly considered, his own testimony establishes quite the contrary. For instance, Dailey testified that Schuch "told me the company were doing the best they could to raise money, but that he would pay me what was owing me himself." He also testified that "\$952.50 is due me from the Friday Mining & Leasing Company." And, again, "I was working for the Friday Mining & Leasing Company; Schuch said he would guarantee the money." Plaintiff introduced a letter from Schuch to himself, containing the following: "After our telephone talk this morning, I have decided to write you a statement in full, so that you may assure all the men to whom some money is due [Dailey appears to have been foreman at the mine] from the Friday Mining & Leasing Company that I will personally see that they get every cent that is due them within a very few days. I have got sufficient subscriptions to make good, and I will have money in the company's treasury, and I shall also request the secretary and treasurer to issue the checks as soon as the money comes in until all accounts are paid." And in another letter, which was put in evidence, Schuch writes Dailey as follows: "You can rest assured, and can assure the men, that I will stick to them, and see that they get their money, even if I have to sacrifice my personal property to make up the company's affairs, which have been intrusted to my care." If Schuch had employed Dailey personally, and personally obligated himself to pay, there could have been no occasion or justification for any assurances from Schuch that he would pay him, "even if he had to sacrifice his personal property to make up the company's affairs." These letters make it clearly apparent that Schuch did not regard himself as obligated in the first instance to Dailey by any contractual

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

relation. That Dailey understood that he was employed by the mining company, and was working for it, and not for Schuch, is equally apparent, not only from what we have already quoted from his testimony, but from the further fact that all payments which he received for his wages were made by company checks, and his time book, kept by himself, was headed, "Services rendered for the Friday Leasing Company," and all bills were rendered by him to the company. Indeed, not until he filed his complaint did he ever, so far as the record indicates, intimate that he had any legal right to look to, or claim upon, Schuch for his wages. It is possible that there may have been a very short period of time when, under the most favorable construction of the evidence, Schuch may have become personally and directly responsible to Dailey; but, if so, the time covered by such change in the relationship, if there was any change, was short, and the amount earned under it small.

[3] As we have said, the sole question is, Can Dailey, on a complaint on the common count, averring that Schuch employed him jointly with the company to work for him (Schuch) and the company, recover where the proof clearly shows there was no such employment at all, and that at most Schuch was a guarantor only? This question must be answered in the negative, if pleadings are to cut any figure whatever in a case. To rule otherwise would be as flagrant a violation of all rules of pleading as to permit one who had sued in tort to recover on quantum meruit, if the proof chanced to show defendant not guilty, but that he owed plaintiff for services performed. Against a complaint charging liability as a guarantor, Schuch may have been able to successfully plead the statute of frauds, though we do not so decide.

[4] Counsel for appellee suggest in their brief that defendant did not plead the statute of frauds as a defense, but denied generally. There are two sufficient answers to this suggestion, viz.: (1) Schuch's right to have this judgment reversed in no manner rests upon the statute, but upon a fatal variance between the pleadings and the proof. (2) A defendant is not required to plead the statute. "Where the plaintiff sues on the common count, and therefore does not disclose the foundation of his case until he puts in his evidence." *Brown's Statute of Frauds* (5th Ed.) § 598; *Durant v. Rogers*, 71 Ill. 124, 125; *Salomon v. McRae*, 9 Colo. App. 26, 47 Pac. 409.

Much as we dislike to disturb the judgment of a trial court, or reverse judgments for errors pertaining to pleadings, no alternative is left us, since it cannot be said that the substantial rights of the defendant were not prejudiced by the errors to which we have called attention. The trial judge should have sustained the motion for a di-

rected verdict interposed by defendant at the close of plaintiff's testimony.

Judgment reversed.

MORGAN, J. (dissenting). The majority opinion is based upon the conclusion that the lower court should have sustained Schuch's motion for a directed verdict at the close of the plaintiff's case. It is unnecessary to cite authorities that, where the plaintiff's evidence tends to prove the allegations of his complaint, such motion should be denied. The issue that was tried in this case was upon Schuch's individual liability, as an original promisor, for the payment of the plaintiff's services. The question before this court is, Was the evidence sufficient to justify the court in submitting such issue to the jury? The complaint was upon an indebtedness for services performed, *indebitatus assumpsit*. Answer, general denial. The majority opinion concludes that the plaintiff's testimony shows that Schuch's promise was within the statute of frauds. The lower court did not think so, nor did the jury, and this court should not interfere if the evidence tended to prove the allegations of the complaint, or if there is a conflict in the entire evidence on which the issue was submitted. *Union Coal Co. v. Edman*, 18 Colo. 438, 440, 27 Pac. 1060; also *Colo. Coal & Iron Co. v. John*, 5 Colo. App. 213, 38 Pac. 399.

A reversal is in violation of the Code provisions as to substantial rights (section 78, *Mills' Ann. Code*), and subversive of a rule established by many decisions of our courts, concerning judgments on conflicting testimony.

Schuch was general manager, stockholder, and president of the mining company, and, as such, hired plaintiff as a timekeeper and laborer in December, 1907, and the plaintiff continued to work for the company up to July 6, 1908. His wages were not paid for June, and he took up the matter with Schuch concerning the payment thereof. They had some talk about it over the telephone, and otherwise, and some letters passed between them as to the matter. Plaintiff's version of it is that Schuch agreed to pay his wages individually from and after that time if he would continue to work; Schuch denied it, and this was the issue tried. The court, by the instruction quoted in the majority opinion, eliminated any other issue. The following extracts from plaintiff's testimony show the basis of the court's ruling, and the jury's verdict:

"Q. Now, what I am getting at, did you have a conversation on the 6th day of July, 1908, with Mr. Schuch with reference to his paying you from that time on? A. Very close to the 6th, if not the 6th."

"Q. What did he say to you with reference to your continuing working on for him? A.

He said he would pay it himself. Q. About when was the conversation you had with Mr. Schuch with reference to getting your pay? A. Have had a good many conversations about it.

"Q. What did he say with reference to that letter? A. I was talking about the money, and he said he would pay it.

"Q. You had two conversations with him? A. Yes, sir. Q. And in both of these conversations he referred to these two letters? A. Yes, sir; he said he would pay this money himself."

On cross-examination, in reference to Schuch's first promise:

"Q. For how long a time had he been telling you that? A. Let me see—from the first he owed me. I think that was in June. It was the first time he paid the rest and didn't pay me.

"Q. What did he say about you continuing working there? A. He wanted me to stay right on with him."

In reference to his time book containing daily time of himself and the other men:

"Q. Tell the jury what it has at the head? A. Labor performed for the Friday Leasing Company.

"Q. And you never put Phillip Schuch's name in any of these statements? A. I don't think I did. He told me to make out my statements that way.

"Q. From the last of June, 1908, to the present time the Friday Mining & Leasing Company have been owing you something all the time? A. Schuch has been owing me. It has never been squared up.

"Q. And, except for what Mr. Schuch wrote in letters to you, he didn't say anything more than was said to you on or about the 6th of July, 1908, about paying you? A. Why, about paying me, he has told me time and again he would pay me.

"Q. Now, will you tell this jury exactly what words Mr. Schuch said to you whereby he hired you to work for him? A. He told me to stay with him, and he would pay me; that's the words.

"Q. Until you commenced this suit did you ever make a demand upon him personally to pay this or any part of this time account? A. Yes, sir.

"Q. In what way; by letter or word of mouth? A. I don't know whether by letter or not.

"Q. And did he not reply that the company was getting in money as best it could from the stockholders? A. He has told me the company were doing the best they could to raise money, but that he would pay me what was owing me himself.

"Q. Now, you went to Denver once, did you not, at Mr. Schuch's expense, and as the guest of the company, and were entertained there at the Shirley Hotel? A. I was there at the Shirley with the exception of 12 days.

"Q. Do you recollect when that was? A.

I think last 4th. I am pretty certain it was last 4th.

"Q. In 1909? A. Well, I couldn't tell you; some time in July last year.

"Q. Did you at that time make claim upon Mr. Schuch personally to pay you the money then owing you? A. At the time that I was there?

"Q. Yes. A. I asked him for it, and he said he would pay it. Q. Who was present? A. I don't know. I never dunned him for money in the presence of anybody.

"Q. Wasn't the directors there? A. No, sir; there was a gathering at that time, and he took me to Mr. Peterson, and wanted me to tell them what I knew of the mine.

"Q. Then you say at that time you made a personal request to pay the money he owed you, and he said he would? A. Yes; that's all. I think he paid me \$2; but he said, 'You need not make any account of it.'"

It is true the plaintiff testified that Schuch "guaranteed" the payment of his wages as quoted in the majority opinion; but it was in regard to money earned prior to July 6, 1908, and it was in answer to the following question: "I will ask you who you were working for then during the month of June, 1908, and the first six days of July, for Schuch, or for the Friday Mining & Leasing Company?"

In addition to the quotations from Schuch's letters in the majority opinion, I quote the following: "Now, Mr. Dailey, I want you and Judson to do me one favor, and, if any of the other boys are willing to, I will gladly do for them on the same basis. * * * Now, Mr. Dailey, I want you and Judson to help me hold the Friday Mine until I can get the money together to clean up its debts and proceed with the development work just enough to hold the contract." Schuch further testified on this issue: "I wrote the letter of October 22, 1908, and I intended to see those men paid. * * * I would say there was then some conversation to the effect that I wanted Mr. Dailey to continue with the mine, and stick to me, and I would stick to him."

If Schuch would say this, together with his letters quoted in the majority opinion, in writing, does it not indicate the truth of plaintiff's testimony as to what he said orally? From any viewpoint, was there not enough in the testimony to justify the court in submitting the issue to the jury?

At the close of the evidence Schuch asked for an instruction to the effect that there was no evidence to bind him individually, which the court refused, but gave two instructions requested by him, one quoted in the majority opinion, and the other as follows: "In any event a verdict against the defendant Phillip Schuch cannot be recovered for more than the amount of unpaid indebtedness which has accrued since the 6th day of July, 1908."

Schuch's request for these instructions,

and the giving of them, shows clearly the issue that was tried. No attempt was made to hold Schuch as a guarantor, and the court took such consideration from the jury, and limited the jury's deliberations to one issue alone.

In the late case of *Hall v. Allen*, 46 Colo. 355, 104 Pac. 489, the Supreme Court held a similar promise not within the statute. Allen was a physician, and had been attending Mrs. Hall's brother in a hospital for a short time, and, while so attending him, received a letter from Mrs. Hall making inquiry, and, on answering it, received the letter copied in the court's opinion (46 Colo. 356, 104 Pac. 490), wherein she said: "Doctor, may I ask a favor of you, namely, that you let me know every day or two just how he is doing, and even a postal card will be appreciated. And we will gladly pay all expense. * * * All of his expenses will be paid later on, and we want him to have anything to make him more comfortable," etc. The court held this was "a request to the doctor to continue to render such services required," and the court said: "The questions as to whether the doctor relied solely upon this employment, and, if a third person is liable at all, the promisor's undertaking is collateral, are eliminated from our consideration by proper instructions to the jury upon that phase of the case, which found adversely to the contention of the appellant, which findings we think there is sufficient evidence to sustain."

The opinion cites *Boston v. Farr*, 148 Pa. 220, 23 Atl. 901. In that case a physician had attended defendant's stepson for a time, and, another physician's assistance being needed in an operation, he stated to defendant that he did not know whether he would be paid or not, and defendant replied: "If the boy dies, I don't want any blame resting on me. You go, and get the doctor, and do all you can for the boy. I will see that you get your pay." The court held this was an original promise.

King v. Edmiston, 88 Ill. 257, is also cited, wherein the court held the promisor liable for a physician's services from and after an offer and request that he "continue his labors."

If services are performed for, or goods sold to, one person at the request of another, and the credit is given to him, he is liable. *Gearry v. O'Neil*, 73 Ill. 593. Schuch requested the plaintiff to continue working for the mining company, saying he would pay the plaintiff himself, if he would continue his work. Plaintiff had refused to credit the company any longer, and must have given credit to Schuch thereafter.

That plaintiff put at the top of the page of daily time record for the other men and himself the words "Labor performed for the Friday Leasing Company" does not show that plaintiff credited the company; furthermore,

he testified that Schuch told him to make his statements that way. Plaintiff was looking after everything as superintendent, hired the men, kept the time for all, along with that of his own, and sent the statement for all to Schuch, in Denver. Checks were returned, and plaintiff paid men. Plaintiff never kept a separate personal account, nor did he present any separate personal statement. The majority opinion says he never demanded payment of Schuch individually prior to the suit; but the foregoing testimony shows the contrary.

Schuch had an individual as well as a representative capacity, and his representative capacity did not bar him from acting as an individual. The contested fact was peculiarly a question for the jury. They saw the witnesses on the stand, observed their demeanor, and so did the court. The jury found the issue for the plaintiff; the court ordered judgment thereupon, and denied a new trial. The judgment should stand.

PLANK v. MAXWELL et al.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. VENDOR AND PURCHASER (§ 34*)—IDENTITY OF LAND—FRAUD.

Where plaintiff falsely described the location of land which he sold to defendants, so that the land defendants viewed in accordance with such description was much more valuable than that which plaintiff owned and conveyed to defendants, such fraud was a complete defense to an action to enforce payment of a balance of the price, regardless whether plaintiff had actual knowledge of the mistake, under the rule that where a person makes an unqualified false statement of a fact which is susceptible of knowledge, knowledge is implied, and if he has no knowledge, he is guilty of actual fraud.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 39; Dec. Dig. § 34.*]

2. VENDOR AND PURCHASER (§ 17*)—MEETING OF MINDS—MISDESCRIPTION OF LAND.

Where plaintiff misdescribed the land which he contracted to sell to defendants, so that they examined other lands, which they supposed they were buying, than that described in the conveyance, there was no meeting of minds sufficient to establish a valid contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 21; Dec. Dig. § 17.*]

Appeal from District Court, Mesa County; Sprigg Shackelford, Judge.

Action by J. C. Plank against Sadie Maxwell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Rozzelle, of Salt Lake City, Utah, for appellant. Wheeler & Weiser, of Grand Junction, for appellees.

CUNNINGHAM, P. J. Since the opinion in this case was prepared our attention has been called to the death of the appellee, Maxwell, and by proper order his widow and

children have been substituted. With this preliminary explanation we do not deem it necessary to redraft the opinion.

Plank, the appellant, who was plaintiff below, and who will hereinafter be referred to as plaintiff, sold a 40-acre tract of unimproved land to Maxwell, the appellee, defendant below, receiving \$1,000 in cash and two notes for \$500 each in payment therefor. These notes were secured by a trust deed on the land. Defendant defaulted in the payment of the notes, and plaintiff brought his action in the county court to foreclose the trust deed which defendant had given. Defendant answered, charging plaintiff with having misrepresented the land, the misrepresentations consisting in directing defendant to one tract of land, which plaintiff did not own, and selling an entirely different and vastly inferior tract. There is no attempt made by plaintiff to dispute the deception, but he bottoms his whole defense upon ignorance as to where the land he owned and was selling actually lay. Plaintiff had seen his land but once or twice before he sold it to defendant. It lay several miles from Grand Junction, and in an uncultivated and unimproved section of country. Before defendant went to look at the land, he and one Harris, who was showing the land for the purpose of inducing defendant to buy it, called upon plaintiff, who gave the two men explicit instructions as to the direction and distance they must go in order to find his, plaintiff's, land. In addition to giving the direction and distance, plaintiff described a post or stake which he said stood at the northeast corner of the land he owned and was offering for sale. He also described certain natural objects near, such as a small butte, stone, etc. With these directions and descriptions received from plaintiff, Harris and the defendant, Maxwell, proceeded to the stake, finding it without trouble. The land that lay to the southwest of this stake, which they had been told by plaintiff was his, was a very fine tract, level and of splendid red soil. But the stake was not at the northeast corner of plaintiff's land. It was a quarter of a mile distant from that point, and the land actually owned by plaintiff, and which he deeded to Maxwell, was rough, hilly, and practically worthless. The evidence offered by defendant to support these statements was ample and practically uncontradicted. Upon returning from the supposed view of the land, Harris and Maxwell again called upon plaintiff, and told him they had found the stake, describing it and its surroundings with considerable minuteness.

Again plaintiff stated to them that the stake was at the northeast corner of his land. Relying upon these statements, defendant bought the land as hereinabove stated. In his answer defendant counterclaimed for the \$1,000 he had paid, with interest, expenses paid by him for a survey, and perhaps other items. Both in the county and later in the district court to which the case was appealed, judgment went in favor of the defendant.

[1] That plaintiff falsely described the location of his land cannot be questioned; indeed, he admits it. If plaintiff had known that his statements concerning the location of the stake were false, at the time he made them, there could be no possible doubt as to the correctness of the judgment, since it was shown that defendant was a man of no experience in the matter of locating lands, and had no knowledge whatever as to section corners in the vicinity of the land. But the authorities are ample in support of the proposition that it is not necessary that a vendor should have absolute or actual knowledge of the falsity of his statements under circumstances such as we have narrated. "If a person makes a positive and unqualified false statement of a fact which is susceptible of knowledge, an affirmation of knowledge is implied from the positive character of the statement; and, if he has no knowledge, he is guilty of actual fraud." 14 Enc. Law (2d Ed.) 99. Other authorities sustaining this rule are: *Lahay v. Bank*, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407; *Sellar v. Clelland*, 2 Colo. 532; *Gooddale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Stimson v. Helps*, 9 Colo. 33, 10 Pac. 290; *Ballard v. Lyons*, 114 Minn. 264, 131 N. W. 320, 38 L. R. A. (N. S.) 301; *Vincent v. Corbett*, 94 Miss. 48, 47 South. 641, 21 L. R. A. (N. S.) 86; 20 Cyc. 33. Under the foregoing authorities, plaintiff having stated unqualifiedly and as of his own knowledge where the land which he owned lay, he cannot now be heard to say that he had no such knowledge, or that defendant was so negligent in accepting his statement as to bar his right of recovery.

[2] It is urged on behalf of plaintiff in the opening brief (no reply brief has been filed by him) that there was never a meeting of the minds of Plank and Maxwell because of the misdescription of the land. It is not entirely clear how this contention (which we are disposed to believe sound) can avail plaintiff in his attempt to collect the balance of the purchase price of the land. Two courts have found, properly as we think, for the defendant, the appellee here.

Judgment affirmed.

BOVEE et al. v. BOYLE.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. CORPORATIONS (§ 360*)—DIRECTORS—PERSONAL LIABILITY—COMPLAINT—CONSTRUCTION.

In an action to enforce the personal liability of directors of a corporation, the complaint alleged that during the year 1909 defendant company incurred certain obligations toward plaintiff and belonging to him, for which plaintiff duly recovered judgment for a specified sum and costs, that defendants, as officers and directors, did not, as required by law, file their annual report, and had not filed such annual report, whereby they became individually liable to plaintiff "for said judgment rendered as aforesaid for the debts of the corporation." *Held*, that the action was based on the judgment, and not on the original cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1503, 1505; Dec. Dig. § 360.*]

2. CORPORATIONS (§ 338*)—REPORTS—FAILURE TO FILE—OFFICERS AND DIRECTORS—INDIVIDUAL LIABILITY.

Where officers and directors of a corporation failed to file an annual report of its business, as required by Rev. St. 1908, § 911, providing that a failure to file such report shall render the officers and directors individually liable for corporate debts for the preceding year, they were not liable for the payment of a judgment recovered against the corporation after the necessary report had been filed and their default removed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1460, 1461-1466; Dec. Dig. § 338.*]

3. CORPORATIONS (§ 326*)—OFFICERS AND DIRECTORS—DEBTS—INDIVIDUAL LIABILITY.

Rev. St. 1908, § 911, providing for the filing of annual reports by the officers and directors of corporations, and making them individually liable for debts incurred during the preceding year in case of the failure to file, is penal in character, and must be strictly construed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1443, 1460½, 1469, 1498; Dec. Dig. § 326.*]

4. CORPORATIONS (§ 360*)—OFFICERS AND DIRECTORS—DEBTS—INDIVIDUAL LIABILITY—REPORTS—FAILURE TO FILE—STATUTES—CONSTRUCTION—"PRECEDING YEAR."

Rev. St. 1908, § 911, provides that, if the directors of any corporation shall fail to file a specified annual report, they shall be jointly and severally liable for all debts of the corporation contracted during the year next preceding the time when the report should have been filed and until it is filed. The statute also requires that the report be filed within 60 days from January 1st. *Held*, that the "preceding year," during which directors become personally liable for failure to file the necessary report, dates from the sixtieth day after January 1st, and relates back 12 months from the date on which the default attaches, so that a complaint to enforce such liability must necessarily allege when the obligation on which it is based occurred, so as to show that it is within the time specified; an allegation that it was incurred during the year 1909 being insufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1503, 1505; Dec. Dig. § 360.*]

5. CORPORATIONS (§ 340*)—OFFICERS AND DIRECTORS—PERSONAL LIABILITY—"DEBT."

The term "debt," as used in Rev. St. 1908, § 911, imposing individual liability on directors of a corporation for failure to file required reports for the debts of the corporation during

the year next preceding the time when the report is required, means an unconditional promise to pay a fixed sum at a specified time, and is not synonymous with "obligation," nor does it include liability for torts (citing Words and Phrases, vol. 2, pp. 1864-1886. See, also, vol. 8, p. 7628).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1473, 1474, 1476-1478; Dec. Dig. § 340.*]

6. CORPORATIONS (§ 82*)—CONTRACT—CONSTRUCTION—CORPORATE LIABILITY.

Plaintiff purchased certain stock in a corporation under a contract that, in case the corporation did not commence the manufacture of an automatic water lift and compressor at once, and complete the machine on or before June 28, 1909, plaintiff might return the stock and receive from the corporation the entire amount paid therefor. *Held*, that no obligation to repay was imposed on the corporation until plaintiff availed himself of the option to tender back the stock and demand repayment, so that a complaint based thereon which did not allege that the corporation had failed to comply, or that plaintiff had elected to avail himself of the option, was insufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.*]

7. EVIDENCE (§ 332*)—JUDGMENT—JUDGMENT ROLL.

A judgment and the complaint on which it was based, without the judgment roll, is inadmissible to prove the judgment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237-1246; Dec. Dig. § 332.*]

Appeal from District Court, Denver County; George W. Allen, Judge.

Action by Charles A. Boyle against R. Y. Bovee and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

William C. Danks, L. F. Crawford, and Felix B. Tait, all of Denver, for appellants. S. S. Abbott and R. D. Rees, both of Denver, for appellee.

CUNNINGHAM, P. J. This action was brought by Boyle, the appellee, to whom we shall hereafter refer as plaintiff, against appellants, to whom we shall hereafter refer as defendants, under section 911, R. S.

The first paragraph of the complaint alleges the corporate capacity of the Hydro-Engine Power & Irrigation Company, of which appellants were directors, and the date of its incorporation, to wit, March 8, 1909. The third paragraph alleges that the defendants were the directors of said company. The fourth paragraph pleads the following from section 911: "And if any such corporation, joint stock company or association shall fail, refuse or omit to file the annual report aforesaid, and to pay the fee prescribed therefor, within the time above prescribed, all the officers and directors of said corporation shall be jointly and severally and individually liable for all debts of such corporation, joint stock company or association that shall be contracted during the year next preceding the time when such report should by this section have been made and

filed, and until such report shall be made and filed." Those portions of the complaint above alluded to were either admitted or are not vital to this controversy, hence need not receive further consideration. The remaining paragraphs of the complaint, II and V, read as follows:

"Par. II. That said company duly incurred certain obligations during the year 1909 towards the plaintiff herein, and belonging to the plaintiff herein, for which said plaintiff duly recovered judgment on a case tried and decided. Finally, on, to wit, the 15th day of March, 1910, said plaintiff did recover judgment in the sum of \$1,050, together with his costs in that behalf expended, to wit, in the sum of \$50."

"Par. V. That said officers and directors did not, in pursuance with said law, file their annual report as required by the law referred to in said statute, and have not filed any such report, whereby, by virtue of the law in such cases made and provided, said officers and directors became and are personally and individually liable, jointly and severally, for the debts of said corporation, and are liable to plaintiff for the said judgment rendered as aforesaid for the debts of such corporation."

Defendants answered, admitting the judgment and the statute as pleaded by plaintiff, and denying all other allegations, and especially denying paragraphs II and V quoted above. The defendants further, in their answer, demurred to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action. On the trial appellants admitted their official capacity, and it was further stipulated that the corporation was organized under the laws of the state of Colorado, and had not filed its annual report as required by statute; but it was stipulated that the same was filed on March 9th, eight days after it should have been filed. Aside from certain formal exhibits not necessary to be considered, plaintiff's proof consisted of an agreement entered into between the corporation and the plaintiff, bearing date May 24, 1909, which we shall later quote in part, the complaint against the corporation on which the judgment pleaded was based, a certain notice served by plaintiff upon the corporation offering to return to the corporation the stock which he had purchased from it, and demanding the return of the money which he had paid, and a note that he had given for stock in the company. (This notice will be referred to later on, and its purpose made apparent.) The decree of the district court against the corporation, being the decree pleaded in the complaint in this case, and a receipt given by the corporation to plaintiff admitting the payment by plaintiff to it of \$500 on the stock purchase, were also introduced. No witnesses were introduced by either side, and the defendants offered no proof whatever. At the close of

plaintiff's case, defendants moved for a nonsuit on the ground: "(1) That the complaint did not set forth, and the evidence support, any original cause of action against the defendants, or any one or more of them, as contemplated under section 911, R. S. (2) That the complaint and the evidence disclose this to be an action based wholly upon a judgment obtained against the company after the removal of the default of the directors. * * * (3) That the plaintiff has failed to establish any original cause of action against the defendants, or any one or more of them." This motion was denied, and judgment was rendered against defendants, from which this appeal is prosecuted.

The agreement introduced in evidence, and hereinabove referred to, discloses that Boyle had subscribed for 4,000 shares of the treasury stock of the corporation, for which he was to pay \$1,000, as follows: \$500 cash, and the balance in a bankable note due in six months. In this agreement the corporation bound itself that it would at once commence the manufacture of an automatic water lift, and complete the machine on or before June 28, 1909. It is then provided in this agreement that: "In case said party of the first part [the corporation] does not commence the manufacture of said automatic water lift and air compressor at once, and does not complete said machine on or before June 28th, Charles A. Boyle is to have the option of reverting his stock back to the party of the first part, and the party of the first part hereby agrees to refund the entire amount paid by said Charles A. Boyle on such stock to him, when such stock shall have been delivered [apparently meaning redelivered or delivered back] to party of the first part."

The notice served by Boyle upon the corporation, and which was introduced in evidence in this case, and of which we have already made mention, recites the agreement between Boyle and the corporation of May 24th, and its terms and conditions; asserts that the agreement has been violated in that the company had not completed the air compressor on or before June 28, 1909; tenders back to the corporation plaintiff's certificate for 2,000 shares of stock; and demands the repayment of the \$500 which he had paid to the corporation, and the return of his note for \$500. This notice tenders 2,000 shares of stock; whereas, the plaintiff appears to have purchased 4,000 shares of stock, but, as no point is made of this discrepancy, we shall not further notice it. This notice is not dated, nor is there anything to indicate when the same was served.

[1, 2] 1. We shall first consider and determine whether, under the pleadings, the plaintiff counted on his judgment against the corporation, as it is held, in *Tabor v. Commercial National Bank*, 62 Fed. 383, 10 C. C. A. 429, he might have done, or whether

he counted on the original obligation. Counsel for plaintiff repeatedly on the trial below vigorously insisted (as indeed he was obliged to do in order to maintain his cause, since the judgment pleaded was not rendered until after the annual report had been filed and the default of the defendants removed) that he was not suing on the judgment. At one point during the course of the trial he used this language: "I am not suing on the judgment. I am suing on the obligation against the officers and directors. I only state that it ripened into a judgment, and became a judgment, for the purpose of showing this situation. * * * And the decree [meaning the decree against the corporation] is simply evidence of the amount of the indebtedness and the judgment. All I have to show here is when the obligation was contracted." We, however, are unable to perceive, under the pleadings, any escape from defendants' contention that the plaintiff did, in fact, notwithstanding the protest of his counsel to the contrary, count upon the judgment against the corporation. And in support of our conclusion we call attention to paragraphs II and V of the complaint, hereinabove set forth. If the plaintiff counted on the judgment as the debt for which he was suing, then the judgment in this case must be reversed, since the judgment against the corporation, pleaded and introduced on this trial, was rendered, as we have said, some five or six days after the defendants had complied with the statute by filing their annual report.

[3] 2. If the defendant counted, as counsel states he did, upon the original obligation, then his complaint was fatally defective for reasons which we shall now proceed to point out. At the threshold of this branch of the discussion it must be borne in mind that a liability of the sort here sued upon is penal, and therefore strictly construed. Both the Supreme Court and Court of Appeals of this state have often so ruled, and we know of no well-adjudicated case to the contrary. In the case of Colorado Fuel & Iron Co. v. Lenhart, 6 Colo. App. 515, 41 Pac. 835, wherein the statute now before us was under consideration, it is said: "But there is another light in which the question may be considered. The statute just invoked is penal in its character. The debt was owing by the Rolling Mills Company, and not by the defendants. Its amount was recoverable from them as a penalty, and not as an indebtedness. They are therefore entitled to a strict construction of the statute. There are no equities in the plaintiff's favor as against them. It is entitled to what the letter of the law gives it, and no more." See, also, Hazelton v. Porter, 17 Colo. App. 1-6, 67 Pac. 170. In Anfenger v. Anzeiger Pub. Co., 9 Colo. 377, 12 Pac. 400, it is said: "The contract of indebtedness, the default of the corporation, and the directorship of the de-

fendants should all be averred, and as of such dates as to show the liability of the defendants under the statute."

[4] A casual examination of those portions of the complaint filed in this case which we have quoted shows clearly that it fails to comply with the requirements of a good complaint in a cause of this kind, under the authorities just cited, since it fails to state when the obligation upon which the complaint is based was incurred. It has been expressly ruled in this state that the liability of directors of a corporation for failure to comply with the statute in the matter of filing annual reports attaches after 60 days from January 1st, and that, according to the plain letter of the statute, "the preceding year," for the debts contracted during which the directors become personally liable, dates from the sixtieth day after January 1st, and extends back 12 months from the date on which the default attaches. *Bradford v. Gulley*, 10 Colo. App. 146, 50 Pac. 314. The plaintiff in this case contented himself with alleging that the obligation incurred by the corporation, upon which he seeks to recover in this case, was incurred during the year 1909; hence, if it were incurred during either January or February of that year, there would be no liability on the part of the defendants.

[5] 3. There is another respect in which the complaint, in our judgment, is insufficient. It is not alleged therein that plaintiff's action was based upon a debt (unless he counted upon the judgment against the corporation, which he expressly disavows); the language of the complaint being, "that the company duly incurred certain obligations." No description whatever appears in the complaint as to the nature or character of the alleged obligation. Our statute, it will be observed, makes the directors liable for failure to file the annual report within the proper time "for all debts of such corporation * * * that shall be contracted during the year next preceding," etc. The word "obligation" and the word "debt" are by no means synonymous terms. Many definitions of the word "debt" will be found in 2 Words and Phrases, p. 1368 et seq. In *Saleno v. City of Neosho*, 127 Mo. 627, 38 S. W. 190, 27 L. R. A. 749, 48 Am. St. Rep. 653, it is said: "A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, dependent upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed." In *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156, this language is used: "'Debts,' as used in Comp. Laws 1857, § 1821, declaring that, on the neglect or refusal of the directors of a manufacturing company to comply with certain provisions of law regarding the filing of their articles of asso-

clation, or filing annual report, the directors shall be jointly and severally liable for all debts of the corporation contracted during the period of such neglect or refusal. Held, that the word 'debt,' as used in the statute, means 'present debts,' and liabilities which may give cause of action against the company and result in judgment against it are not embraced in the provision." In re Putman et al. (D. C.) 193 Fed. 464; Weber v. Draper, 170 Mich. 550, 136 N. W. 596.

From these authorities, and under the strict rule of construction applicable to cases of this sort, we think it is not enough for a complaint to allege that the corporation incurred "certain obligations"; but it must go farther, and plead the nature of these obligations, for the purpose of showing affirmatively that they fall within that class of debts which the statute was designed to cover. Liabilities sounding in tort, for instance, it is generally held, cannot be made the basis of a suit against directors who have failed to file the annual report; some authorities holding that, where such liabilities against the corporation, i. e., liabilities sounding in tort, have ripened into a judgment, the directors are not liable for such judgment.

[6] Moreover, the agreement between the plaintiff and the corporation, out of which the alleged obligation flowed, imposed no certain obligation upon the corporation unless and until the corporation had violated the agreement, and the plaintiff had availed himself of the option in the agreement to tender back the stock which he had received, and demand the repayment to him of the money which he had paid, and the return of the note which he had given. The complaint in this case throws no light whatever upon when, if at all, this agreement had ripened into an obligation, even against the corporation, since it nowhere is pleaded in the complaint that the corporation had failed to comply with any of the obligations imposed upon it by the agreement, or that the plaintiff had elected to avail himself of his option. Indeed, no reference whatever is made to the agreement in the complaint. The agreement provides that the plaintiff should give to the corporation a bankable note, but it is not alleged that he did so; that he should pay \$500 in cash, but it is not alleged in the complaint that he did so. In other words, for aught that appears in the complaint, the alleged obligations which, it is asserted, the corporation incurred may well have sprung from a tort.

[7] 4. Plaintiff, in his brief, contends that, if the complaint be defective, it was aided by the proof. But, turning to the proof, we find it to be quite as fatally defective as the com-

plaint itself. If the plaintiff, as he says, was suing on the original obligation, we see no necessity for him having introduced the decree in the first case. But, if the decree was competent, it was inadmissible in evidence in this case, because it was not accompanied by the judgment roll—only the complaint on which it was based was offered in connection with it—and the objection of the defendants to its introduction should have been sustained. In *Terry v. Gibson*, 23 Colo. App. 273, 128 Pac. 1127, we held that, where a judgment is relied upon as an estoppel, or as an adjudication of certain facts, it must be accompanied by the judgment roll, i. e., "the complaint and summons, and, according to the weight of authority, the return of service." Not even by way of recital in the decree against the corporation is it made to appear, either that the corporation had been served with summons, or had voluntarily, or in any other way, appeared. The amended complaint itself, on which the decree against the corporation was based, cannot be taken as proof of the allegations in the complaint upon which this case was tried. Plaintiff relies upon, and quotes at length from, *Tabor v. Commercial National Bank*, 62 Fed. 383, 10 C. C. A. 429, a case from this district, wherein the statute before us was under consideration. A careful reading of the opinion in that case will make clear its inapplicability, for the following reasons: (a) The plaintiff in the *Tabor Case* unequivocally counted on a judgment theretofore obtained against the corporation; (b) to the introduction of the judgment roll in that case the plaintiff in error, defendant below, objected, but assigned no ground for his objection; (c) the assignment of error that the court erred in finding for the defendant in error, plaintiff below, rested upon a futile exception; (d) the court expressly found in that case that there was no question of the time when the debt in question was incurred, because the corporation never filed any reports, and the plaintiff in error became liable for all its debts; (e) it is stated in the opinion that "the court below rendered judgment against the plaintiff in error for one of the debts of the corporation"; (f) the whole case is bottomed upon the conclusion of the court that a judgment had been counted on, and that a judgment is a debt of a corporation.

For the reasons pointed out, we are convinced that the complaint in this case was fatally defective, and that the evidence was wholly insufficient to sustain the judgment: hence the judgment of the trial court will be reversed, and the cause remanded, and it is so ordered.

Reversed and remanded.

TOWN OF MEEKER v. FAIRFIELD.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. EVIDENCE (§ 472*)—OPINION EVIDENCE—CONDITION OF SIDEWALK.

It is reversible error to permit a witness to give his opinion as to the existence or non-existence of ultimate facts which are to be determined only by the jury unless such witness is testifying as a qualified expert or his testimony involves a description or estimate of condition, dimension, value, etc., or when from the nature of the subject of inquiry it is difficult or impossible to state with sufficient exactness, or in detail, the facts and their surroundings in such a manner as to produce upon the minds of the jury the impression that a personal observation has produced on the mind of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195, 2248; Dec. Dig. § 472.*]

2. TRIAL (§§ 105, 412*)—WAIVER OF ERROR—ADMISSION OF EVIDENCE.

In an action against a town for personal injuries from a fall on the sidewalk, where the defendant throughout the trial, without objection, permitted witnesses for plaintiff to give their opinion as to the dangerous construction of the walk and upon direct examination interrogated its own witnesses upon the same subject and elicited their unqualified opinion as to such fact, the defendant waived its right to predicate reversible error upon the court's refusal to exclude the cumulative opinion evidence over its objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 260-266, 974-977; Dec. Dig. §§ 105, 412.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a town for personal injuries from a fall upon a crosswalk, where opinion evidence as to its condition was received with and without objection, and there was evidence by both parties as to the dangerous construction of the walk, and the jury made a personal examination when it was in the same general condition as at the time of the accident, error in admitting opinion evidence over defendant's objection could not be held prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

4. MUNICIPAL CORPORATIONS (§ 818*)—ACTION FOR PERSONAL INJURIES—CONDITION AFTER ACCIDENT.

In an action against a town for personal injuries from falling upon a crosswalk, the admission of evidence that soon after the accident sand and gravel were placed on the crosswalk in order to make it more level and presumably safer for pedestrians was error.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

5. TRIAL (§§ 105, 412*)—WAIVER OF ERROR—ADMISSION OF EVIDENCE.

Such error was waived by defendant where it pursued the same course after the trial and without objection permitted plaintiff's witnesses to so testify and in addition interrogated its own witnesses on their direct examination as to the same fact and established by them the fact that it did place the sand on the crosswalk after the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 260-266, 974-977; Dec. Dig. §§ 105, 412.*]

6. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error, if any, in the admission of such evidence over objection was without prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

7. MUNICIPAL CORPORATIONS (§ 818*)—ACTIONS FOR PERSONAL INJURIES—EVIDENCE—NOTICE.

In an action against a town for personal injuries from a fall on a crosswalk, evidence that prior to the accident to plaintiff other persons had slipped and fallen upon the same walk was admissible only on the issue of defendant's notice of the condition of the crosswalk and not to establish negligence on the part of the defendant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

8. TRIAL (§ 207*)—INSTRUCTIONS—REQUESTED INSTRUCTION.

Where a party thinks that the jury might have misunderstood the real purpose for which evidence was admitted, he was entitled to submit a special instruction for the consideration of the court upon that point.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 498, 499, 501; Dec. Dig. § 207.*]

9. TRIAL (§ 86*)—ADMISSIBILITY—ADMISSIBLE IN PART.

If evidence is competent and admissible for one purpose, though it might be considered incompetent for another, it is admissible for the purpose of applying it to the issues of fact which it is competent to sustain.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 226; Dec. Dig. § 86.*]

Appeal from District Court, Rio Blanco County; John T. Shumate, Judge.

Action by Matilda F. Fairfield against the Town of Meeker. Judgment for plaintiff, and defendant appeals. Affirmed.

James C. Gentry, of Meeker, for appellant. Edward C. Stimson, of Denver, for appellee.

HURLBUT, J. Action begun May 23, 1910, by appellee, as plaintiff, against appellant, seeking to recover a judgment for personal injuries received from falling upon a crosswalk in the town of Meeker. Plaintiff recovered judgment, from which this appeal is prosecuted.

The evidence tends to show that on or about November 15, 1909, plaintiff started to cross Sixth street on a crosswalk (covered with snow and ice) which had been constructed by the town; that after passing over about one-half of the same she slipped and fell, thereby breaking her leg; that she was confined to her bed some six weeks and suffered considerable pain; and that the injury was of a serious and permanent nature. It is charged in the complaint that defendant constructed said crosswalk unskillfully, negligently, and carelessly, and in such manner that the same was dangerous to pedestrians walking thereon; and it is also charged that the crosswalk was constructed of cement or a kind of mortar,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

laid and finished in an oval form or shape, which, if covered with snow or ice, would likely cause pedestrians to slip and fall thereon. The answer denies liability on the part of plaintiff and alleges that, if plaintiff was injured in using the walk, it was by reason of her own negligence and not by reason of any negligence on the part of defendant.

Many witnesses testified at the trial. The most serious claim of error contended for by appellant is that the jury's verdict was based principally upon opinion evidence admitted at the trial over defendant's objections, and its brief appears to be almost entirely directed to this contention. There are one or two other objections raised by appellant which we will hereafter notice. It is clearly shown that a number of witnesses for plaintiff were permitted, over objection of defendant, to testify that in their opinion the crosswalk upon which plaintiff sustained her injuries was of faulty construction and dangerous for pedestrians using the same.

Appellee in her brief rather intimates error in the court's ruling but contends that the admission of such opinion evidence was not prejudicial to defendant's rights because (as claimed) defendant waived the right to question such rulings by permitting other evidence of the same character to be introduced without objection and by subsequently introducing evidence itself of the same character. She therefore invokes the rule that "errors committed in the admission of evidence which is affirmatively shown by the record to be not prejudicial will not warrant reversal of the judgment." She further contends that if incompetent testimony was received, over objection, still, if it appears elsewhere in the record that the same facts had been introduced in evidence without objection, appellant cannot complain. This is one of the decisive issues presented. As a sample of the evidence admitted over objection, we extract the following from the record, viz.:

From the testimony of George Suttles, plaintiff's witness, on direct examination: "Q. State whether in your judgment those crosswalks are safe or dangerous crosswalks. (Objection. Overruled.) A. According to the condition of the weather. If they are wet I consider them not safe."

From plaintiff's witness Harley Suttles, direct examination: "Q. Mr. Suttles, is that a dangerous crossing? (Objection. Overruled.) Q. Is that a dangerous sidewalk to pedestrians crossing it? A. Yes, sir."

From plaintiff's witness Joy, direct examination: "Q. State whether it is dangerous from its manner of construction, dangerous to pedestrians passing over it. (Objection. Overruled.) A. I should think it was."

Other witnesses for plaintiff testified to the same effect, over defendant's objection. The following questions, however, were propounded to plaintiff's witnesses, on direct ex-

amination, and answered, without any objections whatever from defendant, viz.:

Witness Mellinger, on direct examination: "Q. State whether, as a matter of fact, in your judgment, the manner in which those crossings are constructed, that they are dangerous to pedestrians crossing over them, persons walking over them. A. In my judgment? Q. Yes. A. I think they are. Q. Why? A. On account of the shape of them. Q. Just state to the jury all about it, and why. A. They are too oval. Q. Is it from the manner in which they are constructed that they are dangerous? A. I think so, at times." On cross-examination defendant fully interrogated the witness concerning the above testimony.

Also from direct examination of plaintiff's witness Miller: "Q. From the manner in which it is constructed is that walk, in your opinion, dangerous to pedestrians crossing over it? A. Well, I think it has a little crown, a little bit too much. I think it would be a little bit dangerous there in wet weather, or snow."

Defendant's witness Lindow testified on direct examination as follows; Mr. Gentry, defendant's attorney, interrogating: "Q. But generally speaking, from your experience and observation of the construction of similar crossings, this particular crosswalk, state whether it is safe or dangerous, in your opinion. A. That is a pretty broad question to answer; for myself I can say it is safe, because I never fell on it. Q. Can you say whether or not it is dangerous? A. Well, I can't say that it is dangerous."

Other similar questions were, by defendant, propounded to and answered by its own witnesses.

From the foregoing it will be seen that the opinion of witnesses, of both plaintiff and defendant, was elicited, without objection, as to whether or not the crosswalk was dangerously constructed, and cross-examination was freely indulged in by both parties as to the experience and qualification of such witnesses, without objection.

As to when and under what circumstances witnesses (expert or nonexpert) will be permitted to give their opinion upon ultimate facts which are exclusively within the province of the jury to determine, we have a number of decisions of our own Supreme Court to guide us.

In Colo. C. & I. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251, it was held that it was error to permit a witness, over objection, to state whether or not in his opinion the roof of the mine was properly secured at the time the deceased was at work. The court said: "This was not a case which called for expert testimony on that subject. The answer of the witness, which was naturally adverse to the company, tended to determine the thing which was the very essence of the action, to wit, the negligence of the company. This was a question for the jury to determine un-

der all the evidence. It was a matter which, when the facts were before them, they could as well decide as the witnesses themselves, and the case was not brought within the rule which permits the opinions of witnesses to be given to the jury in place of the facts on which those opinions must of necessity be based."

In *D. T. & Ft. W. R. Co. v. Pulaski I. D. Co.*, 19 Colo. 367, 35 Pac. 910, the court said: "It is insisted by counsel for appellant that the testimony was inadmissible because the mere opinion of witnesses who were not expert. While the general rule is that the opinion of a witness is inadmissible except when the inquiry involves a question of skill or science, and the witness possesses a peculiar knowledge of the subject, acquired by study or experience, there are well-recognized exceptions to the rule, and among these exceptions are instances which involve a description or estimate of magnitude, size, dimension, velocity, value, etc., and when, from the nature of the subject under investigation, it is difficult or impossible to state with sufficient exactness, or in detail, the facts, with their surroundings, in such a manner as to produce upon the minds of the jury the impression that a personal observation has produced upon the mind of the witness." Also in point: *Smuggler U. M. Co. v. Broderick*, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106; *R. G. W. R. Co. v. Boyd*, 44 Colo. 119, 96 Pac. 781; *Nichols v. C. B. & Q. R. R. Co.*, 44 Colo. 501, 98 Pac. 808; *D. & R. G. Ry. Co. v. Reiter*, 47 Colo. 417, 107 Pac. 1100.

[1] From the foregoing authority it seems to be the established rule that it is reversible error to permit a witness to give his opinion as to the existence or nonexistence of ultimate facts, which are to be determined only by the jury, unless such witness is testifying as a qualified expert, or his testimony involves "a description or estimate of magnitude, size, dimension, velocity, value, etc., or when, from the nature of the subject under investigation, it is difficult or impossible to state with sufficient exactness, or in detail, the facts, with their surroundings, in such a manner as to produce upon the minds of the jury the impression that a personal observation has produced upon the mind of the witness." If nothing appeared in this record upon this question but the interrogatories propounded to plaintiff's witnesses concerning their opinion as to the dangerous or faulty construction of the crosswalk, with proper objection thereto by defendant, and the overruling of the same by the court, this judgment would have to be reversed. Such, however, is not the case.

[2] As above shown, defendant, throughout the trial, not only permitted, without objection, one witness after another to give his opinion as to the dangerous construction of the crosswalk, but upon direct examination interrogated its own witnesses upon the same

subject and elicited from them their unqualified opinion concerning that fact. Under these conditions defendant must be held to have waived its right to predicate reversible error upon the refusal of the court to exclude the cumulative opinion evidence admitted over its objection. Our own appellate courts, as well as those of other jurisdictions, have repeatedly passed upon this question, and we find them practically unanimous as supporting our conclusions.

From page 42, vol. 9, *Encyclopedia of Evidence*, we quote: "Thus the failure to sustain an objection to improper evidence is not prejudicial error where ample evidence to the same effect, establishing the same facts, has been admitted without objection, or, it has been held, where other evidence of the same fact has been introduced unchallenged."

In *D. & R. G. R. R. Co. v. Morrison*, 3 Colo. App. 194, 32 Pac. 859, a similar question being before the court, it was said: "The contention was abandoned on argument, because the record disclosed that the objection was not preserved save by an exception to the testimony given by one witness, and the whole subject has been antecedently embraced in what has been offered and received without objection. Counsel very properly conceded that the force of the objection was destroyed, and that no valid error could be predicated on the ruling of the court."

Moynahan v. Perkins, 36 Colo. 481, 85 Pac. 1132, 10 Ann. Cas. 1061, involved the same point. The court said: "But however this may be, its admission in any event would not have constituted prejudicial error, since the plaintiff testified to the value of his services without any objection to his qualification," etc.

In *Scott S. & T. Co. v. Roberts*, 42 Colo. 280, 93 Pac. 1123, in passing upon a question like the one before us, the Supreme Court used this language: "Counsel for plaintiff in error * * * assigns as error the ruling of the court in admitting testimony offered by the defendant as to the construction that should be placed upon the written contract above mentioned. Whether the court erred in this particular we do not feel called upon to determine, since the plaintiff is not in a position to avail itself of this objection, having on its own behalf introduced testimony of the same tenor and effect." To the same effect: *Bouknight v. Charlotte*, etc., R. R. Co., 41 S. C. 415, 19 S. E. 915; *B. & O. R. Co. v. State*, Use Chambers, 81 Md. 371, 32 Atl. 201; *Seay et al. v. Fennell et al.*, 15 Tex. Civ. App. 261, 39 S. W. 181; *McCaffery v. St. L. & M. R. Ry. Co.*, 192 Mo. 144, 90 S. W. 816; *Olmstead v. City of Red Cloud*, 86 Neb. 528, 125 N. W. 1101; *Pratt v. Seamans*, 43 Colo. 517, 95 Pac. 929.

[3] In the light of the authorities cited, as applied to the facts before us, we think the error of the trial court in admitting some

of the objectionable testimony referred to, over defendant's objection, was not prejudicial. The record shows that there was about as much opinion evidence received without objection as was admitted over objection. The jury listened to opinion evidence of both parties, one affirming, the other denying, the dangerous construction of the crosswalk. They then made a personal examination of the same before rendering their verdict (the evidence showing that the walk was in the same general condition at the time of trial as at the time of the accident). Under this aspect of the case it would be difficult to assert and maintain that the opinion evidence which was admitted over objection, although error, was prejudicial to defendant's rights. No fair presumption could be indulged in to that effect. Defendant having elected to pit the force and effect of the opinion evidence introduced by it upon the character of the crosswalk construction, against that of plaintiff, should not be heard, after an adverse finding by the jury, to insist that the error complained of was prejudicial.

[4, 5] Appellant also insists that it is entitled to a reversal because of error of the trial court in admitting, over its objection, other testimony to the effect that, soon after the accident, sand and gravel were hauled and placed on the crosswalk by appellant in order to make it more level and presumably safer for pedestrians using it. The record discloses that defendant pursued the same course at the trial, concerning this evidence, as that adopted by it concerning opinion evidence admitted over its objection (that is to say, it permitted other witnesses of plaintiff to testify, without objection, that after the accident defendant hauled and placed sand on the crosswalk to make it safer for use by pedestrians), and in addition interrogated its own witnesses on their direct examination as to the same fact, and established by them the fact that defendant did place the sand on the crosswalk after the accident. We again say that, had defendant at the trial squarely stood upon its right to have such testimony excluded and, when offered, had objected and saved its exception to the court's ruling in receiving it and gone no further, the judgment could not be upheld; but, having pursued the course above shown, it waived its right in that regard. In personal injury cases a party charged with negligence in causing an accident should not be put in the apparent position of admitting negligence on its part upon mere proof that after the accident such party had taken reasonable and commendable steps to repair the thing causing the injury in order to avoid possibility thereafter of similar accidents. Such action should receive the approval and encouragement of the courts rather than necessitate the enforce-

ment of a rule which subjects the party to a penalty for so doing.

[6] Here, however, defendant permitted such evidence to be introduced without objection, and afterwards, of its own motion, on original examination of its witnesses, interrogated them and brought out the same facts. The authorities heretofore cited are in point also on this question and seem to uniformly hold that under such circumstances, if the court erred in admitting such testimony, over objection, it was without prejudice.

[7] The consideration of one more question will dispose of this appeal. Appellant contends that the court committed reversible error in permitting witnesses to testify that, prior to the accident, other persons had slipped and fallen upon this same crosswalk. Appellee claims that such evidence was admitted only for the purpose of showing knowledge of, and notice to, the municipal authorities of the character and condition of the crosswalk, and not to establish negligence on the part of defendant. In this case there was an issue before the jury as to whether or not the city had notice and knowledge, prior to the time of the accident, of the dangerous condition and construction of the crosswalk. It was therefore proper for plaintiff to introduce evidence upon this point, and the jury were entitled to consider it for that purpose only.

[8] Had defendant feared that the jury might have misunderstood the real purpose for which this evidence was admitted and believed themselves authorized to consider it as proof of negligence, it would have been entitled to submit a special instruction for the consideration of the court upon that point. This was not done.

[9] It seems to be well settled that if evidence is competent and admissible for one purpose, though it might be considered incompetent for another, it is admissible for the purpose of applying it to the issues of fact which it is competent to sustain. *Encyclopedia of Evidence*, vol. 8, p. 188; *Dillon's Municipal Corporations*, vol. 2, § 1025.

The case of *Hotchkiss Mt. M. & R. Co. v. Bruner*, 42 Colo. 305, 94 Pac. 331, was based upon the death of an employé who was killed while descending into the company's mine. Evidence had been admitted, over objection, to show that a previous accident had occurred at the same point shortly before the one causing the employé's death. The court held that the admission of this testimony was not error, and said: "It is also contended that the court erred in admitting testimony of a previous accident and one which occurred shortly before the one involved. This testimony was admissible for the purpose of showing knowledge on the part of the defendant that the existing conditions were dangerous"—citing cases.

The recent case of *Griffith v. City and County of Denver* (Sup.) 132 Pac. 57, was one grow-

ing out of injuries sustained by a pedestrian while walking upon one of the city's sidewalks. Justice Bailey rendered the opinion of the court and disposed of the issues before the court by clear and forceful reasoning; some of such issues being almost identical with one or more involved in the present case. In that case it was held not to be error for the trial court to exclude from evidence testimony that other persons had slipped and fallen upon the sidewalk prior to the time of the accident. But it appears in the opinion that the question of notice to, and knowledge of, the city, concerning the alleged dangerous condition of the sidewalk for some time prior to the accident, was not an issue in the case, and for that reason it was held that such evidence was inadmissible. The court said: "The defendant, for answer to the complaint, admitted knowledge and notice of the condition and manner of construction of the walk, but, alleged that it was a reasonably safe one," etc.

In the instant case, however, this matter was a direct issue, as such notice and knowledge, prior to the accident, on the part of the city, had been pleaded in the complaint and denied in the answer. The court further said in the Griffith Case: "Bearing in mind that the testimony of former accidents was offered for the purpose of proving negligence and could not have been properly offered for any other purpose, as that was the sole issue. * * * And in Denver City Tramway Co. v. Cowan, 51 Colo. 64, 116 Pac. 136, it is said: 'The general rule is that, when a party is sued for damages arising from a particular act of negligence imputed to him, disconnected, though similar, negligence acts are inadmissible. A different rule applies when the purpose of the evidence is to establish a previous and continuous defective or dangerous condition of a thing and knowledge or notice thereof upon the part of the person sought to be charged, or perhaps when its purpose is to charge one with notice of another's incompetency, and probably in a few other instances not necessary to notice here.'"

District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618, was an action for personal injuries received from falling on a sidewalk. It was there objected by defendant that the admission of evidence of other people slipping and falling upon the sidewalk at the same place, prior to the time of the accident complained of, was reversible error. The Supreme Court disposed of the contention adversely to defendant and held the evidence admissible as tending to show the dangerous character of the place where the injury occurred and to show notice on the part of the city of that fact.

There are some other minor questions raised, not necessary to consider. The case appears to have been fairly tried. The record in no way intimates prejudice or passion

on behalf of the jury or that the substantial rights of defendant have been invaded.

Judgment affirmed.

R. W. ENGLISH LUMBER CO. v. HIREEN.
(Court of Appeals of Colorado. Nov. 10, 1913.)

1. APPEAL AND ERROR (§ 193*)—PLEADINGS—AMENDMENTS REGARDED AS MADE.

Where a complaint attempting to state a cause of action for money had and received was insufficient but was not attacked by demurrer or by objection to the evidence on the ground of its insufficiency, and the evidence was amply sufficient to support the verdict for plaintiff as for money had and received, the judgment would not be reversed, since where, upon a proper application, it would be the duty of the trial court to permit a complaint to be amended to correspond with the proof, it will be treated on appeal as so amended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.*]

2. CORPORATIONS (§ 426*)—UNAUTHORIZED ACTS—LIABILITY.

Where a person loaned money to a corporation, taking its note executed by its manager, who had no authority to borrow money and give its note, under the honest belief that the manager had such authority, and the money went into the corporation's bank account and was checked out in the usual course of business and so appropriated by it, the lender could recover it from the corporation in a suit for money had and received, since to sustain such action it is only necessary to show that defendant has obtained money which in equity and right it ought to return.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.*]

3. APPEAL AND ERROR (§ 1099*)—FORMER DECISION AS LAW OF THE CASE.

In an action for money had and received, the holding of the Supreme Court on a former appeal that to sustain such action it was necessary only to show that defendant had obtained money which in equity and right it ought to return was the law of the case on a subsequent appeal to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

Appeal from District Court, Otero County; J. E. Rizer, Judge.

Action by Amanda Hireen against the R. W. English Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

George C. Manly, of Denver, for appellant. O. G. Hess, of La Junta, for appellee.

PER CURIAM. This case has previously been before the Supreme Court. Hireen v. R. W. English Lumber Co., 46 Colo. 216, 104 Pac. 84. The case was carefully considered in the Supreme Court, and, as the facts are there clearly stated, a repetition is not required at our hands. There appears to have been no new evidence offered on the second trial, which resulted in the judgment from which this appeal now before us was taken.

[1] The only matter not common to both

appeals grows out of the amendment to the complaint which plaintiff, under permission given by the Supreme Court, made prior to the last trial. Some question was made on the former appeal as to whether the complaint stated a cause of action for money had and received, and, while the court did not hold the complaint defective in that respect, it permitted the plaintiff to amend her complaint, if she desired so to do. Pursuant to this permission, presumably plaintiff did amend her complaint by adding thereto a third cause of action on which she attempted to state a cause of action for money had and received, but which, instead of stating the facts constituting her cause of action in plain and concise language, as required by our Code, conclusions of law were stated, and therefore the complaint, perhaps, failed to state a good cause of action under the Code; nor was it in common-law form a declaration for money had and received. However, conceding this cause of action was not well pleaded, its sufficiency was not attacked by demurrer or by objection to the evidence on the ground that the complaint did not state a cause of action as for money had and received.

[2] The evidence shows beyond controversy that the plaintiff paid to the defendant \$500, taking a promissory note, under an honest but mistaken belief that the note was executed by an agent of the defendant authorized to borrow money for the defendant and give its promise for payment; that the money so paid to the defendant went into its bank account and was checked out in the usual course of business and so appropriated by it. It was further shown that the agent, although manager of the defendant's business, exceeded his authority in borrowing the money and giving defendant's note therefor. Under these circumstances, it would be inequitable and unjust to permit the defendant to enrich itself by retaining the money of the plaintiff, paid to it by plaintiff under a mistake of fact. Such has frequently been held to be the law, and suit for money had and received maintained. *Keener, Quasi Contracts*, pp. 114, 115. In *Deery v. Hamilton*, 41 Iowa, 18, it is said: "The estate has received the benefit of the money which was advanced by defendant. It ought in good conscience to repay it with legal interest. This is not required because of the contract under which the money was borrowed, which is invalid, but on the ground that the estate has had the benefit of the money received from defendant."

[3] Our Supreme Court, when this case was before it, held that, to sustain an action for money had and received, it is only necessary to show that the defendant has obtained money which in equity and right it ought to return. *Hireen v. English Lumber Co.*, supra. That announcement is in har-

mony with the authorities hereinabove cited and, having been announced by our Supreme Court in the former consideration of this case, may well be said to be the law of the case. The evidence was amply sufficient to support the verdict of the jury upon a proper plea of a cause of action for money had and received, and it would be an idle waste of time and of money, and wholly without advantage to appellant, to return the case to the trial court for further amendment; substantial justice having been done. *Colorado Springs Co. v. Allen*, 48 Colo. 4-8, 108 Pac. 990. It has frequently been ruled that where, upon a proper application interposed in apt time, it would become the duty of the trial court to permit a complaint to be amended to correspond with the proof, it will be the duty of a court of review to treat the complaint as so amended. *Merritt v. Hummer*, 21 Colo. App. 568, 122 Pac. 816; *Lang v. Crescent Coal Co.*, 44 Wash. 267, 87 Pac. 261.

Judgment affirmed.

In re PAUL.

McKIBBIN v. PAUL.

(Court of Appeals of Colorado. Nov. 10, 1913.)

ACKNOWLEDGMENT (§ 39*)—CERTIFICATE OF AUTHORITY—STATUTE.

Rev. St. 1908, § 684, referring to the method of acknowledging written instruments purporting to convey land in this state, by subdivision 1 enumerates the officials having power to take acknowledgments, by subdivision 2, those authorized to take acknowledgments out of the state but within the United States, not including justices of the peace, and further provides that acknowledgments may be taken before any other officer authorized by the laws of any such state to take and certify such acknowledgments, provided that there shall be affixed thereto a certificate of the clerk of some court of record of the county, etc., wherein such officer resides, under the seal of that court, that the officer is the officer he assumes to be, with authority to take such acknowledgment, and that his signature thereto is a true signature. A deed purported to have been acknowledged in a county of the state of Indiana, by a justice of the peace for that county, and attached thereto was a certificate by the clerk of the circuit court that the justice was on that date a justice of the peace for such county, that his signature was genuine, and his official act entitled to credit. Held that, as the clerk's certificate did not affirmatively show the justice's authority, the purported acknowledgment was defective and the deed without proper proof of its execution.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 244-254; Dec. Dig. § 39.*]

Appeal from District Court, Phillips County; H. P. Burke, Judge.

Application by C. E. Paul to register title to land, opposed by R. G. McKibbin and by E. N. McPherrin. Decree for plaintiff, and defendant McKibbin appeals. Affirmed.

Allen & Webster, of Denver, for appellant. Munson & Munson, of Sterling, for appellee.

HURLBUT, J. June 22, 1908, C. E. Paul, as applicant, filed his petition in the district court of Phillips county, praying the court to determine and declare his title to the S. E. $\frac{1}{4}$ of section 31, township 8 N., range 42 W., situate in Phillips county, Colo., and for an order requiring registration of the same. The petition was founded upon an act of the Legislature (Session Laws 1903, p. 311 et seq.) sometimes spoken of as the "Torrrens Land Registration Act." The petition appears to conform to the statute, and alleges in part that the deed conveying the land from Frederick D. Hasler to appellant McKibbin was filed for record June 5, 1908, but the same was of no force or effect against applicant because he was a bona fide purchaser for value, without notice of the deed to McKibbin. To this petition McKibbin, appellant, filed an answer, alleging among other things that the applicant had no legal or equitable right to have his title registered; that he (McKibbin) owned all right, title, and interest in and to the land; that the applicant Paul claimed an interest in the premises by virtue of a tax deed which was void on its face and void in fact, for the reason that no proper notice of the sale of the land had been given; and that the land was sold at tax sale to Phillips county on the first day thereof. It is further alleged that applicant also claims title by virtue of a quitclaim deed from one F. D. Hasler, patentee, to S. H. Johnson, dated February 9, 1908, and a warranty deed from said Johnson to applicant; that, prior to the execution of the deed from Hasler to Johnson, Hasler, the then patent owner of the premises, on December 5, 1907, executed his warranty deed to McKibbin for the land; that neither Johnson nor applicant were bona fide purchasers of the land as against McKibbin's unrecorded deed; and that defendant is the sole owner of the premises against whom there exists no enforceable claim, estate, interest, or title, in and to the premises. Applicant by replication denied all new matters alleged in McKibbin's answer. There was also an answer filed to applicant's petition by one E. N. McPherrin, claiming an interest in the land by virtue of two mortgages; but, as the issue tendered is not involved in this appeal, no further notice will be given to it. The case was tried to the court and decree rendered in favor of applicant, therein adjudging the title to the land to be in him and ordering its registration, subject to the two mortgages under which McPherrin claims, declaring, however, that such mortgages were not a lien upon the premises. This appeal is prosecuted from said decree.

Appellant in the first paragraph of his brief informs us that he will discuss but one question on this appeal, being that which relates to the ruling of the trial court in excluding from evidence the said warranty deed from Hasler to appellant. We will take appellant at his word and devote our atten-

tion solely to this question. As above shown, this deed bears date December 5, 1907, and purports to have been executed and delivered that day. The grantor therein is F. D. Hasler, and the grantee R. G. McKibbin, and it is in every respect a warranty deed. It purports to have been acknowledged in Greene county, state of Indiana, on the day of its date, by Lafe Scott, justice of the peace in and for that county. The deed has attached to it a certificate by Clyde O. Yoho, clerk of the circuit court of said Greene county, and reads as follows: "State of Indiana, Greene County—ss.: I, Clyde O. Yoho, clerk of the circuit court, within and for Greene county, state of Indiana, do hereby certify that Lafe Scott, whose certificate of acknowledgment appears to the instrument of writing to which this is attached, was on the date and at the time of making such certificate, to wit, the 5th day of December, 1907, a justice of the peace (he was appointed to take oath of office September 29, 1896, and has been acting since that date to the present time) within and for said Greene county, duly commissioned and qualified, whose term of office began on the 29th day of September, 1896, and will expire on the — day of —, 19—, and that full effect and credit ought to be given to his official acts, and that the signature purporting to be his is genuine. In witness of which I have hereunto affixed the seal of said court and subscribed my name at Bloomfield, Indiana, this 23d day of December, A. D. 1907. Clyde O. Yoho. [Official Seal.] Filed for record the 5th day of June, A. D. 1908, at 11:30 o'clock a. m. Leon Kepler, Clerk, by Mattie Slagle, Deputy." When the record of the deed was offered in evidence, applicant objected to its introduction for several reasons; the only one necessary to notice being "that there is no certificate attached to this, as provided by our statute, showing the authority of the justice of the peace to take acknowledgments in Indiana where the deed is executed." Section 684, Revised Statutes 1908 refers to the manner and method of acknowledging or providing written instruments purporting to convey land or any interest therein, located in this state. The first subdivision of the section enumerates what officials have power to take acknowledgments of such instruments when executed within this state; the third, how acknowledgments are to be taken in foreign countries and beyond the limits of the United States. The second enumerates those who are authorized to take acknowledgments of such instruments out of this state but within the United States (as in the case before us). In the list of officials enumerated as possessing such authority, justices of the peace do not appear. After enumerating by official title what officers may take such acknowledgments, the statute continues: "Before any other officer authorized by the laws of any such state or territory to take and certify such ac-

knowledgments; provided, there shall be affixed to the certificate of such officer, other than those above enumerated, a certificate by the clerk of some court of record of the county, city or district, wherein such officer resides, under the seal of such court, that the person certifying such acknowledgment is the officer he assumes to be; that he has the authority, by the laws of such state or territory, to take and certify such acknowledgment, and that the signature of such officer to the certificate of acknowledgment is the true signature of such officer."

The record fails to disclose any other proof of the execution of the deed than that contained in the deed itself, leaving but one question to decide, viz., Was the certificate of Yoho, clerk of the circuit court, sufficient in form and recital to comply with our statute and render the acknowledgment effective as proof of the execution of the deed? From the statute above quoted it is plain that the Legislature intended to provide a method of taking acknowledgments to written instruments, not only in our own state but in every state or territory of the Union, as well as in foreign countries. A justice of the peace not being mentioned in the statute as a proper officer before whom acknowledgments may be taken in a sister state or territory, it becomes necessary, by force of the statute, that, if such official in another state assumes to certify an acknowledgment of a deed conveying real property in Colorado, the certificate of a clerk of a court of record in such state must, under the seal of the court, affirmatively show that the justice of the peace is authorized under the laws of that state to take and certify such acknowledgment. The omission of such a statement in the clerk's certificate renders the purported acknowledgment defective and insufficient, and leaves the deed lacking in proper proof of its execution. We do not think such statement must necessarily be in the identical language of the statute, but it must be so clear and unequivocal that it can be readily seen from the clerk's certificate that the officer certifying to the acknowledgment had power or authority under the laws of his state to act.

Appellant's counsel urgently insists that the phrase found in the clerk's certificate, viz., "that full effect and credit ought to be given to his (justice of the peace) official acts," is tantamount to a statement that the justice of the peace had authority by the laws of Indiana to take and certify the acknowledgment. Appellant does not favor us with any citation from any text-book or decision in support of his contention. The statement of the clerk that the official acts of the justice of the peace are entitled to full faith and credit conveys no information as to whether or not the justice had authority under the laws of Indiana to take and certify acknowledgments. This information is

just what the Legislature required should appear in the clerk's certificate to establish due execution of the deed and entitle it to admission in evidence without further proof of its execution. A justice of the peace in Indiana probably has power and authority to perform many and divers official acts, among which may or may not be that of taking and certifying acknowledgments to written instruments. The information required to appear in the clerk's certificate is not whether or not faith and credit should be given to the official acts of the justice of the peace, but, rather, did he have authority under the laws of the state of Indiana to take and certify an acknowledgment to a deed. This power is necessary to the validity of an acknowledgment to a deed, taken in a sister state, when the deed purports to convey land in Colorado, and, if this power is not clearly shown by the clerk's certificate, the acknowledgment is defective and leaves the deed wanting in proof of its execution. It cannot be contended that the court will presume a justice of the peace in a sister state or territory has authority to take acknowledgments to written instruments. The Legislature certainly did not indulge in any such presumption, for it required a certificate of an officer of a court of record to impart the information required under the seal of the court. The clerk's certificate was fatally defective, and insufficient to show a proper acknowledgment of the deed; therefore the trial court ruled correctly in excluding it from evidence. The following cited cases are somewhat in point upon the question under consideration: *Buckmaster v. Job*, 15 Ill. 328; *Tully v. Davis*, 30 Ill. 103, 83 Am. Dec. 179.

The record showing the judgment to be right, the same will be affirmed.

Judgment affirmed.

GERMAN-AMERICAN INS. CO. v. MESSENGER.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. INSURANCE (§ 165*) — CONSTRUCTION OF CONTRACT—PROPERTY COVERED.

In an action on a fire insurance policy on the stock of a farm implement business, including that in the building and additions adjoining, and that "in yard, and on platforms in rear and alley adjoining" the building, it appeared that insured had no yard room immediately adjoining his building or anywhere except a vacant lot diagonally across the street, and that he offered to go over with the insurer's agent and look at the goods there, but the agent said he knew what was there, for which reason they did not go. *Held*, that a grain separator standing on the vacant lot was included in the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 351; Dec. Dig. § 165.*]

2. INSURANCE (§ 146*) — CONSTRUCTION OF CONTRACT.

A contract of fire insurance is one of indemnity, and where loss occurs thereunder it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

will be given the construction which is most probable and natural under the circumstances, so as to attain the object the parties had in making it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.*]

3. APPEAL AND ERROR (§ 1099*) — LAW OF CASE.

The decision of the Supreme Court on a former appeal as to the admissibility of evidence, so far as applicable, becomes the law of the case on a subsequent appeal to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

Appeal from District Court, Denver County; Greeley W. Whitford, Judge.

Action by K. E. Messenger against the German-American Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sylvester G. Williams, of Denver, for appellant. John R. Smith and H. B. Woods, both of Denver, for appellee.

BELL, J. The appellant insurance company insured the appellee against loss by fire under the following provisions in the policy: "The following described property while located and contained as described herein, and not elsewhere, to wit: \$1,400 on all his stock of merchandise, chiefly agricultural implements, engines, and supplies, their equipments and extra parts of all kinds and descriptions, knocked down or set up, and all other merchandise kept by him, including boxes and packings for and containing same, and packing materials, his own or held by him in trust or on commission, or on storage, or for repair, or sold but not delivered, or for which he may be legally liable; * * * \$100 on his office and store-room furniture and fixtures of all kinds and descriptions, including advertising materials, circulars, catalogues, cuts, counters, shelving, showcases, typewriters, safes, carpets, scales, trucks, linoleums, office stationery, and supplies, cash registers, letter files and presses, signs and awnings in and upon building, and on such betterments and improvements to the building as may have been made by the assured (lessee) and recognized by the lessor in the lease as being the property of the assured, all while contained in the two story and basement composition roofed brick building and additions, adjoining and communicating, situate No. 1710 (Map No. 1712) Fifteenth street, Denver, Colorado, occupied for mercantile purposes. This policy shall cover all merchandise and goods with their spare parts as described, while located in above described building, vaults, showcases, windows, vestibules, under sidewalks, or upon sidewalks, in yard, on platforms in rear and alley adjoining above described building, and in railroad cars on tracks immediately adjacent thereto."

[1] The pivotal question before us for decision is whether a grain separator, which stood on a vacant lot diagonally across the street from the building mentioned and described in the provisions of the policy above recited, is included in the policy.

The appellee testified at the trial that August 9, 1906, he was engaged in the farm implement business, corner of Fifteenth and Wynkoop streets, Denver, and had a grain separator about 10x25 feet standing on a lot which he had used for 14 years for storing machinery; that his office building was at 1710 Fifteenth street, 25x60 feet; that he had no yard room whatever immediately adjoining the office building or elsewhere, except diagonally across the street as aforesaid; that the value of the separator was from \$750 to \$800; that an employé or soliciting agent of the appellant company called upon him at his office and solicited the policy in suit, and at that time the assured stood at his office window and pointed to the place where the separator stood and said to him, according to his testimony, which is as follows: "We will go over and look over these goods," and the gentleman's reply to me was: "I have been through those lots a dozen times and I know what is on there as well as you do," and he and I did not go over. We did not go over together, he went away and later on mailed me this policy, and I put the policy in my safe and in due time sent him a check for the money, and the matter lay until I had this fire." He further testified that this conversation took place the day the policy was solicited and written in his office; that the agent who wrote the policy called on him at his office occasionally, and he thought that he paid him a premium. The regularly appointed agent of the company was Frederick W. Standart, who testified that the policy was a renewed annual policy, and was written from the records in his office, the first having issued from May 30, 1904, the second from May 30, 1905, and the last, or one in suit, from May 30, 1906, to May 30, 1907; that he never solicited the risk; that it was a part of the business of the office when he took the agency; that he could not remember what he did or how the policy was written in this specific case, and stated, as his opinion, that the description in the policy would not include the separator.

The testimony shows that a horse corral immediately adjoined the building on the rear, and that the assured had no yard room, except where the separator stood. There is no dispute that the assured and the soliciting agent or employé arranged for the insurance. Mr. Frederick W. Standart testified that he knew nothing about the property intended to be covered, except what was disclosed in former policies of which the one here under consideration was a renewal.

The printed part of the policy purports to cover all merchandise in yard adjoining the building. The term "adjoining the building" was construed by the Supreme Court, when this case was before it on a former appeal (*Messenger v. German-American Insurance Co.*, 47 Colo. 449-455, 107 Pac. 643, 646), as follows: "From the language employed in the policy the most that can be claimed for it, with respect to the yard, is that it was a yard adjoining the building, but this does not necessarily mean adjoining to or on, but, according to the circumstances, may be intended to denote that to which it refers as being 'near,' 'close by,' 'neighboring,' or 'not far from.' Under such description, the only way to definitely determine the location of the yard mentioned, or what ground was intended to be embraced under that designation in the policy, is to ascertain from the facts and circumstances surrounding the transaction what ground plaintiff was using outside the building specified, upon which to store his agricultural implements at the time they were listed by the agents of the company and the policy in suit was issued. Following this course enables us to ascertain what ground was meant by the term 'in yard,' and construing the yard mentioned in the policy as the one which plaintiff was using when the company issued its policy results in giving the contract a construction which is perfectly natural and probable, effectuates the object the parties had in contemplation in making it, and does no violence to any language employed in the policy, because it is only by resorting to the circumstances connected with and surrounding the transaction that the intent of the parties with respect to the location of the yard can be determined."

Under the evidence as it now stands, it would seem unconscionable to permit the company to avoid responsibility on this policy after the assured pointed out the yard where the separator stood, and offered to go and show it to the soliciting agent, who refused to be shown, saying that he knew as much about the yard and machinery as the assured did, and afterward the company issued the

policy, and collected the premium therefor in pursuance of the arrangement made with the agent. It must be borne in mind that the agents of the companies write these policies, and deliver them to the assured after being informed of the situs of the property, and it is the duty of the companies to give explicit descriptions of the property pointed out and intended to be insured, and, if they fail to do so, it would be unjust to permit them to take advantage of their own neglect and escape responsibility. The courts should hold as done that which the parties intended to do.

[2] It is a well-established doctrine in this state that a contract of fire insurance is one of indemnity, and, when loss occurs under such a contract, it will be given that construction which is most probable and natural under the circumstances, so as to attain the object the parties had in making it. *St. L. Co. v. Tierney*, 5 Colo. 582; *O. F. & I. Co. v. Pryor*, 25 Colo. 540, 57 Pac. 51; *Messenger v. G. A. I. Co.*, 47 Colo. 448-453, 107 Pac. 643.

[3] This case was taken to the Supreme Court on a former appeal from a decision of the district court excluding evidence of alleged circumstances attending the making of the contract, including what was said and done at the time of the execution of the policy, and the Supreme Court held that such evidence as was tendered should have been admitted, and, assuming that the evidence tendered might be given on a new trial, settled the law on most, if not all, legal points involved in this hearing, and that decision, as far as pertinent, becomes the law of this case. *Grand Lodge A. O. U. W. v. Taylor*, 131 Pac. 783-784; *First Nat. Bk. of Ouray v. Shank*, 53 Colo. 446, 128 Pac. 56-60.

The evidence actually introduced in the trial court did not altogether conform to that tendered at the former trial; nevertheless, we think it sufficiently approached the evidence tendered as to make the judgment of the Supreme Court controlling in the trial, and the trial court so held, and we see no reversible error in the record. Therefore the judgment is affirmed.

SPOKANE CASKET CO. v. MITCHELL et al.
(Supreme Court of Washington. Nov. 26, 1913.)

1. DAMAGES (§ 62*)—DUTY TO MINIMIZE—EVIDENCE.

In an action for damages from the obstruction of a street, a demurrage charge on a shipment of lumber which plaintiff was prevented from hauling to its factory could not be recovered in the absence of evidence showing what a reasonable charge for storage would have been had such lumber been removed from the cars, or what the additional cartage would have been, since plaintiff was bound to use reasonable efforts to minimize his damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 119-131; Dec. Dig. § 62.*]

2. DAMAGES (§ 184*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action for obstructing a street compelling plaintiff to close its factory, assuming that overhead charges, including salaries of employees, might be recovered, they could not be recovered where the evidence showed that some of the employees performed services of some benefit to plaintiff, but did not segregate such items.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 502; Dec. Dig. § 184.*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the Spokane Casket Company against Albert L. Mitchell and another, co-partners doing business as Mitchell Bros. Judgment for defendants, and plaintiff appeals. Affirmed.

Tolman & King, of Spokane, for appellant. Danson, Williams & Danson and George D. Lantz, all of Spokane, for respondents.

MAIN, J. The purpose of this action was to recover damages alleged to have been sustained by the unreasonable obstruction of a street.

During the year 1910 the defendants entered into a contract with the city of Spokane for the improvement of Water avenue and Huron street. This improvement consisted in the grading of the streets mentioned, the building of retaining walls, and the lowering of the sewer which had previously been laid. The work was begun during the latter part of the month of June or the early part of July of that year. The evidence does not show the exact date.

At and prior to this time the plaintiff was a corporation engaged in the business of manufacturing caskets and jobbing undertakers supplies. Its factory was located at 1610 to 1620 Water avenue, and abutted upon the proposed improvement. In its factory the plaintiff used considerable quantities of lumber and other supplies which were transported to it by teams and wagons. In like manner the products of the factory were conveyed to shipping points or places of delivery within the city. The only practical way for such travel and teaming was via Huron street and Water avenue. There was another way over Ontario street and Main avenue; but this was unsuited to heavy hauling.

There was evidence that the defendants, after having commenced the work upon the streets, did not prosecute it with reasonable diligence. From September 6th to the 13th inclusive the street was in such a condition that the plaintiff could not haul thereover the products of its factory. During this time only emergency orders were filled which could be taken out in light loads. The factory was closed, because the storage room had been filled to its capacity. From the early part of September until the 15th of October the plaintiff was unable to haul lumber to its factory due to the condition of the streets. During the early part of September a number of car loads of lumber were received in the freight yards of the Great Northern Railway Company, consigned to the plaintiff. Owing to the fact that the streets were in such a condition that this lumber could not be hauled to the factory, it was permitted to remain in the cars until the 15th day of October, for which delay in unloading a demurrage charge was paid in the sum of \$206.

This was one of the items of damage which the plaintiff sought to recover. The evidence which was offered in support of this claim was extremely general. Giving the plaintiff the benefit of its most favorable construction, it went no further than an offer to show the amount of the demurrage charge paid. To the introduction of this evidence an objection was interposed and sustained by the court.

On account of the closing down of the factory for the time already mentioned, damage is claimed for what is termed "overhead charges." This consisted of salaries of employees, interest, insurance, and taxes. The employees whose salaries were included in the overhead charges were the teamster, shipping clerk, bookkeeper, superintendent, four or five men who were the foremen of different departments, and one traveling salesman. During the week that the factory was shut down these employees were all at the factory. The teamster looked after his team, and was working. The shipping clerk attended to some local deliveries in the city. The bookkeeper was in her office, and earned her salary. The superintendent and the foreman took care of telegraphic and telephone orders which came in. The traveling salesman was out on the road taking orders the same as at any other time. There is no evidence showing loss of business or profits. Orders which came in during this time were subsequently filled.

The cause was tried to the court and a jury. At the conclusion of the plaintiff's evidence the defendant challenged the legal sufficiency thereof, and moved the court for judgment in its favor. This motion was granted, and judgment entered dismissing the action. The plaintiff appeals.

It is claimed that the evidence which was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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introduced was sufficient to carry the case to the jury on the question as to whether or not the streets were unreasonably or unnecessarily obstructed. It will be assumed, but not decided, that this position is correct.

[1] The first question to be determined is whether or not the court committed error in not permitting the plaintiff to prove the demurrage charge. As already stated, the evidence was general, and only sought to prove the demurrage as such. There was no evidence tendered showing what the reasonable charge for storage would have been during the time had the lumber been removed from the cars. Neither was there any showing as to what the additional cartage would have been.

There is a well-known rule of law which requires a party to use reasonable efforts to minimize his damages. Had it been shown what the expense of storage and additional cartage would have been, and that these sums would not have exceeded the amount of the demurrage, a different question would be presented. It seems plain that demurrage, as such, could not be the correct measure of damages. Assume, for the sake of argument, that the consignee of a car load of flour permitted it to remain in the car for the period of six weeks, and that the demurrage would amount to the sum of \$100, while the expense of removal and storage would have amounted to only \$25. Can it be said in such a case that the demurrage would be the just measure of the damages sustained?

[2] Relative to the matter of overhead charges: The evidence establishes the amount of these expenses per day, and the number of days that the plant was idle. But it appears that some of the items which were included in the overhead charges were not a loss to the appellant. The traveling man was working as usual. The teamster delivered light orders from time to time. And other employes were performing services which were of some benefit to the appellant. Even assuming that overhead charges may be recovered as damages, obviously where the evidence does not segregate from the total of such charges items included therein which were not a loss, there would not be sufficient evidence upon which a jury could base a verdict.

The judgment will be affirmed.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

STATE ex rel. MURPHY v. WRIGHT,
Superior Court Judge.

(Supreme Court of Washington. Nov. 15, 1913.)

1. PROHIBITION (§ 3*)—ADEQUACY OF REMEDY BY APPEAL.

The adequacy of the remedy by appeal in the ordinary course of law is the test to be ap-

plied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

2. JUDGMENT (§ 735*)—RES JUDICATA—MUNICIPAL ASSESSMENTS.

Although the contractor for a municipal improvement, upon mandamus to compel the city to levy a special assessment upon the property in the district sufficient to pay the contract price, had a judgment therein requiring the levy of an assessment upon the property benefited, and although thereafter objections to the assessment were filed by numerous property owners who, after a confirmatory ordinance, applied to the superior court and brought injunction to restrain the collection thereof, such adjudication in the first place could go no farther than to determine the liability of owners to assessment, and under Rem. & Bal. Code, § 7961 (Laws 1911, c. 98, § 21), they still had the right to contest before the commissioners the amount of the assessment levied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263, 1265; Dec. Dig. § 735.*]

3. MUNICIPAL CORPORATIONS (§ 518*)—ASSESSMENT—INTEREST.

Interest on the contract price of a municipal improvement was collectible from the date of the commissioners' approval of the assessment roll.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1218, 1219; Dec. Dig. § 518.*]

4. PROHIBITION (§ 3*)—GROUNDS—SUFFICIENCY OF REMEDY BY APPEAL.

Where interest on the contract price was still running in favor of a contractor for a municipal improvement, his remedy by appeal, in cases appealed by owners from the order of confirmation and for an injunction against collection of the assessment, in the event of their wrongful determination would be adequate, and hence he was not entitled to a writ of prohibition against such actions.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Department 2. Original application for prohibition by the State of Washington, on the relation of W. J. Murphy, against Edward H. Wright, sitting as judge of the Superior Court of Lewis County. Denied.

Boyle, Brockway & Boyle, of Tacoma, for appellant. C. A. Studebaker and Preston & Thorgrimson, all of Seattle, for respondent.

MOUNT, J. This is an application for a writ prohibiting the respondent from proceeding with the hearing or making any order in two certain causes now pending in the superior court of Lewis county, one an injunction suit brought by C. L. Brown and wife against the city of Chehalis to enjoin the city from proceeding to collect assessments levied by the city upon property in a sewer improvement district; the other an appeal by certain property owners from an order of the city commissioners levying such assessments. It appears from the record before us that heretofore the city of Chehalis created an improvement district for the purpose of constructing a sewer to be paid for by the property benefited. A contract was let to one W. J. Murphy to con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

struct the sewer. The sewer was subsequently constructed. Afterwards a contention arose between the city and the contractor as to whether the sewer was constructed in substantial conformance with the contract. The contractor thereupon brought an action in mandamus to compel the city to levy a special assessment upon the property in the district sufficient to pay the contract price. That action was defended by the city and resulted in a judgment requiring the mayor and commissioners of the city to levy an assessment upon the property benefited. *State ex rel. Murphy v. Coleman*, 71 Wash. 15, 127 Pac. 568. In that case we sustained the action and affirmed the judgment of the lower court. Thereafter the city gave notice of its intention to levy the assessment, and a roll was prepared, to which objections were filed by numerous property owners. The matter was heard by the commission, which made certain findings or statements, and concluded by passing an ordinance confirming the assessment roll. Thereafter certain of the property owners appealed to the superior court from this confirmation, and Brown and wife brought an action to enjoin the city from proceeding to collect the assessment, alleging that the property had not been benefited; that the sewer was not constructed in substantial performance of the contract; and alleging fraud and collusion between the engineer employed by the city to supervise the work of the contractor, and the contractor. The contractor, W. J. Murphy, was notified of these actions and was by the city required to appear and defend them. Thereupon the relator, being the original contractor, applied to this court for a writ of prohibition.

It is argued by the relator that the trial court has no jurisdiction; that the issues in the case of *State ex rel. Murphy v. Coleman*, supra, were finally determined in that action; that the issues there made and litigated are the same as the ones that the property owners are now endeavoring to relitigate; that the judgment in that case is res judicata of the issues there made, or which could or should have been made, and the judgment therein is final; that all questions which can be raised upon the appeal from the ordinance passed by the city commission confirming the assessment roll levying an assessment upon the property, and in the action for an injunction, were all decided in the case of *State ex rel. Murphy v. Coleman*, supra, and are final and binding upon the property owners.

[1] It is conceded by the relator that the rule in *State ex rel. Miller v. Superior Court of Spokane County*, 40 Wash. 555, 82 Pac. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep.

925, to the effect that the adequacy of the remedy by appeal in the ordinary course of law is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction. But it is contended that the remedy by appeal in the cases pending before the superior court of Lewis county, namely, *Brown and Wife v. City of Chehalis*, and the appeals from the ordinance passed by the city commission to the superior court, is not an adequate remedy by reason of the fact that no provision is made for interest which may accrue upon the contract price for the construction of the sewer; that this interest amounts to about \$4,000 per year, and will be lost to the relator by lapse of time in case he is required to appeal those cases.

[2] We think there can be no doubt that if the issues adjudicated in *State ex rel. Murphy v. Coleman*, supra, were finally decided and are binding upon the property owners, still the property owners have the right to contest before the commissioners the amount of the assessment levied against their lots. The statute gives them this right. *Rem. & Bal. Code*, § 7961; *Laws 1911*, § 21, p. 452. The adjudication in the case above mentioned did not and could not go further than to determine the liability of the property owners to pay the cost of the improvement to the extent of the benefits received by their property, and they clearly have the right under the statute to have that question determined in the proper forum.

[3] At the hearing upon this application, counsel for the respondent did not dispute that interest might be collected from the date of the approval of the assessment roll. And we are of the opinion that interest begins to run from that date. *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448. And that if the relator shall finally be successful, and the property is found to be benefited in the amount of the assessment, that he will be entitled to recover his contract price, together with interest from that time.

[4] This being true, interest is now running, and his remedy by appeal in those cases, if they shall be wrongfully determined, will be adequate.

Whether the issues in *State ex rel. Murphy v. Coleman*, supra, are res judicata of the questions set up in the injunction case must be pleaded and determined in that case. We are of the opinion therefore that the relator has an adequate remedy by appeal.

The writ is therefore denied.

CROW, C. J., and FULLERTON, MORRIS, and PARKER, JJ., concur.

STOFFERAN et ux. v. OKANOGAN COUNTY et al.

(Supreme Court of Washington. Nov. 1, 1913.)

1. APPEAL AND ERROR (§ 1008*)—FINDINGS OF TRIAL COURT—WEIGHT.

Where the trial court did not hear the evidence, its findings are not entitled to the same weight which would be given to the findings of a judge who heard the evidence, especially where, on trial de novo, the Supreme Court passes upon the same record upon which the trial court bases its decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

2. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

The irregular entry of additional findings could not be prejudicial where the judge who made all of the findings did not hear the evidence, so that his findings are not entitled to the usual weight on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting a letter purporting to be a certificate of the record of plaintiff's filing in the land office for the land in controversy would not be prejudicial where the oral testimony sufficiently established plaintiff's right to possession subject only to the paramount rights of the United States.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

4. PUBLIC LANDS (§ 35*)—HOMESTEAD.

An intention to take possession of public land as an additional homestead would give the possessor right of possession as against mere trespassers; proof of complete title not being necessary as against them.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

5. PUBLIC LANDS (§ 64*)—CONSTRUCTION OF HIGHWAYS—GRANT OF RIGHT.

Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), providing that the right of way for highways over public lands not reserved for public uses "is hereby granted," did not operate as a grant in present; the grant not taking effect until the highway is established under some public law.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 222-225; Dec. Dig. § 64.*]

6. PUBLIC LANDS (§ 64*)—ESTABLISHMENT—PRESCRIPTION.

Public highways may be established over public lands, pursuant to Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), either by use by the public for not less than 7 years, if work is kept up at the public expense pursuant to Rem. & Bal. Code, § 5657, or, where not so maintained, by continued use by the public for the 10-year period of limitation for quieting title to land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 222-225; Dec. Dig. § 64.*]

7. PUBLIC LANDS (§ 64*)—HIGHWAYS—ESTABLISHMENT—LAND "RESERVED FOR PUBLIC USE."

Since the Indians are wards of the nation, the reservation of public lands for their use is a reservation for "public use" within Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), granting the right of way for constructing highways over public lands not reserved for public uses, so that the statute would not operate as a

grant of right of way for a highway over an Indian reservation until the land was thrown open for settlement, in view of Act March 3, 1901, c. 832, § 4, 31 Stat. 1085, authorizing the Secretary of the Interior to grant permission to the state authorities for establishing highways through an Indian reservation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 222-225; Dec. Dig. § 64.*]

8. PUBLIC LANDS (§ 64*)—ESTABLISHMENT.

Act of 1903 (Laws 1903, c. 103; Rem. & Bal. Code) § 5607, authorizing the boards of county commissioners to accept grants of rights of way for highways over public lands not reserved for public uses, and providing the width of the highways, and section 5608, ratifying any action theretofore taken by the boards purporting to accept such grants, would not make a general resolution of a board accepting the grant for the county such an acceptance as would give the county complete title to a highway over public lands until it was actually established in a recognized legal manner, such as by prescription, etc.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 222-225; Dec. Dig. § 64.*]

Department 2. Appeal from Superior Court, Okanogan County; R. S. Steiner, Judge.

Action by Louis Stofferan and wife against Okanogan County and another. From a judgment for defendants, plaintiffs appeal. Reversed, and remanded for judgment for plaintiffs.

P. D. Smith, of Conconully, for appellants. J. W. Faulkner and Neal & Neal, all of Conconully, for respondents.

ELLIS, J. The plaintiffs brought this action to restrain the defendants from cutting their fences or interfering with their property rights in the southeast quarter of the southeast quarter of section 22, township 38 N., range 28 E. W. M. It is admitted that until October 10, 1900, this land was a part of the Colville Indian reservation, at which time the reservation was thrown open to settlement. Prior to that time, since 1896, it had been open to mineral location, and there were a good many people in that locality even then, though few actual settlers until 1900. There appears to have been some sort of a road across this land long prior to any occupancy thereof by the plaintiffs. Prior to the government survey, the defendant Lanoue occupied this 40 acres, and it is admitted that he fenced it, maintaining gates or bars across the road. As to whether or not these gates were always open to the public, there was a direct conflict in the evidence. Lanoue and other witnesses testified that they were; the plaintiff and one other witness that they were often locked. The plaintiffs claim that on September 22, 1909, the plaintiff husband filed an application in the United States land office at Waterville for the location of scrip for soldier's additional homestead on this 40 acres. In July, 1910, he built a fence across the road in controversy, prohibiting travel thereon. Shortly afterward Lanoue, under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

direction of the county commissioners, cut the wires of this fence, claiming the road as a public highway, and plaintiffs brought this action.

The complaint alleged, in substance, that the plaintiffs were the owners, subject to the paramount title of the United States, of the land in question; that the defendants unlawfully entered upon the land, and destroyed the plaintiffs' fences; that no public highway has ever been established over this route—and prayed for an injunction perpetually restraining the defendants from interfering with the fences, or trespassing on the land, and for damages in the sum of \$100 and costs. The answer alleged that the road in question has been for over 11 years last past a public highway and county road; that the plaintiffs wrongfully erected the fences; that the defendants did no injury to the fences except to cut them where necessary; that this road has been used as a public highway since 1895; that, by virtue of section 2477, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1567), the public has a vested right to the road; that no part of the land in question has been reserved for public uses or purposes; that the county commissioners, by resolution, accepted the grant of roads over the public domain granted by the above-mentioned statute; and that for more than 11 years last past the public has been "in open, notorious, peaceable, exclusive, uninterrupted, and adverse possession and use of said public highway under a bona fide claim of right thereto"—and prayed for the recognition of a right of way 60 feet wide as a public highway, and that the plaintiffs be restrained from interfering therewith, and for costs. The reply put in issue these affirmative matters.

The cause was tried before Hon. Ernest Peck, late judge of the superior court of Okanogan county, who died before rendering a decision. His successor being disqualified, the record of the trial was, on stipulation of the parties, submitted to the Hon. R. S. Steiner, another superior judge, for decision. Judge Steiner made findings to the effect that the road in question had been continuously traveled as a public road and highway at all times since the year 1895 until closed by the plaintiffs; that it was plainly marked upon the ground, and in a good state of repair; that no part of the land claimed by the plaintiffs has been reserved by the United States for any public use; that on August 11, 1903, the county commissioners of Okanogan county passed the following resolution: "On motion of Commissioner Rosenfelt, seconded by Commissioner Wehe, the following order is unanimously adopted: Be it remembered, that on the 11th day of August, A. D. 1903, at a regular meeting of the board of county commissioners in and for Okanogan county, state of Washington, said meeting being duly held, and all members of said board being present, on motion it was ordered and re-

solved that the right of way for the construction of highways over public lands as granted by act of Congress (section 2477, Revised Statutes of the United States) be and the same is hereby accepted, as far as said grant relates to said Okanogan county, state of Washington; that is to say, to the extent of 30 feet on each side of the center line of all wagon roads which now exist or which have heretofore existed upon or across or over lands that are now public lands of the United States, not reserved for public uses in said Okanogan county, Washington"—that during all times since 1895, except for about 4 days when interrupted by the action of the plaintiffs, the general public has been in "open, notorious, peaceable, exclusive, uninterrupted, and absolute use and possession of said road and highway, at all times claiming a legal right thereto as and for a public highway"; that the plaintiffs claim some right to the land over which the road passes, but the evidence does not establish any vested right in the plaintiffs to such land. On appropriate conclusions, the court entered a decree that the plaintiffs take nothing by this action, and that the defendant Okanogan county recover from the plaintiffs its costs; that the road in question is now, and has been at all times since 1895, a public road and highway of the defendant county; that the plaintiffs have no right, title, or interest in the roadway extending across the land in question, as the same existed and was used at the time of the commencement of this action; and that the title to the roadway as a public highway be quieted in the defendant county—and enjoined the plaintiffs from obstructing or interfering with it to the extent of 30 feet on each side of the center line thereof. From the decree, the plaintiffs prosecute this appeal.

[1, 2] After the signing of the decree, the court, at the instance of the appellants, made certain other findings, which the respondents move to strike. Since this is a trial de novo, in which we are passing upon the same record upon which the lower court based his decree, and since the lower court himself did not hear the evidence, his findings are not entitled to the same weight which would be accorded findings made by a judge who heard the evidence. Under such circumstances, these additional findings, though irregularly entered, cannot be prejudicial. The motion is denied.

1. On the merits, the respondents contend that the decree should be affirmed, because the plaintiffs showed no title to the land over which the road passed. The evidence of title and right to possession introduced by the plaintiffs was, in substance, as follows: The plaintiff husband testified that he bought and applied certain soldier's additional homestead scrip by filing upon this land; that, pursuant to his filing, he received from the United States land office at Waterville notices to be posted, and posted one upon the land,

and published one in the *Riverside Argus*, received the affidavit of publication, and forwarded it to the United States land office at Waterville—all of which was done under printed and written instructions from the land office. He further testified that at that time he went into possession, and fenced the land. The plaintiffs, over objection that it was not the best evidence, introduced a letter to their attorney from the register of the United States land office at Waterville, which reads as follows:

"Department of the Interior, United States Land Office, Waterville, Wash., September 12, 1910. Mr. P. D. Smith, Conconully, Wash.—Sir: Louis Stofferan filed a Soldier's Additional Homestead Application, 06864, on September 22, 1909, for the lot 6, S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. 22, T. 36 N., R. 28 E. W. M. and the same was transmitted to the General Land Office at Washington, D. C., from which nothing further has been heard in this office. This application segregates the land from further filing. I hereby certify that the above is a true and literal exemplification of the records in the above case. W. F. Haynes, Register."

[3, 4] It will be noted that this letter purports to be a certificate or exemplification of the record of the plaintiff's filing in the local land office, and it is authenticated only by what purports to be the signature of the officer by whom it is signed. Assuming, without deciding, that it is not an exemplified copy within the terms of the federal statute or of any statute of this state, its admission would not change the result. Its admission could not be prejudicial, since the oral testimony was sufficient to establish the rightfulness of the appellants' entry and possession of the land, subject only to the paramount rights of the United States, as against all persons showing no better right. It established a bona fide intention to take the land as an additional homestead, which was sufficient to sustain the right of possession as against mere trespassers. Without regard to this certificate, we think the parol testimony of Stofferan himself was competent and sufficient to show the origin, inception, and rightfulness of his possession. It has been held that the actual date of the filing of such an application by the assignee of soldier's additional homestead scrip may be proved by parol even to contradict an indorsement upon the papers themselves in the land office, in order to show rightful possession as against a trespass committed prior to the filing date shown upon such papers. *Hastay v. Bonness*, 84 Minn. 120, 86 N. W. 896. It was not incumbent upon the appellants to prove complete title. A right of possession only was requisite.

"While the plaintiff did not acquire full title to the land through her application, yet, if the same was valid and authorized by law, it entitled her to an inchoate interest therein, and a right of possession as against

trespassers." *Hastay v. Bonness*, 84 Minn. 120, 124, 86 N. W. 896, 897.

"It is claimed, however, that an entry under the homestead law gives the settler no vested rights in the land until the issue of the patent. To this we cannot assent. We are aware that it has been authoritatively decided, in *Frisbie v. Whitney*, 9 Wall. 187 [19 L. Ed. 668], and the *Yosemite Valley Case*, 15 Wall. 77 [21 L. Ed. 82], that occupation and improvement on public lands with a view of pre-emption do not confer any vested right in the land as against the United States; that this is only obtained when the purchase money has been paid and the receipt of the land office given to the purchaser. This is put upon the ground that until such time the proposed pre-emptor has merely a right to be preferred in the purchase over others, provided a sale is made by the United States. But a homesteader, after entry, occupies an entirely different position. He has in fact purchased. His entry, which is made by making and filing an affidavit and paying the sum required by law, is a contract of purchase which gives him an inchoate title to the land, which is property. This is a substantial and vested right which can only be defeated by his failure to perform the conditions annexed." *Red River & Lake of the Woods R. Co. v. Sture*, 32 Minn. 95, 98, 20 N. W. 229, 230; *Enoch v. Spokane Falls & Northern Ry. Co.*, 6 Wash. 393, 33 Pac. 966.

The appellants' proof of interest was sufficient to put the respondents to proof of a better title in the county, if it had one.

[5] 2. The county's title to the right of way, if it has any, must be traced to the grant from the general government found in section 2477 of the Revised Statutes of the United States, which reads as follows: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This court first held that grant to be a grant in present immediately effective upon user by the public without the necessity of formal action on the part of the state. *Okanogan County v. Cheetham*, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027. In the more recent case of *McAllister v. Okanogan County*, 51 Wash. 647, 100 Pac. 146, 24 L. R. A. (N. S.) 764, this court reconsidered the character of the grant, and overruled the *Cheetham Case* in so far as it held the grant to be one in present. In the *McAllister Case*, it is said: "The second contention [that the grant is one in present] undoubtedly finds support in the comparatively recent case from this court of *Okanogan County v. Cheetham*, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027. In this case, while perhaps not strictly necessary to a decision of the questions presented, it was said that the grant of the right of way made by this act was a grant in present, and cases were cited which held, under grants containing similar expressions, that a present

Interest passed by such grant, which took effect as of the date of the grant whenever the land granted was definitely located. But, on further consideration, we have reached the conclusion that this is not a correct construction of the act. * * * The act, in all of its essential features, is a law rather than a conveyance. It is a grant in the sense that the Oregon donation act, the pre-emption act, and the homestead act, are grants, and subject to the rules that govern such acts; that is to say, the grant in each of these several acts becomes complete upon a compliance with the terms of the act, and the grant dates, at the earliest, from the time the initiatory steps are taken which ripen into the completed title. * * * So the grant in question here remains in abeyance until a highway is established under some public law authorizing its establishment, and takes effect as a grant from that time." The respondent earnestly urges that we now overrule the McAllister decision, and return to our holding in the Cheetham Case; but a thorough reconsideration of the question convinces us that the McAllister Case is correct, both upon reason and authority.

[6] The appellant contends that, since the act of Congress referred to is not a grant in present, it can only be available by the establishment of the road by the county commissioners upon application by petition of at least 10 householders of the county residing in the vicinity of the proposed road, as provided in Rem. & Bal. Code, §§ 5623, 5624, et seq., citing in support of that view *Tucson Consol. Copper Co. v. Reese*, 12 Ariz. 226, 100 Pac. 777; but in that case it was held that, under the laws of Arizona, no road could be established except under a statute similar to that contained in the sections of our statute above cited. In this state, however, we have repeatedly held that roads may be established by prescription by the use by the public for a period of not less than 7 years, where the same have been worked and kept up at the expense of the public, as provided in Rem. & Bal. Code, § 5657, or, where not so kept up at the public expense, simply by continued use by the public for a period co-extensive with the period of limitation for quieting title to land, which is, in this state, 10 years. *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 615; *Cheetham v. Okanogan County*, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027; *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858. It will be noted that the Cheetham Case is not overruled by the McAllister Case in this respect, as is shown by the following language from the latter case: "Whether the county can, under the act of 1903 above quoted, establish a highway across unsurveyed public land by marking the way on the ground and declaring the way marked a highway by resolution, we need not here inquire. We are clear that it can-

not do so as against the interests of the respondent. As to him, a highway must be established after the manner prescribed in the act of 1895, and the acts amendatory thereof, or by user for such a period as will ripen into a prescriptive right." It is plain that, under the authority of the foregoing decisions, a public highway in this state may be just as effectually established by prescription as by order of the county commissioners on petition.

In *Smith v. Mitchell*, supra, this court held that, under Revised Statutes of the United States, § 2477, above quoted, the establishment of highways over public lands may be made in any of the ways recognized by the law of the state in which such lands are located, and that in this state such highways may be established by prescription, dedication, or user, as well as by proceedings under the state statute by petition. The net result of our decisions, therefore, is that the United States statute takes effect as a grant only when the res comes into being; that is, when the road has been established on petition as prescribed by our statute, or by prescription prior to the attaching of any adverse rights upon the public lands over which it passes.

[7] The evidence in this case wholly fails to show that the road here in question was ever established by proceedings pursuant to petition under the statute. It also fails to show that any work has ever been done upon this road by the county, or at the expense of the county. In fact, there is no serious claim that this road could be maintained as a public road under the 7-year statute. Rem. & Bal. Code, § 5657. It is plain, therefore, that the county has shown no title or right to this road unless it be by reason of continuous use for a period coextensive with the period of limitation for quieting title; that is to say, for 10 years. It is clearly established, and the fact is not mooted, that the land here in question was a part of the Indian reservation, which was not thrown open for settlement until October 10, 1900. Prior to that time it was reserved for the use of the Indians. The Indians are wards of the government, and the reservation of public lands for their use would seem clearly to be a reservation for public use, so that, until the reservation was thrown open for settlement, the land here in question did not come within the purview of the grant contained in section 2477 of the Revised Statutes of the United States. This view is further borne out by the fact that prior to March 3, 1901, Congress had provided no method for the construction of public highways on Indian reservations. Section 4 of the act of that date (chapter 832, 31 Stat. 1085) provides: "That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local

authorities for the opening and establishment of public highways, in accordance with the laws of the state or territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation." This section would have been useless if section 2477, which was passed in 1866, applied to Indian reservations. Section 2339 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1437) gives the right to appropriate waters and rights of way for irrigation, mining, and manufacturing purposes across the public lands; but we have held that no such right can be acquired in lands included within an Indian reservation prior to its being thrown open for public settlement. *Avery v. Johnson*, 59 Wash. 332, 109 Pac. 1028. It would seem plain that, by parity of reason, no user by the public, however long continued, of the right of way here in question prior to the opening of the reservation for settlement on October 10, 1900, could inure to the benefit of the county under section 2477 of the Revised Statutes. Assuming that the evidence fully established an open, notorious, and adverse use of this land by the public at all times since the opening of the reservation to settlement until the appellants made their filing and went into possession of the 40 acres here in question, and even until they built their fence across the road in July, 1910, the period is still some months short of the prescriptive period fixed by analogy to the 10-year statute of limitations. Since the grant contained in section 2477 is not a grant in present, it could only attach upon the acquiring of title by the complete lapse of the period of prescription subsequent to the opening of the reservation for settlement and prior to the attachment of any adverse rights.

[8] The respondent, however, contends that, under the act of 1903 (Laws 1903, c. 103; Rem. & Bal. Code, §§ 5607, 5608), the general resolution of the board of county commissioners of Okanogan county entered on August 11, 1903, was such an acceptance of the grant as gave the county complete title from that date. Under our holding in *McAllister v. Okanogan County*, this position is untenable. The right could only attach as a vested interest in the county upon the establishment of the road in some manner recognized by the laws of this state. The act of 1903 was merely intended as an authorization to the boards of county commissioners of the various counties of this state to avail themselves of the grant by the establishment of roads across public lands of the United States not reserved for public use.

We are constrained to hold that there was sufficient evidence in this case to establish a

right to possession in the appellants prior to any vested right in the respondent county, and that the respondent has shown no right to the road in question as a public highway.

The judgment is reversed, and the case is remanded, with direction that the injunction issue as prayed for.

CROW, C. J., and MORRIS, MAIN, and FULLERTON, JJ., concur.

In re CITY OF SEATTLE.

CITY OF SEATTLE v. GATTON et ux.

(Supreme Court of Washington. Nov. 22, 1913.)

1. MUNICIPAL CORPORATIONS (§ 472*)—PUBLIC IMPROVEMENTS—ASSESSMENT—ARBITRARY.

An assessment of benefits for the opening of streets which took part of appellant's land is arbitrary and excessive, where the benefits assessed against appellant's land were three times those assessed against the land directly opposite.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1120; Dec. Dig. § 472.*]

2. JURY (§ 19*)—CONDEMNATION—AWARD OF DAMAGES.

A party whose property is taken for the widening of streets is entitled to have his damages assessed by a jury's verdict, and after that verdict has been confirmed by judgment it must be given full faith and credit.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

3. MUNICIPAL CORPORATIONS (§ 508*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS.

The action of the eminent domain commission in assessing benefits for the widening of a public street will not be disturbed by the courts unless it acted arbitrarily or fraudulently or proceeded on a fundamentally wrong basis.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1181, 1182; Dec. Dig. § 508.*]

4. MUNICIPAL CORPORATIONS (§ 473*)—PUBLIC IMPROVEMENTS—BENEFITS.

Where a street was widened by the taking of plaintiff's land, the eminent domain commission proceeded upon a fundamentally wrong basis when it charged back against the remainder of appellant's land the amount of the condemnation award made by the jury and then assessed full benefits on the remainder; for the verdict of the jury as to the amount of damages in the condemnation proceeding is conclusive.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1121; Dec. Dig. § 473.*]

5. MUNICIPAL CORPORATIONS (§ 508*)—APPEAL—DETERMINATION.

Where the evidence in the record of an appeal from an assessment of benefits by the eminent domain commission is not sufficient to enable the appellate court to determine what would be a proper assessment, the proceeding must be reversed and remanded; the commission having assessed the benefits on an erroneous theory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1181, 1182; Dec. Dig. § 508.*]

Main, Morris, and Mount, JJ., dissenting.

En Banc. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In the matter of the petition of the City of Seattle to condemn private property for the establishment of streets. Asa Gatton and Alice Gatton, his wife, appeal from an assessment of benefits. Reversed and remanded, with directions.

Farrell, Kane & Stratton, of Seattle, for appellants. Jas. E. Bradford and C. B. White, both of Seattle, for respondent.

FULLERTON, J. The city of Seattle by ordinance directed Eighth Avenue West and Ninth Avenue West, with certain others of its streets, to be widened, and condemnation proceedings were had to acquire the real property necessary to be taken for that purpose. The awards made by the jury for the property taken, added to the costs of the proceedings, aggregated \$28,410.25. The appellants, Asa Gatton and Alice Gatton, his wife, owned a tract of land lying between Eighth Avenue West and Ninth Avenue West having a frontage on each of these streets of 260 feet. In the widening of the streets a strip of land approximately 30 feet in width was taken off each side of the tract, for which the jury awarded the appellants \$4,209.50. The city had directed the improvement to be made at the expense of the property benefited, and the matter was referred to the eminent domain commission to make up an assessment roll. The commission returned a roll in which they assessed the appellants' property remaining at \$5,000.70. Exceptions were taken to the roll by the appellants, and a hearing was afterwards had thereon in which the assessment was confirmed in so far as it affected the appellants' property.

The assessment roll as returned into court showed that property directly across the street from the appellants' property, of practically the same area and apparently affected in the same way by the widening of the street, was assessed in the aggregate at less than one-third the amount that was assessed against the appellants' property. In explaining this difference Commissioner Pardee is quoted as follows: "Upon cross-examination Mr. Pardee testified that the eminent domain commission took into consideration the \$4,209.50 awarded to Mr. Gatton for the portion of his land taken, in determining the amount that they assessed against the remainder of his property; and also took into consideration the fact that Mr. Gatton's property had not given any part of the streets, while the property opposite across Eighth and Ninth Avenues West had already given 30 feet for street purposes. * * * Witness Pardee stated that the eminent domain commission considered that a condemnation of this kind confers benefits upon the property in the same manner as the platting of property by the dedication of streets, and that the improvement was a greater benefit to Mr. Gatton's property than the property

on the opposite sides of Eighth or Ninth Avenues West for the reason that the property opposite Mr. Gatton's property either on Eighth Avenue West or Ninth Avenue West faced upon a 30-foot street, the line of which conformed to the street lines to the south, and that property could be considered as platted property with boundary line established. And the eminent domain commission did not consider this property benefited in the same amount as Mr. Gatton's property for the further reason that property was established as lots with definite street line which gave it a value, in the opinion of the commission, equal to Mr. Gatton's property remaining after the condemnation plus the value of the strip condemned, and, as the properties were of equal value after the condemnation, a simple rule of arithmetic would not permit an equal assessment upon the opposite side of the street from Mr. Gatton's property. And on further cross-examination the witness Pardee finally admitted that the eminent domain commission had charged back against the remainder of Gatton's property the amount of the condemnation award made for the portion of the property taken, and had then assessed the remainder for the full benefits in addition. But the witness explained his answer by stating that the result of the reasonings by which the board of eminent domain commissioners levied this assessment on Mr. Gatton's property might and in this case probably was somewhere near the same as though they had charged back to the property the amount of the condemnation award, but that the commission did not reach its conclusion by doing so, but by reason solely from the benefits which the commission believed accrued to the property remaining by reason of the improvement."

[1, 2] It is the contention of the appellants that the commission proceeded upon a fundamentally wrong basis in making the assessment upon their property, with the result that they have been asked to pay an undue proportion of the cost of the improvement, and a greater sum than their property was benefited thereby. We think the evidence quoted justifies this conclusion. It is evident that the opinion of the members of the eminent domain commission differed from that of the jury as to the amount of damages the appellants suffered because of the property taken for the street, and that they sought to correct the jury's mistake in the assessment roll by levying an undue proportion of the assessment upon their property. But the appellants had the right to have the value of their land taken assessed by a jury; and the jury's verdict, under such circumstances, after it has been confirmed by the judgment of the court, must be given full faith and credit.

[3, 4] It has been declared by us to be the policy of the courts not to disturb the findings of the commission unless it has acted arbitrarily, or fraudulently, or has proceeded

in making the assessment upon a fundamentally wrong basis; (*Spokane v. Miles*, 72 Wash. 571, 131 Pac. 206); and to this rule we adhere. But we think it was proceeding upon a fundamentally wrong basis when the commission "charged back against the remainder of Gatton's property the amount of the condemnation award made for the portion of the property taken, and then assessed the remainder for the full benefits in addition."

[5] The evidence in the record is not sufficiently full to enable us to determine what would be a proper assessment, and we have no alternative other than to send the cause back for further proceedings. The order will be, therefore, that the judgment confirming the assessment roll in so far as it affects the appellants' property be reversed, and the cause remanded, with instructions to again refer the matter of the assessment to the eminent domain commission, with instructions to recast the assessment on the appellants' property so that the amount assessed against the same shall not exceed the benefits conferred and the due proportion the property should bear when compared with the assessments upon other property in the assessment district.

CROW, C. J., and PARKER and CHADWICK, JJ., concur.

ELLIS, J. I am not convinced that the assessment was made upon a fundamentally wrong basis, nor that the appellants' property was not benefited to a greater extent than the property on the opposite side of the street. The disparity, however, between the two amounts, seems to me so great as to indicate arbitrary action. It is difficult to see from the evidence wherein the appellants' property was benefited in more than double the amount assessed against like property across the street. I therefore concur in the result.

GOSE, J. I think that the assessment was arbitrary, and that it was made "upon a fundamentally wrong basis." I concur upon both grounds.

MAIN, J. (dissenting). This is an appeal from a judgment confirming an assessment roll. By ordinance approved November 29, 1909, the city council of the city of Seattle provided for the laying off, widening, extending, altering, and establishing of Eighth and Ninth Avenues West, and other streets, and directed that a condemnation proceeding be instituted for that purpose. The cost of the improvement was to be borne by the property benefited. The boundaries of the assessment district were to be fixed and the assessment roll prepared by the eminent domain commission.

The appellants, Asa Gatton and wife, own-

ed a tract of unplatted land situated between Eighth and Ninth Avenues West, extending along these streets for a distance of approximately 264 feet. These avenues along this property were each 30 feet wide; the adjacent property, both to the east and the west, having been platted, and streets to that width dedicated. These avenues to the south of appellants' property were 60 feet wide. To the north, Eighth Avenue West was 60 feet wide. Ninth Avenue West, for a short distance, was not opened, but further to the north was 60 feet in width. With the street lines where the streets were 60 feet wide, extended, the appellants' property would extend 30 feet into each of the avenues. By the condemnation proceeding a 30-foot strip on each side of appellants' property was taken. For this the jury returned a verdict for \$4,209.50. Judgment was entered upon the verdict awarded to the appellants, as well as the other property taken necessary to open and extend the streets covered by the ordinance. The matter was then referred to the eminent domain commission for the purpose of establishing boundaries of the assessment district and preparing the assessment roll. In due time the assessment roll was prepared. Whereupon the appellants entered written objections thereto. Hearing upon the assessment roll occurred in the superior court on May 2, 1912. On September 2, 1912, judgment was entered confirming the roll, except in some particulars not necessary here to mention. No reporter being present during the hearing upon the assessment roll, the appellants, after the entry of judgment, desiring to appeal, prepared a bill of exceptions which, as amended, the trial court certified. According to the bill of exceptions on the hearing upon the assessment roll, there was introduced in evidence a plat showing the property taken under the condemnation, the boundaries of the district, and the amount of the assessment which each tract of ground bore. There was also introduced in evidence the assessment roll. In support of the assessment roll the city called two of the eminent domain commissioners as witnesses. They in substance testified:

That the assessment roll was regularly prepared, and showed the amount of benefits to each piece of property within the district; that the natural outlet for the district to the business section of the city is south along Ninth Avenue West; that the total cost of the improvement and the amount to be raised by the assessment was the sum of \$28,410.25; that the amount of the awards for property taken was \$24,421.33; that the commission had before it when making the assessment roll the amounts of the several awards made by the jury.

One of the commissioners further testified: That the west 30 feet of Ninth Avenue West, and the east 30 feet of Eighth Avenue West, was open and in use for street purposes ad-

jacent to the appellants' property; that Ninth Avenue West was open and improved to the width of 60 feet south of appellants' property prior to the condemnation proceedings; that the condemnation was not what is commonly known as a widening of Eighth and Ninth Avenues West, but was properly a laying off, opening, and establishing of the west half of Eighth Avenue West, and the east half of Ninth Avenue West along the appellants' tract, in conformity with the street lines to the south; that the eminent domain commission believed that the values established by the awards of the jury in the condemnation trial was a fair value and was used by the eminent domain commission in determining benefits; that the appellants' property and the properties to the east and to the west occupied relatively the same position to the streets; that in the widening of Eighth and Ninth Avenues West, to correspond to the uniform width of other streets, the abutting property had been specially benefited. Upon cross-examination this commissioner testified: That the eminent domain commission had taken into consideration the amount of the verdict awarded to the appellants in determining the amount that should be assessed against the remainder of the property; and also took into consideration the fact that the appellants had not given any part of the streets, while the property across Eighth and Ninth Avenues West had already given 30 feet for street purposes; that the appellants' property fronting on Eighth and Ninth Avenues West was accessible to and enjoyed the use of abutting streets; that the eminent domain commission had determined that the benefits were greater on Ninth Avenue West than on Eighth Avenue West, and had accordingly assessed one-half of the appellants' property fronting on Ninth Avenue West higher than the portion fronting on Eighth Avenue West; that the eminent domain commission considered that, in a condemnation of this kind, benefits are conferred upon property in the same manner as the platting of property by the dedication of streets; that the improvement was a greater benefit to the appellants' property than to the property on the opposite sides of Eighth and Ninth Avenues West; that this property was not benefited in the same amount as was the appellants' property for the reason that the property was established as lots with definite street lines which gave it a value equal to the appellants' property remaining after the condemnation, plus the value of the strip condemned; that the properties, taking equal frontage and depth, were of equal value after the condemnation; and that, as the properties were of equal value after the condemnation, a simple rule of arithmetic would not permit an equal assessment upon the property which was on the opposite side of the street from appellants' property. This commissioner further testified

on cross-examination: That the eminent domain commission had charged back against the remainder of the appellants' property the amount of the condemnation award, and had then assessed the remainder for the full benefits in addition. This answer was explained by the witness by stating that the result of the reasoning by which the eminent domain commissioners levied this assessment might, and in this case probably was, somewhere near the same as though they had charged back to the property the amount of the condemnation award, but that the commission did not reach its conclusion by doing so, but by reason solely of the benefits which the commission believed accrued to the property remaining by reason of the improvement.

The appellants, in support of their objections to the roll, produced three witnesses who testified substantially as follows: That the topography of the adjoining ground is practically the same on each side of Ninth Avenue West, where it passes the appellants' property; and that the property on each side of the street bears the same relative position to the street; that the benefits by reason of the improvement were the same on each side of the street; that the assessment as made by the commission upon the appellants' property was excessive; that it should not have been higher in proportion than the assessments on the opposite side of the street; that the property in this district is residence property, and on such property the benefits would be as great on a lot 40 feet by 100 feet as it would be on a lot 40 feet by 130 feet; that the assessment placed against the appellants' property was as much as the property itself was worth on the market.

From the assessment roll and the plat, which was introduced in evidence, it appears that the property of other owners similarly affected by the improvement as was the appellants were assessed in like proportions. The property immediately to the east and to the west of the appellants' property and fronting upon Eighth and Ninth Avenues West was, taking the street frontage as a basis, assessed at less than one-half the assessment upon appellants' property. The question then is whether the portion of the appellants' property which remained after the 30-foot strip which extended into the streets had been taken was benefited in a greater amount than was the property adjacent both east and west.

By repeated decisions it has become the settled doctrine of this court that the assessment roll prepared by commissioners will not be disturbed unless the evidence shows mistake, fraud, arbitrary conduct, or that the assessment was made upon a fundamentally wrong basis. In *City of Spokane v. Mills*, 72 Wash. 571, 131 Pac. 206, it is said: "The best rule that has been announced, and the only practicable working rule, is that the courts should not change the district established by the commissioners, except where

the commissioners have acted arbitrarily or fraudulently or have proceeded upon a fundamentally wrong basis"—citing authorities. In *City of Spokane v. Fonnell*, 136 Pac. 211, it is said: "We have frequently held that the action of the commissioners in fixing the limits of the districts, and in determining what property is in fact benefited, and apportioning the cost of the improvement, in the absence of fraud or action clearly arbitrary, will not be disturbed by the court; the commissioners being appointed for the very purpose in doing these things, their action is entitled to the same presumptions which attend official action in other cases, and is conclusive in the absence of mistake, fraud, or arbitrary discrimination amounting to an abuse of discretion"—citing authorities.

In the present case there is no claim either of mistake or fraud. The inquiry must therefore be directed as to whether or not the commissioners in assessing the appellants' property acted either arbitrarily or proceeded upon a fundamentally wrong basis.

Upon cross-examination one of the commissioners answered categorically that there had been charged against the remainder of the appellants' property the amount of the condemnation award. This answer, however, was immediately explained by the witness by stating that the result of the reasoning by which the eminent domain commissioners levied the assessment might be, and in this case probably was, somewhere near the same as though they had charged back to the property the amount of the condemnation award, but that the commission did not reach its conclusion by doing so, but solely by reason of the benefits which accrued to the property on account of the improvement. Considering only the answer of one witness to one question on cross-examination, it would show that the commission in making the assessment had acted in an arbitrary manner. But giving effect to the entire testimony of the witness, as well as to the testimony of the other commissioner, it cannot be said that the assessment was made in such a manner. Neither do we think the evidence sustains the contention that the assessment was made upon a fundamentally wrong basis. The property in question was located in one of the residence districts of the city. As it existed prior to the condemnation, it extended 30 feet beyond the street lines as they would be when extended. After the condemnation the portion of the tract that remained extended from Eighth avenue to Ninth avenue and was capable of being platted into lots of the same depth as other property in the same community. There is no claim that these lots would not be of adequate depth for residence purposes. The commissioners testified that the property was benefited in the amount in which it was assessed. The

witnesses for the appellant testified that it was not benefited greater than was the property opposite. This presented a question of fact. It cannot be said as a matter of law that, because properties on opposite sides of a street are not assessed in like amounts, it necessarily follows that the assessment was made upon a fundamentally wrong basis. We think the evidence fails to establish that the appellants' property had either been assessed for a greater amount than it is benefited, or that it is assessed proportionately higher, considering the benefits, than is other property within the district.

We therefore dissent from the views expressed in the majority opinion.

MORRIS and MOUNT, JJ., concur.

HILL v. PACIFIC GAS & ELECTRIC CO. et al. (Civ. 1,130.)

(District Court of Appeal, Third District, California. Sept. 25, 1913. On Rehearing, Oct. 25, 1913. Rehearing Denied by Supreme Court Nov. 22, 1913.)

1. ELECTRICITY (§ 19*)—DUTY OF ELECTRIC COMPANIES—APPLICATION OF DOCTRINE OF RES IPSA LOQUITUR.

An electric power company which furnishes current is not bound to examine or inspect the fixtures and appliances used by its customers and under their control, and hence an injury to one who was hurt by reason of a defect in an appliance of a user of electric power does not authorize an application of the doctrine of *res ipsa loquitur* whereby liability can be fastened on a power company.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. TRIAL (§ 165*)—NONSUIT—MOTION.

A motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact which may be legitimately drawn therefrom.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 873, 874; Dec. Dig. § 165.*]

3. TRIAL (§ 139*)—NONSUIT—ALLOWANCE.

A motion for nonsuit should be denied if there is any evidence tending to support plaintiff's case.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

4. MASTER AND SERVANT (§ 99*)—INJURY TO SERVANT—ACTIONS—LIABILITY.

Where the president of a mining company which used electric power engaged a competent electrician to install the electric fixtures, and the mode of installation was not negligent, neither the president nor the electrician are liable for the wrongful death of a servant of the company electrocuted at one of the machines.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 165; Dec. Dig. § 99.*]

5. MASTER AND SERVANT (§ 286*)—ACTIONS—"RES IPSA LOQUITUR."

In an action for the wrongful death of a servant killed in attempting to start a pump operated by electric power, the question of the company's negligence is for the jury under the doctrine of "*res ipsa loquitur*," which is the presumption of negligence arising when the thing which caused the injury without fault of the injured person is shown to be under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

exclusive control of the defendant, when the reason for the accident is not explicable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 288.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6136-6139; vol. 8, p. 7787.]

6. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.

In an action against a master for the wrongful death of a servant, the question of his contributory negligence *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

7. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The burden of proving the contributory negligence of a deceased servant rests on the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

8. MASTER AND SERVANT (§ 289*)—JURY QUESTION—CONFLICTING EVIDENCE.

The question of contributory negligence is for the jury, unless there is but one conclusion which can reasonably be reached from the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

On Rehearing.

9. MASTER AND SERVANT (§ 284*)—PROVINCE OF COURT AND JURY.

In an action for the wrongful death of a servant, electrocuted in attempting to start a pump operated by electric power, the question of the power company's liability is for the court when the facts on which its liability must be based are undisputed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090; Dec. Dig. § 284.*]

10. PROPERTY (§ 2*)—NATURE.

Under Civ. Code, § 655, declaring that there may be ownership of all inanimate things which are capable of appropriation, there may be ownership of electric current, even though the nature of the current is unknown.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. § 2.*]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by Jacob Hill, administrator of Oscar Robert Hill, against the Pacific Gas & Electric Company, the Bucket Gravel Mining Company, and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded as to the mining company and affirmed as to the other defendants.

W. A. Gett, of Sacramento, and H. D. Gregory, of Oroville, for appellant. A. F. Jones, of Oroville, and John P. Coghlan, of San Francisco, for respondent Pacific Gas & Electric Company. Lon Bond, of Chico, for respondents Bucket Gravel Mining Co. and another. George F. Jones, of Oroville, for respondent Soares.

CHIPMAN, P. J. This action was commenced by plaintiff as the administrator of

the estate of his son, Oscar Robert Hill, deceased, to recover damages resulting from the death of the latter caused by an electric shock while in the employ of defendant Bucket Gravel Mining Company, hereinafter referred to as the "mining company." A jury was called to try the case, and at the close of plaintiff's testimony each of the defendants moved for a nonsuit, which was granted by the trial court. Plaintiff's motion for a new trial was denied, and thereupon judgment passed for defendants. Plaintiff appeals from the judgment and from the order denying his motion for a new trial on statement of the case.

The relation of the defendant Pacific Gas & Electric Company (hereinafter referred to as the "electric company") to the accident, as shown by the uncontradicted testimony, very clearly appears. This company was engaged in the business of supplying electricity for power and other purposes. It had a line passing the mining company's dredger carrying about 4,400 volts, which voltage it engaged to deliver to the mining company at a meter owned by and placed upon a pole by the electric company on the premises of the mining company. From the meter three wires, erected by the mining company, carried the current to another pole about 40 feet from the mining company's pumphouse. From this pole the wires continued on to the interior of the pumphouse where they entered three transformers. When the current of electricity was desired by the mining company, it was turned on by a switch at the pole last above referred to, operated by the mining company, and passed by wires thence to the three transformers above mentioned, by means of which the electricity was reduced to the requisite voltage. It then passed from the transformers along wires to what is called a compensator or auto-starter, operated by a switch, and when opened allowed this reduced current to pass to and turn the motor which drove the pumps. After the electricity passed through the meter, it was no longer under the control of the electric company. The transformers and all the machinery, wires, and attachments of every nature necessary to make use of the electricity were installed and owned by the mining company, were under its exclusive control, and were operated by the mining company's servants.

[1] Appellant devotes a large part of a 200-page opening brief to a discussion of the electric company's liability. He contends that a legal duty devolved upon it to supervise the installation of the appliances by which the mining company was to make use of the electricity furnished by the electric company; that a duty was also imposed upon it to make such reasonable inspections of the mining company's electrical appliances as would give assurance that they were prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erly performing the purpose for which they were designed; and that the doctrine of *res ipsa loquitur* should be given effect in passing upon the ruling of the trial court. This doctrine is thus stated: "When a thing which causes injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Judson v. Giant Powder Co.*, 107 Cal. 549, 556, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146.

The maxim *res ipsa loquitur* is somewhat differently explained by the United States Supreme Court, in *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 99, 32 Sup. Ct. 399, 401 (56 L. Ed. 680), as follows: "When a thing which caused the injury without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." These definitions embrace the case of contributory negligence of the injured person which is an issue in the case as to all the defendants; but we do not think it necessary to be considered with reference to the defendant electric company.

It is contended that this rule is as logically applicable "to an injury occasioned by a current of such a dangerous element as electricity, as to an injury due to an explosion in a powder factory." In a proper case the proposition may be conceded to be sound. Considered, however, with reference to the liability of the electric company in the light of the undisputed facts, the rule, in our opinion, has no application. It is true that the thing, in the instant case, which caused the injury, was originally under the management of the electric company, i. e., it produced the electricity and caused it to be conveyed and delivered, at a given point, to the mining company for its use. But the electricity which caused the injury was not, at the time and place of the injury, under the management or control of the electric company, nor were any of the appliances by which the electricity was being utilized under its management or control, nor was it in any degree responsible for any failure of these appliances to perform their offices. No causal connection of the electric company, at the time of the accident, with the thing which caused the injury, was shown. It is a matter of common knowledge that electric power companies supply electricity to corporations and persons engaged in lighting cities, in operating street cars, and in furnishing individuals with light and power. Along their lines of

transmission hundreds and thousands of persons are furnished light, heat, and power in connection with the multifarious industrial enterprises in which our people are engaged. Plaintiff's contention is that, because of the extremely dangerous character of this element brought into use by these electric power companies, they should be compelled not only to superintend the installation of all appliances constructed to receive and utilize this dangerous element, but should be charged with such inspections from time to time of all such appliances as would relieve the power companies from the charge of want of care and would enable them at all times to explain that any accident which might happen through its use was not the result of want of care on their part. When we consider the multitudinous uses to which electricity is now being applied, and assuming that the user receives it by means of appliances of his own choice, erected by himself, and under his own control and management, as in the present case, it would be an intolerable burden to require of the power companies what is here contended for. The rule invoked was never intended to apply to such a case. The rule was applied in the *Judson Powder Company Case* because the explosion occurred on the company's premises and in a storage house under the company's management. But suppose the company had sold and delivered a car load of dynamite and an explosion had occurred while the car was in the possession and under the exclusive control of the railroad company. Would it be reasonable to apply the rule to the powder company because it had manufactured and sold this dangerous explosive? Suppose a company, engaged in selling water which it conveys in a canal, sells a given quantity to be taken by gates to be erected and controlled by the purchaser and by him conveyed through ditches to the point of use. Is the water company to be charged with negligence for a damage that may result from some faulty construction of the headgates or ditches which it did not construct and over which it had no control? In the case before us there is no evidence, and it is not contended, that the electricity delivered by the electric company at the transformers, at the time of the accident, was of greater voltage than 4,400 volts. The contention is that its responsibility traveled along with the current of electricity it had created and sold and that it was bound to see that all appliances constructed by the purchaser were sufficient for its safe use, and that, by frequent inspections, it must inform itself that these appliances were kept in a safe condition for such use.

Appellant cites a long array of cases in support of his contention, but with the exception of a single case—*Thomas v. Marysville Gas Co.*, 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147—it will be seen that there was

some sort of control by the defendant, either in the construction of the appliances or in operating them. With commendable candor plaintiff does not conceal the fact that the cases cited by him recognize the distinction we have pointed out. The cases are numerous holding to the view we have indicated, and in some of them the doctrine of the Kentucky case is distinctly disapproved. We make reference to some of those cases.

In *Peters v. Lynchburg Light Co.*, 108 Va. 333, 61 S. E. 745, 22 L. R. A. (N. S.) 1188, plaintiff sued to recover for injuries caused to his wife by a shock received in turning off an incandescent light in their dwelling. The transformers by which the greater voltage of defendant's wires was reduced to that required for lighting the house were the property of the defendant, but the house was wired by the owner. The transformers were not shown to be out of order or insufficient to perform their proper office, and it was not claimed that the low tension wire leading into the house had in any way come in contact with the defendant's higher tension wire; nor was it shown that any excessive voltage had passed from defendant's high tension wires to plaintiff's house wires. There was expert evidence that there was a defective contact between the brass of the light bulb and the wires in the socket, which circumstance might account for the accident. The trial court took the case from the jury on a demurrer to the evidence, and the Virginia Supreme Court of Appeals affirmed the judgment. In the course of the opinion the court referred to one of the cases now relied upon by appellant, and it fairly illustrates the distinguishing difference between that class of cases and the one here. Said the court: "To sustain a recovery, the plaintiff relies chiefly on the doctrine of *res ipsa loquitur*, and calls special attention to the case of *Alexander v. Nanticoke Light Co.*, 200 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475. There is, however, obvious dissimilarity in the facts of the two cases. In the outset the opinion in the Pennsylvania case states: 'The premises of the appellant * * * were lighted by electricity. The electric light was furnished by the appellee, an electric light company. It had wired the store and cellar of the plaintiff, furnished the electric lamps, and made and maintained the connections. * * * He went into his cellar to show goods to a customer, and while handling, in the usual way, an ordinary incandescent light bulb, suspended from the ceiling by a flexible extension cord, was severely shocked and seriously injured. From the facts submitted, it appeared that when he was shocked the electric wires on his premises were charged with a higher voltage than they should have carried, but the cause of this was not shown to have been any specific negligence of the defendant.' The court held, upon the foregoing premises, that the pre-

sumption was that the company was negligent. The differentiating features between the Pennsylvania case and the case in judgment are the presence in the former case, and absence in the latter, of excessive voltage on the lighting wires; and the further fact that in the former case the light company wired the plaintiff's store and cellar, furnished the electric lamps, and made and maintained the connections, while, in this case, the wiring was done, and the electric outfit was owned, installed, and controlled, by the proprietor of the premises."

The present case is stronger than the Virginia case in the fact that there the defendant owned and controlled the transformers. Speaking of the Pennsylvania case and others, the court said: "But the doctrine of *res ipsa loquitur* can have no application where the accident is due to a defective appliance under the management of the plaintiff; nor to a case involving divided responsibility, where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible."

In the Tennessee case, the defendant in error recovered judgment for the killing of a horse by electricity, which was tied to a pole carrying an illuminating sign in front of the house of one Roberts. The wires and appliances by which the sign was illuminated were owned and controlled by him. The accident was due to defects in these wires. The trial court excluded evidence showing ownership and control of Roberts. The appellate court said: "If it be true that the facts were as this rejected testimony indicates, we cannot conceive of any rule of law which holds the gas and electric company liable for this loss. It is true that electricity is a subtle, and, unless controlled, a dangerous agent; yet we do not see how this fact fixes responsibility on this company, when it simply furnished the electric current to the wires of Roberts, over which it had no control, and with regard to which there was on its part no duty of inspection, and when the record does not impute to it any knowledge of the defect producing the loss complained of. * * * We understand that liability for an injury occasioned through such a defect depends on the interest in or control over the appliance in which the defect exists, and, if there is neither interest nor control, there would be none." Discussing the Kentucky case, the court said: "Pressed to its legitimate conclusion, we think this argument would make an electric company or a gas company an insurer against defects in appliances over which they had no control, and, to avoid liability, would impose upon them the duty of continued inspection of the wires and pipes of every customer supplied with their products. This would be a burden which no such company could bear and live; and it also would be a source of annoyance

to its customers, which they would not long submit to." *Memphis Consolidated Gas & Electric Co. v. Speers*, 113 Tenn. 83, 81 S. W. 595.

A similar view of the law was taken by the Iowa Supreme Court, in *Harter v. Colfax Electric Light & Power Co.*, 124 Iowa, 500, 124 N. W. 508. An electric light fell upon the guest of a hotel and he was injured by the shock. In that case the voltage of the company's high tension wires was reduced by transformers owned and controlled by defendant, but it was not shown that the transformers were insufficient or out of order. The wiring of the hotel was not done by the defendant. The Supreme Court reversed a judgment for plaintiff, saying: "The maxim *res ipsa loquitur* does not apply to such a case as this, for there is no evidence that the accident was due to a dangerous current knowingly, or even negligently, sent into the hotel by the defendant company. The testimony shows that the negligence was primarily that of a third person in wiring the house in such a manner as that the fixtures were likely to fall and injure some of its occupants. Plaintiff's theory seems to be that when the wire fell upon him a short circuit was created, which did the damage complained of. This was due, not to defendant sending a dangerous current into the house, but to something over which it had no control, and for which it was not responsible." This case holds that, even where the transformers are furnished and controlled by the defendant, the maxim *res ipsa loquitur* does not apply, where there is no evidence that the accident was due to a dangerous current knowingly or negligently sent into the hotel by the defendant.

See, also, *National Fire Ins. Co. et al. v. Denver Consol. Elec. Co.*, 16 Colo. App. 86, 63 Pac. 949; *Fickelsen v. Wheeling Electrical Co.*, 67 W. Va. 335, 67 S. E. 788, 27 L. R. A. (N. S.) 893; *Keefe v. Narragansett Elec. Lighting Co.*, 21 R. I. 575, 43 Atl. 542; *Minneapolis Genl. Elec. Co. v. Cronon*, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816, 818-825. See, also, note in 22 L. R. A. (N. S.) 1183, 1184, where the cases are given which recognize the distinction between cases where the injured party himself installs the appliances and cases where this is done by the company.

Our conclusion is that, so far as the electric company is concerned, the order of the trial court was justified.

[2, 3] We are next to examine the evidence touching the liability of the remaining defendants. In the consideration of this evidence we are to be governed by certain well-established rules which may be briefly stated. The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that may be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. If

there is any substantial evidence tending to sustain plaintiff's action the nonsuit should be denied, without passing upon the sufficiency of such evidence; and when there is a conflict in the evidence, some of which tends to sustain plaintiff's case, a motion for a nonsuit should not be granted. *Kramm v. Stockton, etc., R. Co.*, 3 Cal. App. 606, 609, 86 Pac. 738, 903; *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252; *Burr v. United Railroads*, 163 Cal. 663, 126 Pac. 873.

[4] The relation of defendant Jensen to the mining company does not clearly appear. He is spoken of in the testimony as manager, and one witness mentions him as president. There is no evidence connecting him personally with operating the mining company's plant. He purchased transformers of the Westinghouse type, and other electrical appliances, concededly adequate for the purposes of reducing the current of electricity to the voltage required for the uses of the mining company. He employed the deceased to take charge of the construction work and to superintend the operation of the plant. Mr. Hill, the deceased, was 27 years old, a skilled machinist of large experience, but had no special knowledge of electricity, although he had worked on dredgers and at other places where electricity was the motive power. His competency to manage the mining company's plant is not questioned, and he was paid \$200 per month as wages. Hill employed an electrician, B. C. Best, who was a witness at the coroner's inquest and whose testimony was read at the trial, to install the electrical plant. Best testified that he was an electrician and had been engaged for seven years in his occupation as such; that he installed the mining company's electrical plant; that the plan was drawn by defendant Soares. "Q. Did Mr. Hill put you under his charge? Yes, sir; introduced me to him and told me to do the work under his instructions. I done the work and he received it and said it was all O. K.; he examined it the first thing and said it was all O. K. Q. That is, the pumping plant? A. Yes, sir; where I done the work. Q. After that was installed, did you run it? A. I run it two nights, 24 hours, two 12-hour shifts. Q. Did you find it in good condition? A. Yes, sir; so far as I could see or know." He spoke of a ground wire put in by Soares which he said he would not himself have put in because it was something new to him. He was asked if he considered it unsafe, and answered: "I did not understand it at all. I made the remark that I didn't understand it; it was something new. * * * Q. Otherwise you considered the whole plant safe? A. I did; yes, sir. Q. Did you operate it with that wire on there? A. Yes, sir." It appeared that the wire he referred to was a wire connecting the auto-starter with a ground wire "running from the transformers to the river." We shall have occasion to refer to this connection later on.

At present we are dealing only with defendant Jensen's relation to the accident. The undisputed testimony as to defendant Soares was that he was represented to Mr. Jensen as being "a good electrician" and "a man that has a good standing." We do not see how the doctrine of *res ipsa loquitur* or any other rule of law can be invoked to hold defendant Jensen personally responsible for what happened. He exercised ordinary care in the selection of Hill as superintendent and Hill seems to have employed competent electricians to install the electrical part of the plant.

Nor does it appear that defendant Soares failed in the exercise of due care and skill in directing Best in the work of installation. The plant was in full and successful operation up to the day when the accident happened, and, on that day after the accident and on subsequent days, the equipment performed its office as it did from the start. Witness Hillis was the agent for the sale of a different type of transformer from the Westinghouse, which latter was purchased by Jensen. In talking over the matter with Jensen, Hillis volunteered a recommendation to Jensen to "connect up" the transformer by what he called a Y or star connection, and he drew a rough sketch of his suggestion and gave it to Jensen. Hillis, however, told Jensen to consult Soares about it, whom he recommended to Jensen as a good electrician and in good standing. It does not appear that Jensen showed this sketch to Soares and does appear that Soares did not "connect up" the transformers on Hillis' plan but on his own, and there is no evidence that Soares' plan was not a proper one. There was some testimony as to the ground wire connected with the transformers and a connection of this ground wire with the auto-starter, as having some possible connection with the accident. But we find nowhere in plaintiff's elaborate briefs any claim that either Jensen or Soares should be held personally liable for the accident. The contention most urgently pressed is that the electric company is liable, and, if not, the rule of *res ipsa loquitur* casts the burden upon the mining company to explain the accident.

[5, 6] On the evening of the ninth day after the plant was in operation, deceased Hill told the witness Crail, whom he had hired to run the pump, to shut down and not to start it the next morning as he (Hill) wanted to be present and start it himself. Crail closed the auto-starter and shut off the current at the switch between the meter and the transformers. The next morning Hill came to the plant, and by his direction Crail turned the current on and returned to the pumphouse. No other person was near by. Crail testified: "I was at the pumphouse of the Bucket Gravel Mining Company on the morning of May 27, 1910, and saw Mr. Hill that morning.

I saw him take hold of the auto-starter and turn the electricity on the motor, and I saw him pull it open. It would not start, and he shut it up again, and he pulled it open again, and still it would not start. He pulled it open again and said there was something the matter, and up over the auto-box is three fuses about that long (showing), and he looked up at those, and I don't know whether it was the right-hand fuse he took out or whether it was the middle one, and he looked at it, and said, 'Yes, there it is, the fuse blew out,' and he threw it up on a shelf behind him and got a new one to put it in and pulled it open again. Pulled out the lever and opened up the auto-box. He pulled the lever open to move it to start the machinery to run the pump. The auto-box was for running the machinery. Q. What became of him when he did that? A. He said something—he was a little taller than I was. I was on the outside of the pumphouse and he was on the inside, and he said something. I did not catch what was said, and I knew then that there was something the matter with him, and I looked at him and knew that he got a shock. Q. Did you mean that you knew that there was something the matter with Oscar Hill? A. Yes, sir. As soon as I looked at him, I seen that he had got a shock from the electricity. Q. Well, what happened then? A. Well, I was standing on the outside of the pumphouse. There was a piece of batten board lying there—a batten for battening a cabin or house—and I picked that up and tried to pry his hand loose from the auto-lever, and I couldn't do it, and I threw it down and looked down the road to see if I could see any one passing, and there was no one passing, and I went back to him. It seemed to me like a half hour, but I guess it was only two or three minutes, and he just fell back that way. (Showing.) * * * He took hold of the auto-starter with his right hand. He had his left hand on the water pipes. * * * He had his hands wet. You couldn't start the pump without getting your hands wet. You have to use water to start the pump. It was not over a minute or a minute and a half after he had primed the pump that he got the shock of electricity. Before he started the pump I went to the box on the pole and turned on the juice. * * * A Juror: I want to ask the witness a question. Q. When Mr. Hill threw the lever back the third time, did that machinery start off the same—the pump—as it always did? A. Yes, sir; it started right away as soon as he threw it open." Shortly after Hill "just fell back that way," Crail testified that he closed the auto-starter and stopped the pump.

Dr. F. M. Whiting was called soon after the accident. He testified: "I do not think he was dead when we got there; he was dead before we left. I found some traces of what

were apparently electrical burns on the outside surface of the right hand, also in the angles of the left hand. Oscar Hill was killed by electrification."

It appeared that the effect of the transformers was to reduce the 4,400 volts entering at their primary side to a current of 440 volts at the secondary side, which was the voltage required to operate the pump. A ground wire, as we understand the evidence, was connected with the secondary or neutral side of the transformers, and another wire also connected the frame or case of the auto-starter with this ground wire. Witness Hillis testified that this ground wire was not necessary to the perfect operation of the plant; that some electricians used it and others did not. Witness Best, who installed the plant, said this ground wire was proper, but the wire connecting the auto-starter with it was new to him. Witness Montague, who appears to have possessed expert knowledge of the subject, gave similar testimony to that of Hillis; but both agreed that when the said ground wire was used the object was to carry off any surplus electricity as a protection to the plant and in some measure also to protect the operators. The wire connecting this ground wire with the case or frame of the auto-starter was for the purpose of carrying off through the ground wire electricity that might accumulate in this frame or case, and was a protection to the operator as well as to the auto-starter. The witnesses made use of certain exhibits, introduced by plaintiff, which were not printed in the transcript but which it was stipulated might be used at this hearing. They were not sent up with the record, and we find some difficulty in clearly understanding the meaning of witnesses who used them for illustration at the trial. There was evidence that this ground wire was spliced, and when examined after the accident this splice was found to be loosened, and this is suggested as a possible cause of the accident—that electricity which, but for this condition of this wire, would have safely passed to the ground, found its way over the wire connecting the ground wire with the auto-starter and overcharged the frame of the auto-starter, and that when Hill took hold of the handle of the switch at the auto-starter with his right hand and of the water pipe with his left hand and a cross-circuit was formed through his body, and he thus received the shock. There was evidence, too, that others safely operated the plant before and after the accident while having hold of both the handle of the auto-starter and the water pipe as did Hill; but whether their hands were wet at the time did not appear. Defendants suggest the only rational explanation of the accident to be that Hill had concededly wet hands at the time, and that the testimony of Dr. Whiting shows, from the only visible wounds, that Hill's wet knuckles of his right hand in some way came too near

the wires, and a short circuit was thus formed with his body and his left hand grasping the water pipe, and that by his contributory negligence he was killed. An examination of the testimony fails to convince one of the precise cause of the accident—whether from some faulty construction in the installation or from the splice in said ground wire working loose so as to break the contact and thus cause an undue current of electricity to pass into the auto-starter frame. The strong probability is, as appears from the evidence, that the wires leading into the auto-starter and thence to the motor were not overcharged, else a fuse would have "blown out" and the current into the auto-starter would have been cut off and all danger removed. But the frame or case of the auto-starter may have become overcharged, and the electricity thus accumulated have found its way into the handle of the auto-starter which was grasped by Hill. There was also some evidence tending to show that possibly the iron plate at the end of the ground wire which rested on the bank of earth and in the river made a somewhat faulty grounding. Witness Montague examined the plant after the accident. The system of grounding the wire leading from the transformers and the wires connecting the auto-starter with this wire was explained to him, and on that hypothesis he was asked: "If there was a charge of electricity coming through these transformers and through this ground wire, what would be the effect upon the compensator and upon the compensator handle, in your opinion? A. Under the conditions described by the attorneys, these transformers, as I understand it, are charged with currents. The ground wires coming from the transformers over here into the river bed, and that ground connection consists of a short piece of iron about six inches long and one inch in diameter. Then, the case of the compensator or auto-starter in this same wire. That is, it is connected across on to this ground wire, at this point here, we will suppose. * * * Under those conditions the case of this auto-starter would be charged with a straight current that was coming off the neutral part of this transformer; and supposing this ground connection was faulty and the current not going into the ground, and, secondly, the case and the auto-starter were charged— Q. (Int.) With electricity? A. (Cont.) Yes, sir. * * * Under those conditions the man would experience a shock. How great the shock would be, it would be impossible to say."

It seems to us that we have shown enough of the facts to make it reasonably clear that the doctrine of *res ipsa loquitur* applies to defendant Bucket Gravel Mining Company. The view taken by the learned trial judge is found in a written opinion printed in the transcript. After speaking of Hill as having entire charge of the machinery, "as the

boss, foreman, head man, and manager of the business," and after expressing the opinion that Hill met his death by a "fortuitous occurrence not attributable to mistake, neglect or misconduct, by accident pure and simple," the opinion continues: "Now, it would almost appear that he was warranted in placing one hand upon the auto-starter in starting the machine and the other upon the water pipe and be in a perfectly safe situation, unless he did something before the third attempt to start the machinery that caused him to be electrocuted. In other words, he was electrocuted by reason of what he himself did on that occasion, and not by any defects in or of the machinery itself. Certainly it ran before that time without any trouble, and after that we have the testimony of the witness Crail that there was no trouble with its working. The wires were installed by experts at the business. Every witness who testified in regard to Mr. Soares and Mr. Best pronounced them experts at the business, so that he had a perfect machine to work with, and, if he lost his life in working with that machinery, it was owing to his own mistake, and, if such was the case, the Bucket Gravel Mining Company cannot be held to be responsible for his death."

As already noted, Hill was not an electrician; he was a machinist. Whether or not the company furnished him "a perfect machine to work with," and whether or not "if he lost his life in working with that machinery it was owing to his own mistake," or that "he was electrocuted by reason of what he himself did on that occasion, and not by any defects in or of the machinery itself," were questions of fact about which "different conclusions upon the subject can rationally be drawn from the evidence." *Herbert v. S. P. Co.*, 121 Cal. 227, 229, 53 Pac. 651. Under the rules hereinbefore stated, we think it sufficiently appears that the accident was such as "affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

[7, 8] The burden of proving the contributory negligence of Hill was on defendant. "That the existence or absence of contributory negligence is in general matter primarily for the jury there can be no doubt. * * * If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury." *Jacobson v. Oakland Meat & Packing Co.*, 161 Cal. 425, 119 Pac. 653, Ann. Cas. 1913B, 1194.

Again, it was said in *Payne v. Oakland Traction Co.*, 15 Cal. App. 127, 113 Pac. 1074: "If there is some evidence introduced on his behalf disclosing negligence in defendant and showing that plaintiff was not guilty of that degree of contributory negligence to which

the cause of his injuries may directly or proximately be imputed, then the question presented is one of fact and for the solution of the jury."

It seems to us that the learned trial judge overstepped the boundaries of his judicial power and invaded the functions of the jury in deciding that defendant Bucket Gravel Mining Company was not guilty of negligence and that plaintiff was guilty of contributory negligence. The evidence was not such as warranted the trial court in reaching this conclusion as matter of law.

The order as to defendant Bucket Gravel Mining Company is reversed, and as to the other defendants it is affirmed.

We concur: HART, J.; BURNETT, J.

On Rehearing.

CHIPMAN, P. J. [9] In his petition for rehearing plaintiff urges as ground therefor that, in the opinion heretofore rendered, the court invaded the province of the jury in dealing with the facts concerning the defendant Pacific Gas & Electric Company. The petition states: "The court may possibly be right in its view of the evidence as indicated in its statement of facts, which on the basis of lack of control of the electrical company, and complete control by the mining company, would exempt the electrical company from liability and hold the mining company liable. But where did the court get its right to usurp the functions of the jury and, in effect, weigh this evidence at all?" We neither claimed nor exercised such right. There was no pretense by plaintiff that the electric company had any control of the electricity beyond the switch that allowed the current to pass to the transformers, and there was not a particle of evidence tending to show any control of the current by the electric company after it was received by the mining company and passed into the transformers erected by and under the exclusive control of the latter as were all the appliances erected to utilize the current. Indeed, this state of facts appeared in plaintiff's complaint. There being no controversy as to these facts, it was clearly within the province of the court to determine as matter of law therefrom whether they gave rise to any liability on the part of the electric company. It was upon this undisputed condition of the pleadings and evidence that we assumed to express our view of the law, which we still think was within our province, as it was also within the province of the trial court.

Petitioner cites the recent case, decided since the briefs were filed, of *Augusta Ry. & Elec. Co. v. Beagles* (Ga. App. June 25, 1913) 78 S. E. 949, as "precisely controverting the position advanced in the opinion." Plaintiff in error was the defendant in the action. Among the averments of the petitioner (complainant) he alleged that the electric company (defendant) "permitted a high and danger-

ous voltage to be transmitted to the secondary wires in said plant, rendering it dangerous for him to handle said lights, and that he was unaware of the existence of this dangerous condition"; that "it permitted its transformer, connecting its primary with the secondary wire entering the plant, to become and remain out of repair, without sufficient insulation and in a burnt-out or punctured condition, so that the electricity escaped therefrom and became grounded and liable to be communicated to persons using the electric light lamps on the secondary wire." In its opinion the court called attention to the evidence tending to show that the light socket was defective which might have caused the injury, and for this the lumber company alone was responsible. But said the court: "There was evidence also which tended to support the theory of the petition on the question of negligence. There was positive evidence that the primary (in charge of the electric company) and secondary wires had been permitted to come in contact with each other outside of the plant or the transformer, and by this contact the full current carried by the primary wires had been transmitted to the secondary wires and on into the plant." The trial court in that case instructed the jury—and correctly, as the appellate court seems to have intimated—"that defendant would not be liable for any injury that was received from defective appliances or wires inside of the plant, but that the electric company was only responsible for the condition of the wires outside of the lumber plant." This case, instead of "precisely controverting" the view taken in our opinion, is in perfect harmony with it.

Of course, as there was conflicting evidence, as shown in the review of the case, upon all the theories advanced, the court properly held that it was for the jury to determine the facts. Petitioner seems unable to comprehend the proposition that where the facts are undisputed the court may determine, as matter of law, that they are wholly insufficient to give rise to any legal liability.

[16] Petitioner reiterates a point we did not heretofore consider, namely, that electricity is incapable of being made the subject of purchase and sale. The point is disposed of very satisfactorily in *Terrace Water Co. v. San Antonio Elec. Co.*, 1 Cal. App. 511, 82 Pac. 562, as follows: "There may be ownership of all inanimate things which are capable of appropriation by manual delivery. Civ. Code, § 655. * * * It may be regarded as a solecism to say that one may own a thing not susceptible of definition and the nature and character of which is practically unknown, yet when one gathers from the elements an energy or force which he may store, transmit, and utilize, he thereby

appropriates to his own use that thing, whatever it may be, and it is a subject of ownership, of barter and sale, so long as it is in his possession."

The petition is denied.

We concur: HART, J.; BURNETT, J.

BROOKS v. WHITE et al. (Civ. 1,351.) (District Court of Appeal, Second District, California. Sept. 20, 1913. Rehearing Denied by Supreme Court Nov. 19, 1913.)

1. DISMISSAL AND NONSUIT (§ 19*)—VOLUNTARY DISMISSAL—OBJECTIONS—CLAIM OF AFFIRMATIVE RELIEF.

In an action to quiet title, as authorized by Code Civ. Proc. § 738, defendant may ask affirmative relief either in his answer by way of counterclaim or by cross-complaint on the ground that such claim, based upon sufficient facts, would give the protection of Code Civ. Proc. 581, forbidding plaintiff to dismiss a suit before trial on payment of costs, where a counterclaim has been prayed for or affirmative relief sought.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 33-36; Dec. Dig. § 19.*]

2. JUDGMENT (§ 106*)—DEFAULT—FAILURE TO PLEAD.

Where an answer, in an action to quiet title, seeks affirmative relief so as to prevent a dismissal by plaintiff, a cross-complaint which is a repetition of the answer and presents no new issues is unnecessary, and the failure to answer it does not authorize the clerk to enter plaintiff's default or the court to render judgment otherwise than upon the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by W. H. Brooks against Martha S. White and James White, with cross-complaint by defendant Martha S. White. Judgment by default for defendant on the cross-complaint, and, from the denial of an order to vacate the judgment, plaintiff appeals. Reversed and remanded.

Luce & Luce, of San Diego, for appellant. E. S. Torrance, of San Diego, for respondent.

ALLEN, P. J. An action to determine conflicting claims to real property, as authorized by section 738 of the Code of Civil Procedure, was instituted by plaintiff against defendants. Defendant Martha S. White filed an answer in due time denying the averments of the complaint, alleging ownership and possession of the premises involved, and asking for affirmative relief in that she be adjudged the owner of the premises and that plaintiff be enjoined from asserting any claim thereto. At the same time she filed a pleading denominated a cross-complaint, alleging ownership and possession of the premises described in the complaint precisely as in the answer, and praying for the same

affirmative relief as in the answer demanded. Service of this cross-complaint was admitted by attorneys, and plaintiff not answering the same within ten days, the clerk entered plaintiff's default, and the court on December 5, 1910, rendered a judgment and decree as prayed for in the cross-complaint, which judgment was on the same day entered in the judgment book. On December 12th plaintiff gave notice of an intention to move for an order vacating the judgment and default because of the want of authority of the clerk to enter such default and because of mistake, inadvertence, and excusable neglect on plaintiff's part in failing to answer such cross-complaint. This was supported by proper affidavits. This motion the court denied, and from such order made after judgment plaintiff appealed.

The only question presented upon this appeal relates to the effect which should be given the pleading denominated "cross-complaint" filed in an action of the character shown and under the circumstances presented by the record. For many years it was established in this state that in actions under section 738 of the Code of Civil Procedure a cross-complaint was unnecessary for the reason that full relief could be granted defendant upon the denials and averments of the answer. An exception to this rule was observed in *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243, where additional parties were necessary in order that full affirmative relief might be awarded defendants and to permit new and additional matters to be set out necessary for a full and complete determination of the rights of the parties. Subsequently in *Islais, etc., Co. v. Allen*, 132 Cal. 438, 64 Pac. 713, it was determined that affirmative relief similar to that asked for in the answer filed in this case under consideration was such relief as under section 581 of the Code of Civil Procedure prevented a dismissal upon the part of plaintiff. It is even suggested in that case that, if affirmative relief was not demanded in the answer, a cross-complaint demanding the same was permissible; the effect of either being to prevent arbitrary dismissal by plaintiff. And in *Johnson v. Taylor*, 150 Cal. 208, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181, it is determined that, however unnecessary a cross-complaint may have been, yet, when parties answer the same and proceed to trial on the merits, plaintiff would be held to have consented to the method of procedure adopted. It is also suggested in the last-mentioned case that *Islais, etc., Co. v. Allen*, if not overruling the earlier cases, seriously impairs their authority in reference to the matter mentioned; but, as before said, the matter involved and the rule with reference to which is said to be impaired had no reference in fact to a cross-complaint nor to any matter other than the right of a defendant

by his answer to present facts entitling him to affirmative relief; and, having done so, plaintiff, under section 581 of the Code of Civil Procedure, could not dismiss without his consent.

[1] Considering all of the decisions involving the office of cross-complaint in actions to quiet title, we think it may be said that defendant possesses the right to ask affirmative relief, either in his answer, by way of counterclaim, or by cross-complaint, even though the effect of a judgment that plaintiff's allegations are all untrue would insure to defendant every right and fully settle the question of title between the parties. This for the reason that such prayer for affirmative relief, based upon sufficient facts, would confer upon defendant the protection afforded by section 581 of the Code of Civil Procedure, and this prevents an arbitrary dismissal by plaintiff against defendant's objection.

[2] It seems plain to us, however, that, where the answer through its allegations, as in the case at bar, fully and completely secures the purpose mentioned, another pleading in terms but a repetition thereof, presenting no new issues, is not only unnecessary but serves only to incumber the record, and that, the issues being once fully and fairly presented by the complaint and answer, further pleading upon the part of the plaintiff is not required, and the omission to answer an unnecessary pleading confers no authority upon the clerk to enter plaintiff's default or upon the court to render judgment otherwise than upon the merits.

We are of opinion, therefore, that the court erred in denying the motion to vacate the default and judgment, and the order is reversed and cause remanded.

We concur: JAMES, J.; SHAW, J.

PEOPLE v. HOLT. (Cr. 294.)

(District Court of Appeal, Second District, California. Sept. 18, 1913. Rehearing Denied by Supreme Court Nov. 17, 1913.)

1. EMBEZZLEMENT (§ 44*)—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a conviction for embezzlement.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

2. CRIMINAL LAW (§ 833*)—TRIAL—INSTRUCTIONS—ORDER OF INSTRUCTIONS.

The order in which instructions are given is immaterial, so that accused cannot object that the court gave his instructions before those offered by the people were given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2015; Dec. Dig. § 833.*]

3. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A requested instruction, in an embezzlement prosecution, that it was a sufficient defense that the property was appropriated openly and under claim of title made in good faith,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

though such claim was untenable, was sufficiently covered in a general way by instructions that to convict it must be found that accused received the money for the purpose charged and appropriated it with an intent to embezzle, and, if the appropriation was under the honest belief that he had a lawful right to appropriate the money, he was not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; E. P. Unangst, Judge.

Ira W. Holt was convicted of embezzlement, and appeals from the judgment of conviction and from an order denying his motion for a new trial. Affirmed.

Robert T. Linney and Ralph W. Schoonover, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of embezzlement and appeals from the judgment of imprisonment and from an order denying his motion for a new trial.

The evidence offered in support of the charge showed that a woman named Grace M. Carter had delivered to defendant, who was a real estate agent, the sum of about \$1,100 with which to erect for her a house; that, instead of putting the money to the use for which it was delivered to him, defendant expended it for his own purposes, a portion thereof being paid for an automobile. Prior to the filing of the original complaint, defendant was taken to the office of the district attorney and there interrogated as to the facts connected with the transaction. While it did appear that his visit to the district attorney's office was not entirely voluntary upon his part, sufficient was shown to establish that whatever statement he there made he made voluntarily and with full knowledge that it might be used against him in the event prosecution was instituted. The evidence showed that while in the district attorney's office, in answer to questions asked him, defendant admitted receiving the money of the complaining witness for the purpose charged, and admitted having expended a portion of it in the purchase of an automobile for his own use and the remainder for some other purposes which he did not name but which he admitted had not to do with the erecting of a house for the complaining witness. On his own behalf defendant testified that the money had been given him by the complaining witness for the purpose of aiding him to engage in business for himself as a real estate agent. He testified that the complaining witness desired him to board with her at one time, and that the only restriction she placed upon the matter of the use to which he should put the money was that he should not expend it for liquor or upon women. He further testified that the complaining witness made no demand upon him for the return of the money until,

happening to pass the office where he was employed, she observed a young woman at work there and that she then became enraged and inquired of him who the woman was and where she lived; that she had also visited the house where he lived without his knowledge and examined his belongings, all evidently for the purpose, as assumed by the defendant, of finding out whether the woman was living at the same place. Shortly after this alleged occurrence the complaining witness lodged her charge with the district attorney.

[1] There was ample evidence to sustain the conviction, and an examination of the whole record clearly shows that, whatever irregularity there may have been or error committed during the course of the trial, none of these were of such a prejudicial character as to compel the conclusion that in this case there has been a miscarriage of justice. However, it may be well, in view of the earnestness with which counsel have presented several of their points, to briefly take notice of the contentions made.

[2] It is first claimed that the court should not have given first the instructions offered by the defendant and reserved those offered by the people to be given at the conclusion of the charge. The order in which instructions are given is immaterial. The instructions are in all cases to be considered as the instructions of the court and not as the instructions of the parties to the litigation. It matters not upon whose behalf an instruction may be offered; if the court determines that it contains a proper and pertinent statement of the law and reads it to the jury, it then becomes the advice of the court and not a special argument in favor of either of the parties litigant. In defining the crime of embezzlement, the court used the language of the Penal Code, which was all that defendant could expect or require. The jury were particularly instructed that before convicting the defendant they should find that he received the money for the purposes charged and that he appropriated it with an intent to embezzle the same. They were further instructed that, if the appropriation was made upon the belief honestly entertained by the defendant that he had lawful title or right to appropriate the money, the act was not criminal. These instructions sufficiently covered that phase of the defense which was illustrated by the testimony of the defendant.

[3] The court might well have given the additional instruction, which was offered and refused, which embodied a statement of the provisions of section 511 of the Penal Code, but in a general way the proposition there laid down was sufficiently covered in the instructions which have just been referred to; and in any event, conceding that error was committed by the court in refusing the instruction offered, what has been said pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

liminarily as to that aspect of this case, as viewed under the provisions of section 4½ of article 6 of the Constitution of this state, shows the immateriality and nonprejudicial effect of such error. The instruction on circumstantial evidence was not particularly clear, but in the concluding portion thereof the jury were told that in all events the circumstantial evidence must be of such strength as to satisfy their minds beyond a reasonable doubt as to the guilt of the defendant. The venue was sufficiently proven. A careful and critical examination has been made of all of the points enumerated in appellant's assignment of errors, but nothing is contained therein which furnishes sufficient ground upon which to demand a reversal of the judgment or order.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

CIVILLE v. CIVILLE. (Civ. 1,350.)

(District Court of Appeal, Second District, California. Sept. 18, 1913.)

DIVORCE (§ 171*)—JUDGMENT—RES JUDICATA—FINDING OF FACTS.

Where a wife sued for divorce because of her husband's alleged intimacy with another woman, but the court found such imputation untrue and dismissed the action, the judgment was res judicata of such charge, and she could not plead the same misconduct as justification for her desertion of her husband in defense of his subsequent action for divorce on that ground.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554-558; Dec. Dig. § 171.*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Frank D. Civile against Nellie W. Civile for divorce. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Schweitzer & Hutton, of Los Angeles, for appellant. H. H. Appel, of Los Angeles, for respondent.

SHAW, J. On April 22, 1911, plaintiff filed his complaint alleging that on March 21, 1910, defendant, without cause and against his consent, willfully deserted and abandoned him, which desertion on the part of defendant without cause continued to the date of the commencement of the action. Defendant answered admitting the desertion, as set forth in the complaint, but alleged that on and ever since March 21, 1910, she had refused to live with plaintiff "because of the association of said plaintiff with one Ida Beckett, and because the said plaintiff for a long time prior to said date did associate with said Ida Beckett against defendant's will and consent, and because the said plaintiff did for a long time prior to March 21, 1910, exhibit on his

part great indifference towards this defendant and neglected her because of said association with said Ida Beckett." Upon the issue thus joined the court found: "That prior to March 21, 1910, she (defendant) demanded of and requested the said plaintiff to desist from associating or keeping company with said other woman, and that said plaintiff refused to desist from associating with or keeping company as aforesaid and continued to and did associate with and keep company with a woman other than defendant at late and unusual hours of the night, all of which facts were made known to the said defendant and caused her great mental anguish, and then and there she refused to longer live with said plaintiff herein." "That prior to March 21, 1910, the said plaintiff upon numerous occasions and divers times, and when not engaged in his business, kept away from his home until late and unusual hours of the night, and exhibited on his part great indifference towards the defendant herein, and neglected her by reason of his association with a woman other than defendant." And as a conclusion of law the court found that said facts justified defendant in abandoning her husband and refusing to live with him.

Whether or not the allegation quoted from the answer constituted a defense to the action admits of grave doubt; but conceding that the facts pleaded, if true, as found by the court, constituted extreme cruelty, and hence sufficient cause for the admitted desertion, it was nevertheless error to admit any evidence in support of such facts, for the reason that there had been a formal final adjudication between the parties of the issue in an action filed by defendant on said March 21, 1910, against plaintiff, wherein plaintiff, who is defendant here, had alleged the same facts as constituting extreme cruelty, on account of which she asked for a divorce. The court, as shown by the judgment roll in that case, which was here introduced in evidence, found the alleged facts to be untrue and gave judgment against her. The issue tendered was therefore res adjudicata, and plaintiff's objection to the evidence offered in support thereof should have been sustained. The sole and only acts of plaintiff assigned by defendant as a cause for her desertion of plaintiff were those alleged in her action for divorce wherein the court found him without fault. No evidence whatever was offered tending to show any misconduct on his part subsequent to the date of March 21, 1910, at which time she filed her complaint for divorce, and, as stated, one of the grounds therefor being the alleged misconduct pleaded herein as a ground for desertion, and the action of the court had therein was conclusive upon such question.

It was therefore the duty of the wife, particularly when he expressed a desire to have her do so, to return to her husband, instead

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of which her testimony shows an irrevocable determination on her part to never return.

The judgment and order appealed from are reversed.

We concur: ALLEN, P. J.; JAMES, J.

NEWMIRE v. FORD. (Civ. 1,308.)
(District Court of Appeal, Second District, California. Sept. 19, 1913.)

1. ATTORNEY AND CLIENT (§ 134*)—EMPLOYMENT—BREACH OF CONTRACT—DAMAGES.

Under Civ. Code, § 3358, providing that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof, there could be no recovery for breach of a contract to pay an attorney \$1,500 for defending a person charged with murder and employing physicians, detectives, and help when it became necessary, where there was no evidence as to what would be a reasonable or necessary expenditure for physicians, detectives, and help; it being conjectural whether any sum would have remained as compensation after the agreed expenditures were made.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 301-304; Dec. Dig. § 124.*]

2. ATTORNEY AND CLIENT (§ 143*)—BREACH OF CONTRACT BY CLIENT—EFFECT OF PROVISIONS OF CONTRACT.

A contract between a person confined in jail, charged with murder, and a young and inexperienced attorney, who had never tried a murder case and had a very limited experience in the trial of any class of cases, if construed as providing for the payment of \$1,500 in any event as compensation for his services in defending the client, was unconscionable and contrary to substantial justice; and hence for a breach by the client only reasonable damages could be recovered, under Civ. Code, § 3359, providing that where an obligation appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328-331; Dec. Dig. § 143.*]

3. CONTRACTS (§ 329*)—ACTIONS FOR BREACH—PREMATURE SUITS.

Under a contract between an attorney and a client by which the client agreed to mortgage a house and pay the attorney \$1,000 and execute a promissory note for \$500, secured by a second mortgage, or, if a mortgage was not procurable, to sell the house and furniture and pay the attorney \$1,500, or, if she could not mortgage or dispose thereof within two months, to deliver her note to the attorney for \$1,500, secured by mortgages upon the house and furniture, an action for damages from the client's breach thereof, brought within 60 days after the execution of the agreement, was premature.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1511, 1585-1588; Dec. Dig. § 329.*]

4. ATTORNEY AND CLIENT (§ 140*)—ACTIONS FOR COMPENSATION—APPEAL.

In an attorney's action for breach of an agreement to employ him and pay him \$1,500 for his services, assuming that the trial court, in the absence of any direct evidence of value, might in its discretion assess the attorney's

damages, the allowance of \$1,000 was an abuse of discretion, where it appeared that the only services performed by the attorney consisted of 1½ hours talk with the client, and a single visit to the courthouse for the purpose of examining the stenographer's notes taken at the preliminary hearing.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 336-349; Dec. Dig. § 140.*]

5. DAMAGES (§ 163*)—ACTIONS—PROOF OF DAMAGE.

A party suing for damages sustained through another's breach of a contract must show what damages he has actually sustained.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

Appeal from Superior Court, Los Angeles County; John L. Childs, Judge.

Action by Earl Newmire against Caroline F. Ford. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

See, also, 128 Pac. 952.

John S. Steely, Earl Rogers, and W. H. Dehm, all of Los Angeles, and Henry W. Nisbet, of San Bernardino, for appellant. Newmire & Morris and Byrer & Monteleone, all of Los Angeles, for respondent.

ALLEN, P. J. The action was one upon a written contract alleged to have been entered into between plaintiff and defendant, and was in these words:

"This agreement, made and entered into this 5th day of June, 1911, witnesseth: That, whereas Earl Newmire, Esq., attorney at law, has undertaken, first, the defense of Caroline F. Ford, charged with the murder of A. P. Ford, and has agreed with the said Caroline F. Ford to procure the testimony of physicians necessary to her proper defense and employ detectives and other help when the same becomes necessary; and secondly, has further undertaken on behalf of said Caroline F. Ford to have the last will and testament of said A. P. Ford set aside and procure for her the share of said A. P. Ford's estate to which she believes herself justly entitled: Now, therefore, in consideration of the services which have already been rendered and to be rendered in connection therewith, said Caroline F. Ford agrees to pay to said Earl Newmire the following sums and in the following manner, to wit: Said Caroline F. Ford agrees to immediately, or as soon as is deemed advisable by said Earl Newmire, to execute a mortgage of her interests in the house, lot and furniture in said house located at No. 1428 W. 30th street, in the city of Los Angeles, county of Los Angeles, state of California, for the sum of not less than \$1,000, or if more to pay to said Earl Newmire the sum of \$1,000 the same way, reserving the balance for her own personal use, and to execute a promissory note for \$500, payable in one year from date of executing the said first mortgage, which said note is to

be secured by a second mortgage of her interests in said premises. And the sum of \$1,500 is understood to be in full for the services mentioned in the first undertaking on the part of said Earl Newmire, provided the said Caroline F. Ford retains the said Earl Newmire to undertake the setting aside of the last will and testament of A. P. Ford, her deceased husband, or in the case the mortgage upon said premises is not procurable within a month hereof, then to sell her said interests if possible in said house, lot and furniture for the sum of not less than \$1,500 and to pay the sum of \$1,500 to said Earl Newmire, which sum is to be in full for all services mentioned in the first undertaking above set forth, provided the said Caroline F. Ford retains the said Earl Newmire to undertake the setting aside of the last will and testament of A. P. Ford, her deceased husband. Or in case she cannot mortgage or dispose of the said property within two months from date hereof, then the said Caroline F. Ford agrees to execute and deliver her promissory note to said Earl Newmire for a sum of \$1,500, payable in thirty days, which said note is to be secured by mortgages upon the premises and the furniture located in said house as above mentioned, which said note, if collectible, is to be in full for all services mentioned in the first undertaking above set forth, provided the said Caroline F. Ford retains the said Earl Newmire to undertake the setting aside of the last will and testament of A. P. Ford, her deceased husband. And said Caroline F. Ford agrees to pay to said Earl Newmire in return for his undertaking the setting aside of the last will and testament of A. P. Ford, her deceased husband, and for the recovery of the portion of his estate to which she believes herself justly entitled, one-half of all moneys or property recovered by her from the estate of said A. P. Ford, deceased. In witness whereof, the parties hereto have hereunto affixed their hands and seals the day and year first above written. Caroline F. Ford. Earl Newmire.

"Subscribed and sworn to before me this 5th day of June, 1911. F. M. Shepard, Notary Public. [Seal.]"

The answer of defendant admits the execution of the contract, but alleges that the same was procured through fraudulent representations, and was immediately rescinded upon discovery of the fraud; further, that at the time when defendant entered into such contract she was of unsound mind; that it had been reported to her that plaintiff was a lawyer of great experience, learning, and skill in the trial of murder cases; that one Rogers, her regular attorney, was less competent; that such regular attorney was not attending to her case; and, being so weak mentally, she yielded to the solicitations and entered into the agreement; that such representations were untrue; that on

the succeeding day, being apprised of the falsity of the representations, she rescinded said agreement. She denies that plaintiff entered into her defense, or performed any services in her behalf therein, or that any damage was suffered by plaintiff. The trial court found that defendant, at the time of entering into said contract, was of sound mind, that no undue influence was exerted, and that because of the breach on defendant's part plaintiff had suffered damages in the sum of \$1,000, for which sum, with costs, judgment was entered. From this judgment, and from an order denying a new trial, defendant appeals upon a statement of the case.

The agreement is somewhat unique, not only as a verified contract, but with reference to its terms generally. While it recites that plaintiff has undertaken the defense of defendant, the only thing he had expressly agreed to do in connection therewith was to employ physicians, detectives, and help when it became necessary. Further, the sum stipulated as compensation or reimbursement is conditioned upon employment in another case, civil in its nature, and for which plaintiff was to receive one-half of an estate to be thereby recovered. Further, no money was made payable, but it was agreed that if defendant did not sell certain property, or mortgage the same for her own use and to realize money to be paid to plaintiff, she was, within two months from the date of the contract, to execute to plaintiff her note for \$1,500, payable in 80 days and secured by mortgage, which note and mortgage, if collectible, were to be received as full compensation, provided employment in the civil case followed. It would seem that if plaintiff was not employed in the civil case, or if the note was uncollectible, the extent of his fees in the criminal case was not stipulated.

[1] Considering the whole contract, we are unable to see how the learned trial judge could determine therefrom its terms, or the obligations imposed upon either of the parties. It does not appear from allegation or evidence in the record what amount would be a reasonable or necessary expenditure for physicians, detectives, and help; the necessity for help through the employment of a competent criminal lawyer being obvious from the matters appearing in the record. It is a rule laid down by section 3358, Civil Code, that no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance. Whether any sum would have remained as compensation to plaintiff for his services after agreed expenditures were made is a matter of conjecture.

[2] If the contract be considered as an agreement to pay \$1,500 in any event as a compensation for plaintiff's services, the youth and inexperience of plaintiff, the fact that he had never tried a murder case, and

had had but a very limited experience in the trial of any class of cases, the circumstances surrounding the execution of the contract, and the surroundings of the parties would indicate that such a contract would be, within the spirit of section 3359, Civil Code, unconscionable and contrary to substantial justice, in which event only reasonable damages could be recovered.

[3] But were the contract, the basis of the action, one proper for enforcement, under the optional right given defendant, no sum was due from her for 60 days after the execution of the agreement, and, the action being brought before the expiration of such time, the same is premature.

[4] The only services actually shown to have been performed by plaintiff consisted of 1½ hours' talk with defendant at the jail, a part of which time was taken up in negotiations leading up to the employment, and a single visit to the courthouse for the purpose of examining the stenographer's notes taken at the preliminary hearing. Whether such examination was actually made or not does not appear. There is not a particle of evidence tending to show what amount would be a reasonable compensation under the circumstances on account of any services actually rendered. There is no evidence in the record tending to show that plaintiff's damages were \$1,000, as found by the court.

[5] Were it conceded that plaintiff, upon notice on defendant's part that she would not comply with the contract, possessed a present right of action for damages actually sustained through defendant's breach, it nevertheless was incumbent upon him to show what damages he had actually sustained. Even upon the theory that the trial court, in the absence of direct evidence of value, might assess an amount of damages through an exercise of discretionary power, still we should regard the allowance so made as an abuse of discretion. In our opinion, therefore, under the record, the trial court could only have assessed such damages as would have been reasonable under the circumstances of the case. There is no finding with reference thereto, and we regard the finding that plaintiff suffered damages to the amount of \$1,000 as unsupported by any evidence.

Judgment and order reversed, and cause remanded.

We concur: JAMES, J.; SHAW, J.

REED et al. v. McDONALD. (Civ. 1,316.)
(District Court of Appeal, Second District,
California. Sept. 18, 1913.)

1. EVIDENCE (§ 445*) — PAROL EVIDENCE — WRITTEN CONTRACT.

Where a written contract for the sale of baled hay provided a method for approxima-

tion of the weight, but such method was not followed by the parties at any time, evidence of a subsequent parol agreement between them to pursue another method which they deemed would secure a more accurate weight was not objectionable as varying the terms of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.*]

2. ESTOPPEL (§ 78*) — DETERMINATION OF QUANTITY — WEIGHT — AGREEMENT — ESTOPPEL.

Where plaintiffs purchased a definite lot of baled hay from defendant, agreeing to estimated weights, and after removal of a part thereof sold the remainder to G., who employed L. to remove and ship it, defendant, having also agreed with plaintiffs to accept car weights for the hay removed by L. in order to relieve them from the obligation to check the weights as the hay was removed, was estopped by such agreement to assert that it was not binding, having permitted plaintiffs to relinquish to L. the matter of hauling the hay and checking the weights.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

3. SALES (§ 61*) — PASSAGE OF TITLE — WEIGHING MERCHANDISE.

Where plaintiffs bought a stack of baled hay from defendant at \$8.75 per ton, paying therefor on an estimated tonnage basis, and agreeing to adjust differences after the hay had been weighed and removed, the contract was not executory, but title passed on the making thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.*]

4. SALES (§ 151*) — PASSING TITLE — CARE OF MERCHANDISE PRIOR TO DELIVERY.

Where title to a stack of baled hay passed to the buyers on the making of the contract of sale, subject to an agreement to adjust differences in weights on the removal and weighing of the hay, the duty of keeping the stack protected by fences, etc., and preventing its removal by third persons was on the buyers; they being required to account to the seller for the entire stack.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 352; Dec. Dig. § 151.*]

5. SALES (§ 397*) — SHORTAGE IN QUANTITY — ABATEMENT OF PRICE — BURDEN OF PROOF.

Where plaintiffs purchased a stack of hay from defendant on an estimated tonnage basis, with an agreement to adjust differences in weight after the hay had been removed and weighed, the burden was on plaintiffs claiming an abatement for shortage in quantity to prove the difference between the amount of hay in the stack and that for which they paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1136; Dec. Dig. § 397.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by H. M. Reed and another against R. McDonald. From a judgment for plaintiffs, and from an order denying defendant's motion for new trial, he appeals. Reversed.

Geo. E. Whitaker, of Bakersfield, for appellant. W. S. Allen, of Los Angeles, and F. E. Borton, of Bakersfield, for respondents.

JAMES, J. This litigation has for its origin a dispute which arose out of a written contract for the sale of a lot of baled hay. The cause of action accrued in the year 1900

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and is therefore now of well-seasoned age. During the year mentioned the defendant was the owner of a large stack of baled hay, located at Bakersfield, which plaintiffs were desirous of purchasing. The parties having agreed upon the price of \$8.75 per ton, the next question to be settled was as to the amount of hay contained in the stack. This amount was finally estimated to be 650 tons. A written agreement was thereupon executed which provided that, based upon such estimated tonnage, the plaintiffs should pay \$2,645 on February 20, 1900, and the balance of \$3,042.50 on September 1, 1900. It was not agreed that the estimated tonnage should be taken as the basis for a final accounting, but to cover that matter the following clause was included in the written agreement: "The approximate tonnage to be accepted by both parties, until the parties shall move the said hay, at which time the portion of same shall be weighed, and balance of stack counted in bales, and average of same be taken to the satisfaction of both parties. And overplus from above said figures 650 tons shall be paid for by the parties of the second part at aforesaid rate \$8.75 per ton, and any shortage of aforesaid figures 650 tons shall be refunded at same rate." The cash payments hereinbefore referred to were made at about the time specified, but the hay was not all removed from the stack by the plaintiffs, or under their direction, until about January of the year 1901. After the hay had all been removed, plaintiffs claimed that there was a shortage of approximately 100 tons and demanded a refund therefor under the term of the contract covering such contingency. The demand was refused and this action followed, which resulted in a judgment in favor of plaintiffs. The trial court found that there was a shortage of 91 tons, 856.80 pounds, and gave judgment for that amount at the contract price of \$8.75 per ton, with interest. Defendant appealed from the judgment and from an order denying his motion for a new trial.

The evidence showed without dispute that when the plaintiffs first began to remove hay from the stack a quantity of it was weighed and these weights were compared with the balers' tag weights which were attached to each bale. It being found that these tag weights corresponded very closely with the actual scale weights then made, plaintiffs and defendant agreed to use the tag weights in ascertaining the total tonnage received by the former. This method of establishing the weight of the hay continued until plaintiffs had removed about 307 tons. At that time plaintiffs had, through some arrangement with a man named De Groot, agreed to let De Groot have the remainder of the hay, and De Groot had arranged with one Loveland to remove the hay from the stack and make shipment of it. Thereupon one of the plaintiffs called upon defendant and stated, so he testified, that De Groot had

acquired ownership of the hay and that he desired Loveland to remove it. This plaintiff testified that defendant then agreed that Loveland might remove the hay and that he (defendant) would accept car weights from Loveland as proof of the quantity removed. Defendant denied that he ever agreed to accept car weights or any weights from Loveland, although it appears that he did accept such weight returns from Loveland for a time. All parties agree that, before Loveland had taken away all of the hay, defendant did notify him that he would not accept his weights any further. Loveland continued to remove the hay until it had all been disposed of. Loveland did not ship all of the hay which he removed and therefore did not receive car weights for all of it, but he testified that the total amount which he removed was 164 tons, 439 pounds, and that of this amount he shipped 141 tons, 1,600 pounds, and sold the remainder at different places in Bakersfield. There was some loose and damaged hay, the quantity of which was estimated by the parties, and plaintiffs were charged with this in the computation made by the trial court. Respondents have not favored the court with any brief on this appeal, and therefore appellant's points must be examined without the aid of counterargument.

The chief contention of appellant is that, the contract for the sale of the hay being in writing and being reasonably clear and explicit as to the method which it was agreed should be pursued in arriving at the tonnage of the hay, such contract could not be altered or varied by an unexecuted parol agreement. The deduction is then made that, even though the finding of the trial court wherein it was determined that defendant had agreed to accept the car weights for the hay, as furnished by Loveland, should not be disturbed because it rested upon a conflicting state of the evidence, still defendant was not bound by the latter agreement because it contemplated the use of a method different from that stipulated for in the written contract. The second principal contention is that in any event the burden of showing a shortage in the quantity of hay sold rested upon plaintiffs and that this burden was not sustained by the proof offered.

[1] The clause in the contract referring to the method which the parties agreed might be used in estimating the quantity of hay was never strictly followed. In interpreting it in the light of the evident intention of the parties, it is clear that the desire was to get at, as nearly as possible, the exact weight of the hay. The stack being a large one, the method of averaging the greater quantity of it was agreed upon as a satisfactory one. However, the parties themselves did not follow this method at any time. When the plaintiffs first began to remove the hay they weighed a quantity of it and then plaintiffs and defendant together

decided to take the tag weights that had been attached by the balers, as these weights were found to be approximately correct as verified on the scales. The clause of the contract describing the mode how the weight should be ascertained should be, as before suggested, construed only as indicating how an approximation of the exact weight might be arrived at. If the exact weight had been ascertained by weighing all of the hay upon the scales, undoubtedly neither party could have questioned that method. Therefore it would not be proper to hold that an agreement to pursue some other method, which the parties deemed would secure for them the actual weight of the hay, should be deemed to work a variation of the terms of the written contract in a material particular.

[2] Moreover, assuming that the finding of the court as to the agreement to accept car weights properly determines that fact, as must be assumed because of the contradictory state of the evidence, it appears that the plaintiffs depended upon this agreement so made with the defendant and that defendant did not refuse to abide thereby until a large portion of the remainder of the hay had been removed under Loveland's direction. One of the plaintiffs testified that his reason for securing the assent of defendant to allowing Loveland to turn in the car weights of the hay was so that he (that plaintiff) might be relieved of the obligation of checking it and that he relied upon defendant's agreement to accept car weights from Loveland. Under this state of the case defendant should be held to be estopped from asserting that the agreement to accept car weights was not binding after he had allowed plaintiffs to relinquish into the hands of Loveland the matter of hauling away and checking the weights of the hay. There is more merit in the second contention of defendant that the evidence was not sufficient to enable the trial court to ascertain the cause of the alleged shortage or the amount thereof.

[3] The title to the hay in the stack passed to the plaintiffs upon the making of the contract of purchase. *Lassing v. James*, 107 Cal. 348, 40 Pac. 584. It was not an executory sale, and the only control over the merchandise retained by the defendant, the vendor, was that control which would enable him to check the hay as it was moved away from his ground.

[4] The duty of keeping up protecting fences and the wooden guards placed about the stack devolved upon plaintiffs. The plaintiffs, therefore, were obliged to account to defendant for the entire stack of hay; the condition of contract was not such that they were to pay for whatever hay they might remove from the stack; but the entire lot of hay belonged to them, for which they made payment to defendant. There was evidence showing that at different times, through the evident negligence of Loveland

and his men, the fences which inclosed the haystack were down, apertures therein were allowed to remain for a day or two at a time, and that some persons did remove hay from the stack. Loveland testified that the fence was open at times so that any one could drive in, and admitted that he had told defendant on one occasion that some of the damaged hay had been taken out or stolen; that the men he had hauling the hay had told him that some bales were taken out. The quantity of hay thus removed was neither estimated nor accounted for, and the fact that it may have been damaged hay did not in any way relieve plaintiffs from the obligation to pay therefor according to their contract. The evidence showed very clearly that Loveland was negligent in not properly protecting the stack of hay from the depredations of thieves, and, as indicated by his own testimony, he showed that it was probable that hay had been stolen and taken away. If there had been any testimony indicating, or tending with reasonable certainty to indicate, what quantity of hay had been removed and not accounted for, the court would have had a basis upon which to calculate the actual shortage.

[5] The burden which plaintiffs assumed in order to establish their case was the burden of showing the difference between the actual amount of hay in the stack and that for which they had paid. This they did not do.

There seems to have been no error committed in the admission of testimony which should be characterized as prejudicial. Testimony given by the plaintiffs at a former trial was read in evidence, but all of this was fairly in the way of explanation of detached statements which had been read from the same record on cross-examination.

It appearing that the evidence was insufficient to sustain the finding of the court as to the alleged fact that there was a shortage in the quantity of hay sold and as to the amount thereof, the judgment and order must be reversed, and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

NATIONAL LUMBER CO. v. TEJUNGA
VALLEY ROCK CO. et al.
(Civ. 1356.)

(District Court of Appeal, Second District, California. Sept. 20, 1913. Rehearing Denied by Supreme Court Nov. 19, 1913.)

1. SALES (§ 52*)—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for the price of railroad ties, sold to one corporation and used by another, the defendant in the action, held to sustain a finding that no agreement was made by defendant to pay plaintiff for the ties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

2. LIMITATION OF ACTIONS (§ 29*)—"STATED ACCOUNT"—"OPEN ACCOUNT."

Where a statement of account was rendered and its correctness verbally admitted, it constituted a stated account which superseded the original account and created a new cause of action not founded upon an instrument in writing, and was barred by limitations under Code Civ. Proc. § 339, after two years; the term "open account," as used in the statute of limitations (Code Civ. Proc. § 337) prescribing a four-year period, being in opposition to a stated account the correctness of which is admitted.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 136-140; Dec. Dig. § 29.*]

For other definitions, see Words and Phrases, vol. 7, p. 6642; vol. 6, pp. 4984, 4985.]

3. TROVER AND CONVERSION (§ 16*)—RIGHT OF ACTION—POSSESSION.

Where a company sells railroad ties to another company, and such ties are converted by a third company, the seller cannot recover against the third company for conversion; possession or the right of possession being necessary in order that a plaintiff may recover in such action.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 119-147; Dec. Dig. § 16.*]

4. LIMITATION OF ACTIONS (§ 151*)—STATED ACCOUNT—ENLARGEMENT OF PERIOD.

A stated account, rendered after the right to sue on a prior stated account has been barred by the statute of limitations, will not enlarge the time within which suit may be brought upon the original stated account.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 614-618, 620; Dec. Dig. § 151.*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the National Lumber Company, a corporation, against the Tejunja Valley Rock Company, a corporation, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant. Flint, Gray & Barker and F. E. Davis, all of Los Angeles, for respondents.

ALLEN, P. J. In what is hereinafter said the respondent Tejunja Valley Rock Company is denominated the "Valley Company," while the respondent Tejunja Rock Company is mentioned as the "Rock Company."

Plaintiff by its complaint filed January 20, 1911, declared upon five alleged causes of action; the first being that on March 14, 1908, plaintiff sold and delivered to defendant Valley Company a quantity of railroad ties, under an agreement on the part of said defendant to pay therefor the sum of \$1,639.20; that afterwards the Rock Company took possession of said ties, agreeing to pay plaintiff therefor. The second cause of action alleged the sale and delivery by plaintiff to both companies, while the fifth cause of action alleged facts tending to show a conversion of the ties by both defendants, and the fourth cause of action declared against both companies upon a stated account rendered in 1910. The

Valley Company by its answer denies all of the allegations of the complaint. No answer of the Rock Company appears in the record, other than an amendment to an answer which amendment pleads the bar of the statute. It refers, however, to an answer on file. The findings of the court are in favor of the plaintiff as to the alleged sale and delivery to the Valley Company, but in favor of defendants upon all other issues; and the court further finds that the cause of action arising from the sale was barred at the commencement of the action by section 339 of the Code of Civil Procedure. Judgment was entered in favor of both corporations defendant. From this judgment, and from an order denying a new trial, plaintiff appeals upon a bill of exceptions. This bill of exceptions shows that the parties assumed upon the trial that an issue was presented by both defendants, and upon that assumption evidence was introduced by the parties in respect thereto, and the court in its findings so considered the case as thus presented; in fact, appellant raises no question as to the omission of the Rock Company in presenting issue. Upon this appeal we will therefore consider that the case was tried regularly, and after all material issues had been tendered.

[1] Appellant's principal contention is that there is no evidence supporting the finding that no agreement was made by the Rock Company to pay plaintiff when it took possession of said ties. The bill of exceptions develops that evidence was received tending to show the following facts: That the sale and delivery of the ties mentioned by plaintiff to the Valley Company was upon 60 days' time. A cause of action accrued by virtue of the sale in favor of plaintiff and against the Valley Company May 17, 1908. When the sale was made plaintiff's bookkeeper made an entry thereof upon its books, and after the maturity of the claim, and after October, 1908, rendered monthly statements to the Valley Company, which it conceded to be correct. In April, 1908, the Rock Company, was incorporated with a capital stock of \$200,000, represented by 200,000 shares of \$1 each, and in May following one Peckham proposed to the Rock Company to transfer to it certain assets of the Valley Company in consideration of the issue to him of 199,900 shares of the company's stock. About the same time the Rock Company absorbed another corporation, called the Standard Rock Company, engaged in like business, and the agreement was that the stock issued by the Rock Company to Peckham should be divided by him among all interested parties, including the shareholders in the Valley Company and the Standard Company. While the stockholders in the Valley Company were given stock in the Rock Company, no property of the Valley Company was ever transferred. In truth, it seems to have had no property of any value, except these ties, and they were not included

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the proposed transfer. While as a fact neither the plaintiff nor the Rock Company had any property in these ties, yet negotiations were kept alive looking to payment therefor by the Rock Company whenever it could issue bonds, or should have occasion to use such ties. It does not appear that bonds were ever issued, but the Rock Company appropriated the ties to its own use some time in the year 1909 or 1910, without payment to the Valley Company, or to any other one. It will be thus seen that, not only is there an absence of agreement upon the part of the Rock Company to pay plaintiff, based upon a consideration, for during all the time it was negotiating with the Rock Company plaintiff had no property interest in the ties, and could transfer nothing to the Rock Company, even upon payment, but nothing in evidence tends to show that the Rock Company's incorporation was intended to be or was a reorganization or consolidation of the Valley Company sufficient to bring it within the rule that "neither law nor equity will permit one corporation to take all of the property of another, deprive it of the means of paying its debts, enable it to dissolve its corporate existence, and place itself beyond the reach of creditors, without assuming the liabilities." The evidence shows that the Valley Company parted with nothing, and the mere fact that Peckham got 66,000 shares of the Rock Company's stock without consideration in no wise tends to strengthen plaintiff's claim against the Rock Company, and the transaction is not such as will raise the presumption of an agreement upon the part of the Rock Company to pay a debtor of the Valley Company. We think the claim of appellant that the court erred in finding a bar to the claim of plaintiff against the Valley Company is without merit.

[2] The amendment of 1907 (St. 1907, p. 599) to section 337 of the Code of Civil Procedure, extending the time for bringing actions upon open book accounts, has no application under the facts of this case; were it conceded that the entry upon plaintiff's books of this single transaction constituted an open book account. Nevertheless, when a statement of account was rendered in June, 1908, and its correctness admitted, the same as a stated account superseded the original account and furnished a new contract. *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371. The term "open account" is in opposition to a stated account the correctness of which is admitted. *Whittlesey v. Spofford*, 47 Tex. 13. A stated account, in the absence of written promise to pay, creates a new cause of action, becomes and is an obligation not founded upon an instrument in writing, and is therefore barred under section 339 of the Code of Civil Procedure after two years.

[3] There is nothing in the record justifying the claim of inaccuracy as to the finding relating to the alleged conversion, or the

cause of action claimed to have arisen by reason of the stated account in 1910. As to the Valley Company, the transaction was one of purchase; as to the Rock Company, whatever may have been done by it by way of converting the ties, the same only affected the Valley Company, owner of the ties, for possession, or the right of possession, is necessary in order that plaintiff may recover in conversion. *Middlesworth v. Sedgwick*, 10 Cal. 393.

[4] A stated account, if rendered in 1910, long after the original statement which determined the rights of the parties to sue, would not have the effect to enlarge the time within which suit could be brought upon the original account as stated.

We see no error in the record warranting a reversal of the judgment and order, and the same are affirmed.

We concur: JAMES, J.; SHAW, J.

THOMAS v. THOMAS. (Civ. 1,190.)

(District Court of Appeal, Third District, California. Sept. 30, 1913.)

COURTS (§ 212*)—APPELLATE JURISDICTION—TRANSFER OF CAUSE—WANT OF JURISDICTION.

The District Court of Appeals, having no appellate jurisdiction on appeals from the superior courts in cases at law involving the title and possession of real estate, since Const. art. 6, § 4, confers such jurisdiction upon the Supreme Court, had no power to dismiss the appeal but will transfer the appeal together with the motion to dismiss it to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513-515; Dec. Dig. § 212.*]

Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by Mary A. Thomas against Frank V. Thomas. Judgment for plaintiff, and defendant appeals. Appeal and motion to dismiss appeal transferred to the Supreme Court.

James Snell, of Grass Valley, for appellant. J. M. Walling and Fred Searls, both of Nevada City, for respondent.

HART, J. The defendant has taken an appeal to this court from a judgment entered against him in the above-entitled cause and from an order denying his motion for a new trial therein.

There is no transcript on file, and the plaintiff has noticed a motion to dismiss the appeal on the ground that the defendant has failed to "serve or file a transcript of the record of said cause on appeal as required by rule 5 of the Supreme Court" (119 Pac. x). The plaintiff has also submitted a motion to this court that the appeal, together with the motion to dismiss the same, be transferred to the Supreme Court on the ground that this court has not appellate jurisdiction of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cause and cannot therefore legally pass upon and dispose of the motion to dismiss the appeal. The motion to transfer the case to the Supreme Court must be granted.

As stated, there is no transcript of the record on file here, but it is made to appear by a certified statement of the clerk of the court below that the action involves the question of the title and possession of real estate, and in such cases the appellate jurisdiction is in the Supreme Court. Article 6, § 4, Const. That section, among other things, provides that the Supreme Court shall have appellate jurisdiction on appeal from the superior courts "in all cases at law which involve the title or possession of real estate." This court cannot therefore acquire jurisdiction in such cases by direct appeal; nor obviously has this court the right or the power to dismiss an appeal of which it has no jurisdiction.

It is accordingly ordered that the appeal, together with the motion to dismiss the same, be transferred to the Supreme Court.

We concur: CHIPMAN, P. J.; BURNETT, J.

WICKERSHAM CO. v. NICHOLS et al.
(Civ. 1,371.)

(District Court of Appeal, Second District, California. Sept. 22, 1913.)

1. PRINCIPAL AND SURETY (§ 78*)—CONSTRUCTION OF SURETYSHIP—AGREEMENT—EXTENT OF LIABILITY—"VALUE."

Under a suretyship obligation reciting the delivery to the principal, as salesman, of "articles and samples of diamonds," etc., and conditioned upon the return of said diamonds, etc., or in case the principal "shall sell any of said merchandise, then in that case to pay over to" plaintiff "the value of such merchandise so sold" when the obligation shall be void, the sureties were liable for the market value of jewelry intrusted to the principal for sale, whether samples or otherwise, if sold by the principal or appropriated to his own use; the word "value" used in the undertaking meaning market value.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 124; Dec. Dig. § 78.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7275-7280, 7826.]

2. PRINCIPAL AND SURETY (§ 59*)—CONSTRUCTION OF AGREEMENT.

Sureties are entitled to stand by the letter of their bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

3. PRINCIPAL AND SURETY (§ 144*)—LIABILITY OF SURETY—AMOUNT.

While no private agreement between the employer and a salesman could increase the liability of the salesman's sureties under a surety agreement conditioned for the salesman's return of diamonds, etc., intrusted to him, or his payment to his employer of the market value of any such merchandise sold, in order that the sureties' liability may not exceed the salesman's, the sureties may deduct from the market value of goods sold any commission to which the salesman would be entitled under any

personal agreement between him and his employer.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 393-396; Dec. Dig. § 144.*]

4. PLEADING (§ 84*)—ALLEGATIONS OF COMPLAINT—CONSTRUCTION—"VALUE."

An allegation of the complaint in an action on a suretyship agreement, conditioned for the payment of the market value of any goods sold by the principal, that the goods were sold at a "value," stated meant that they were of that market value.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.*]

5. APPEAL AND ERROR (§ 843*)—REVIEW—UNNECESSARY FINDINGS—FINDINGS CONTRARY TO ADMISSIONS.

A finding of a fact contrary to an admission of the complaint upon a question not in issue was unnecessary and cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

6. APPEAL AND ERROR (§ 717*)—TRANSCRIPT—CONTENTS—OPINION OF COURT.

The opinion of the trial court, though appearing in the transcript, cannot be considered as determining any question of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2967; Dec. Dig. § 717.*]

Appeal from Superior Court, San Luis Obispo County; Wm. M. Finch, Judge.

Action by the Wickersham Company against Archie Nichols, as principal, and others, as sureties. From a judgment in favor of the sureties, plaintiff appeals. Reversed and remanded for new trial.

E. L. Foster and Charles A. Palmer, of San Luis Obispo, for appellant. Carpenter & Gibbons, of San Luis Obispo, for respondents.

ALLEN, P. J. Plaintiff's action was based upon an undertaking executed by Archie Nichols, as principal, and Hans Christian Hansen and H. H. Carpenter, as sureties. This undertaking was conditioned as follows: "The condition of the above obligation is such that, whereas the said Wickersham Company has employed the said Archie Nichols as salesman for the purpose of selling diamonds, watches, clocks, jewelry, and merchandise belonging to the jewelry business, and have delivered unto the said Archie Nichols articles and samples of diamonds, watches, clocks and jewelry of various kinds. Now, therefore, should the said Archie Nichols, well and truly return the said diamonds, watches, clocks, and jewelry so delivered, unto the said Wickersham Company; or in case the said Archie Nichols shall sell any of said merchandise, then in that case to pay over to the said Wickersham Company the value of such merchandise so sold; then this obligation to be void; otherwise to remain in force."

The record discloses that an agreement existed between Nichols and plaintiff, of which the sureties at the time of signing the bond

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were ignorant, to the effect that the goods delivered to Nichols, as between the parties, should have a value equal to plaintiff's retail price for kindred goods; that if Nichols sold any of the goods delivered to him he should be allowed a commission of 20 per cent., 25 per cent., and 33 per cent.; that upon the filing of the bond, and under the agreement, plaintiff delivered to Nichols goods to the value of \$17,059.35; that of such goods so delivered to him Nichols returned goods to the value of \$14,606.66; that of such goods so delivered he sold goods to the value of \$2,452.69, accounting to plaintiff only for the sum of \$490. The complaint alleges that these goods so sold by Nichols were of the value of \$2,504.20. This averment in the complaint as to the value of the sold goods is not denied in the answer filed by the sureties. The court, however, finds that this value of the goods sold was based upon plaintiff's usual retail price, and that the commission of Nichols on account of such sale under his agreement amounted to \$586.47. The court accordingly rendered judgment in favor of plaintiff and as against the principal for \$1,376.32 but in favor of the sureties for their costs. From this judgment in favor of the sureties plaintiff appeals upon the judgment roll.

[1] It is obvious from the findings and the whole record that the trial court determined that under the terms of the bond the sureties were not liable for the value of any goods sold except such as were delivered as samples; that unless the goods delivered as samples were sold the sureties were not bound. We are of opinion that, under the conditions of this bond, the sureties were liable for the value of any articles of jewelry, whether samples or otherwise, intrusted to the principal for sale, but that their liability only extended to the market value of such goods so by the principal sold or appropriated to his own use. The word "value" appearing in the bond must be taken to mean market value. *Kountz v. Kirkpatrick*, 72 Pa. 376, 13 Am. Rep. 687; *In re McGhee's Estate*, 105 Iowa, 9, 74 N. W. 695; *Jonas v. Noel*, 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862.

[2, 3] The sureties are entitled to stand upon the letter of their bond and were in no wise affected by any private agreement between the principal and plaintiff, of which they had no knowledge.

[4] The allegation of the plaintiff's complaint that the goods sold had a value of \$2,504.20 must have the same construction given it as to the word "value" as the sureties are entitled to when the same word is employed in the bond. While, as before said, no private agreement between the plaintiff and Nichols could increase the liability of the sureties, nevertheless, in order that the sureties' obligation might not exceed that of the principal, the sureties were entitled to

a reduction from the market value of any amount to which, by the agreement between plaintiff and Nichols, Nichols was entitled to retain as commission. The court, however, having found that under this agreement Nichols was entitled to 20 per cent., 25 per cent., and 33 per cent., such commissions would have aggregated the sum of \$1,502.52. The finding of the court that the value of the goods sold or appropriated was based upon the retail prices of plaintiff may be ignored for the reason that there was no issue tendered as to the basis of value.

[5] Plaintiff alleging the value which must be accepted as the market value, and the sureties not denying this, the finding was unnecessary and, being in opposition to the admissions of the complaint, cannot be considered.

[6] While the opinion of the court, which appears in the transcript, cannot be considered as determining any fact, yet, from the peculiar character of the findings and the conclusions of law deduced therefrom, it is obvious that the court rendered the judgment in defendants' favor without regard to the market value of the goods and upon the sole theory of the nonliability of the sureties for articles of merchandise sold other than samples. We are of opinion that justice demands a reversal of this judgment rendered in respondents' favor and that a retrial of the cause be had in order that the rights of the parties under the bond and evidence may be correctly determined.

The judgment in favor of the sureties is therefore reversed, and cause remanded for a new trial.

We concur: JAMES, J.; SHAW, J.

CAMPBELL v. RICE. (Civ. 1,369.)

(District Court of Appeal, Second District, California. Sept. 22, 1913.)

1. EVIDENCE (§ 174*)—BOOK ACCOUNTS—COPY OF ORIGINAL ENTRY BOOK—ADMISSION.

A copy of a bill of particulars, constituting a statement of account between the parties, which was made out by transcribing items from order sheets, pay rolls, etc., constituting original entries which were in plaintiff's possession, and could have been put in evidence, was not admissible in evidence; it being necessary to offer the original entries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561-564, 566-569; Dec. Dig. § 174.*]

2. EVIDENCE (§ 354*)—BOOK ACCOUNTS—ADMISSION AS EVIDENCE.

A tradesman's book of original entries is generally admissible in evidence as prima facie proof of the accounts shown therein, when supported by his oath.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

3. PLEADING (§ 327*)—"BILL OF PARTICULARS"—PURPOSE.

A "bill of particulars" served upon defendant is only an amplification of the complaint,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

intended to inform defendant of the specific demands made, and hence is no more admissible as substantive evidence than a copy of the complaint would be.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 993, 994; Dec. Dig. § 327.*

For other definitions, see Words and Phrases, vol. 1, pp. 795-797; vol. 8, p. 7590.]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by John Campbell against John C. Rice. From a judgment for plaintiff, defendant appeals. Reversed.

A. H. Sweet and Chas. H. Forward, both of San Diego, for appellant. Patterson Sprigg, of San Diego, for respondent.

SHAW, J. This is an action whereby plaintiff seeks to recover from defendant the sum of \$636.75 for materials used and money expended for labor performed in the construction of a building at the special instance and request of defendant. The allegations of the complaint were denied. Defendant appeals from a judgment rendered in favor of plaintiff.

[1] Some time after the commencement of the action, in April, 1911, plaintiff, in response to a demand therefor by defendant, delivered to him a bill of particulars of the account, consisting of several hundred items, upon which the action was based. At the trial plaintiff, for the purpose of proving the allegations of the complaint, produced a copy of this bill of particulars so served upon defendant, and called plaintiff's bookkeeper to the stand, by whom he proved that during the construction of the building, which appears to have been commenced in April, 1910, and completed in July, 1910, he as bookkeeper had charge of and kept the accounts between plaintiff and defendant. He identified the document produced as a true and correct copy of a statement of account between the parties, showing the amount due from defendant to plaintiff for labor and materials used in the work. He was then asked: "Are those items correct there, as to the amount of the payments made?" to which he answered: "Yes, sir; they agree perfectly with my book, with my ledger." "Q. Will you state to the court whether or not this is an exact copy from the book of original entry?" to which he answered: "It is, yes." "Q. Made by yourself? A. I believe I even typewrote it myself." He further testified that he copied it from his original order slips, which were entered from the timebooks and pay rolls; that he did not have a book showing the original entries, but had the original order sheets from which he made the statement after the suit was commenced. Upon this showing plaintiff tendered the said document in evidence, to which defendant interposed an objection that it was incompetent, irrelevant, and immaterial, for the reason that it was

not shown to be a book of original entries, and no foundation laid for its introduction. This objection was overruled, and the paper admitted in evidence. In thus ruling the court clearly erred.

[2] The contention of respondent is shown by the following excerpt from his brief: "The evidence of George E. Campbell (the bookkeeper) shows that the said account or bill of particulars was copied from a book of original entry, and on cross-examination he modified his statement by saying that they were copied by himself from original order slips kept by him. It makes no difference from what source the account is made, so long as it is made from original entries, order slips, or what not." We cannot assent to this proposition. "In the United States a tradesman's book of original entries is in most jurisdictions received in evidence as prima facie proof, when supported by the tradesman's oath" (1 Wharton on Evidence, § 678); and this rule, though not expressly declared, has the sanction of numerous authorities in this state (White v. Whitney, 82 Cal. 163, 22 Pac. 1138; Landis v. Turner, 14 Cal. 573). The rule, contrary to the common law, had its origin in the necessity of cases arising where such books were the only evidence of the matter in controversy, and were therefore the best evidence obtainable. Not only was this copy of the bill of particulars not the best evidence, but no necessity existed for its introduction, for it conclusively appears that the document was transcribed from order sheets, pay rolls, and other data constituting a book of original entry (Hooper v. Taylor, 39 Me. 224; Rowland v. Burton, 2 Har. [Del.] 288; Kendall v. Field, 14 Me. 30, 30 Am. Dec. 728; Taylor v. Tucker, 1 Ga. 281), in the possession of plaintiff and which he might have produced, thus giving defendant and the court an opportunity to examine it, in order to determine its integrity and correctness and giving to plaintiff an opportunity to explain any errors or discrepancies therein affecting its weight as evidence. We are referred to no authority, and we know of none, holding that a party to an action may copy a book of original entry in his possession, withhold the original, and prove his case by introducing such copy in evidence, while, on the contrary, numerous authorities hold such ruling to be error. See Creamer v. Shannon, 17 Ga. 65, 63 Am. Dec. 226; Halstead v. Cuppy, 67 Iowa, 600, 25 N. W. 820; Moody v. Roberts, 41 Miss. 74; Skipworth v. Deyell, 83 Hun, 307, 31 N. Y. Supp. 918.

[3] Moreover, a bill of particulars, served upon defendant in response to his demand therefor, is but an amplification of the complaint (Edelman v. McDonell, 126 Cal. 210, 58 Pac. 528), its purpose being to apprise defendant of the specific demand of his adversary, and hence there would be as much

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propriety in receiving in evidence a complaint wherein the items of the account are set forth as to receive a copy of a bill of particulars served upon defendant in response to his demand therefor.

The judgment is reversed.

We concur: ALLEN, P. J.; JAMES, J.

KONDA v. FAY. (Civ. 1,327.)

(District Court of Appeal, Second District, California. Sept. 20, 1913.)

1. PLEADING (§ 376*)—FACTS ADMITTED—NECESSITY OF PROOF.

Where, in a real estate broker's action for commission due under an employment, the answer admits the employment, no proof need be made of the written employment required by Civ. Code, § 1624, subd. 6.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.*]

2. BROKERS (§ 84*)—ACTION FOR COMMISSION—PLEADING AND PROOF.

Where, in a real estate broker's action for a commission, plaintiff relies upon a contract made by the vendor and vendee for his benefit, which contract he could enforce under the express provisions of Civ. Code, § 1559, at any time before its rescission, and does not rely upon an employment, and where employment is pleaded by defendant as a basis of establishing a confidential relation and showing as a defense that plaintiff violated such relation, the burden is on defendant to prove such employment; a denial of same by plaintiff being presumed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.*]

3. BROKERS (§ 86*)—ACTION FOR COMMISSION—DEFENSE—EXPRESSION OF OPINION.

Where, in a real estate broker's action against the purchaser for a commission, defendant claimed that he relied upon false statements as to the market value of the property and as to the amount of a loan which a certain bank would make upon it, and the evidence showed that defendant made four trips to examine the land and tested the soil, and that the land was located in the same vicinity as the bank, a verdict for plaintiff was proper; the statements made to defendant being mere matters of opinion upon which he was not authorized to and did not rely.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

4. EVIDENCE (§ 474*)—COMPETENCY—MARKET VALUE.

Market value of land is not provable solely by expert testimony but may be proven by the testimony of persons living in the neighborhood.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

5. APPEAL AND ERROR (§ 1073*)—FINDINGS—BROKERS.

Where, in a real estate broker's action on a contract made by the vendor and vendee for his benefit, there is evidence that the contract was rescinded before suit, but no finding thereon, a judgment for defendant, to which such finding is essential, will not be affirmed on appeal; it not being within the province of the appellate court to supply omitted findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Anton Konda against F. E. Fay. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Murry & Knupp, of Porterville, for appellant. William L. Kuehn, of Los Angeles, for respondent.

ALLEN, P. J. Plaintiff declared upon a written agreement entered into between defendant and one Pluth, through which an exchange of real property was sought to be effected. This agreement, after a specification of the terms of exchange, contained a further agreement: "That each shall pay one-half of the commission to Anton Konda for his services as agent in arranging this exchange, and that each agrees to pay as his part of such commission the sum of \$500." Defendant by his answer admitted the execution of the agreement but alleged that plaintiff was in his employ as agent to effect the exchange, and that by reason of false and fraudulent representations of plaintiff as to the value of the premises owned by Pluth, and in relation to the amount which a certain local bank was ready and willing to loan thereon, he was induced to enter into the agreement; that, before plaintiff brought the suit and upon discovery of the fraud, he paid Pluth a sum of money to be released from the contract and the same was by the agreement of the parties rescinded. The trial court found that before the exchange defendant had employed plaintiff to effect and procure such exchange; that a confidential relation therefore existed, and that plaintiff had made the false statements alleged knowing the same to be false, upon the truth of which defendant relied and was thereby deceived and misled to his injury; that defendant was a stranger in the vicinity of the lands and did not know the market value, nor the value placed thereon by the bank, or the amount which it would loan thereon, but in the proposed exchange confided altogether in the statements of plaintiff as agent. Judgment was accordingly entered in defendant's favor, from which, and an order denying a new trial, plaintiff appeals upon a statement of the case.

[1] Appellant insists upon the inaccuracy of the finding with reference to his employment and the relation of agency found to exist. Were the action one to recover commissions due under an alleged employment, and the answer admitting the employment, no proof of written employment would be necessary, as required by subdivision 6, § 1624, Civil Code, as the answer furnishes the proof which the statute requires. *Jamison v. Hyde*, 141 Cal. 112, 74 Pac. 695.

[2] But where, as in this case, such employment is not claimed by plaintiff, and the fact thereof is pleaded by defendant as a basis of establishing a confidential relation, in order to change the rule affecting false

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statements of value when considered as tending to establish fraud, it should follow that such prior agency should be proven by defendant, as under our system of pleading the denial thereof by plaintiff is presumed. The record discloses no evidence tending to show such confidential relation between defendant and plaintiff before or when the exchange agreement was executed. On the contrary, it appears that a valid agreement for commissions had been entered into between plaintiff and Pluth, through which Pluth had agreed to pay plaintiff, upon effecting an exchange acceptable to him, 5 per cent. upon an estimated value of \$20,000. The situation of the parties at the time of the exchange was this: That, upon the exchange being effected, Pluth was obligated to pay plaintiff \$1,000, and defendant was under no legal obligation to pay him anything. This condition being recognized by the contracting parties, and obviously intending to relieve Pluth of part of the burden, it was agreed between Pluth and defendant that defendant would pay plaintiff one-half of the amount due from Pluth. This contract being one expressly for the benefit of plaintiff, he possessed the right, under section 1559 of the Civil Code, to enforce the same at any time before the parties thereto rescinded it, and it was this right which plaintiff by his action was seeking to enforce. Omitting, then, from consideration the allegations of employment found in the answer, there is no evidence supporting the finding that plaintiff in the matter of the exchange was acting as the agent of defendant.

[3] There remains the question as to the effect which should be given false statements of market value either by Pluth or his agent. There is found in the record nothing tending to show that either Pluth or plaintiff assumed a knowledge of value based upon other declared statements of fact, as was the case in *Winkler v. Jerrue*, 129 Pac. 804, nor any evidence tending to show that the expressed opinion as to the value was a dishonest one, in which case deceit, if practiced, an action therefor would not lie. *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 573, 126 Pac. 351. In fact, there is nothing in the record tending to show the value of defendant's property which was exchanged, and as a consequence that through the exchange he had paid what was the equivalent of \$125 per acre. The statement of the case shows that defendant made four trips to examine this land, tested the soil, and made a critical examination thereof.

[4] Market value is not a question of science or skill upon which only an expert can

give an opinion. Persons living in the neighborhood may be presumed to have sufficient knowledge of the market value. *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 540, 28 Pac. 681. *Pomeroy's Equity Jurisprudence* (3d Ed.) § 878, lays down the rule that a statement as to value expressed, not as an opinion, but as an existing fact material to the transaction, becomes an affirmation of fact. This is true when no opportunity is at hand to ascertain value otherwise than from statement, but as said in *Strait v. Wilkins*, 16 Cal. App. 188, 116 Pac. 685: "It was never intended to establish a rule that, where parties have an equal opportunity to determine value, one might neglect the opportunity and, if subsequently to his interest, avoid the contract merely because an inflated value was fixed by the other party to the exchange. To apply such rule generally in the ordinary affairs of life, where opportunity exists to ascertain the truth, would be to encourage rather than to prevent or punish fraud." The land of Pluth is shown to be in the vicinity of Porterville, where the bank referred to was located. Defendant had every opportunity, through inquiry of neighbors or of the bank, to ascertain the market value of the property or, if he wanted a loan, to have ascertained from the bank what amount it would loan thereon. He should not be permitted to blindly rely upon statements of interested parties when means of correct information was at hand. We regard the statements made by plaintiff to him as matters of opinion only and not such statements as would warrant defendant in treating the same as statements of fact when the opportunity was present to ascertain the weight which should be given them. In our opinion, therefore, the finding as to the confidential relation between plaintiff and defendant being unsupported, that eliminating such confidential relation, the representations found to have been made under the circumstances were not such as to entitle defendant to be relieved from his contract.

[5] The record contains evidence fully supporting the allegation of defendant in his answer to the effect that the agreement made for plaintiff's benefit had been rescinded before suit, but no finding was made thereon. Had a finding been made in conformity to the proof in the record, the judgment would be affirmed, notwithstanding the errors to which reference has heretofore been made.

It is not within the province of this court to supply omitted findings, and the judgment will therefore be reversed, and cause remanded for a new trial.

We concur: JAMES, J.; SHAW, J.

JOHNSON v. ALL NIGHT & DAY BANK.
(Civ. 1,252.)

(District Court of Appeal, Second District, California. Sept. 19, 1913.)

APPEAL AND ERROR (§ 1011*)—FINDINGS BY COURT—CONFLICTING EVIDENCE—CONCLUSIVENESS.

A finding by the trial court of the material facts made upon conflicting evidence is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, Los Angeles County; C. W. Norton, Judge.

Action by John O. Johnson against the All Night & Day Bank. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Tanner, Taft & Odell, of Los Angeles, for appellant. D. K. Trask, of Los Angeles, for respondent.

JAMES, J. Plaintiff, being the owner of a \$1,500 credit at a bank in South Dakota, drew a draft against that depository and placed it with defendant for collection. At the time this draft was delivered to defendant bank, a man named Dixon, a confidence operator who had chosen plaintiff as a victim, was present, and it appears that the deposit slip issued by defendant as a receipt for the draft was made out in the name of Dixon and delivered to the latter. When the money was collected defendant paid it over to Dixon. Plaintiff later made demand that the \$1,500 be paid to him, which the bank refused, and this action was then brought. On a former trial judgment was in favor of defendant. That judgment was reversed upon an appeal heard in this court. See *Johnson v. All Night & Day Bank*, 17 Cal. App. 571, 120 Pac. 432. The case coming on for a new trial, plaintiff secured judgment. Defendant's motion for a new trial was denied, and this appeal, taken from that order and from the judgment, followed. The evidence heard at the second trial differed not at all in substance from that presented at the first hearing. It was the contention of defendant that plaintiff had orally directed it to pay over the money when collected to Dixon. Plaintiff testified that he gave no such authorization.

Conceding the most that can be allowed in favor of the contention of appellant (that is, admitting that under the proof made it does not appear that a judgment in favor of defendant would find no support in the evidence), it must be agreed that there was a conflict of evidence upon the main issue, a conflict which the findings of the trial judge settled and determined conclusively. The opinion filed when this cause was decided on the first appeal expresses the present

views of the court upon the matters therein discussed.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

GOBERT v. BUTTERFIELD et al.
(Civ. 1,111.)

(District Court of Appeal, Third District, California. Oct. 1, 1913.)

1. MINES AND MINERALS (§ 29*)—LOCATION—INTERFERENCE BY TRESPASSERS.

The inchoate rights of the locator of a mining claim cannot be defeated by the torts or trespasses of others.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

2. MINES AND MINERALS (§ 29*)—CERTIFICATE OF LOCATION—AMENDMENT.

An amended notice of the location of a mining claim relates back to the original notice, notwithstanding intervening locations, if made to cure obvious defects in the original notice without including any new ground.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

3. MINES AND MINERALS (§ 29*)—LOCATION—EXCESS OF GROUND.

A location in excess of the statutory limit is voidable only as to the excess, if it is made in good faith and does not injure any one else.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

4. MINES AND MINERALS (§ 21*)—LOCATION—AMENDMENT.

A notice of the location of mineral land may be amended if that can be done without prejudicing the rights of others.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 45-50; Dec. Dig. § 21.*]

5. MINES AND MINERALS (§ 29*)—LOCATION—MARKING GROUND.

If a mining claim is sufficiently marked on the ground, and all necessary acts of location are done, the rights thereby acquired by the locator cannot be divested by the subsequent obliteration of the location marks or removal of the stakes without the locator's fault, and the fact that the stakes cannot afterwards be found raises no inference against the sufficiency of the original markings.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66-72; Dec. Dig. § 29.*]

6. MINES AND MINERALS (§ 20*)—LOCATION—MARKING—TIME.

A claim may be marked at any time before an intervening right is acquired, irrespective of whether the time of marking is reasonable.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 40-44; Dec. Dig. § 20.*]

7. MINES AND MINERALS (§ 38*)—CONTESTED CLAIMS—SUFFICIENCY OF EVIDENCE—LAND LOCATED.

Evidence, in an action to determine title to a mining claim, held to show that plaintiff's

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original location was not intended to and did not include the land in controversy.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

8. MINES AND MINERALS (§ 38*)—CONTESTED CLAIMS—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to determine title to a mining claim, *held* to sustain a finding that plaintiff's only purpose in amending his original notice of location was to take advantage of a subsequent discovery, made by one who had, at the time, located the ground in good faith, and that plaintiff did not originally intend to claim the ground.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by Henri Gobert against F. L. Butterfield and others. From a judgment for defendants, plaintiff appeals. Affirmed.

L. N. Peter, of Quincy, for appellant. H. B. Wolfe, of Quincy, for respondents.

CHIPMAN, P. J. Plaintiff brings the action to determine his title to a certain quartz mining claim situated in Plumas county and alleging, among other things, that defendants had wrongfully entered upon said claim and were removing ore therefrom, and praying for an injunction to prevent the said trespass. Defendants denied plaintiff's ownership, and claimed ownership in defendant Butterfield. The controversy relates to a triangular parcel of land situated at the easterly end of the so-called Old Harry quartz claim, herein referred to as the Old Harry, claimed by plaintiff, and the westerly end of the so-called Old Harry Extension quartz claim, hereinafter referred to as the Old Harry Extension, claimed by defendant Butterfield and under lease to defendants Shinn and Smith. The ownership of the respective claims as alleged in the pleading is not disputed except as to the small piece of land in controversy, and the question here concerns only the location of the boundary line between the two claims. This triangular piece of land is 248.7 feet wide at the northerly boundary line of the two claims and tapers close to a common point marking the southeasterly corner of plaintiff's claim and the southwesterly corner of defendants' claim. The court found that defendant Butterfield is the owner of the disputed land, and defendants Shinn and Smith lessees thereof, with an option to purchase. The restraining order was accordingly discharged, and judgment passed for defendants. Plaintiff appeals from the judgment, and brings here the judgment roll and a duly certified transcript of the proceedings at the trial.

A motion was made by plaintiff to have the cause submitted on briefs on file, under rules 2 (119 Pac. ix) and 5 (119 Pac. x) be-

cause of respondents' failure to file their reply brief in time. Respondents made no appearance at the hearing of the motion, and have filed no brief. The cause was submitted for decision in accordance with said motion.

It appeared that, on December 11, 1899, plaintiff posted on his claim a preliminary notice, and; on July 11, 1900, his final notice of location. These notices stated that the land was in Plumas township, Plumas county, on surveyed land of the United States, "and particularly described as follows: Beginning 700 ft. east of notice posted at point of discovery and running westerly 1500 ft. together with 300 ft. of surface ground on each side of the lode or vein. The exterior boundaries are definitely marked so as to be readily traced." On July 31, 1912, plaintiff posted an "amended notice of quartz location," in which his former location was extended easterly to definitely include the disputed piece of land, and he declared in his notice that it was "for the purpose of amending" the said preliminary and final notices of 1899 and 1900. On August 10, 1912, he posted another amended notice of location in which he declared his purpose to be to amend his preliminary and final notices of said claims made in 1899 and 1900, and also to amend his amended location posted on July 31, 1912. Plaintiff's amended complaint describes his claim so as definitely to include the disputed land. Defendants introduced evidence of the location of the Old Harry Extension posted on the claim January 1, 1912, by Robert McAuley; also a quitclaim deed by McAuley of said mining claim to F. L. Butterfield, dated July 16, 1912; also a notice of location by Butterfield which declared that it "was for the purpose of amending and perfecting the description of the Old Harry Extension quartz claim, the notice of the location of which is recorded in vol. 10 of Quartz Claims, Plumas Co. records," the notice of location posted and recorded by McAuley. This amended location was posted on the claim August 2, 1912. Plaintiff's amended location and the McAuley location and Butterfield's location embraced the disputed land.

[1-6] Appellant states certain propositions which may not be controverted: That a locator cannot be deprived of his inchoate rights by the tortious acts of others; nor can an intruder and trespasser initiate any rights which will defeat those of a prior discoverer. *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113. That where the object is to cure obvious defects, and there is no attempt to include new ground, the amended certificate will relate back to the original, notwithstanding intervening locations. *Lindley on Mines*, p. 719. That a location in excess of the statutory limit, where it injures no one when made, if made

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in good faith, is voidable only as to the excess. *Lindley on Mines*, p. 664. That a locator may amend his location, if it can be done without prejudice to the rights of others. *Id.*, 984. That where the claim is once sufficiently marked on the ground, and all necessary acts of location are performed, a right vests in the locator, which cannot be divested by the subsequent obliteration of the marks or removal of the stakes without the fault of the locator. If the evidence shows that the boundaries were originally marked, the fact that the stakes then set could not in later years be found raises no presumption against the validity of the original marking. *Id.*, 691, 692. That a claim may be marked at any time prior to the acquisition of an intervening right, regardless of the question as to whether the time within which such marking was made is reasonable or not. *Id.*, pp. 597, 679.

The case turns largely on the fact whether the plaintiff originally placed a stake at the point now claimed as his northeast corner, being the point at which he placed a stake when he surveyed and posted his amended location in 1912, and whether he claimed originally his easterly end boundary to be on a line leading from said northeast corner to the point originally and now claimed to be his southeast corner, which is substantially Butterfield's southwest corner. Plaintiff was the only witness to his having placed a stake for his northeast corner at the point above referred to. He testified that it was the same as the stake at the other corners; that it was pulled up and thrown away about two or three months later, and he never replaced it for the reason, as he testified: "I got a witness tree marked; I think the witness tree show my post was there." He testified that he marked the lines by blazing the trees between the corners, and that these blazed trees plainly marked his line and were as near to it as he could find them. He testified that without compass or chain he stepped off the distances from corner to corner, commencing at the southwest corner of his claim and endeavored to mark out a piece of ground whose sides were of equal length and the ends parallel, as near as he could. When his survey was made it appeared that his north boundary line, as he then claimed it, was about 160 feet longer than his south boundary line, while the two end lines were within a few feet of the same length. His explanation of the difference between the north and south lines was shown not to be satisfactory. Witness Barbee, who surveyed plaintiff's claim, commencing August 22, 1912, testified that he located the corners and lines under plaintiff's direction, he himself having no knowledge of them except as imparted by plaintiff; that he found no corner at the point claimed as plaintiff's northeast corner, but found the other corners. He was asked, on cross-examination: "Q. Was there any evidence of a stake or

mound of rock at or near this place you established as the northeast corner? A. No, sir." Of the blazed tree he found eight or nine feet from where he placed the corner, he testified that it was blazed on the east and west sides and not on the north; that it was not blazed as he would have blazed it to mark a corner; that he would not have taken it for a corner tree but as a line tree; and that plaintiff "did not claim that was a corner." He testified that he found blazed trees along the boundary lines which plaintiff pointed out as having been marked by him as boundary trees. Witness Barbee also testified that he noted but one blazed tree between the original northeast corner and the northeast corner established in this survey of April, 1912, a distance of 278.5 feet as shown by defendants' plat Exhibit B. There was evidence that there were a good many trees along that line which might well have been marked as line trees if a line had been run there. Witness Barbee also testified that he saw no evidence of any work or mining done on plaintiff's claim east of the line now claimed as Butterfield's west boundary line, except the work in the shaft being done by defendants at the time Barbee made his survey. He found and located on his plat the tunnels, drifts, and shafts and other workings done by plaintiff since he located the claim in 1900. Barbee also testified that he found no center end stakes of plaintiff's claim and no center or lode line blazed.

Surveyor Watson was a witness for defendants and made a plat (defendants' Exhibit D) showing in red lines the survey made by Barbee and in black lines the survey of the Butterfield claim by Surveyor Cameron made in June, 1912, as located by McAuley in January, 1912. He found no evidence of any workings east of the west line of the Old Harry Extension (the Butterfield or McAuley claim) except the shaft called the Butterfield shaft, the work of defendants. He testified that the distance between Butterfield's west end center and plaintiff's new east end center was 120 feet.

On October 1, 1910, plaintiff leased to Charles Grill and Robert McAuley a certain parcel of the Old Harry claim for the period of 18 months from the date of the lease. "to mine and stope and extract all ores, together with all ground extending from the east end line of the said 'Old Harry' claim along the course of said vein six hundred (600) feet." Witness Grill testified that they worked under the lease about 17 months, to about April 1, 1912; that other lessors were there in June, 1911, and it became necessary to mark out the land included in his lease; that plaintiff and Grill and McAuley did this at that time. He testified that they "started at a tree Mr. Gobert said was his east end line, or very near his east end line and measured 600 feet to a cedar tree and marked the cedar tree." He testified that he had recently, in company with Mr. Butterfield,

found the tree indicated at the east line and also the cedar tree. He was asked what he used to measure the ground at first, and answered: "A 75-foot tape; Mr. McAuley carried the front end of the tape, Gobert and I brought up the rear. I stayed with Gobert." There was a certain ravine at the west end that he testified Gobert did not want them to go beyond. He testified that in his recent measurement "he used a 100-foot tape," and that they had no difficulty in finding the tree shown him as marking plaintiff's east end line—the line now claimed by defendants as the west end of the Old Harry Extension. Witness Butterfield gave similar testimony as to this 600-foot measurement. He was present in June, 1912, when Cameron surveyed the Old Harry Extension. He testified that plaintiff was there at the same time; that, in a conversation with plaintiff, witness told him that "the boundary lines between the two claims was being surveyed out;" that he heard Surveyor Cameron tell him the same thing; that while Gobert was there the west end center of the Old Harry Extension was established and posts completed; that he was familiar with the ground since 1899, and never saw a stake or evidence of any corner at the point now claimed by plaintiff to be his northeast corner. He testified: That he assisted Cameron in his survey of the Old Harry Extension and establishing the west end line. That they started at the cedar tree mentioned by Grill and ran 600 feet to the yellow pine tree also mentioned by him, and took that as the starting point or as marking the west end line of the Old Harry Extension. At this time shaft No. 1, marked on Barbee's plat, had been dug about 30 feet, and ore had been discovered. Defendants Shinn and Grill were working there at that time under a lease, and "continued until stopped by order of this court." That they were working there when plaintiff had his survey made by Barbee. That all the corners and the west and east end centers were established and postmarked by the Cameron survey in June, 1912. He also testified that he assisted Grill in posting the McAuley notice.

Witness Shinn testified to his having assisted in putting down what is called shaft No. 1, and that it is 30 or 33 feet east of the west end of the Old Harry Extension; that he worked there from the 25th of June, 1912, until in August, when stopped by injunction; that except their work there were no workings or discovery of ore east of that line. He testified that he assisted Cameron in making his survey on June 27, 1912; that plaintiff "came there while we were surveying. Q. What did he do while he was there? A. Stood there with his eyes wide open to see what he could see. Q. Did he follow along the line? A. Very close; yes, sir. Q. Do you know whether or not he was

at the west end center of the Old Harry Extension? A. He was in sight of it." He testified that plaintiff asked what they were doing, and Cameron told him they were "running a boundary line"; that the west end center of the Old Harry Extension claim "was either established or being established at the time ne (plaintiff) was there"; that witness was then working on this claim and continued to do so until stopped by order of court. He testified that he had been at the point claimed by plaintiff as his northeast corner, both before and since the Barbee survey, and he saw no evidence of an old corner, no evidence of a mound of rock, or stake or corner. He testified that at the time the west end of the Old Harry Extension was being surveyed plaintiff "did not make any claim as to being the owner of this ground where work was being done"; that the first time he made any claim to it was on the 22d of July, 1912. Defendant Smith was also present in June when the Cameron survey was made. He testified that plaintiff asked him what they were doing, and he told him "they were running a boundary line"; that plaintiff "was there when the west end center was set up" of the Old Harry Extension; that plaintiff was living near the property. It appeared that after the location of the Old Harry Extension claim in January, 1912, the lines were not run out and marked until in June, 1912, at the time of the Cameron survey, but the evidence was that the survey embraced the land included in the location by McAuley. A copy of McAuley's location notice was introduced in evidence, marked "Exhibit A" but, for some unexplained reason, is not in the transcript.

[7] There were some further facts and circumstances made to appear tending to confirm what, it seems to us, is sufficiently shown by the facts above given—that plaintiff's original location did not include and was not intended to include the land in dispute. For 12 years he had been working his claim and put down several shafts, had run two or three tunnels of some extent, on different parts of his claim, and one shaft was quite near to the disputed boundary, but in all this time he had not apparently made any claim further east, nor had he prospected or done any work further east. As late as in 1910 he leased the east 600 feet of the claim, and in 1911 he designated the location of his east boundary line, and this was the line claimed by McAuley as his west line. In June, 1912, when Cameron was surveying the McAuley location, plaintiff was present, saw, and was told what was being done. At that time a shaft had been dug on the McAuley claim, and work was being done on it. He saw this, but made no claim that it was on his location. It was not until the latter part of July that he asserted any right to this land, and then it was he posted and filed

his notice of amended location. He explained his silence by testifying that he thought the lines were being run and the work done by a company that held an option on his property then about to expire. It was shown that this company had applied for an extension of time on their option and was refused, and that the company had ceased work some time before. The facts brought out were such as to have warranted the trial court in rejecting this explanation as accounting for plaintiff's silence when he learned that the disputed land was claimed by another.

The rules of law invoked by plaintiff were established to meet the conditions under which prospectors and mineral locators often find themselves in making their locations, and are just and salutary and are in the interest of honest effort to develop the mineral resources of the country. Turning back to these rules, can it be said, in the face of the evidence which the learned trial judge presumably accepted as true, and so must we, that the defendants' acts were tortious and an intrusion upon plaintiff's rights as a prior discoverer? Can it be said that his amended location was to cure obvious defects in his original location; that his amended claim was without prejudice to the rights of others; that there were no intervening rights when he extended his claim so as to include the ground located by McAuley and on which McAuley's grantee was working when this extended claim was being marked out? The answers must be in the negative. It is true that McAuley was plaintiff's tenant at the time McAuley located his claim, but he and his partner, Grill, had been shown the eastern boundary of plaintiff's claim by plaintiff himself after more than 10 years of possession, and it was nearly a year thereafter that McAuley made his location. There is no evidence of bad faith on McAuley's part, or that plaintiff was deceived or lulled into a feeling of security by him or any one else.

[8] The evidence was conflicting, but we think there was sufficient evidence to justify the trial court in concluding that plaintiff had no intention originally of claiming any ground beyond the disputed boundary line, and that his object in amending his location was to take advantage of a discovery made by one who had already in good faith located the ground. We do not doubt that had there been no intervening rights plaintiff could have lawfully done what he attempted to do. The rules relied upon by him, and as we had occasion to consider them in *Madera & Western Carbonic Acid Co. v. Sonoma Magnesite Co.*, 130 Pac. 175, so declare. But, unfortunately for him, he failed to do these acts which these rules presuppose have been done in order to protect him in his assumed rights.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

PEOPLE v. BARRETT. (Cr. 295.)

(District Court of Appeal, Second District, California. Sept. 25, 1913.)

1. HOMICIDE (§ 174*)—EVIDENCE—ACTS OF ACCUSED AFTER KILLING.

Evidence of the unnatural act of defendant, within an hour after the killing, claimed to have been in self-defense, in drawing his revolver, and pointing it at himself, and, on it being taken from him, saying, "I couldn't do it," was admissible; it being for the jury to say whether it was entitled to any weight as tending to show his guilt or was prompted by a feeling of remorse for a justifiable act.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 359-371; Dec. Dig. § 174.*]

2. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE.

Evidence in a case, in which the killing was claimed to have been in self-defense, that after the killing witnesses saw what appeared to be a bullet hole in the floor, with blood around it, about where the head of deceased lay after the shooting, with the board, shown to be in the same condition as immediately after the shooting, is admissible; it being for the jury to say whether the hole was made by a bullet fired by defendant into and through the head of deceased after he had fallen.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.*]

3. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If the overcoat worn by deceased when killed was immaterial and without weight for any purpose as claimed by defendant, its admission in evidence was harmless.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 754, 8088, 8130, 8187-8143; Dec. Dig. § 1169.*]

4. HOMICIDE (§ 188*)—SELF-DEFENSE—EVIDENCE OF DECEASED'S REPUTATION.

Defendant, claiming to have killed in self-defense, may not, under his right to show the reputation of deceased as a violent and dangerous man, show he was in the habit of using cuss words, talked too much, and called one of the boys a liar.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 391-397; Dec. Dig. § 188.*]

5. CRIMINAL LAW (§ 858*)—TAKING EXHIBITS TO JURY ROOM.

Allowing the jury on retiring to take with them certain exhibits, articles offered in evidence, is not obnoxious to Pen. Code, § 1137, stating a list of papers the jury may take with them on retiring, making exception only of depositions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2056-2059, 2062; Dec. Dig. § 858.*]

6. CRIMINAL LAW (§ 1174*)—HARMLESS ERROR—TAKING EXHIBITS TO JURY ROOM.

Allowing the jury on retiring to take with them certain articles admitted in evidence, even if error, cannot be complained of; it not appearing any use was made thereof which could have prejudiced defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3170-3178; Dec. Dig. § 1174.*]

7. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE.

It was proper to instruct in a homicide case, in which defendant claimed self-defense, as to the powers, duties, and authority of de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ceased, acting chief of police, as superior officer of defendant, a policeman.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

8. HOMICIDE (§ 300*)—SELF-DEFENSE—INSTRUCTIONS.

There being some evidence that the last shot fired was the fatal one and was fired after deceased had fallen on the floor, an instruction referring solely to the apparent necessity, or absence thereof, for firing shots in excess of those sufficient to protect defendant, to the effect that if the jury were satisfied this was so, and also that, by reason of the circumstances as they then appeared to defendant as a reasonable man, he no longer had cause for fear, it would justify a conviction, was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

9. HOMICIDE (§ 340*)—HARMLESS ERROR—INSTRUCTIONS.

Any error in instructions as to murder in the first degree was harmless; the conviction having been of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

Appeal from Superior Court, Riverside County; Curtis D. Wilbur, Judge.

Egbert J. Barrett was convicted of manslaughter, and from the judgment, and from an order denying a motion for new trial, appeals. Affirmed.

Miguel Estudillo and Lafayette Gill, both of Riverside, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Upon an information charging him with murder, defendant was convicted of manslaughter; the judgment of the court being that he be imprisoned for a term of ten years. He appeals from the judgment and an order of court denying his motion for a new trial.

At the time of the tragedy defendant was a police officer in the city of Riverside, and John R. Baird, the deceased, was the acting chief of police of said city. At about midnight on December 14, 1912, defendant met Baird and Policeman Lucas, when deceased, after some conversation with defendant, told him that he had been drinking. All three of the parties repaired to the police station, where Baird and defendant sat down in the front office and talked the matter over in the presence of Lucas. During this talk Baird said to defendant, "Bert, you have been drinking;" and, receiving no reply, added, "You are drunk enough to be thrown downstairs." At this defendant applied to deceased a vile epithet, but immediately withdrew it, stating that he was sorry he had said it, at which, after a few minutes further conversation, apparently, as witness Lucas states, free from anger or excitement, they, at the command of Baird, went into the rear office of the station, deceased closing the door after them, and continued their talk in an ordinary tone, so low, however, that

Lucas, who remained in the outer room, could not distinguish what was said. In a very few minutes Lucas opened the door, saying, "Good night," that he was going home, to which deceased replied, "All right," that he was going in a few minutes. At this time the parties were standing and nothing in their manner indicated that either was angry or excited. Lucas left the door to this private office open and made his preparations in the outer office to go home. In a very short space of time he stepped from this outer office through a screen door out upon the street, when he heard immediately from the private office the report of a gun, followed in quick succession by two other reports. Going back he found deceased lying upon the floor in a dying condition and defendant standing near him with a revolver in his hand.

The shooting of deceased is admitted by defendant; his contention being that it was done in self-defense. The only evidence as to what occurred in the back room was that given by defendant, who testified that after entering this room he and deceased both remained standing, and that neither one said anything for a little while, until deceased looked at him and said, "Bert, I don't know what to do with you;" and said something about Harblson and Lucas (two members of the police force) talking about his drinking; that deceased then said to him, "If it wasn't for your family, I would send you home right now;" to which defendant replied, "John, that is no way to use a man; this thing has gone far enough; you are not fit for the job you have got;" and, as testified by defendant, "he (deceased) seemed to fly into a passion, and said, 'I will fix you.'" Deceased, so defendant says, was standing with his elbow resting upon a table, and as he said this he dropped his hand and "I thought the man was going for his revolver in his overcoat pocket." "I pulled my revolver and fired three times just as quick as I could, as near as I can tell." At the time deceased had no revolver in his overcoat pocket; nor was there any evidence that he ever carried a gun therein. His revolver was in its holster belted around him under his blouse and overcoat, both of which were buttoned up, and his gloves were on. It is unnecessary to quote further from the evidence. Suffice it to say that much circumstantial evidence was adduced which tended to prove a total absence of any reason for defendant believing that deceased was about to attack him; indeed, the insufficiency of the evidence to justify the verdict is not assigned as error.

The grounds assigned by appellant for reversal are: Alleged erroneous rulings of the court in the admission and rejection of evidence and erroneous instructions given to the jury.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] 1. Defendant's objection to evidence that at the sheriff's office, where he was taken, and within less than an hour after the commission of the offense, he drew his revolver from its holster, pointed it at himself in a threatening manner, and, upon the gun being taken from him, said, "I couldn't do it," was overruled. It was not error to admit evidence of this unnatural act, leaving the jury to determine whether it was entitled to any weight as tending to show defendant's guilt or whether it was prompted by a feeling of remorse for a justifiable act in taking human life. *People v. Weber*, 149 Cal. 339, 86 Pac. 671; *People v. Leung Ock*, 141 Cal. 323, 74 Pac. 986.

[2] 2. Mr. Lucas and the mayor testified that the next morning after the homicide they saw what appeared to be a bullet hole in the floor, with blood around it, about where the head of deceased rested when witness Lucas entered the room after the shooting. This board was removed, and, upon sufficient evidence that its condition was identical with that in which it was found immediately after the shooting, it was admitted in evidence. Whether or not the perforation was made by a bullet fired by defendant into and through the head of deceased after he had fallen, or whether made in some other manner, were questions for the jury to determine.

[3] 3. Objection was made to the introduction in evidence of the overcoat worn by deceased at the time he was killed; the ground therefor being that it did not tend to prove or disprove any of the issues in the case. The objection was overruled. If we accept the view of counsel for appellant that the evidence was wholly immaterial and without weight for any purpose, it must necessarily follow that the error in so ruling could not have prejudiced the substantial rights of defendant.

4. The action of the court in admitting in evidence article 12 of the charter of Riverside is assigned as prejudicial error. An examination of the record, however, shows that defendant's objection to the reception of said article in evidence was sustained; hence there is no occasion for complaint.

[4] 5. It is insisted that the court denied to defendant the right to offer evidence tending to show that the reputation of deceased for peace and quiet was bad, and that he was reputed to be a violent and dangerous man. The record discloses no limitation placed upon the examination of witnesses for the purpose of showing the reputation of deceased for peace and quiet other than the fact that the court, after allowing considerable evidence to the effect that deceased was in the habit of using profane language, talked too much, and "cussed the boys," refused to permit further testimony of this character. Such ruling was not error. As said by the learned trial judge: "Violent language is no justification for an assault." In *People*

v. Murray, 10 Cal. 310, it is said: "The rule is well settled that the reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man; but it has been held that the reputation of the deceased may sometimes be given in proof to show that the defendant was justified in believing himself in danger, when the circumstances of the contest are equivocal." This language is quoted with approval in *People v. Lamar*, 148 Cal. 573, 83 Pac. 996, where it is further said: "The reputation of the deceased as a violent, turbulent, dangerous man would be a legitimate subject of inquiry, illustrating the animus with which he encountered the defendant." We cannot concede, as claimed by appellant, that, from the fact deceased used "cuss words," "talked too much," and "called one of the boys a liar," it necessarily followed that deceased was a dangerous or violent man. An examination of the record in this regard shows that the court was extremely liberal in the latitude accorded defendant.

[5, 6] 6. The action of the court in complying with the jury's request that they be permitted to take with them to the jury room certain exhibits, namely, the overcoat, revolver, and piece of flooring offered in evidence, is assigned as error, appellant claiming that such action is obnoxious to the provisions of section 1137 of the Penal Code. This section is almost identical with section 612 of the Code of Civil Procedure. There is nothing in either of these sections which limits the discretionary power of the court to allow exhibits of the kind in question to be taken to the jury room. The reason for the inhibition as to depositions is obvious. "The court may permit the jury to take with them and use in their deliberations any exhibit where the circumstances call for it, observing the proper precaution of instructing the jury in the nature of the use which they shall make of the exhibit." *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717. There was no occasion here for any instructions. Moreover, conceding the ruling to have been erroneous, it does not appear that any use was made of the exhibits which could by any possibility have been prejudicial to defendant. *People v. Hower*, 151 Cal. 646, 91 Pac. 507.

[7] 7. As stated, deceased was acting chief of police of Riverside. The court gave to the jury an instruction embodying the charter provision of the city with reference to the police department, wherein the powers and duties of the chief of police were set forth, and instructed it that deceased, if they found that he was acting chief, had and possessed like powers. Among other things, the charter, as the jury were told, provided

that "he (the chief) shall have power to suspend or remove any member of the police force for disobedience of any lawful order, for the violation of rules and regulations of the department and for neglect of duty, or for conduct unbecoming a member of the police force." Appellant insists that the giving of this instruction was prejudicial error, for the reason that it in effect gave the jury to understand that deceased was justified in his treatment of defendant and thereby led to excuse the acts of deceased, who was the aggressor and assailant, upon the ground that such acts were in pursuance of the duties of deceased as such acting chief of police. This contention is without merit. It was proper that the jury, in considering the evidence, should not only know the relations existing between the parties but know the powers, duties, and authority of deceased as defendant's superior officer.

[8] 8. The court, after instructing the jury clearly and fully as to the law of self-defense applicable to the circumstances of the case, told them that, notwithstanding the fact they might be convinced that defendant, acting upon appearances, was justified in believing, and did believe from the circumstances and appearances, that the deceased intended to make an assault upon him with a deadly weapon with intent to do him great bodily harm or kill him, they should "also consider whether or not the conduct of the defendant in resisting that assault upon him, if any such you find, was the exercise of such reasonable force as was reasonably commensurate with the apparent danger. If you should find from the evidence beyond a reasonable doubt that the firing of one shot or more was all the force appearing to the defendant as a reasonable man to be necessary, under all the circumstances as they appeared to a reasonable man situated as defendant was situated, to successfully resist such assault, the court instructs you that the firing of any other shot would not under such circumstances and conditions be justified by the law of self-defense; and the court instructs you that, if you find the defendant fired any more shots at the deceased than would so appear to the defendant acting as a reasonable man under all the circumstances as they appeared to him as a reasonable man at the time than was or appeared to be really necessary to resist the assault upon his person aforesaid, you should find that such shot, if any such you find, so fired in excess of those appearing to the defendant as a reasonable man to be reasonably necessary for his defense as aforesaid were not justifiable, and the defendant is as fully liable for the consequences of any shots fired in excess of those reasonably necessary as aforesaid, or appearing to be as aforesaid, as though they were not preceded by any acts on his part, or the firing of any shots which of themselves would not be justifiable

under the law of self-defense; if therefore you should find from the evidence beyond a reasonable doubt that the shot or shots which killed the deceased, if you find from the evidence beyond a reasonable doubt that he was so killed, were fired by the defendant at the deceased while the deceased was lying upon the floor and after all apparent danger which would justify a reasonable man in further resistance had passed, then in that event the defendant would not be justifiable under the law of self-defense." The giving of this instruction is attacked as not only being erroneous but as highly prejudicial to the substantial rights of defendant, in support of which contention counsel cite *People v. Thomson*, 145 Cal. 717, 79 Pac. 435. Elsewhere the jury were fully and properly instructed with reference to defendant's right to act upon appearances and the apparent necessity of using force, even to the extent of taking life, in order to protect his own or prevent the infliction of great bodily harm, even though in fact there was no danger. The instruction complained of had reference solely and alone to the apparent necessity or absence thereof for firing fatal shots in excess of those sufficient to protect defendant. There was some evidence tending to prove that the last shot was the fatal shot and that that was fired after deceased had fallen to the floor. If the jury were satisfied that this was true, and likewise satisfied that by reason of the circumstances as they then appeared to defendant as a reasonable man he no longer had cause for fear, it would justify a conviction.

[9] 9. Since defendant was convicted of manslaughter, he is not in a position to complain of an instruction as to what constituted murder in the first degree. Conceding the instruction attacked to be argumentative, and that it assumed facts not borne out by the evidence, as claimed, defendant could not have been prejudiced by the giving of it. *People v. Ryan*, 152 Cal. 364, 92 Pac. 853; *People v. Besold*, 154 Cal. 363, 97 Pac. 871.

The verdict is amply supported by the evidence, and we find no prejudicial error. The judgment and order are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

KRAMM v. STOCKTON ELECTRIC R. CO.
(Civ. 1,115.)

(District Court of Appeal, Third District, California. Sept. 23, 1913. Rehearing Denied by Supreme Court Nov. 22, 1913.)

1. APPEAL AND ERROR (§ 117*)—ORDERS APPEALABLE—BILL OF EXCEPTIONS—TIME TO SETTLE AND FILE—EXTENSION.

An order extending the time to prepare and serve a bill of exceptions, and relieving defendant from a default in that respect, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 805-812; Dec. Dig. § 117.*]

2. EXCEPTIONS, BILL OF (§ 40*)—PREPARATION—FILING—TIME—EXTENSION.

Under Code Civ. Proc. § 1054, the trial judge is without jurisdiction to extend the time for preparation and service of a proposed bill of exceptions beyond the 30 days allowed by law without the consent of the adverse party.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 45, 57-64; Dec. Dig. § 40.*]

3. EXCEPTIONS, BILL OF (§ 40*)—PREPARATION—FILING—TIME—EXTENSION—STIPULATION.

Where the trial court, without jurisdiction, and without plaintiff's consent, extended defendant's time to file a bill of exceptions beyond the 30 days allowed by law, in violation of Code Civ. Proc. § 1054, but thereafter plaintiff's attorney stipulated that defendant should have certain additional time to prepare and serve the bill, such stipulation constituted an acquiescence in, or consent to, all extensions theretofore made by the court, and plaintiff was estopped to claim a default on the ground that the previous orders were void; defendant having prepared and served the bill within the time specified in the stipulation.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 45, 57-64; Dec. Dig. § 40.*]

4. EXCEPTIONS, BILL OF (§ 42*)—SERVICE—EXTENSION OF TIME—VOID ORDER—WAIVER.

Where plaintiff's attorneys not only accepted defendant's bill of exceptions, filed out of time under a void extension, but requested and secured from defendant a stipulation granting them 30 days within which to prepare and serve amendments, they waived their right to object to the bill on the ground that it was not served in time, and were estopped to object to the allowance and settlement of the bill on that ground.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72; Dec. Dig. § 42.*]

5. EXCEPTIONS, BILL OF (§ 40*)—PREPARATION AND SERVICE—EXTENSION OF TIME.

Where defendant's time to prepare and serve a bill of exceptions expired November 24, 1911, and counsel filed an affidavit that the bill would have been completed and ready to be served November 23, 1911, but for certain important testimony, etc., inadvertently omitted by the stenographer to whom the work of typewriting it had been committed, and that on that day counsel was engaged in the trial of another case in court, and that on his return to his office he discovered the omissions for the first time, and that it took so much time to make the corrections, and he was delayed one day in sending it to plaintiff's attorneys, making it impossible for it to reach them before the expiration of the time for service, it was not an abuse of the trial court's discretion to grant a further extension of time.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 45, 57-64; Dec. Dig. § 40.*]

6. EXCEPTIONS, BILL OF (§ 43*)—SETTLEMENT—DEFAULT—INADVERTENCE—EXCUSABLE NEGLIGENCE—"PROCEEDING."

The settlement of a statement or bill of exceptions is a "proceeding" within Code Civ. Proc. § 478, providing that the court in furtherance of justice may relieve a party to a proceeding from a failure to perform an act required within the time specified, where such failure resulted from inadvertence, surprise, or excusable neglect.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5631-5638.]

7. EXCEPTIONS, BILL OF (§ 58*)—"PERSONAL SERVICE"—DELIVERY TO EXPRESS COMPANY.

Where a proposed bill of exceptions was delivered by defendant's attorneys to an express company for transmission to plaintiff's attorneys in another city, the delivery of the bill by the company to plaintiff's attorneys was "personal service."

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100-105; Dec. Dig. § 58.*]

For other definitions, see Words and Phrases, vol. 6, p. 5363.]

8. EXCEPTIONS, BILL OF (§ 58*)—SERVICE—METHOD.

Where the person on whom service of a bill of exceptions was to be made resided and had his office in a different place from that of the person making the service, it was not essential that service should be made by mail; but the person making service might avail himself of any agency, as an express company or the post office department, with the same effect, and delivery of the bill through the agency selected was personal service on proof thereof.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 100-105; Dec. Dig. § 58.*]

9. JURY (§ 131*)—QUALIFICATIONS—EXAMINATION.

Where, in an action for wrongful death, plaintiff admitted decedent's contributory negligence, and relied on the last clear chance doctrine, the court properly permitted plaintiff to ask jurors on voir dire whether, if the court should instruct that, notwithstanding decedent's neglect in placing himself in a position of danger, if the motorman by ordinary care could have prevented the accident, it was his duty to do so, would they follow such instruction.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 561-582; Dec. Dig. § 131.*]

10. STREET RAILROADS (§ 103*)—PERSON ON TRACK—MOTORMAN'S NEGLIGENCE—LAST CLEAR CHANCE.

Where a motorman saw decedent on the track apparently oblivious of the approaching car when it was 650 feet away, and continued to see him so standing until the car struck him, and the car, though traveling at an unusual speed, could have been stopped when within 12 or 14 feet of decedent, and the motorman testified that he stopped the car within 3 or 5 feet, but it did not appear that he had used the reverse, by which the car could have been stopped much more quickly than by means of the brakes, plaintiff was entitled to recover under the doctrine of last clear chance, notwithstanding decedent's contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

11. STREET RAILROADS (§ 113*)—ACTION FOR INJURIES—EVIDENCE—DESCRIPTION OF SITUATION.

In an action for decedent's death by being struck by a street car, a witness of the accident was properly permitted to state what he saw on reaching the track where the accident occurred; the purpose being to secure a description of the condition of the track, and the situation of decedent's body with reference to the car, etc.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229-238; Dec. Dig. § 113.*]

12. EVIDENCE (§ 127*)—RES GESTÆ—EXCLAMATIONS.

In an action for death in collision with a street car, evidence that a witness, from her house, a short distance from the place of col-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lision, heard the exclamation "Oh!" proceed therefrom at about the same time she heard a bumping noise of the car as it seemed to have struck some object was admissible as res gestae, and, since it tended to prove nothing more than the infliction of the injury and the experiencing of consequent pain, it was not objectionable as tending to show that decedent's body was dragged a considerable distance by the car, and did not show by whose negligence the accident was proximately caused.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.*]

13. WITNESSES (§ 248*)—EXAMINATION—RESPONSIVE ANSWER.

In an action for the death of decedent by being struck by a street car, a witness was asked to describe the appearance of the car as he saw it when he turned, referring to the time immediately after witness had cautioned decedent of its approach. *Held*, that his answer that "the car was carrying a current of wind ahead of her" was partly descriptive of the car in action, and not objectionable as nonresponsive.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

14. STREET RAILROADS (§ 113*)—INJURIES ON TRACK—EVIDENCE—RELEVANCY.

Where, in an action for decedent's death, it appeared that he was struck by a street car as he was standing on the track talking to L., who was in charge of a sprinkler wagon being used to sprinkle a freshly graveled street, evidence of the weight of such wagon when filled with water was properly received to show that in passing over the gravel the wagon made a loud noise, by reason of which decedent was somewhat prevented from hearing the approaching car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229-238; Dec. Dig. § 113.*]

15. EVIDENCE (§ 492*)—EXPERT TESTIMONY—"QUESTION OF SCIENCE, ART, OR TRADE."

The question of the speed of a train or other vehicle is not one of science, art, or trade within Code Civ. Proc. § 1870, subd. 9, declaring that the opinion of a witness on a question of science, art, or trade in which he is skilled may be given in evidence, but involves purely a question of judgment concerning which it is competent for any person to give testimony, the weight of which is solely for the jury, on consideration of such person's opportunity for observation of the train or vehicle as it passed along, the state of his mind at the time, the degree of intelligence he appears to possess, and whether he is biased or otherwise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2270; Dec. Dig. § 492.*]

16. EVIDENCE (§ 500*)—KNOWLEDGE—WEIGHT OF EVIDENCE.

Where a witness was offered to testify as to the speed of a car when it collided with decedent, he was properly permitted to state that he had owned and then owned race horses, and was accustomed to observe the time within which horses attached to vehicles would cover certain distances; the purpose being to show that, having acquired a habit of making such observations, he was better able to form a more reliable judgment as to the speed of the car than he otherwise would have been, and not to qualify him as an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 500.*]

17. DEATH (§ 69*)—EVIDENCE—DECEDENT'S FAMILY.

In an action for wrongful death, decedent's married daughter was properly permitted to testify that the surviving family consisted of

decedent's widow, the witness, and three minor children.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87; Dec. Dig. § 69.*]

18. DEATH (§ 88*)—ELEMENTS OF DAMAGE.

While solace for wounded feelings may not be included in damages awarded for wrongful death, yet loss of society, comfort, and care to decedent's wife and children, as well as their support, may be considered in so far as they affect pecuniary loss to them by decedent's death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 116; Dec. Dig. § 88.*]

19. DEATH (§ 68*)—EVIDENCE—DECEDENT'S CHARACTER.

In an action for wrongful death, it was not error to permit a witness to testify that decedent was kind and loving to his minor children.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 86, 87; Dec. Dig. § 68.*]

20. DEATH (§ 99*)—EXCESSIVE AWARD.

Where decedent, in an action for wrongful death, was shown to have left surviving a widow, a married daughter, and three minor children, a verdict awarding plaintiff \$8,000 was not so excessive as to show that it was the result of passion and prejudice.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

21. TRIAL (§ 321*)—VERDICT—RETURN—"RENDERED"—READING.

Code Civ. Proc. § 618, provides that, when the jury or three-fourths thereof have agreed on a verdict, they must be conducted into court, their names called by the clerk, and the verdict "rendered" by their foreman, reduced to writing and signed by him, and read by the clerk to the jury, and inquiry made whether it is their verdict. *Held*, that the word "rendered" as used in such section did not mean that it was the foreman's duty to read the verdict which was sufficiently "rendered" when it was returned into court by him, and handed to the trial judge, and it was therefore not error to permit the reading to be done by the clerk.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 760-763; Dec. Dig. § 321.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6081, 6082.]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Catherine Kramm against the Stockton Electric Railroad Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. *Affirmed*.

Arthur L. Levinsky, of Stockton, for appellant. Jacobs & Flack and G. F. Buck, all of Stockton, for respondent.

HART, J. Plaintiff's intestate lost his life through the alleged negligence of the defendant, and the purpose of this action is to recover damages therefor. The jury by whom the questions of fact were tried awarded the plaintiff a verdict in the sum of \$8,000, and this appeal is prosecuted by the defendant from the judgment entered upon said verdict, and from the order denying it a new trial.

The accident by which the deceased lost his life occurred in the month of October, 1900, and this action, which was commenced

in June, 1903, has had 5 trials; the first resulting in a verdict in favor of the plaintiff. That verdict was set aside by the granting by the trial court of the defendant's motion for a new trial. In the second trial the court granted the defendant's motion for a nonsuit on the close of the plaintiff's original case, and the plaintiff appealed from the judgment entered upon the order granting said motion. This court reversed said judgment, and remanded the case for a trial upon its merits. *Kramm v. Stockton Elec. R. R. Co.*, 3 Cal. App. 606, 86 Pac. 738, 903. Upon the third trial the plaintiff obtained a verdict, which was set aside, and a new trial granted by the trial court. From the order granting said motion, the plaintiff took an appeal, and this court thereupon rendered judgment affirming the order. *Kramm v. Stockton Elec. R. R. Co.*, 10 Cal. App. 271, 101 Pac. 914. In the fourth trial the jury disagreed, and the fifth trial is the one with which we are now concerned, and as to which it is claimed for a reversal of the judgment and order: (1) That the court erred, to the damage of the defendant, in permitting certain questions to be propounded to certain jurors on their voir dire examination; (2) insufficiency of the evidence to justify the verdict; (3) error in certain particulars in the court's charge to the jury; (4) excessive damages; (5) that the court erred in not requiring the foreman of the jury to read the verdict, upon its return, the clerk having performed that function.

The defendant set up contributory negligence as a special defense to the action, claiming that the injuries received by the deceased, and from the effect of which he died, were proximately caused by his own carelessness, and therefore through no fault or negligence of the defendant.

[1] A preliminary objection is urged by the plaintiff against a consideration of the bill of exceptions and the affidavits used by the defendant on its motion for a new trial, on the ground that the same were not prepared and served within the time prescribed by law. The same point is made the subject of a distinct appeal in *Kramm v. Stockton Elec. R. R. Co.* (Civil No. 1126) 136 Pac. 534, but the order relieving the defendant from its alleged default is not one from which an appeal is authorized (*Kaltschmidt v. Weber*, 136 Cal. 675, 69 Pac. 497); hence said appeal has this day been dismissed. The point may, however, be disposed of here; the proceeding being brought here on a bill of exceptions which is embraced in the transcript of the record in this case.

The judgment upon the verdict was entered on the 22d day of July, 1911, and a notice of intention to move for a new trial filed on July 29, 1911. It appears from the affidavits filed by the plaintiff that, at some time after the trial of the action, and before the expiration of the time allowed by law for that purpose, counsel for the defendant requested one of the counsel for the plaintiff for a stipula-

tion extending the time within which he might prepare and serve his bill of exceptions or statement on motion for a new trial. This request was refused, and thereupon counsel for the defendant, on the 8th day of August, 1911, applied to the court for an order extending the time to and including the 1st day of September, 1911, which application was granted. It further likewise appears that the court thereafter made several other orders extending the time within which the bill or statement might be prepared and served, whereby the time for that purpose was extended to the 14th day of November, 1911, inclusive. The orders so made after the making of the first order above referred to, although not objected to by counsel for the plaintiff, were not affirmatively assented to by them. Section 1054, Code Civ. Proc. On the 10th day of November, 1911, however—the day preceding that on which the time granted by the last order of the court was to expire—one of the attorneys for the plaintiff stipulated that counsel for the defendant might have until and including the 24th day of November, 1911, within which to prepare and serve his bill or statement.

It appears that the bill was completed and ready for service on the 24th day of November, but that the attorneys for the plaintiff were then located and maintained their offices in the city of Los Angeles, in which city the service was therefore required to be made. Obviously, the service could not be made on said day, and the court, upon the application of the defendant, extended the time for the service to and including the 29th day of November, 1911—4 days beyond the date to which the time had been extended by the stipulation of the attorneys. On the 24th day of November the attorney for the defendant deposited the bill or statement, addressed to the attorneys for the plaintiff at Los Angeles, with Wells Fargo & Co.'s Express at Stockton, and thus the document was transmitted to the plaintiff's attorneys.

It is further made to appear that the bill was received by the attorneys for the plaintiff on the 29th day of November, 1911, and it also appears that, in the letter to the attorney for the defendant acknowledging the receipt of the bill, the attorneys for the plaintiff inclosed the draft of a stipulation, whereby they were to be given 30 days within which to prepare and serve proposed amendments to said proposed bill of exceptions, and requested the attorney for the defendant to sign the same, and that said stipulation was so signed. Thereafter, and on the 14th day of December, 1911, counsel for the plaintiff obtained from the court an order extending the time to 30 days from and after said date within which to prepare and serve proposed amendments to the bill or statement as prepared and served by the defendant.

The plaintiff thereafter interposed a motion to disallow and strike out the defendant's bill of exceptions, etc., on the ground

above stated, and at the same time the defendant gave notice of motion to be relieved of the default claimed against it in its alleged failure to serve its proposed bill of exceptions on the ground of inadvertence and excusable neglect, etc. Code Civ. Proc. § 473.

The plaintiff makes two points against the legality of the proceedings allowing and settling the bill of exceptions, viz.: (1) That (as above stated) the bill was not prepared and served within the time required by law; (2) that, assuming that it was so prepared and served, the service was illegal, because the defendant deposited the bill with Wells Fargo & Co.'s Express in the place of the United States post office for transmission, and that substituted service cannot be secured in that way. Sections 1011, subd. 1, 1012, 1013, Code Civ. Proc.

[2, 3] It is necessarily to be conceded that the court was without power to extend the time for more than 30 days beyond that allowed by law without the consent of the plaintiff. Code Civ. Proc. § 1064; *Cameron v. Arcata*, etc., R. R. Co., 129 Cal. 279, 61 Pac. 955; *Bunnel v. Stockton*, 83 Cal. 319, 23 Pac. 301; *Bryan v. Maume*, 28 Cal. 238. It follows that the several orders made by the court extending the time after the first order was made were void because in excess of the authority of the court. But we think that the stipulation entered into by the attorneys for the plaintiff on the 10th of November, and after the orders referred to were made by the court, should be held to operate as an acquiescence in and virtually a consent by said attorneys to all the orders theretofore made by the court. At any rate, we think that where, as here, the court has made orders extending time to do an act, or to prepare and serve a bill of exceptions, when its power to do so has been exhausted, and thereafter the "adverse party" by stipulation consents to a further extension of time, the latter should be held to have waived the right to claim, and to be estopped from claiming a default as against the other party on the ground that the previous orders were void, where the latter has performed the act or prepared and served his bill within the time designated in the stipulation.

[4] The allowance by the court of the 4 days' more time after the bill had been completed within which to serve it upon the attorneys for the plaintiff in Los Angeles without the consent of the latter was clearly in excess of the power of the court; but, as has been shown, the attorneys for the plaintiff not only accepted the bill but requested of and secured from the defendant a stipulation granting to them 30 days within which to prepare and serve their proposed amendments. Thus, we think, the plaintiff waived any right she might otherwise have had to object to the bill on the ground that it was not served within time, and should be held to be estopped from objecting to the allowance and settlement of the bill on that ground.

The acceptance of the proposed bill by the plaintiff was, in our judgment, tantamount to the giving of her consent to the order of the court allowing the 4 days' additional time referred to.

[5] But, independently of the foregoing considerations, we are unable to say, upon the record appertaining to the point under present review, that the court abused its discretion in granting the defendant relief from its claimed default in preparing and serving its bill of exceptions within time. In his affidavit, counsel for the defendant declares that the bill would have been completed and ready to be started on its way to the attorneys for the plaintiff in Los Angeles on the 23d day of November but for certain important matters—testimony, etc.—inadvertently left out of the bill by his stenographer, to whom the work of putting the same in typewriting had been committed. He states that on said day he was engaged in the trial of a case in court, and that on his return to his office he discovered for the first time that the omissions had been made; that it required so much time to make the corrections or to add to the bill the omitted matter that he was delayed one day in sending it on its way to the attorneys for the plaintiff, thus making it impossible to reach said attorneys before the expiration of the time—the 24th of November—granted to him by them.

[6] As stated, upon the foregoing showing, which appears to be reasonable, it cannot justly be said that the action of the court relieving the defendant from its default, assuming it to have been in default in the matter, involved an abuse of the discretion with which a trial court is clothed in such cases. In *Banta v. Siller*, 121 Cal. 416, 53 Pac. 935, which involved the consideration of a similar proceeding as the one here, the defendant having been in default in the matter of the presentation of the proposed statement and amendments to the judge, and relieved from such default upon the ground of inadvertence and excusable neglect, the court said: "As was held in *Stonesifer v. Kilburn*, 94 Cal. 33 [29 Pac. 332], the settlement of a statement is a 'proceeding' within section 473 of the Code of Civil Procedure, and under that section the release of a party from a proceeding taken against him through mistake, inadvertence, etc., is a matter largely within the discretion of the trial court. An order granting such release will not be disturbed here, unless it clearly appears that the court or judge was guilty of gross abuse of discretion in making it. Indeed, it has been frequently said here that in cases of doubt the court ought to resolve the doubt in favor of the application, so that the full merits of the litigation might be presented,"—citing a number of California cases.

[7, 8] The contention that the service of the proposed bill of exceptions was invalid, because it was transmitted to the attorneys for the plaintiff through the agency of Wells

Fargo & Co., cannot be upheld. The delivery of the bill of exceptions to said attorneys by Wells Fargo & Co. made the service a personal service. "The fact that the person upon whom the service is to be made resides or has his office in a different place from that of the person making the service does not require that the service be made by mail, or preclude a personal service, and the person seeking to make the service can avail himself of any agency, such as Wells Fargo & Co., or the instrumentality of the post office department, with as much effect as if he had employed any other messenger. The delivery of the notice through such agency renders the service personal, and the proof of such delivery establishes a personal service." *Heinlen v. Heilbron*, 94 Cal. 636, 640, 30 Pac. 8, 9.

We hold that the action of the court in allowing and settling the bill was proper, and we now proceed to a review of the merits of the case.

[8] 1. The following is typical of the several questions asked by counsel for the plaintiff of certain jurors upon their voir dire examination, which questions the defendant insists were improper, and prejudiced its rights, in that thereby it was forced to exhaust all its peremptory challenges, and was therefore compelled to complete the panel without the privilege of objecting to certain jurors except upon special grounds which it failed to develop; "It being admitted in this case that the deceased was careless in getting upon the railroad track of the defendant street car company, if the court should instruct you that, notwithstanding his carelessness and neglect in placing himself in a position of danger, and if the motorman in charge of the car, by the exercise of ordinary care, could have prevented the accident, it was his duty to do so, would you follow that instruction?"

The foregoing question involves, we think, a correct statement of the theory upon which the plaintiff relied for a recovery. As will be more particularly shown hereafter, the deceased was standing on the defendant's street car track when he was struck by a car traveling over said track, and sustained the injuries resulting in his death, and, as is to be implied from the above question to the jurors, the plaintiff admitted, at the beginning of the trial, that, in stepping upon the track, the deceased was guilty of negligence, claiming, however, that the evidence would and does show that the motorman saw the deceased on the track in ample time to have stopped the car, and have prevented the accident by the exercise of ordinary care. In other words, the plaintiff, conceding negligence in the act of the deceased in stepping upon the track, relied upon the doctrine of the "last clear opportunity"; that is, that the motorman, having discovered and realized the deceased's perilous situation, could have prevented the accident and its consequences by

the exercise of ordinary care. *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 208, 93 Pac. 1049; *Bennichsen v. Market St. Ry. Co.*, 149 Cal. 22, 84 Pac. 420. The question above quoted and other questions of a like character which the court permitted the plaintiff to propound to the jurors did not, as counsel for the defendant assert is true, call for an unqualified statement of what the verdict would be in advance of the taking of the testimony. The questions were obviously hypothetical, containing a brief and, as before declared, a correct enunciation of the rule applicable to a personal injury case in which, as is the claim here, although the injured party voluntarily placed himself in a position of peril, and was guilty of negligence in so doing, still, if the party responsible for the injuries could, by the use of ordinary care, have avoided the accident whereby they were inflicted, and failed to do so, he is guilty of negligence for which the law will hold him liable. Indeed, the questions objected to amounted to no more than asking the veniremen whether they would follow the instructions of the court.

2. The facts brought out by the evidence at the trial with which the present appeals are concerned are substantially the same as those adduced at the former trials of this action, and a full and correct statement of them will be found in the opinions filed in the former appeals of this case, above referred to. We shall, nevertheless, restate the facts here in a general way, and specially refer, briefly, to certain of the testimony.

The deceased, Philip Kramm, was the husband of the plaintiff. They were, at the time that the deceased lost his life, the parents of 4 minor children, one daughter and 3 sons, aged, respectively, 20, 16, 14, and 11 years. The deceased, on the day of his death, as he had been for some time previously, was in the employ of the county of San Joaquin, having been engaged in spreading gravel over the roads and streets therein. At the time of the accident he was employed in this service on California street, over and along which the street car track of the defendant is located. Over said track the defendant ran its street cars. While the deceased was engaged as stated, one Looper, also employed by said county as the driver of a water wagon, used for the purpose of sprinkling or watering the roads and streets, came along with his wagon, having been instructed to sprinkle water on the gravel which was being spread over California street by the deceased for the purpose of packing it down and solidifying it. As Looper, driving in a northerly direction on said street, reached the point where the deceased was working, the latter, in order to avoid collision with the horses and wagon, stepped back onto the street car track, and remained there until after the wagon had passed, when he again stepped into the street. Looper sprinkled as far as the gravel extended on

the street, and then turned his horses, and started in a southerly direction over the same ground, and, as he approached the point where the deceased was engaged in spreading the gravel, the latter again stepped back upon the car track to let Looper pass. As the latter was passing the deceased, the two engaged in conversation concerning the quantity of water which was required for the gravel; "the team moving and the water running from the sprinkler as they talked." The deceased was then leaning on his shovel and rake, and was facing northeast, with his back toward the south. At about this time Looper observed a car traveling on California street in a northerly direction and toward the deceased. It appears that the appearance of the car startled Looper's horses; they making a quick and sudden jerk. Looper exclaimed to the deceased, "Look out there, old boy, for the car," and at the same time turned his attention to the horses, which, from having been frightened, had suddenly left the part of the street on which the gravel was spread. "By the time I looked around—stopped my team, looked around," testified Looper, "and I seen his hat lying behind the car. I jumped off as quick as I could. I thought he was under the car probably, and I jumped off of my team—off of my wagon and ran around, and he was lying under the west front wheels." A number of people, most of whom lived in close proximity to the place where the accident occurred, immediately gathered at the scene of the accident, and the body of the deceased, mangled in a horrible manner, was removed from the track. The deceased passed away shortly after his body was removed from the track.

Looper testified that the running of the water from the sprinkler on the gravel and the passing of the wagon and horses over the gravel made considerable noise. He said that the car was going at the rate of 15 or 20 miles an hour when he first observed it, and at the time he cautioned the deceased of its coming, and that it was then within 50 or 60 feet of where the deceased stood. The car, he said, "was carrying a current of wind right ahead of her. * * * It was bobbing up and down." He said that the deceased remained in the same position on the track from the time he stepped upon it after the horses and wagon had turned and started in a southerly direction over the gravel until he was struck by the car. He continued: "After the car moved away * * * I stepped the distance from where * * * they had drug him. * * * You could see very plainly, you know, from where the car struck him. It might have knocked him a good ways before he struck; but anyway I stepped the dragged place, where they dragged him there, and it was 5 or 6 steps—between 15 and 18 feet." The witness further testified that, if the deceased had seen the car when he (witness) first saw it, and

"had been quick," he might have jumped off the track, although even then, he said, there was not room enough between the track and the wagon for the deceased to have avoided collision with the car. Looper also stated that he did not hear the motorman ring the bell or give any other warning of the approach of the car.

The witness Barnhart, who resided near the point at which the accident happened, and who was at his home at that time, saw the car as it was approaching the deceased just before the latter was struck. He said that the car was going at full speed; that, when the car was so near the deceased that he could see but a "streak of daylight" between the front of the car and the deceased, he observed that the brake handle was in a vertical position, although at about the same instant of time, he said, the motorman appeared to be in the act of applying the brakes. He proceeded: "I remember hearing the noise made by the body striking against the metal front of the car. I was about 260 feet from the car. * * * The body seemed to be lifted, as though it had gone off its feet, and had gone up, and gone down. * * * It went forward and slightly out." He said that he heard the car bell ring but once, and that was when the car was at a point some 6 feet north of the south line of Hazel street; the accident having occurred at a point about half way between said street and the next street on the north (Locust) intersecting California street. He declared that the speed of the car did not seem to have been slackened or lessened until after it struck the deceased. "The car was rocking—was running along at full speed—and was rocking as those old cars did when running at that speed. * * * I lived on Hazel street in the vicinity of those cars for 8 years before this, and had observed the speed of the cars running there daily. * * * My estimate of the speed was some place between 15 to 16 or 18 miles. By full speed I mean a speed obtained on the older cars by throwing the controller around full thing."

Other witnesses testified that the car was going at full speed, and that the motorman failed to ring the bell.

The witnesses Williams and Morris, who had worked for the defendant 10 and 9 years, respectively, in the capacity of both conductor and motorman, testified that the car which ran over the deceased had, in addition to a brake, a reverse; the latter being the most effectual for stopping the car in case of a sudden emergency. "When you throw on the reverse," said Williams, "it starts the wheels in the other direction; it stops it. In other words, it is a quicker way of stopping the car than that of using the brake, if the track is dry. Car 25 [the one which struck the deceased] has 5 notches for putting on the current. If 3 notches were on, I think a man could stop it in 15 feet, some-

thing like that. * * * If 5 notches were turned on, I think you could stop a car in about 50 feet by the use of the brake, and by the use of the reverse about 10 feet less than that. The reverse is used in the case of accident for the purpose of preventing accidents."

Pickering, the motorman operating the car at the time of the accident, said that he first observed the deceased opposite the water wagon when the car rounded the curve on California street. This curve, it is conceded, is about 650 feet from the point where the deceased stood when struck by the car. The deceased, he said, appeared to be in conversation with Looper. "While I was on this curve," the witness continued, "I rang the bell, and Mr. Kramm backed across the track; that is, I suppose I was within 100 feet, more or less—started to back across the track. He got within, probably, two-thirds of the way across the track. I was within—the car was within about 12 or 14 feet, 10 or 12 feet, at that time, I should judge, between 10 and 12 feet when he hesitated, and the car struck him." He said that he saw Kramm "at all times from the time he first started back on the track until he was struck." "Q. Did Kramm seem to notice you when you rang the bell? A. Well, I could not say. The man backed across the track—started to back across the track, and stopped. I could not say positively whether he noticed me or not. I didn't see him look at me, or look at the car. * * * Q. Within what distance did you stop the car after putting on the brakes? A. I should judge from 3 to 5 feet, somewhere along there, from the front end of the car to the front wheel; that was the distance the car went."

The testimony further discloses that California street, which runs in a northerly direction, bearing westerly at the curve referred to, passes over perfectly level ground, and that the day on which the accident happened was bright and "sunshiny," so that there was nothing to prevent the motorman from clearly observing any object which might have been on the track before him for the distance between said curve and the point on the track at which the deceased stood when struck.

The above synopsis of the testimony is sufficient to show that the position of the defendant that the verdict is without sufficient support cannot be sustained.

As seen, the deceased was standing with his back towards the direction from which the car was moving. He was in conversation with Looper, and, with his mind thus occupied, and with the noise produced by the moving of the horses and wagon over the gravel, and the water falling from the sprinkler attached to the wagon, it is manifest that he neither saw nor heard the car, nor was he aware of its near approach. Indeed, it is very clear, from Looper's testi-

mony, that neither he nor the deceased observed the approach of the car until it had reached a point in such close proximity to the place where the deceased was standing as to make escape impossible at the rate of speed at which the car was traveling.

[10] It cannot be doubted that the jury were warranted in finding that the motorman had ample opportunity to have stopped the car long before the point where the deceased stood was reached. He saw the latter when his car turned the curve, a distance of 650 feet from where Kramm was standing. He saw him at all times after that, and until the car struck him. The motorman admitted this. It is true that he testified that Kramm, after the bell was rung, started to back off the track. This testimony was flatly contradicted by Looper, however, who said that the deceased never moved from the position he originally took on the track; but, assuming that the motorman was correct in his statement that the deceased started to leave the track, still the evidence is such that the jury were justified in finding that the car could have been stopped after it had approached within 12 or 14 feet of the deceased, the car being that distance from the deceased when, according to the motorman, the former hesitated on the track after moving backward a short distance. As has been shown, there is evidence that the car was moving at full speed from the time it rounded the curve, at which point the motorman first noticed or saw the deceased, and that this rate of speed was not slackened or diminished, nor any attempt made by the motorman to reduce it. That there was some reason for believing this to have been the case is shown by the testimony strongly tending to disclose that the body of the deceased was dragged over the track by the car for a distance of some 17 feet, and by the testimony of the motorman himself that he stopped the car, after applying the brakes, within a distance of from 3 to 5 feet. It does not appear that the motorman used the "reverse," whereby, according to the testimony of the witnesses who testified on that subject for both the plaintiff and the defendant, the car could have been stopped much more quickly than by means of the brakes.

It must be taken as proved that the car was traveling at an unusual rate of speed (Lee v. Market St. Ry. Co., 135 Cal. 294, 67 Pac. 765), and that the motorman did not reduce the speed until after the car struck the deceased. At any rate, in our judgment, clearly the record discloses plenty of evidence from which the jury were legally authorized to find that the motorman saw the deceased in a situation of peril in ample time to have prevented the accident had he made proper use of the means in his power to have done so, and the case presented here is therefore plainly one for the jury upon the question whether, notwithstanding the negli-

gence of the deceased, the fatal accident would have occurred but for the negligence of the defendant or its agent. It will not be disputed that it is a "principle, now firmly established in this state, that a party having an opportunity by the exercise of proper care to avoid injuring another must do so, notwithstanding the latter has placed himself in the situation of danger by his own negligence or wrong." (Fox v. Oakland Con. St. Ry., 118 Cal. 62, 50 Pac. 25, 62 Am. St. Rep. 216; Lee v. Market St. Ry. Co., 135 Cal. 295, 67 Pac. 765; Zipperlen v. S. P. Co., 7 Cal. App. 206, 93 Pac. 1049), and a review of the evidence in this case will leave no room for doubting that the jury were fully justified in finding that the evidence brought the act of the defendant in causing the death of Kramm within the ban of the doctrine thus enunciated.

[11] The witness Barnhart was allowed to state, over objection by the defendant, what he saw after reaching the track where the accident occurred; the purpose of the question being to secure a description of the condition of the track and the situation of the body of the deceased with reference to the car, etc. Barnhart saw the accident from a short distance away from the track, and immediately ran to the scene thereof. We can perceive no possible impropriety in this testimony.

[12] 3. The witness Tulan, from her house, a short distance away, heard the exclamation "Oh" proceed from the direction of the place where the accident occurred at about the same time she heard the "bumping noise" of the car as it seemed to have struck some object. This testimony was manifestly for the purpose of showing that the deceased uttered the exclamation referred to. We can see nothing improper in the testimony. If such an exclamation was uttered by the deceased when struck by the car, evidence of that fact was admissible under the rule of res gestæ. But the defendant does not deny that its car struck the deceased, and thus produced his death, and the mere fact that, simultaneously with being struck, he uttered an exclamation, indicating that he had been injured, and was in pain by reason thereof, could tend to prove nothing more than the infliction of the injury and the experiencing of consequent pain. It would not, as counsel contends was its effect, necessarily tend to prove that the body was dragged a considerable distance by the car, nor by whose negligence—whether that of the deceased or that of the defendant—the accident was proximately caused.

[13] 4. It is next objected that the court erred by its refusal to strike out the statement of the witness Looper that "the car was carrying a current of wind right ahead of her." The ground of the motion to strike out was that the answer was not responsive to this question: "Describe the appearance

of the car as you saw it when you turned"—referring to the time immediately after which Looper had cautioned the deceased of the approach of the car. The statement was partly descriptive of the car in action, and the ruling was proper. Indeed, the question must have had sole reference to the rate of speed at which the car was moving, as its appearance otherwise, before reaching the deceased, could have had no significant bearing upon the main issue in the case.

[14] 5. There was no legal impropriety in the ruling, to which exception was taken and is here urged by the defendant, whereby Looper was permitted to give the weight of the wagon he was driving when loaded with water. The manifest object of this testimony was to show that the large water wagon, containing, as it did, a large quantity of water, as it passed over the freshly gravelled street, sprinkling water thereon, made a loud noise, and that thus the deceased was prevented, to some extent, from hearing the noise of the approaching car.

6. Looper was asked and allowed to answer, against the objection of the defendant, a number of questions, the apparent purpose of which was to qualify him to give an opinion upon the rate of speed with which the car was running when it came in contact with the body of Kramm. He stated that he had owned and then owned some fast horses, belonging to the racing class, and that thus he became accustomed to taking and observing the time within which horses, attached to vehicles, would cover certain distances. By such observations and experience, he was able to form an approximately accurate judgment as to the rate of speed at which any kind of vehicle might travel by merely observing it as it passed along.

[15] Counsel for the defendant contends that questions touching the speed of street cars or trains do not involve subjects of scientific inquiry; hence the testimony of Looper as to his experience and observation in the matter of noting the speed of horses or vehicles, drawn by horses, or the rate of speed with which a steam train or a street electric car might travel, was incompetent and prejudicial. We think counsel is right when he says that the question of the rate of speed at which a train of cars or other vehicle may travel does not, strictly speaking, constitute a subject of expert testimony. Section 1870, subd. 9, of the Code of Civil Procedure declares that the opinion of a witness on a question of *science, art, or trade*, when he is skilled therein, may be given in evidence. The question as to the rate of speed at which a train of cars or other vehicles may be traveling is not one of science, or of art, or of trade, within the meaning of these terms as they are used in said section, but involves purely a matter of judgment, and one which it is competent for any person to give testimony upon, and whether the judg-

ment so disclosed is worthy or unworthy of any weight is a matter solely for the decision of the jury upon a consideration of the opportunity of the witness for observing the train or the vehicle as it passed along, the state of his mind at the time, the degree of intelligence which he appears to possess, and whether he appears to be unbiased or otherwise.

[16] But the testimony of Looper with respect to his experience in noting time or the speed at which vehicles, drawn by racing horses, had traveled over certain distances was not offered or received for the purpose of qualifying him as an expert upon that subject, but merely to show that, having been in the habit of making such observations, he was the better able to form a more reliable judgment as to the rate of speed of the car when it approached and struck Kramm than perhaps he would otherwise have been.

The case of *Grand Rapids & Indiana R. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321, cited by the defendant in support of its position, does not hold that the testimony objected to here is incompetent, nor that an ordinary witness may not give his opinion as to the speed of a train. To the contrary, it is there held that, while questions relative to the speed of trains are "not properly scientific inquiries," yet they "were not beyond the competency of ordinary witnesses who had means and *habits* of observation." In the case at bar, the witness not only had the means but, as shown, the *habit* of observation. Nor is there anything said in the California cases cited by counsel which sustains him in the assertion that the challenged testimony was not proper for the purpose of showing that Looper was capable of forming an approximately accurate opinion as to the rate of speed of the car. See cases referred to, viz.: *Sappenfield v. Market St.*, etc., R. R. Co., 91 Cal. 48, 59, 27 Pac. 590; *Fairbanks v. Hughson*, 58 Cal. 314; *Pacheco v. Judson Mfg. Co.*, 113 Cal. 541, 45 Pac. 833.

[17, 18] 7. The testimony of the married daughter of the deceased that the family left by the latter consisted of his widow, the witness, and three minor children was not objectionable, and the cases of *Simoneau v. Pac. Elec. Ry.*, 159 Cal. 494, 115 Pac. 320, and *Green v. S. P. Co.*, 122 Cal. 563, 55 Pac. 577, do not so hold. In the first-mentioned case, the widow of the deceased, the latter having been injured and killed by one of the cars of the defendant as he was walking across its railroad track, was permitted to testify, against the objection of the defendant, that one of the children of herself and the deceased was crippled in the right arm, and had been under a surgeon's care for 7 or 8 months, and that another child was afflicted with a serious congenital defect in one of her shoulder blades, and had been "doctored for a 'good many years,' and was still under the doctor's

care." In the *Green Case*, the trial court allowed evidence of the poverty of one of the plaintiffs; the action having been brought by the widow and children of the deceased. The testimony in both cases was, with obvious legal propriety, held to be inadmissible, since, clearly, neither the physical affliction of the children in the one case nor the poverty of the child in the other constituted an element of the damage sustained by the complaining parties. Obviously, a party charged with wrongfully committing a personal injury upon or producing the death of another cannot be held responsible for the physical or financial handicaps of the family of the latter which existed before or at the time the injury was inflicted or the death produced. In the case at bar, however, the proposition is very much different from those presented in the cases above referred to. It was strictly proper in this case to show that the deceased left a family, who had suffered pecuniary loss by reason of his death through the tortious act of the defendant, and to show the extent of such loss with reasonable certainty. In order to determine such loss, the jury were entitled to be informed of whom said family consisted—whether of persons who had never received pecuniary assistance from the deceased, or who were not dependent upon him for nurture, care, and support, or of persons who had received such assistance, and were so dependent, and would, by reason of their minority and consequent helplessness, have still required and been entitled to such assistance and care from him, had he not lost his life. *Chicago & A. R. A. Co. v. Shannon*, 43 Ill. 338; *Sedgwick on Damages* (8th Ed.) § 579; *Simoneau v. Pac. Elec. Ry.*, supra. As is said in the *Simoneau case*: "While solace for wounded feelings may not be included in the damages awarded, the loss of society, comfort, and care to wife and children, as well as their support [*italics ours*] may be considered in so far as they affect pecuniary loss to them by the death of the husband or father." See, also, *Beeson v. Green Mountain Co.*, 57 Cal. 20, 38, *Green v. S. P. Co.*, supra.

[19] Nor was it error to permit the same witness to say that the deceased was "kind and loving" to his minor children. As has been shown, the loss to the children of the society, comfort, and care of a parent by his or her death through the wrongful act of another may be shown as entering into the pecuniary loss thereby suffered, and such a consideration would obviously cut little, if any, figure in the estimation of such loss if the conduct of the parent toward his minor children were the opposite of that described by the witness. In *Beeson v. Green Mountain G. M. Co.*, supra, it is said: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of 'all the circumstances of the case' for the jury to take into

consideration in estimating what damage would be just, from a pecuniary point of view, especially as there is nothing in the case to show that the jury were instructed that they might give damages by way of solace." See *Matthews v. Warner*, 29 Grat. (Va.) 570, 26 Am. Rep. 396; *B. & O. R. R. Co. v. Noell*, 32 Grat. (Va.) 394.

There are some other exceptions to the rulings of the court upon the evidence; but, after a careful examination of them, we do not regard them as of sufficient importance to require special notice in this opinion.

8. Numerous alleged errors are pointed out by the defendant in the action of the court in giving and refusing to allow certain instructions. We can see no necessity for reviewing these assignments in detail. It is enough to say generally that the court, in its charge, declared to the jury correctly and in clear language every principle of law pertinent to the issues made by the pleadings and the proofs. It may further be observed that the instructions proposed by the defendant and rejected by the court contained no principle or rule of law applicable to the issues which the court did not declare in its charge to the jury. It may also be remarked that there is nothing in the language of any of the instructions submitted by the court to the jury which justifies the criticism of counsel for the defendant "that the jury was virtually told by said instructions that, notwithstanding the fact that the deceased was guilty of contributory negligence, and placed himself in a position of danger, the burden was shifted to the defendant." The court, after first declaring that the plaintiff admitted that the deceased was guilty of contributory negligence, stated, with clearness and accuracy, the rule applicable to the doctrine of the "last clear opportunity" invoked by the plaintiff. Nowhere did the court say or intimate that the burden rested upon or was shifted to the defendant to prove that it was not negligent, or, in other words, that it did not, having knowledge of the perilous position of the deceased, exercise ordinary care to prevent the accident by which he was injured and killed. To the contrary, the court in effect said to the jury that, to sustain the complaint, it was requisite for the plaintiff to prove the affirmative of the issue by a preponderance of the evidence, the obvious meaning of which is that the burden of proving the charge that the negligence of the defendant was the proximate cause of the death of Kramm wholly rested on the plaintiff.

[20] 9. We cannot say that the verdict is excessive. "A verdict in this character of cases can only be disturbed where the amount awarded, in view of the evidence, is so excessive as to be apparently the result either of passion or prejudice on the part of the jury." *Valente v. Sierra Railway Co.*, 158 Cal. 412, 419, 111 Pac. 95, 98. There is nothing in this record indicating that the verdict was

the culmination of either passion or prejudice in the jury. It must therefore be assumed that the jury, having found upon sufficient evidence that the death of the deceased was proximately occasioned by the culpable negligence of the defendant, based its award of damages entirely upon a consideration of the great loss sustained by the family of the deceased by the death of him upon whom they depended and had the right to depend for that care and support which the evidence apparently shows that he was capable of affording them. The observations of the learned justice who wrote the opinion in the *Valente Case*, supra, to be found on page 419 of 158 Cal., page 98 of 111 Pac., are peculiarly applicable to the case here with respect to the question of damages.

[21] 10. There is no merit in the proposition, advanced by the defendant, that it was error fatal to the validity of the verdict for the clerk to have read the verdict "in the place of its having been rendered by the foreman," as provided by section 618 of the Code of Civil Procedure. It appears from the record that, when the jury came into court after deliberating upon the case, the court, after asking whether they had agreed upon a verdict, and receiving an affirmative reply from the foreman, requested the latter to pass the verdict up to the court. The foreman obeyed this request, and the judge, after inspecting the verdict, delivered it to the clerk, and ordered him to read it, whereupon the clerk read the verdict, and thereupon counsel for the defendant asked for a poll of the jury, which was granted; each of the jurors, as his name was called, stating that the verdict as read was his verdict. The court thereupon ordered the verdict to be entered of record, after which counsel for the defendant noted and reserved an exception to the reading of the verdict by the clerk.

Section 618, supra, among other things, provides that: "When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and *the verdict rendered by their foreman*; the verdict must be in writing, signed by the foreman, and *must be read by the clerk to the jury*, and the inquiry made whether it is their verdict."

Counsel's argument in support of this point of necessity assumes that the word "rendered," as used in said section, means that it is the duty of the foreman to *read* the verdict. But the section does not say so. As plainly as it could be said, it is declared that the clerk must read the verdict after it has been "rendered" or *returned* into court by the foreman, which is the evident meaning of the word "rendered" as it is used in the section. The Legislature could not have intended so unnecessary a thing as that the verdict should be read by both the foreman of the jury and the clerk of the court, and, if it had, it would have plainly so declared.

The case of *Blum v. Pate*, 20 Cal. 69, cited by the defendant, merely holds that the recordation of the verdict by the clerk before reading it to the jury, and thereupon inquiring whether it is their verdict, is an irregularity. The case does not sustain counsel's interpretation of the word "rendered," as it is employed in the section.

We have discovered no substantial reason for interfering with either the judgment or the order appealed from, and both are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

KRAMM v. STOCKTON ELECTRIC R. CO.
(Civ. 1,126.)

(District Court of Appeal, Third District, California. Sept. 23, 1913.)

APPEAL AND ERROR (§ 117*)—ORDERS APPEALABLE—BILL OF EXCEPTIONS—EXTENSION OF TIME.

An order relieving defendant of its alleged default in failing to prepare and serve a proposed bill of exceptions within the time prescribed by law is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 805-812; Dec. Dig. § 117.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Catherine Kramm, as administratrix, against the Stockton Electric Railroad Company. From an order relieving defendant from its alleged default in failing to prepare and serve a proposed bill of exceptions within the time required, plaintiff appeals. Dismissed.

Jacobs & Flack, of Stockton, for appellant. Arthur L. Levinsky, of Stockton, for respondent.

HART, J. This is an appeal from an order relieving the defendant from its alleged default in failing to prepare and serve, within the time prescribed by law, its proposed bill of exceptions. The proceeding was had under section 473 of the Code of Civil Procedure, and the ground upon which the order was asked for and allowed was that the alleged default of the defendant was due to inadvertence and excusable neglect.

As is shown in *Kramm, etc., v. Stockton Electric R. R. Co.* (Civil No. 1115) 136 Pac. 523, this day decided, the order appealed from is not one from which an appeal may be taken, and this appeal will therefore have to be dismissed. Section 963, subd. 2, Code Civ. Proc.; *Kaltschmidt v. Weber*, 136 Cal. 675, 69 Pac. 497.

The point is, however, reviewed and decided in Civil No. 1115, *supra*; the action of the court relieving the defendant of its alleged default, together with all the proceedings had therein, being incorporated in the

record on the motion for a new trial. *Kaltschmidt v. Weber, supra*.

The appeal herein is dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

EATON v. LOCEY et al. (Civ. 1,132.)
(District Court of Appeal, Third District, California. Sept. 23, 1913.)

1. HUSBAND AND WIFE (§ 264*)—SEPARATE OR COMMUNITY PROPERTY—PURCHASE MONEY—EVIDENCE.

Evidence, in an action involving the question, whether land, title to which stood in the name of plaintiff's wife at her death, was her separate property, or community property, held to support the finding that it was bought and paid for by them out of their joint or community funds.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.*]

2. HUSBAND AND WIFE (§ 264*)—SEPARATE OR COMMUNITY PROPERTY—CONVEYANCE TO WIFE—PRESUMPTION—EVIDENCE.

Evidence on the question of land conveyed to plaintiff's deceased wife by a third person, being community property, held sufficient to overcome the presumption, under Civ. Code, § 164, that title was thereby vested in her as her separate property, or that plaintiff intended the conveyance should operate as a gift to her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.*]

3. APPEAL AND ERROR (§ 1008*)—REVIEW—CREDIBILITY OF WITNESSES.

The appellate court cannot say one's testimony, not appearing to be unreasonable or improbable, and believed by the trial court, as shown by its findings, is not true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

4. EVIDENCE (§ 471*)—LEGAL CONCLUSION—SEPARATE PROPERTY.

One may not testify money was not the separate property of a wife; whether or not it was such, or was community property, being a question of law depending on the manner and time of its acquisition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Allowing one to testify money was not the separate property of his wife was harmless; he also testifying it was the result of their joint earnings after their marriage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

6. HUSBAND AND WIFE (§ 263*)—SEPARATE OR COMMUNITY PROPERTY—JOINT EARNINGS—EVIDENCE.

Plaintiff claiming property, title to which was taken in his wife's name, was community property, bought with their joint earnings, to rebut any inference from the showing, on his cross-examination, that he earned little through his profession of photographer, may show not only that he bought and sold real estate for his wife, who had a separate property, and looked after her affairs, under an agreement that he should have for his services the profits on the deals, she to have the rents, but also that by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

reason of attending to such business he to a certain extent neglected or gave up his photographic business.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 915; Dec. Dig. § 263.*]

7. WITNESSES (§ 286*)—REDIRECT EXAMINATION—LEADING QUESTIONS.

As to new matter elicited by cross-examination, questions suggestive in form may on redirect be asked without impropriety or at least without harm to the other side.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994-999; Dec. Dig. § 286.*]

8. EVIDENCE (§ 273*)—SELF-SERVING DECLARATIONS—MAKING OF DEED.

The making of a deed by a wife alone of property standing in her name, it not appearing the husband knew thereof, is merely a self-serving declaration, as regards the question of the land being separate or community property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

9. EVIDENCE (§ 273*)—SELF-SERVING DECLARATIONS.

Declarations of deceased to a third person that her husband had no interest in their joint bank account are self-serving, as regards the question of the land bought therewith being separate or community property.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 273.*]

10. EVIDENCE (§ 271*)—HUSBAND AND WIFE (§ 263*)—SEPARATE OR COMMUNITY PROPERTY—SELF-SERVING DECLARATIONS.

As regards the issue whether land standing in the name of plaintiff's deceased wife was their community property, bought with their joint funds, or her separate property, her statement to a third person that plaintiff had used money belonging to her to buy stocks for himself is immaterial, besides being self-serving.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.* Husband and Wife, Cent. Dig. § 915; Dec. Dig. § 263.*]

11. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

It being admitted by plaintiff, claiming land standing in the name of his deceased wife was their community property, bought with their community funds, that property inherited by her was her separate property and extensive, and being impossible to see how further inquiry into the extent thereof could have benefited defendants, denial thereof, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by E. F. Eaton against L. C. Locoy, administrator with the will annexed of Clara E. Eaton, deceased, and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

H. B. McClure and D. E. Perkins, both of Visalia, for appellants. Bradley & Bradley, of Visalia, for respondent.

HART, J. An action by the plaintiff to quiet title to a certain tract of land, embracing 80 acres situated in Tulare county.

The plaintiff and Clara E. Eaton, deceased, were husband and wife. The title to the

land in controversy was in the name of said Clara. She died on the 15th day of May, 1911, in the state of Pennsylvania, leaving estate in Tulare county, Cal. She left a last will and testament, and, after due proceedings had in the superior court in and for the county of Tulare, the defendant Locoy was appointed administrator with the will annexed of her estate. By her said will she devised to the defendants Paul and Jesse Lietenberger five acres each of the land in controversy.

The plaintiff claims that, notwithstanding that the title deed to the land was in the name of Clara, the same was nevertheless community property, it having been purchased and paid for by money belonging jointly to himself and his deceased wife, and the court found this claim to be true and rendered and caused to be entered judgment accordingly. The defendants appeal from the judgment and the order denying them a new trial.

The principal question presented here is whether the findings are sufficiently supported by the evidence. Several of the rulings of the court upon the evidence are also assigned as prejudicial error.

1. The findings are based mainly upon the testimony of the plaintiff, who testified in substance as follows: That he was married to Clara Eaton, the deceased, in the month of December, 1880, in Trevorton, Pa., and resided in California from October, 1906, until April, 1907; that in the latter part of October, 1906, he visited and inspected the land in question with a view of buying it; that the land had previously been visited and seen by his wife, but that no suggestion was made with reference to purchasing it until the witness had seen it; that the tract consisted of 320 acres of land; and that he and his wife joined with several other parties in purchasing the entire tract, the plaintiff and his wife taking 80 acres thereof and agreeing to pay and in fact paying therefor the sum, approximately, of \$4,000, said payment being made out of the community funds of the plaintiff and his wife. The deed, he said, was made in the name of his wife because "it was understood between my wife and I if I should survive her the property was to be mine. * * * A small portion of that money that went to pay for the consideration for this land was earned by Clara E. Eaton. A greater portion of it was earned by me in buying and selling real estate while living in California. I had the management of this particular tract of land up to the time of my wife's death. The money was deposited while in California in our joint names of E. F. and Clara E. Eaton. Before going to California, if my memory serves me right, it was deposited in the joint account of E. F. and Clara E. Eaton in the National Bank of Shamokin, Pa. It was our joint

money, from our joint earnings. * * *

There was no portion of the consideration for the purchase of the land the separate property of Clara E. Eaton. Q. Did you, at the time the deed was made to your wife, give or intend to give her that part of your money which went into the purchase of this tract of land as a gift, or did you intend to hold that land as community land? A. It was not a gift but community land." On cross-examination of the plaintiff it was shown that, while living in Pennsylvania, his business was that of a photographer, and that by that business, and also by engaging in some real estate transactions, he earned certain sums of money during his married life. This money, he said, was deposited in the bank in the joint names of himself and wife. He and his wife had a joint bank account in a bank in Los Angeles, Cal., as well as one in a bank in the state of Pennsylvania. The money so deposited was from the joint earnings of his wife and himself. He further testified that his wife was the sole heir of her father and mother, whose estates, which were of considerable value, she inherited or succeeded to. He testified that he made two payments on the land in dispute, one of \$1,250 and the other of \$1,730, both by checks drawn by him on the joint bank account of himself and wife. There were some other smaller payments made on the land, but he could not recall how or when they were made. The check for \$1,730 was the last payment made and was in full payment of the purchase price of the land.

Albert C. Fisher, cashier of the First National Bank of Trevorton, Pa., testified that the plaintiff and his wife opened a joint account in said bank in April, 1907, and that, at the time of the latter's death, the amount of said joint account was \$568.30.

Edward J. Miller, a bookkeeper of the First National Bank of Shamokin, Pa., testified that both the plaintiff and his wife had individual accounts with said bank. "Clara E. Eaton has two cards," he continued, "one is a continuation of an account opened in our bank on July 8, 1902. There were deposits during the year 1902 up to the year 1911. Mr. Eaton had an individual account opened January 29, 1904, and closed up September 6, 1904, and had an account June 29, 1905, up to March 22, 1906. The account of Mr. Eaton has not been opened since 1906. E. F. and Clara E. Eaton have a joint account which was opened March 19, 1906. It was opened in both their names. We got E. F. Eaton's signature when the joint account was opened. The account was closed October 29, 1906, and opened again April 6, 1908, which remained opened until May 13, 1911. I think both drew checks on the account, to what extent I do not know. Either one can draw checks on the account in their individual name. The check drawn on the First National Bank of Shamokin, Pa., for \$1,730, signed E. F. Eaton, was made payable to the

bank for the purchase of a New York draft in favor of the bank of Tulare, Cal." This witness then gave a detailed statement of the deposits made with said bank by E. F. and Clara Eaton in their joint names; the first joint deposit being in the form of a check for \$1,400 on a Harrisburg, Pa., bank.

The defendants introduced testimony tending to show that the plaintiff had made both oral and written declarations whereby he in effect admitted that the land in dispute was the separate property of his wife and that the same was bought with her separate money. It was also shown by one of the witnesses for the defendants that Clara Eaton had, in the presence of the plaintiff, asserted that the land was bought with her separate money; her husband merely negotiating and carrying out the transaction for her.

[1, 2] It is readily to be observed from the foregoing presentation of the state of the record as to the proofs that there exists here a distinct conflict in the evidence upon the question whether the land was or was not bought with money belonging jointly to the plaintiff and his wife, and it is clear that the evidence produced by the plaintiff in support of his claim that the land was bought and paid for by himself and his wife out of their joint or community funds is sufficient to support the findings in that particular. It is equally clear that the testimony of the plaintiff, if believed by the trial court, as obviously it was, is sufficient to overcome the presumption, arising from the fact that the plaintiff permitted the deed to be made to his wife, that the title to the land was thereby vested in her as her separate property (section 164, Civ. Code), or that he intended that the conveyance should operate as a gift of the land to her. *Alferitz v. Arrivillaga*, 143 Cal. 649, 77 Pac. 657.

[3] Counsel in their brief present, against the decision upon the facts, an argument, based upon a critical analysis of the evidence, which appears to be very forceful, but it is an argument which, addressed to a court of review, can be of no avail to the defendants under the state of the record as to the facts; it being beyond the province of this court to declare that the plaintiff's testimony, which does not appear to be unreasonable or improbable, is not true. It was, as is familiarly understood, entirely the function of the trial court to pass upon the weight of the evidence and to that end determine the question of the credibility of the witnesses who gave testimony in the case. The findings in favor of the plaintiff constitute, of course, indubitable and conclusive evidence of the fact that the trial judge believed the testimony of the plaintiff as against any adversary proof which was presented by the defendants, and we can discern no just or legal reason for holding that the court's judgment in that regard is wrong.

[4, 5] 2. The court, against the objection of the defendants, permitted the plaintiff to tes-

tify that the money which was used in payment for the land was not the "separate property" of the wife of the plaintiff. The same witness was also allowed to say, over the objection of the defendants, that the money so used was earned by him and his wife during her coverture. An answer to the following question to the plaintiff was also allowed: "If there was a payment made, by whom was it made and out of what fund?" It was manifestly improper to permit the witness to say that the funds from which the payment for the land was made were not the "separate property" of his wife. Whether the money so used constituted community property or the separate property of either spouse is a question of law depending on the manner and time of its acquisition. *Estate of Pepper*, 158 Cal. 619, 625, 112 Pac. 62, 31 L. R. A. (N. S.) 1042. But we cannot say that the answer was prejudicial to the defendants, since the witness declared, in reply to the other questions referred to, which called for competent testimony, that the money was the result of the joint earnings of himself and wife after their marriage.

[6, 7] 3. The plaintiff testified that, after his wife had acquired the estate of her father and mother, he gave his personal attention to her business affairs, negotiating and executing all the transactions in connection therewith. He said that, acting for his wife, he bought and sold real estate and that for such services his wife had agreed that he should retain as his own the profits on any deals thus made, while she was to have as her own all rents coming from her property. This testimony was brought out on redirect examination for the purpose of rebutting any inference which might have followed from the cross-examination of the witness as to whether he himself, as a matter of fact, ever earned any money other than the small amounts which he stated that he had acquired through the prosecution of his profession as a photographer. Pursuing this line of inquiry, his attorney asked the plaintiff this question: "Is it not a fact, Mr. Eaton, by reason of that understanding and agreement between you and your wife, that you to a certain extent neglected or gave up your photographic business and went into the business of buying and selling real estate?" The question was allowed over the objection of the defense that it was leading and had no pertinent bearing upon the issues. The question, barring its form, while calling for testimony of no great importance, was proper as tending to explain why the witness earned and accumulated so comparatively a small aggregate amount at his professional calling and as further tending to explain the manner in which he to some extent earned and acquired a community interest in the joint bank account from which the money paid for the land was obtained. The question was leading, a form in which a party is not ordinarily

permitted to frame questions to his own witness, but it often happens that the cross-examination elicits new matter with reference to which questions suggestive in form may be asked on redirect without impropriety, or, at any rate, without harm to the other side, and it is believed that the question objected to here comes within that class.

[8] 4. Objections were sustained to a number of questions propounded by counsel for the defendants to the witness Shoner, an attorney, who had transacted some legal business for Clara Eaton; the purpose of said questions being to show that the witness had prepared for Mrs. Eaton certain "deeds and papers in reference to the California land" and the particular land thereby conveyed, that she (Mrs. Eaton) "was the only party to the deeds," and that, in certain conversations with the witness, she discussed the "joint account of her and her husband" and complained "about her husband having her property, using her money to buy stocks in his own name." The course of the court in disallowing answers to said questions, which answers would probably have brought out the testimony mentioned, is assigned as prejudicially erroneous, but clearly it was not. The fact that Mrs. Eaton made deeds conveying the property in dispute to other parties, cannot be held to be an act binding on the plaintiff. It could no more be so than the fact that she attempted to make a testamentary disposition of the property. Both the deeds and the will in that respect, implying as they do that she claimed the land as her separate estate, would, as evidence in this case, amount to mere self-serving declarations. If the deeds referred to constituted a conveyance of the land in dispute and had been executed and delivered to the grantees by Mrs. Eaton in the presence of or with the knowledge of the plaintiff and without protest from him, the situation would be different, and the documents would be admissible against his claim of a community interest in the land. But it was not made to appear that the plaintiff knew anything of the deeds.

[9, 10] The declarations of the deceased concerning the joint account of herself and husband, if tending to show that as a matter of fact he had no interest in said account, which in all probability would have been the result of the testimony, were clearly self-serving, and her statement to Shoner, if she made it, that the plaintiff had used her money to buy stocks for himself is not only self-serving but immaterial to any issue in the case.

[11] 5. The court did not commit error in its ruling foreclosing inquiry into the extent of the real estate holdings of Christian Kramer, father of Mrs. Eaton, and whose estate, as seen, the latter inherited. The purpose of the inquiry was to show indirectly how much separate real property Mrs. Eaton owned. It was important, of course, to show

that Mrs. Eaton owned an extensive separate estate, but it was admitted by the plaintiff that his wife succeeded to the estates of her deceased father and mother, and that said estates consisted of considerable real property as well as of personal property, and that the real property was very valuable. We are therefore unable to perceive wherein further inquiry into that matter would have been of any advantage to the defendants. The ruling was harmless, even if erroneous. Thus we have disposed of all the points made by the defendants for a reversal.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

POSTAL TELEGRAPH-CABLE CO. v. SUPERIOR COURT IN AND FOR YOLO COUNTY et al. (Civ. 1047.)

(District Court of Appeal, Third District, California. Sept. 24, 1913.)

1. CERTIORARI (§ 5*)—GROUNDS—"AND THERE IS NO APPEAL."

Under Code Civ. Proc. § 1068, providing that a writ of review may be granted by any court when an inferior tribunal has exceeded its jurisdiction, and there is no appeal nor any plain, speedy, and adequate remedy, the term "and there is no appeal" implies that if the aggrieved party has the legal right to a regular appeal to an appellate court, there is no authority for the writ of certiorari, and is not confined in its application to the particular order specially attacked, whether that be appealable or not being inconsequential if its effect can be nullified by an appeal from the judgment.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

2. CERTIORARI (§ 5*)—GROUNDS—REMEDY BY APPEAL—"PARTY AGGRIEVED."

A party who, without having been served with process, was substituted as a party defendant and suffered judgment had a right to appeal therefrom, upon which the order of substitution, if erroneous, could be reviewed and corrected; and, under Code Civ. Proc. § 938, allowing any party aggrieved to appeal in the cases prescribed thereby, defendant was a "party aggrieved" and entitled to an appeal, and hence, having the remedy of appeal, would be denied the writ of certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

3. CERTIORARI (§ 5*)—GROUNDS—REMEDY BY APPEAL.

Under Code Civ. Proc. § 1068, giving the right of review when an inferior tribunal has exceeded its jurisdiction and there is no appeal or any plain, speedy, and adequate remedy, a party cannot allow the time for appeal to lapse and then successfully urge that circumstance as ground for certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

4. CERTIORARI (§ 5*)—GROUNDS—ADEQUATE REMEDY BY APPEAL.

Code Civ. Proc. § 1068, gives a writ of review where an inferior tribunal has exceeded its jurisdiction and there is no appeal, nor any plain, speedy, and adequate remedy, without

expressly providing that such an appeal must constitute an adequate remedy. A New York corporation made a party defendant was shown not to have been the party intended, and a domestic corporation of the same name, without proper service, was substituted as defendant, and the counsel for the New York corporation, while disclaiming to represent the domestic corporation, opposed the substitution, and so safeguarded the interests of the latter as to have the record present a clear exposition of the essential facts. *Held*, that even if the statute contemplated that an appeal should be adequate, the record was such that, with a proper bill of exceptions, the issue of substitution could have been raised and determined upon the merits on appeal, and hence that certiorari would not lie.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

5. CERTIORARI (§ 4*)—GROUND—WANT OF OTHER REMEDY.

Under Code Civ. Proc. § 473, providing that in furtherance of justice the court may allow a party to amend or to correct a mistake in the name of a party, a domestic telegraph company, mistakenly made a party defendant in place of a foreign corporation of the same name, without proper service, and therefore not having its day in court or an opportunity to make a record for appeal, had a plain and adequate remedy by which the judgment might be set aside if proper to do so; and, on denial of a motion therefor, an appeal would lie under Code Civ. Proc. § 963, subd. 2, as from a "special order made after final judgment," assuming that an appeal would not be made effective by reason of an imperfect record; and hence petitioner was not entitled to certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 4; Dec. Dig. § 4.*]

6. CERTIORARI (§ 4*)—GROUND—REMEDY BY SETTING ASIDE JUDGMENT.

In such case, regardless of Code Civ. Proc. § 473, the court on motion might set aside the judgment rendered without jurisdiction of the person of the defendant, who would come under the exception to the general rule that a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate a judgment or order, and hence petitioner was not entitled to certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 4; Dec. Dig. § 4.*]

7. JUDGMENT (§ 418*)—WANT OF JURISDICTION—VACATION.

A corporation which, without proper service so as to give the court jurisdiction, was mistakenly substituted as a party defendant in place of another corporation of the same name and suffered a money judgment might stay its execution and have the judgment itself vacated by action in equity for that purpose.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 793; Dec. Dig. § 418.*]

Certiorari by the Postal Telegraph-Cable Company against the Superior Court of the State of California in and for the County of Yolo, and N. A. Hawkins, Judge. Writ denied.

J. S. Spilman, of San Francisco, and L. T. Hatfield, of Sacramento, for petitioner. E. E. Gaddis, of Woodland, for respondents.

BURNETT, J. A re-examination of the questions involved in this application has confirmed our belief in the legal integrity of the views announced on the former hearing.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In stating our understanding of the case we shall follow the order and adopt a large portion of the opinion filed when the application herein was first determined.

In response to an alternative writ of certiorari issued out of this court, respondents filed a demurrer to the petition, and also a complete return of the proceedings sought to be reviewed. An action was brought in said superior court on the 28th day of August, 1911, entitled "Catherine Altpeter and J. C. Altpeter, Plaintiffs, v. Postal Telegraph-Cable Company, a Corporation Defendant." In the complaint therein filed it was alleged "that said defendant is and at all the times herein mentioned was a corporation organized and acting under and by virtue of the laws of the state of New York." Proper service was made upon the New York corporation, and no question was raised as to the regularity of the proceedings until the time of the trial. It then developed, from the testimony of the first witness sworn, that there was a corporation of the same name organized under the laws of the state of California, and that the cause of action existed against the domestic corporation. Application was then made by plaintiffs to amend their complaint by striking out the words "New York" and substituting "California" in said allegation as to the organization of the corporation. This was stoutly opposed by counsel for the foreign corporation, it being contended that the amendment would have the effect to substitute an entirely different defendant that had not been served and was not represented at the trial. After some testimony had been taken and arguments of counsel heard, the court permitted the amendment, upon the theory that it did not operate to change the party defendant, but to correct a mistake in the designation of the place of organization. The court also seems to have entertained the view that there was a sufficient service upon the domestic corporation, and it was concluded that the amendment was in furtherance of justice. Counsel for the New York corporation thereupon withdrew, and the trial proceeded before a jury, and a verdict was rendered and a judgment thereafter entered in favor of plaintiffs and against the said California corporation.

[1] It is plainly provided by the statute (section 1668, Code Civ. Proc.) and so declared by the Supreme Court that, as a prerequisite to the issuance of the writ of review, there must exist the three following concurrent conditions: (1) An excess of jurisdiction of an inferior tribunal; (2) no appeal; and (3) no other plain, speedy, and adequate remedy. If any one of these essentials be missing the writ will not lie. *Noble v. Superior Court*, 109 Cal. 523, 42 Pac. 155.

It may be somewhat difficult to define with accuracy the scope and significance of the expression "and there is no appeal," used in said section. The ready inference from the

terminology is that if the aggrieved party has the legal right to obtain in the regular way a review by an appellate court of the declared wrong, no authority exists for the issuance of the writ of certiorari. The contention of petitioner is that the appeal contemplated must be adequate to correct and redress the injury. It is at least certain that the term is not confined in its application to the particular order that may be made the subject of special attack. Whether that order be appealable or not is of no consequence if its effect can be nullified by an appeal from the judgment.

As stated in *Olcese v. Justice's Court*, 156 Cal. 84, 103 Pac. 317, it is well settled and well understood that certiorari is not a writ of right, and that it "would not be issued where the matter sought to be reviewed could be heard and determined upon appeal. 'The remedy of defendant is by appeal and not by writ of review. The latter lies only when the former does not.' *People v. Shepard*, 28 Cal. 115; *Comstock v. Clemens*, 19 Cal. 80; *Clary v. Hoagland*, 13 Cal. 173."

[2] Herein petitioner complains particularly that without having been served with process it was substituted as party defendant, and it is contended that said order of substitution is not appealable. But it cannot be disputed that the final judgment in the case is appealable, and that upon such appeal the said order of substitution, if erroneous, could be reviewed and corrected. It seems clear, therefore, that the remedy by appeal existed.

That the right of appeal existed in favor of petitioner seems also to follow from the language of the Code. As we have seen, the judgment was against petitioner and, we may add, it was for the sum of \$1,500. Section 938 of the Code of Civil Procedure provides that "any party aggrieved may appeal in the cases prescribed in this title." Petitioner would hardly contend that it was not "aggrieved" by reason of said judgment. In fact, if no judgment had been rendered against it, there would have been no substantial injury to petitioner, and it would not be here asking for this writ.

"Most of the appeal statutes declare that any party aggrieved by a judgment or decree may appeal therefrom. This embraces parties who are subsequently brought into the action, as well as those by or against whom it was originally instituted. In legal acceptance a party is aggrieved by a judgment or decree when it operates upon his rights of property, or bears directly upon his interest." 2 Cyc. p. 633.

[3] It is not, of course, the consideration whether the petitioner takes advantage of the right of appeal, but whether the right of appeal exists in his favor, that is decisive of the question. For instance, he cannot allow the time for appeal to lapse and then successfully urge this circumstance as a legal justification for the writ of certiorari.

"The statute was intended to supply a

remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself." *Bennett v. Wallace*, 43 Cal. 25.

We may refer to the following additional cases as illustrating the application of the foregoing principles:

In *People ex rel. v. Shepard*, 28 Cal. 115, it was held that, conceding an order discharging an insolvent from his debts to be void on account of the want of jurisdiction by the court, certiorari would not lie, since the remedy by appeal existed.

In *Stoddard v. Superior Court*, 108 Cal. 303, 41 Pac. 278, where it was sought to review an appeal from the judgment, it was said: "We have been referred to no case in which it has been held that, under our Code, a writ of certiorari will lie to reverse an appealable order. *That the appeal does not afford a plain, speedy, and adequate remedy makes no difference; the provision of the statute governs.*"

In *Noble v. Superior Court*, 109 Cal. 523, 42 Pac. 155, it was declared that: "Where an appeal is given from a judgment, the appellate court may correct all the errors therein detrimental to the appellant, and the fact that some portion of the judgment is without and in excess of the powers of the court is but a reason for the reversal of the judgment on such appeal."

In *White v. Superior Court*, 110 Cal. 58, 42 Pac. 471, the distinction as to this point between "prohibition" and "certiorari" is noticed and it is said that "*unlike the provision with reference to certiorari the mere right of appeal, independently of its affording adequate relief, does not, ipso facto, deprive him of the remedy by prohibition.*"

In *Tucker v. Justice's Court*, 120 Cal. 512, 52 Pac. 808, it was held that: "Where the summons in an action commenced in the justice's court does not name the plaintiff in the action, but inserts another name as plaintiff, it is fatally defective. To remedy such defect, the defendant may move the court to quash the summons, or within 10 days after entry of judgment by default may move the court to set aside the default and judgment, or may appeal to the superior court from the judgment; but, having such remedy by appeal, the defendant cannot resort to a writ of review to annul the judgment."

In *Elliott v. Superior Court*, 144 Cal. 506, 77 Pac. 1111, 103 Am. St. Rep. 102, it is said: "There is no doubt that a right of appeal excludes the right to proceed by certiorari, and it is equally clear that if the petitioners are parties to the action or the proceeding they have the right of appeal."

[4] In opposition to this view of the situation, suggestions are made by petitioner, as already stated, that really amount to the contention that, under the peculiar circumstances of the case, the writ should issue for the

reason that the remedy by appeal is not adequate. This position is concisely stated as follows: "In the case at bar, no reasonable groundwork could be laid for an appeal that would reach all of the questions in the case. That is to say, no plain, speedy, or adequate remedy, or any remedy whatever, is available to the petitioner."

The Legislature has not provided, by express terms, at least, that said appeal must constitute an adequate remedy. It may be inadequate, of course, by reason of the fault of the appellant. In that case he could not urge its inadequacy.

But where no appearance is made for a party, and he is not represented at the trial, the record is likely to be too imperfect to present properly or at all to the appellate court the vital objections to the judgment. In that respect he would be in no better position than one not a party, of which it is said, in *Elliott v. Superior Court*, supra, that: "When not void on its face a right of direct appeal would be of no value to a person not a party, because he would have had no opportunity of getting into the record the matters necessary to show error or excess of jurisdiction." But this is simply another way of stating that the remedy by appeal is inadequate. It is not necessary, however, to consider such contingency. For, conceding, for the sake of argument, that the statute contemplates an "appeal" that may be adequate for a complete review of the question of jurisdiction, then it may be stated that the record of the proceedings made a part of the return herein warrants the conclusion that, with a proper bill of exceptions, the matter at issue could be fully exploited, and a determination had upon the merits, if an appeal had been taken from the judgment.

While disclaiming to represent the California corporation, the counsel for the New York corporation of the same name seems to have safeguarded the interests of the former in having the record present a clear exposition of the essential facts. It thus clearly appears that plaintiffs believed the declared wrong was committed by the New York association, and hence the allegation in the complaint as to the organization of said corporation. The service was made upon the designated agent of said corporation. At the beginning of the trial, as we have seen, it developed that a mistake as to the identity of the party had been made by plaintiffs, but it was claimed that the real party in interest had actually been designated in the title, and that service was legally made upon it by reason of the fact that the designated agent of the New York corporation was also the manager of the Sacramento office of the domestic corporation.

Every step in the proceeding leading up to the said amendment of the complaint was vigorously contested, and, in response to the statement of counsel for plaintiffs that: "We

have sued the right party; we have sued the Postal Telegraph-Cable Company, a corporation, no matter where it is incorporated"—counsel for the New York corporation offered in evidence the summons and return of service upon J. R. Beatty, and also a certified copy of the designation by said corporation of Beatty as its resident agent. Objection was also urged to the testimony of Mr. Beatty that he was the manager of the Sacramento office of the California corporation, and a motion was made to have his testimony stricken out. It may be that other facts could have been shown that would be pertinent to the inquiry whether service was had upon petitioner, but it must be said that counsel seems to have made an earnest effort to exhibit the question fully. And it is significant that it is argued forcibly and elaborately here by petitioner that this very record shows that no jurisdiction was obtained of the domestic corporation. The record would certainly be equally potential if it accompanied an appeal from the judgment.

[8] But, aside from the foregoing, it is quite clear that the writ should not issue for the reason that petitioner had another plain, speedy, and adequate remedy. In fact, there were two courses, somewhat variant, available for complete redress. Section 473 of the Code of Civil Procedure is probably broad enough to cover the situation. It is suggested that petitioner could not urge successfully that the judgment was obtained through the "mistake, inadvertence, surprise, or excusable neglect" of defendant. It is difficult to conceive of anything approaching more nearly to the full requirement of "surprise" or "excusable neglect," both in a legal and popular sense, than the failure of the defendant to contest a suit where the court has no jurisdiction of the person of the party. Upon the hearing of the motion the facts, of course, could be shown, and we must presume that the lower court, would reach a correct conclusion and set aside the judgment if it were proper to do so. Thus would this remedy be plain, speedy, and adequate. But if the lower court should deny the motion, an appeal would lie as from a "special order made after final judgment" (subdivision 2, § 963, Code Civ. Proc.), assuming, of course, that an appeal from the judgment itself could not be made effective by reason of an imperfect record.

A party defendant not served at all, and therefore not having his day in court, and thus having no opportunity for making a record for appeal, should certainly be entitled to the same privilege in this respect as one not a party at all to the record. As to the latter, it is said, in *Elliott v. Superior Court*, supra, that: "He may make himself a party by moving to set aside such judgment or order, and if his motion is denied may, on appeal from that order, have the proceeding of which he complains reversed, not only for excess of jurisdiction, but for error. People

v. Grant, 45 Cal. 97; *Green v. Hebbard*, 95 Cal. 89 [30 Pac. 202]; *Pignaz v. Burnett*, 119 Cal. 157 [51 Pac. 48]; *Credits Com. Co. v. Superior Court*, 140 Cal. 82 [73 Pac. 1009]." Furthermore, it is said: "And this is a practice to be commended and encouraged for its convenience; for it is to be presumed that, the attention of the court being drawn to its excess of jurisdiction, the order or judgment would be vacated on motion without the trouble and expense of certifying the record to a court of review."

[9] But it is not even necessary to hold that the motion must be made under said section 473. Regardless of that section the court would take cognizance of the motion. In *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, indeed, it was held that: "A motion will lie to set aside a judgment rendered without jurisdiction of the person of the defendant; and section 473 of the Code of Civil Procedure has no application to such motion." In reference to the question of appeal from an order refusing to set aside the judgment it was also said: "No doubt it has been held, and I think correctly, that when a motion is made to vacate an order under such circumstances that it merely calls upon the court to repeat or overrule the former ruling on the same facts, the last order is not appealable, not because the last order is not within the terms of section 963 of the Code allowing appeals, for it may be; but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing, contrary to the intent of the statute. Nor will such practice be allowed merely to permit a litigant to take an exception, or get a bill of exceptions, which he has neglected to do at the proper time. But I see no reason why the appeal should not be entertained. It is plainly within the terms of the statute allowing appeals, and no other method is suggested, in which the right of the appellant to the relief sought could be considered here. An appeal upon the judgment roll would not present all the facts upon which the motion is based—even if one may have a bill of exceptions when he has not been in court, and has taken no exceptions. Besides, it is a case in which it was eminently proper, if not necessary, that relief should first be asked from the trial court." He would manifestly come under the exception to the general rule that "a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of." *Title Ins. & Trust Co. v. Calif., etc., Co.*, 159 Cal. 487, 114 Pac. 838.

The general rule, it may be said, applies where "the errors alleged to have been committed can be considered on an appeal from the judgment" (*Reay v. Butler*, 69 Cal. 572, 11 Pac. 463), or, as stated in *Kent v. Wil-*

Hams, 146 Cal. 11, 79 Pac. 531: "The rule is well established than an order refusing to vacate a prior order or judgment from which an appeal may be taken is not appealable unless there is a record which presents matters for consideration that could not be presented upon the appeal from the original order or judgment."

The question is quite fully discussed and the California decisions reviewed, it may be said, in section 199 et seq., of Hayne on New Trial and Appeal. The learned author's statement of the rule is: "An order refusing to vacate a prior order or judgment, from which an appeal might have been prosecuted, is not appealable, unless the motion to vacate is based upon matter affecting the substantial rights of the moving party, which could not have been presented upon an appeal from the original order or judgment; or unless the right to make such motion and to prosecute an appeal therefrom is directly conferred by statute."

[7] It is quite manifest, also, that, upon the assumption that the judgment was void by reason of the want of jurisdiction of the defendant, its execution may be effectually stayed and the judgment itself vacated by an action in equity for that purpose. This practice seems to be universally recognized. The four cases cited by petitioner to the point that there was a want of jurisdiction in the present instance are examples of the suggested method of procedure.

Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105, was an action "in equity to reform a deed * * * and to declare void a proceeding and judgment in attachment * * * and to set aside the sheriff's deed under said attachment judgment." The judgment in the attachment proceeding was nullified for the reason that the court lacked jurisdiction to render it.

The efficacy of a similar direct attack upon a judgment in excess of jurisdiction is also assumed or asserted in the other cases: *Williams v. Bankhead*, 86 U. S. (19 Wall.) 563, 22 L. Ed. 184; *Wilcke v. Duross*, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394; *National Metal Co. v. Greene Consol. Copper Co.*, 11 Ariz. 108, 89 Pac. 535, 9 L. R. A. (N. S.) 1062.

Petitioner intimates that these remedies are circuitous and burdensome, and therefore not to be exacted. In this petitioner is mistaken. They are simple, direct, and efficacious.

The extraordinary writ of certiorari is to be issued only on certain enumerated conditions. It appears clearly that those conditions do not exist, and therefore the writ should be denied.

It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

BROWNE v. SAN GABRIEL RIVER ROCK CO. (Civ. 1,352.)

(District Court of Appeal, Second District, California. Sept. 17, 1913. Rehearing Denied by Supreme Court Nov. 18, 1913.)†

1. FRAUD (§ 11*)—DECEIT—FALSE REPRESENTATIONS—CORPORATE STOCK—SUBJECT TO ASSESSMENT.

Since, by Civ. Code, §§ 331, 332, the determination of the question whether the stock of a corporation shall be assessed to pay debts rests in the discretion of the corporation's directors, and it may engage that its stock shall be nonassessable, a false representation that the stock of a certain corporation is nonassessable made to induce plaintiff to purchase the same is not mere matter of opinion as to the law regulating such subject, and may be the basis of an action for deceit.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

2. CORPORATIONS (§§ 89, 175*)—STOCK—ASSESSMENT.

Under the express provisions of Civ. Code, § 332, corporate stock may be assessed to pay debts without reference to whether it is paid up or not; the only difference being that paid-up stock is only subject to assessment to the extent of 10 per cent. in any one assessment, while the unpaid stock may be assessed for the full amount unpaid thereon.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 367-379, 381, 382, 654-656; Dec. Dig. §§ 89, 175.*]

3. CORPORATIONS (§ 80*)—SALE OF STOCK—REPRESENTATIONS.

A representation that the stock of a corporation was nonassessable made to induce plaintiff to purchase the stock should be construed as an assurance that the corporation had taken whatever steps were necessary to effectually waive its right to levy the assessments provided for by the statute, which representation was one of fact, and not of law, and, if untrue, would be actionable, and entitle the purchaser to rescind.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.*]

4. CORPORATIONS (§ 423*)—CORPORATE STOCK—AGENT TO SELL—AUTHORITY TO MAKE REPRESENTATIONS.

Under Civ. Code, § 2323, providing that authority to sell personal property includes authority to warrant title in the principal and the quality and quantity of the property, an agent employed to sell corporate stock was impliedly authorized to represent that the stock was nonassessable.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Michael C. Browne against the San Gabriel River Rock Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Trask, Norton & Brown, of Los Angeles, for appellant. John C. North, of Los Angeles, for respondent.

JAMES, J. In this action respondent secured a judgment enforcing rescission of a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† See 136 Pac. 544.

contract for the sale of corporate stock. The cause of action was based upon the alleged fraudulent representation made by the agent of the corporation that the stock was "non-assessable." The appeal is from the judgment, and from an order denying defendant a new trial.

The trial court found that the representation had been made as alleged, and, if there was any evidence presented which would sustain that finding, it must here be assumed to be correct, for in such a condition this court has not the duty nor privilege of weighing the proof. The sale of defendant's stock was made through the vice president of the corporation. The only substantial evidence of any representation as to the non-assessable quality of the stock was furnished by the testimony of respondent. He testified that a man named Peck, who appears to have been respondent's agent in negotiating for the purchase of the stock, told him that the shares were nonassessable. If the proof had stopped there, it would not have been sufficient to establish the charge that the alleged false representation had been made by any one acting for the corporation. But plaintiff testified that the vice president of defendant also said that the stock was non-assessable. This was denied by the official mentioned, and it was upon this conflicting state of the evidence that the court made the finding which resolved the facts against defendant.

[1] The main and controlling question presented for consideration is whether the representation that corporate stock is nonassessable is an expression of opinion as to the law regulating the matter of assessment, upon which no action can be predicated, or a representation of fact. The determination of this question requires an examination of the statutes of this state, under the laws of which defendant holds its corporate existence. Preliminarily it may be declared that, where the law in mandatory terms imposes the duty upon officers of a corporation to levy assessments in any contingency, so that an assessment charge may not be avoided through either the acts of the directors or by agreement with the person subscribing for stock then and in that case there can be no misrepresentation which will furnish ground for rescission. Our Civil Code, however, in section 331, provides: "The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein." And section 332, immediately following, declares: "No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for,

as follows: 1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock. * * *

It then appears that the matter of deciding whether the debts of the corporation are to be paid by selling its property or by assessment, in the case of a going concern, may rest with the directors. It follows as a necessary legal conclusion that the corporation can contract with persons subscribing to its capital stock not to do a discretionary act, and hence it can engage that its stock shall be nonassessable. A corporation may generally make any contract not forbidden by express provision of the law, or not violative of some settled rule of public policy. This subject is fully treated of in a recent decision of the Supreme Court of this state, where the authorities are collected and extensively quoted from, all of which sustain the proposition that, under statute law like that of California, corporations may make a valid agreement to issue their stock as non-assessable. The decision referred to was rendered in the case of *Lum v. American Wheel & Vehicle Co. et al.*, 133 Pac. 303.

[2] No rights of creditors are here involved. It is argued on behalf of appellant that, even though it be conceded that defendant's agent made the representation that the shares of stock sold to respondent were non-assessable, such statement should be taken to mean only that the shares would be issued as paid-up stock, and hence not be subject to calls. Respondent in fact did pay the full par value for the stock. But our Code expressly provides that assessments may be levied upon paid-up stock; the only difference being in the per centum of the levy—where stock is fully paid, the assessment must be for not more than 10 per cent. of the capital stock; where not fully paid, it may be for the whole difference between the sum actually paid and the par value of the stock.

[3] A representation that the stock of a corporation is nonassessable should be held to be an assurance that the corporation has taken whatever steps that are necessary to effectually waive its right to levy the assessments provided for by the statute, and this representation would be one of fact, and not of law. If untrue, it would be actionable, and entitle the purchaser to rescind his contract.

[4] The question as to whether the making of the misrepresentation was within the scope of the agent's authority is immaterial, as it is only necessary that the agent have authority to negotiate the sale of the stock. In 1 *Cook on Corporations*, § 140, the author declares: "It matters not whether he [the agent] had any authority, or exceeded his authority, or concealed its limitations. The corporation cannot claim the benefits of his

fraud without assuming also the representations which procured those benefits. Parol evidence is admissible to show the fraud, since it does not vary or contradict the contract, but shows that no contract was legally entered into." See, also, 2 Thompson on Corporations, § 1367. Moreover, shares of corporate stock are personal property (Civ. Code, § 324), and by section 2323 of the Civil Code, it is provided that: "An authority to sell personal property includes the authority to warrant the title of the principal, and the quality and quantity of the property." It would seem that a representation of fact as to whether stock is assessable would be one of which an agent authorized to sell such stock would have authority to speak. As the trial judge determined that the misrepresentation had been made by the corporation, we must assume that he determined that it was made by the vice president, as Peck does not appear to have been the agent of the corporation, but rather the agent of respondent. It is very clear that he was acting for the latter, and he could not well be the agent of both parties. The main question of fact is foreclosed of any examination here beyond the point where it becomes evident that the trial court made its findings upon conflicting testimony. There is in the record a statement made at the close of the trial, and before argument, by the judge who heard the cause, to the effect that he did not believe on the evidence he could find that the vice president made the misrepresentation, but that Peck did. The findings determined, as has been before adverted to, that the defendant corporation made the misrepresentation. Therefore it must be assumed that the court did *finally* conclude that the misrepresentation was made by the vice president, as he was the only person who appears to have acted for the corporation in the transaction.

Prejudicial error not appearing, the judgment and order must be affirmed. It is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

BROWNE v. SAN GABRIEL RIVER ROCK CO. (L. A. 3,185.)

(Supreme Court of California. Nov. 18, 1913.)

In Bank. On motion for rehearing. Denied. For opinion in District Court of Appeal, see 136 Pac. 542.

Trask, Norton & Brown, of Los Angeles, for appellant. John C. North, of Los Angeles, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing, and from the judgment. This is one of the least meritorious of a class of actions with which the time of the courts would never be taken up if parties of mature

age, sui juris, and dealing with others at arm's length in ordinary business transactions, would only take the most obvious precautions for the protection of their own interests, a class of actions, it may be added, by which a fraud may be perpetrated as easily as the fraud alleged may be redressed. The decision of this cause, in my opinion, makes a mischievous precedent in two ways: It encourages the parties to similar transactions to neglect, without excuse, the precautions which would keep them out of trouble; and it opens the door to the prosecution of actions for rescission based upon false claims of misrepresentation. It well illustrates the soundness of the policy upon which many decisions of this and other courts have been based in denying relief to vendees of real property who have neglected, without excuse, to avail themselves of easy access to sources of perfectly trustworthy information as to facts upon the alleged misrepresentation of which they have afterwards claimed the right to rescind. The principle of those decisions is that no person of sound mind and dealing at arm's length with his vendor can pose as the victim of false representations when he has shut his eyes to the plain evidence of the real facts. The same principle, in my opinion, is applicable to the sale of shares of stock. Here the claim of plaintiff is based upon the allegation that defendant's stock was represented to be unassessable. But two ways in which, under the laws of this state, the shares of corporate stock can be made unassessable have been suggested—one by a special agreement with the purchaser, the other by special provisions in the charter. *Lum v. American Wheel, etc., Co.*, 133 Pac. 303. Here there is no pretense of special agreement, and an examination of the articles of incorporation which were of easy access (I assume this, because there is nothing alleged to the contrary, and because the parties were at Monrovia, where defendant's principal place of business had been fixed) would have shown that the shares were not unassessable, and the time of three courts would not have been taken up in deciding which of two conflicting stories was the true one.

SIMONEAU v. PACIFIC ELECTRIC RY. CO. (L. A. 3,142.)

(Supreme Court of California. Oct. 4, 1913. On Petition for Rehearing, Nov. 3, 1913. Rehearing Denied Dec. 3, 1913.)

1. STREET RAILROADS (§§ 74, 84*)—INJURIES FROM OPERATION — SPEED REGULATIONS — VIOLATION.

A city may, by general ordinance, prescribe reasonable regulations under which street railroad companies shall operate their cars, and a violation of such regulations, where they fix the rate of speed, is per se evidence of negligence rendering the company liable for any injury occasioned by the violation.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 154; Dec. Dig. §§ 74, 84.*]

2. STREET RAILROADS (§ 94*)—MUNICIPAL ORDINANCES—CHARTER REGULATIONS.

A municipal corporation in granting a street railroad company a franchise may impose in the ordinance reasonable regulations as to the speed at which the cars are to be operated, and a violation of such regulation has the same effect as a violation of a general municipal ordinance, being per se evidence of negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 201; Dec. Dig. § 94.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. STREET RAILROADS (§ 114*)—INJURIES TO PERSONS ON TRACK—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action against a street railroad for the death of one run down on its tracks, evidence *held* sufficient to support a finding that the servants of the street railroad company were guilty of negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

4. STREET RAILROADS (§ 98*) — INJURIES TO PERSONS ON TRACK — DUTY TO LOOK AND LISTEN.

It is the duty of one about to cross the tracks of a street railroad company to look and listen in order to avoid approaching cars.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

5. STREET RAILROADS (§ 98*)—INJURIES TO PERSONS ON TRACK—EVIDENCE.

In an action for the death of one killed by a street car, which gave a signal before striking deceased, which deceased thought meant that the car would stop, the jury, in determining the question of his contributory negligence, might consider his right to rely on such signal rather than his observation; it appearing that the accident was at night and the headlight made such a blinding glare that the speed of the car could not be determined.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

6. STREET RAILROADS (§ 114*)—INJURIES TO PERSONS ON TRACK—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the death of one killed upon the tracks of a railroad company, a verdict finding that deceased was not guilty of contributory negligence *held* proper under the evidence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

7. STREET RAILROADS (§ 113*) — INJURIES TO PERSONS ON TRACK — EVIDENCE — ADMISSIBILITY.

In an action for the death of one killed upon the tracks of a street railroad company at night, evidence that the glare of the headlights on similar cars was so blinding that a pedestrian could not determine their speed is admissible.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229-238; Dec. Dig. § 113.*]

8. APPEAL AND ERROR (§ 204*) — PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

In an action for the death of a pedestrian killed by one of defendant's local street cars, indiscriminate evidence of the brilliancy of the headlights on defendant's street cars, some of which were local and others through cars, was admitted without any showing that the headlights of the two classes of cars was the same. *Held* that, not having been objected to below, defendant cannot, on appeal, complain of the admission of the evidence on the ground that the headlights on the through cars were more brilliant than those on the local cars.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.*]

9. DEATH (§ 60*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for damages for the death of a husband and father, evidence of subsequent illnesses of members of the family is inadmissible, even though evidence of permanent disabilities of the children dependent on the father for support is admissible; for, in the lat-

ter case, the injuries constitute a condition which would naturally entitle the children to greater protection and care, while, in the other case, the cause of action having already arisen, subsequent injuries cannot affect defendant's liability.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 79; Dec. Dig. § 60.*]

10. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

In an action for the wrongful death of a husband and father, the erroneous admission of evidence of illness of members of the family after the accident is prejudicial, because tending to enhance the amount of the verdict by appealing to the jurors' sympathy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

On Petition for Rehearing.

11. APPEAL AND ERROR (§ 1140*)—DETERMINATION—ALLOWANCE OF REMITTITUR.

Under Code Civ. Proc. § 53, allowing the Supreme Court to direct the entry of a proper judgment, that tribunal may in an action for damages for wrongful death affirm a judgment on condition that a remittitur be entered for part of the recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.*]

12. APPEAL AND ERROR (§ 1140*)—AFFIRMANCE—CONDITIONS—REMITTITUR.

In an action for damages for the death of a husband and father, the jury on the first trial awarded \$7,000, which was not attacked as excessive, and on the second trial a verdict of \$10,000 was rendered, the evidence in both cases being the same, save that on the second the court improperly admitted evidence of illnesses among members of the family subsequent to the father's death. *Held*, that as the evidence was practically the same in both cases, except on the question of damages, the judgment might be affirmed on condition that plaintiff enter a remittitur of \$3,000; the jury by its first verdict having given the appellate court a standard of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Richard T. Simoneau, administrator of the estate of William A. Campbell, deceased, against the Pacific Electric Railway Company. From a judgment for plaintiff and an order denying its motion for new trial, defendant appeals. Reversed.

J. W. McKinley and R. C. Gortner, both of Los Angeles, for appellant. Ernest E. Wood, of Angelo Camp, and Walton J. Wood, of Los Angeles, for respondent.

LORIGAN, J. This action was brought to recover damages for the death of William A. Campbell, alleged to have been killed by a car of the defendant while it was being run over a public crossing at the intersection of Long Beach avenue and Thirty-Eighth street in the city of Los Angeles. A verdict was returned in favor of the plaintiff, and from the judgment entered thereon defendant appeals,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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as it also does from an order denying its motion for a new trial.

This case was here before on an appeal by the defendant from a judgment in favor of the plaintiff and was reversed on account of error on the part of the trial court in admitting in evidence a general ordinance of the city of Los Angeles regulating the rate of speed of cars upon street railroad tracks over street crossings in said city. It was held, on grounds there stated, that such ordinance did not apply to the operation of the cars of the defendant over its railroad tracks at the crossing where the death of Campbell occurred. On this matter, see *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320. On the return of the cause to the trial court plaintiff amended his complaint by striking out the allegation setting up such general speed ordinance, which this court had decided to be inapplicable, and setting up an ordinance of the city of Los Angeles granting a franchise to the defendant for the construction and operation of its electric railway along its private right of way, crossing, among others, Thirty-Eighth street, and which franchise ordinance contained a provision that the cars of the defendant should never travel or be propelled by said railroad across any of the streets therein mentioned, including the said Thirty-Eighth street, at a greater rate of speed than eight miles an hour. With this amendment the allegations of the complaint stood as originally made, and charged negligence on the part of the defendant in several particulars. On this appeal it is only necessary to refer to two. These are that the employés of the defendant negligently and wantonly caused the car by which the deceased was killed to be run over said crossing at a greater rate of speed than 8 miles an hour and at a rate of speed of more than 20 miles an hour; that the employés of said defendant in charge of said car sounded a whistle twice just prior to the time they reached the said crossing as an indication that the car would slow down and stop at said crossing, and then negligently failed to cause the said car to slow down in pursuance of said signal, and thereby misled the said Campbell as to the rate of speed at which the said car would approach the said crossing. In its answer the defendant denied that two blasts of the whistle or any blasts were given by the motorman of the defendant as indicating that the car would stop at the crossing, but admitted that the whistle was sounded several times by the motorman just prior to approaching the crossing, and alleged that these several whistles were sounded to give warning and alarm of the approach of the car, and not otherwise; that the blowing of said whistle was not intended or understood as giving any notice of an intention to stop said car, but was given and intended and was understood as a notice of the approach of the car and of danger to any one upon or near its tracks.

The car by which Campbell was killed was a local one operating between the northern and southern limits of the city. In the district of the city which embraced the crossing at Thirty-Eighth street it was not the custom of the employés of defendant to stop its cars at every crossing therein but only when signaled for. About 8 o'clock on the evening of December 24, 1906, Campbell, accompanied by a friend named Ross, started from their place of employment in the city of Los Angeles to take a south-bound local car of the defendant at the Thirty-Eighth street crossing. As they proceeded to do so, Campbell, who was incumbered in his progress by an armful of bundles and a small Christmas tree which he was carrying, seeing a car coming in the distance, told Ross to hurry on and flag it. Ross did so, crossed the track, and, as he testified, took up his stand at a point where it was usual for passengers to board the cars and waved his hands toward the approaching car as notice that it should stop. He testified that in response to his signals the motorman whistled twice, which, as Ross, who was in the habit of taking cars at this point, and also others, testified, was the usual signal given by the motorman indicating that he would stop after the wave of a hand by a person contemplating boarding a car at such crossing. As the car approached after giving the signals, Campbell started across the track towards the point where Ross was standing, and, while doing so, was struck by the oncoming car and killed. It appears that the car when it hit Campbell was going at the rate of at least 30 miles an hour. The car was equipped with an electric headlight, and there was an electric light suspended over the street at the crossing. Though the night was dark, Ross, when he crossed over, signaled the car, and stood waiting its approach, was under the beams of the suspended electric light. One of the passengers on the car saw him cross the track as the car approached the crossing. The motorman testified that he did not see Ross cross the track nor see him signal for the car to stop; that, as the car was a local one, he would have stopped had he seen any one signal, but, as he did not notice any one do so, he did not stop and had not intended doing so. He also testified that the only whistles he gave were the regulation crossing whistles—two long and two short blasts—which he gave some 500 feet before he reached the crossing; that the first he saw of Campbell was when the car was about 100 feet from the crossing and Campbell was walking quickly across in front of it; that, immediately on discovering Campbell's position, he put on the air brakes and attempted to stop the car, but Campbell was struck before he succeeded in doing so; that the Thirty-Eighth street crossing was a point where passengers frequently got on the cars; and that it was the duty of employés on the local cars, such as he was running, to stop at this crossing on the signal of passengers and

to look out for such signals. There was also evidence in the case that, by reason of the intensity of the headlights reflected from cars operated on the line of the defendant across Thirty-Eighth street, it was difficult for one looking in the direction of an approaching car to determine the distance of the car or the rate of speed at which it was approaching. The franchise ordinance of the defendant to which we have referred as pleaded in the complaint was also introduced in evidence by the plaintiff.

Appellant asserts, as errors warranting a reversal, the denial by the trial court of its motion for a nonsuit and for a directed verdict in its favor, which were both predicated on the claim that the case disclosed no negligence on the part of the defendant, but that the deceased was guilty of contributory negligence. It is also insisted that erroneous rulings prejudicial to the defendant in the admission of evidence were made.

[1, 2] Under this last assignment of error it is insisted that the court erred in admitting in evidence the ordinance granting a franchise to the defendant in which the rate of speed of its cars was limited to eight miles an hour over the crossings of the city and which included the Thirty-Eighth street crossing. It is, of course, well settled that a city may by a general municipal ordinance prescribe reasonable conditions and regulations under which street railroad companies shall operate their cars over or across the streets of a city, including the rate of speed, and that a violation of such regulations is per se evidence of negligence rendering the company responsible for any injury occasioned thereby provided a violation of the ordinance proximately contributes to the injury complained of. *Siemers v. Eisen*, 54 Cal. 418; *Driscoll v. Cable Ry. Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; *McKune v. Santa Clara M. & L. Co.*, 110 Cal. 480, 42 Pac. 990; *Stein v. United Railroads*, 159 Cal. 368, 113 Pac. 663. But counsel for appellant claim that this rule has no application to such an ordinance as is relied on here, it being not a general ordinance but a special ordinance granting a franchise. That there is any difference in the rule applicable rests, however, only on the assertion of the appellant. It is supported by no authority, nor is any reason advanced justifying a distinction save that the franchise ordinance constitutes a contract between the city and the railroad company; that it provides for no penalty for a violation of its provisions, the only provision being that the city may forfeit the franchise should any of its conditions be violated. But these matters afford no reason against the admissibility or applicability of the ordinance. The city had authority in granting the franchise to impose these conditions, and the company accepted them. While the ordinance constituted a contract between the city and the company, the condition imposed as to speed was one which the city had the

right to make, and it was manifestly imposed for the benefit and protection of the public. The general rule is that, where a duty is imposed on any one by statute or by legal authority and that duty is violated, such violation is always evidence of negligence, and, when injury results therefrom, the person injured is entitled to recover therefor. There is no reason for any distinction between general ordinances limiting speed and a franchise ordinance doing so. Both are regulations properly within the power of the city to enact or provide for, and are both solely for the protection of the public against injury. While we are not referred to any authority by appellant in support of its claim against the admission in evidence of this ordinance, on the other hand, in the case of *Chouquette v. Southern Electric R. R. Co.*, 152 Mo. 257, 53 S. W. 897, the same claim of inapplicability of a franchise ordinance was made as here, and it was held that, where the rate of speed at which a company may run its cars is limited in the ordinance granting the franchise, the company is chargeable with negligence at the suit of a private person against it if it runs its cars at a greater rate of speed.

[3] The claim of the appellant that the evidence fails to show that the defendant was negligent, but shows the deceased was guilty of contributory negligence, is without merit. The main evidence relied on by plaintiff in support of the right of recovery was that given with reference to the signals by the motorman as the car approached the crossing. The car was a local one and would have stopped at the crossing on signal. Campbell and Ross both desired to take it, and the latter was sent ahead by the former to signal it to stop. This, Ross testified, he did, and received responses from the motorman of two whistle blasts which he understood, and which the testimony of other witnesses showed were the usual whistles and generally understood by persons traveling on such cars to indicate that cars would stop, and which the jury had a right to assume Campbell understood to indicate that the approaching car would stop at the crossing. The testimony on the part of the defendant denied that the signals were given as claimed, but that only warning or danger signals were given, which indicated, and were generally understood to indicate, that the car would not stop. In this conflict of the evidence on this matter it was for the jury to determine which testimony it would accept, and from the general verdict returned it is clear that it accepted the testimony on this subject as produced on behalf of the plaintiff. This being true, it is unnecessary to discuss the proposition that the failure of the motorman to lessen the speed of his car and slow down, after announcing an intention to do so, clearly constituted negligence on the part of the defendant.

Now as to the claim of appellant that the

deceased was guilty of contributory negligence. It is said by appellant in its briefs that "unless excuse for his conduct be found in the whistling of the defendant's car, or the nature of the headlight, the act of the deceased must confessedly constitute negligence" which directly contributed to his death. But the evidence warranted the jury in finding, as is necessarily implied from their verdict in favor of the plaintiff, that the conduct of the deceased was excused for both the reasons suggested, and hence against the defendant on its claim of contributory negligence. The matter of the headlight bore on the question of the extent to which Campbell could observe the distance that the car was away from the crossing when he attempted to cross, and the rate of speed at which it was coming. There was no obstruction on the track which would intercept his vision, but there was much evidence to the effect that on account of the intense brilliancy of the headlight he could not either see the car or determine the distance or rate of speed at which it was approaching the crossing. The testimony of one witness on this subject illustrates the testimony of many. He testified: "When a car is coming from the north with a bright headlight on, you see only the bright light. The light is so strong that it obscures the car. All you see coming is the bright light out of the darkness. You cannot judge the distance the car is away from you. And at no given time can you tell accurately or with any degree of certainty how fast the car is coming. * * * If you look steadily at the headlight as the car approached you, the brightness of the headlight would dazzle your eyes—if you looked into the center of it. If you just glanced at it, as the ordinary pedestrian would, you could not tell about where it was. Couldn't tell anything about it at all."

[4-6] In determining the question of whether Campbell exercised ordinary care and prudence in crossing the track in front of the approaching car, the jury had a right to take into consideration his motive and purpose in doing so in connection with the conditions as they existed when he made the attempt. Of course, the duty of one about to cross a railroad track is to look and listen in order to avoid an approaching train and not walk heedlessly into a place of danger. It is not pretended that Campbell by listening could have determined whether the car was approaching at such a rate of speed as would indicate to him either that it would or would not stop at the crossing, and the confusing character of the headlight rendered it impossible for him to tell by looking at what rate of speed the car was coming or whether it had or had not lessened its approaching speed. Under these circumstances, the jury was warranted in considering to what extent the deceased was justified in relying on the signals given by the motorman that

the car would stop, rather than any observation he might make of the rate of speed the car was approaching or its distance away. The only purpose the deceased had in crossing the track was to take the car if it was a local one. If the whistles which were given were an announcement that the car would stop, the deceased had a right to assume that it was a local car and would slacken its speed of approach and stop on reaching the crossing, and that such signals were an invitation to cross over so that he might board the car. If the car had lessened its speed so as to effect a stoppage at this point, the attempt of the deceased to cross over when he did would have been successful. The jury was warranted from the evidence in assuming that Campbell knew that the approaching car was a local one which he intended to board; that as indicated by the whistles it would lessen its speed and stop at the crossing; that on account of the confusing nature of the headlight it was impossible for Campbell to determine the speed or distance of the approaching car; and that in hurrying across the tracks he relied entirely upon the signals indicating that the car would stop. It was particularly a matter for the jury to determine whether, under these circumstances Campbell exercised ordinary prudence in relying upon the signals as given by the motorman. Necessarily under their general verdict they determined that he did, and it cannot be said that this inference, under the circumstances, was not a proper one for the jury to draw.

[7, 8] It is insisted that the court erred in admitting evidence offered by plaintiff as to the quality, strength, and effect of headlights on the cars of the defendant operated on its lines over this crossing. It was certainly competent for plaintiff to produce such evidence if it were confined to the headlight of the car which occasioned the accident or cars carrying headlights of equal strength and brilliancy operating over the crossing, under similar conditions as obtained on the evening of the accident. Such evidence was admissible to show the conditions prevailing at the time Campbell attempted to cross the track as bearing on the question of his alleged contributory negligence. As both interurban and local cars ran on the tracks of the defendant over this crossing, it is claimed that the testimony of the witnesses of the plaintiff applied indiscriminately to the headlights on both classes of cars, while it is claimed that headlights of the interurban cars are much more brilliant than on the local, and that the testimony should have been confined to the headlights of the latter. So it should, but that there was any difference only appeared when defendant was putting in its evidence. No such difference appeared in the testimony of any of the witnesses for plaintiff. The claim now made by appellant is that plaintiff should have laid the proper foundation for this evidence by show-

ing that the headlights being testified to were similar to those used on the local car which struck Campbell. But the objection in the lower court was only that the testimony was irrelevant, immaterial, and incompetent, which was obviously without merit. The specific objection now urged that the proper foundation for the admission of this testimony was not laid by plaintiff was not made in the lower court, and it will not be permitted to be urged here for the first time.

These are the only points made for a reversal, save the claim that the court erred in the admission of testimony given by the widow of the deceased as to the illness of the children and herself covering a period of four or five years which intervened between the death of her husband and this second trial.

Campbell was killed on Christmas eve while on his way home with bundles and a Christmas tree. He left a widow and three minor children; one of them, a girl eight years of age, was at the time of his death and had been from birth, permanently afflicted with a turned shoulder blade; another child, a girl, had a broken elbow and a permanently stiffened arm as a result of its injury. After showing these particular afflictions under which these children were suffering at the time of the death of their father, the court, over the repeated objections of the defendant, allowed the widow of the deceased to testify further as to various ills and sicknesses under which the three children and herself suffered intermediate the time of her husband's death and the trial of the action and the constant medical attention they all required therefor. She was permitted to testify that "the Christmas after Mr. Campbell died my three children were laid up and quarantined with scarlet fever. And the second year, on Christmas, we were in quarantine but we had measles; just around Christmas. Then we had mumps—and we had tonsillitis—and chicken pox. * * * And we had Dr. Webber in the house all the time; Dr. Webber and Dr. Webber, Jr., and Dr. Hubbard. * * * Some months he came three or four—scarlet fever—I may get mixed up in that, because he had come quite often during the time we had scarlet fever, and I take her into the office now. I could not tell how many times, because we have had him so many times I don't remember. The second girl still goes to Dr. Webber for her heart. She has got rheumatism going to her heart. She just got cold last winter when it rained, going to school." In response to an inquiry whether her own health had been good, she testified: "No, it has not lately, not very good, but it had been two years after his death, until I got cold in my lungs last year during the rain; I had rheumatism and neuralgia, was all."

[8] Counsel for plaintiff claim to find authority for the admission of this evidence

in the opinion of this court on the previous appeal in the case heretofore referred to. But a simple consideration of that case shows that it nowhere sanctions the admission of such evidence as is recited. There, the only question was whether evidence of the permanent crippled condition of the two children at the time of the father's death—the one with a turned shoulder, the other with a stiffened arm—was admissible on the question of damages. It was held that it was, and so that evidence was properly admissible on this last trial. By reason of their permanent afflictions existing at the death of their father, they had a right to expect from him, had he lived, a future greater measure of comfort, care, and assistance than had their afflictions not existed. This benefit which they had a reasonable certainty of receiving from their father, had he lived, was a proper element to be taken into consideration in determining the value of his life to them and as measuring their pecuniary loss through his death. They were specific benefits which, by reason of such infirmities, they might reasonably expect would be received by them from their father beyond what might be expected by children in normal conditions of health at his death. This was pointed out in the former decision and evidence of such conditions held to be proper matter for consideration by the jury in estimating damages. It was not held in that case, nor even intimated, that evidence of the condition of the family respecting illness or misfortune suffered by some of its members subsequent to the death of the deceased could be shown. Nor do the cases cited in that opinion which respondent claims also to rely on support such a right. They had reference to conditions of ill health existing at the time of the death of the deceased. In *Cook v. Clay St. Ry. Co.*, 60 Cal. 604, the wife had been an invalid for eight years prior to the death of her husband. In *Evarts v. Santa Barbara, etc., Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830, it appears that prior to the husband's death the wife was an invalid. In fact, our attention is not called by counsel for respondent to any case which sustains the admission of the evidence objected to. The cause of action of the family of the deceased arose immediately upon his death, and the defendant became then responsible to them in damages for the probable pecuniary loss suffered by them in being deprived of the future support, care, comfort, and society of the deceased. But this pecuniary loss was to be determined by conditions existing at the time of the death of the deceased, taking into consideration in measuring it these prospective benefits which the members of the family were deprived of by his death. The liability of the defendant could not be in any manner affected by matters occurring to the family subsequent to that time. Changed conditions in the fam-

ily of the deceased, adverse circumstances or misfortunes in the way of sickness, which are in no way connected with or related to the death of the deceased, but occur subsequently thereto, are not matters for which the defendant is responsible and are inadmissible for any purpose. While evidence of the permanent crippled condition of the two children was competent evidence, as pointed out in the former decision, evidence that the whole family or some members of it, after the death of the deceased, and intermediate that time and the trial of the present action, suffered from scarlet fever, measles, mumps, chicken pox, tonsillitis, and rheumatism of the heart (some of these afflictions necessitating a quarantine of the family two successive Christmases—approximately anniversaries of the death of the deceased), and that the widow lately had not enjoyed such good health as at the time of her husband's death, were all matters clearly inadmissible. Evidence of them was neither pertinent nor competent on the matter of damages sustained by the children or widow. They were conditions of ill health and sickness which prevailed subsequent to the death of the deceased; they did not follow as a proximate result of his death, but were entirely independent, distinct, and unrelated to it. If such evidence were admissible, then it would be equally proper in a similar action to show that subsequent to the death of the deceased far more disastrous troubles had afflicted a family; that paralysis had afflicted one child, or that another had suffered a loss of a limb, or that financial reverses had impoverished the family which, of course, no one would pretend could be shown. And yet, in principle, there could be no difference as to the right to have such testimony presented.

[16] As to the testimony which was permitted to go in, it is quite clear that the only effect which it could have was to present a picture of misery and affliction suffered by the family of deceased during the years subsequent to his death and up to the time of the trial of this action, the direct and inevitable tendency of which was to arouse the sympathy of the jury to the end that they might improperly enhance the amount of damages to be awarded beyond what the competent evidence in the case would have permitted. As this was the only purpose to be accomplished by its admission, the evidence should have been excluded. The court erred in not doing so, and a reversal must follow.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; HENSHAW, J.

On Petition for Rehearing.

PER CURIAM. The petition for a rehearing in this case, as far as it is based on al-

leged error committed in the department decision, is denied.

[11] As, however, the only ground upon which the judgment and order denying a new trial was reversed was for the erroneous admission of evidence on the subject of damages, the respondent asks that he be permitted to remit the sum of \$3,000, and that, upon such remission, the order denying a new trial and a judgment against defendant for \$7,000 be affirmed.

There can be no question but that this court in a proper case may do this (Code Civ. Proc. § 53; *Tarbell v. Railway Co.*, 34 Cal. 616; *Kinsey v. Wallace*, 36 Cal. 463; *Davis v. Southern Pacific Co.*, 98 Cal. 18, 32 Pac. 708, 35 Am. St. Rep. 133), and we think this is a proper case for doing so.

[12] This is the second appeal in this case from a judgment in favor of the plaintiff. On the first trial the jury awarded plaintiff a verdict for \$7,000 damages. On the appeal thereupon taken there was no claim that the verdict was excessive; the only point urged against it, so far as the amount was concerned, being that evidence of the permanently crippled condition of two of the children of deceased was inadmissible. We held that such evidence was proper. The judgment, however, was reversed solely because of the erroneous admission in evidence of a general speed ordinance of the city of Los Angeles which it was held did not apply to the defendant. *Simoneau v. Pacific Electric Co.*, 159 Cal. 494, 115 Pac. 320.

On the second trial out of which this appeal arises, there was no practical difference in the evidence produced in the two cases as far as the points presented on appeal in either case discloses, save as to the evidence on the question of damages. While the general speed ordinance was held inadmissible on the former appeal, still on the second trial the franchise ordinance which embraced a similar limitation was admissible, so that the only difference in the evidence was on the subject of damages; the testimony as to the sickness of the children and the widow intermediate the death of Campbell and the second trial being improperly put before the jury as was pointed out in the opinion in the present appeal. On the second trial with this improper evidence before the jury it returned a verdict for \$10,000 in favor of the plaintiff. It must be presumed that the jury on the first trial with entirely legitimate evidence before it made a fair and conscientious award when it fixed the damages at \$7,000. With that as a basis for consideration, it is quite reasonable, and no doubt the fact, that the difference between the amount awarded on the first trial and the verdict of the jury on the second trial was the result of the objectionable and inadmissible evidence, and that this prejudiced appellant to the extent of the difference between these verdicts, namely, \$3,000.

This case has been in the courts for nearly

seven years. A jury has on both trials determined that the plaintiff is entitled to recover. In the present appeal we have decided all questions raised in the case by appellant adversely to it, save solely this one as to the evidence on the subject of damages. When we take into consideration the verdict of the jury for \$7,000 returned on the first trial under competent evidence and which verdict was not challenged on appeal as being at all excessive, we have a proper standard for all practical purposes under which may be determined the extent to which the defendant was prejudiced by the introduction of this incompetent evidence, and this was to the extent of \$3,000. This is what is claimed by appellant as the result of the admission of such testimony. That this is true being fairly apparent, there is no reason why, if the respondent is willing to remit that amount, he should not be permitted to do so.

In conformity with this view, the judgment heretofore given on this appeal is modified to this extent, that, if the respondent shall within 30 days after this date release the verdict and judgment in his favor to the extent of \$3,000, the order denying a new trial to appellant shall stand affirmed. If such consent be not filed within such time, the judgment and order denying a new trial shall be reversed. The appellant to recover its costs.

DAVIS v. RIDDLE.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. MINES AND MINERALS (§ 78*)—OIL AND GAS LEASE—FORFEITURE—FAILURE TO WORK.

Plaintiff grantor executed an oil and gas lease to defendant to run for 40 years under which defendant was only bound to pay 1 per cent. of the net proceeds derived from oil or gas obtained, should he see fit to develop the land, and in so doing obtained oil or gas. Held that, no attempt having been made for almost 18 months to develop the land under the lease, such delay, unexplained, was sufficient to work a forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

2. MINES AND MINERALS (§ 56*)—OIL AND GAS LEASE—CONSTRUCTION.

An oil and gas lease which the lessee recorded purported to tie up not only the land but the water rights incident thereto for 40 years, giving the lessee, without any corresponding obligation on him, the right to prospect the land for oil and gas. He paid no consideration for the lease, nor was he required to make any expenditures of money or time in prospecting. Held, that the contract was not a lease but a mere lease option, and that the lessor or his grantee was entitled to withdraw therefrom at any time before performance by the lessee.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 166; Dec. Dig. § 56.*]

Appeal from District Court, Boulder County; Harry P. Gamble, Judge.

Action by W. H. Davis against David D. Riddle. Judgment for defendant, and plaintiff appeals. Affirmed.

Ward & Montgomery, of Boulder, for appellant. J. T. Atwood, of Boulder, for appellee.

CUNNINGHAM, P. J. On August 13, 1909, appellee filed his complaint in the district court to quiet title to certain lands and water rights in Boulder county. The bill contained the usual allegations on proceedings of this sort where brought under the Code. No question is made as to the ownership or possession of the property, the title to which plaintiff seeks to have quieted. Both are in plaintiff. But the defendant below, appellant here, claimed an interest in the land and water rights by virtue of a certain purported oil and gas lease. Judgment was rendered in favor of plaintiff, from which judgment the defendant, Davis, brings this appeal.

[1] 1. The purported lease upon which appellant bases his claim of interest in the land, and to cancel which appellee brought his action, was made by one Jackson, appellee's immediate grantor, and runs to appellant, Davis. The lease imposed upon Davis, the lessee therein named, appellant here, no duty whatever, save and except the nominal one of paying to the lessor, Jackson, "as royalty to said party of the first part, 1 per cent. of the net proceeds derived from all oil or gas obtained, should Davis see fit to develop the land, and in so doing obtained oil or gas." This lease purports to tie up all the lands and water rights involved in this action for a period of 40 years, without obligating the lessee, Davis, to prospect or search for oil or to do anything whatever other than to pay the nominal royalty just referred to, should he prospect the land and find oil or gas in paying quantities. Granting that the lease was in all respects a valid one, it is our opinion that the lessee forfeited whatever rights he had under the lease by his failure to diligently prospect for oil and gas; no explanation for his failure so to do being offered. The lease was signed by Jackson, the owner of the land, on February 10, 1909. The complaint in this action was filed August 13, 1909, a little more than six months after the lease was signed. The case was called for trial on July 5, 1910, almost a year and a half after the signing of the lease by Jackson. No attempt was made on the trial to show that Davis had ever made a move to prospect for oil or to do anything whatever in that direction, nor did he offer to show to the court or intimate that he ever intended to do anything. In other words, neither by plea nor proof did he attempt any explanation of his delay in that behalf. This delay, unexplained, was sufficient to work a forfeiture of the lease. Snyder on Mines (1902) vol. 2, §§ 1170-1180-1181; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Kindley on Mines (1903) vol. 2, § 862; Federal Oil Co. v. Western Oil Co. (C. C.) 112 Fed. 373-375; Costigan on Mining Law (1908) 478.

Our conclusion from these authorities and the facts as stated is that the lease in question, even though originally valid in all respects, had been forfeited by Davis at the time plaintiff filed his action to quiet title, and therefore the decree of the trial court canceling said lease was proper.

[2] 2. The lease, as we have pointed out, imposed no positive or certain obligation upon the lessee therein named. It purported to tie up, not only the land, but the water rights incident thereto, for 40 years, and purported to give a right during all that time to said lessee (without any corresponding obligation upon him) to prospect the land for oil and gas, construct and maintain machinery, pipe lines, buildings, and railroads upon the land, with the right to remove all such improvements; it gave him the further right to sublet any or all of the premises and to assign and transfer any and all rights by him acquired under the lease. The defendant is not shown to have paid any consideration whatever for the lease, nor is he required by the terms thereof to expend a dollar in money or a day in time in prospecting, searching for, or developing oil or gas wells on the land therein described. Neither did Davis attempt to show on the trial that he had entered upon the work, taken possession of the land, nor that he had any intention of so doing. All that Davis appears to have done under the lease was to place it of record, thereby casting a cloud upon appellee's title. Under these circumstances, the lease was voidable at the option of the lessor, or his successor in title, at any time before the lessee, by performance, had supplied the lack of both consideration and mutuality and made the contract binding and enforceable; and he had the right to withdraw therefrom at any time before performance by the lessee, since the instrument which the parties have termed and which we, for convenience, have referred to as a lease, is, properly speaking, but a lease option. 9 Cyc. 327h; *Beulah Marble Co. v. Mattice*, 22 Colo. 547, 45 Pac. 432; *Gordon v. Darnell*, 5 Colo. 302; *Frue v. Houghton*, 6 Colo. 318, 324; *Stiles v. McClellan*, 6 Colo. 89-90; 9 Cyc. 333.

Judgment affirmed.

EDWARDS v. McLAUGHLIN et al.

(Court of Appeals of Colorado. Nov. 10, 1913.)

APPEAL AND ERROR (§ 1008*) — REVIEW — QUESTIONS OF FACT.

In an action to subject real estate of a husband to a judgment recovered against his wife on the ground that the wife conveyed such property to the husband to defraud her creditors, where there was evidence that the conveyance was made for full consideration which was paid, that at the time thereof both the husband and wife were advised and believed that plaintiff's claim was not a legitimate one and could not be collected from the wife, that her interest in the real estate was of small value, and that it was conveyed to her husband

for the bona fide purpose of liquidating, and that it did liquidate, her indebtedness to some of her creditors, the trial judge's finding that the presumption or suspicion of fraud, raised by the conveyance from wife to husband with knowledge of plaintiff's claim, was overcome by the evidence, would not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

Appeal from District Court, Otero County; C. S. Essex, Judge.

Action by E. Gard Edwards against Emma McLaughlin and husband. From a judgment for defendants, plaintiff appeals. Affirmed.

Earl W. Haskins, of La Junta, for appellant. Marion F. Miller and Henry W. Allen, both of La Junta, for appellees.

KING, J. This action was commenced by the appellant herein for the purpose of subjecting certain real estate, record title of which was in defendant John L. McLaughlin, to the lien of a judgment in favor of the plaintiff and against the defendant Emma McLaughlin, upon the allegation that the last-named defendant conveyed the said property to her husband, the codefendant, with intent to hinder, delay, and defraud her creditors. Upon trial to the court, judgment was rendered in favor of the defendants.

The evidence shows that plaintiff obtained judgment against the defendant Emma McLaughlin under section 3021, Rev. Stat. 1908, which makes both husband and wife liable for family expenses, upon an alleged liability for medical services rendered to the family, at a time when defendant herein was the wife of one Brown, who thereafter died. In that suit, defendant made no appearance, but permitted the judgment to go against her by default. About the time the suit was brought she made a homestead entry upon the property in question, and thereafter conveyed the same to her codefendant, to whom she was at that time married. Plaintiff offered no evidence, except his judgment, execution thereon, and return thereof nulla bona, and the transfer from wife to husband. The evidence upon the part of the defendants tends to show that the conveyance was made to the husband for full consideration, which was paid; that at the time she made the transfer both she and her husband were advised and believed that the claim was not a legitimate one against her, and could not be collected from her property, for reasons not necessary to state here; that her interest in the real estate, acquired by descent from her former husband, was of small value, and was conveyed to her husband for the bona fide purpose of liquidating, and which did liquidate, her indebtedness to some of her creditors. The trial judge, before whom the witnesses appeared, decided that the evidence upon the part of the defendants was sufficient to overcome any presumption or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

suspicion of fraud raised by the conveyance from wife to husband with knowledge of plaintiff's claim. The evidence was sufficient, if credited, to overcome such presumption, and the finding of the trial court in that respect ought not to be disturbed. It would be difficult to find, or even conceive of, a weaker case upon which to predicate an appeal the success of which is dependent entirely upon the finding by a court of review that the trial judge failed to understand the evidence or the weight thereof, or to correctly apply the same. The law in the case is plain. The judgment is affirmed. Affirmed.

MONTE VISTA LAND CO. et al. v. SAN LUIS VALLEY IRRIGATED LAND CO.
In re SAN LUIS VALLEY IRRIGATED LAND CO.

(Court of Appeals of Colorado. Nov. 10, 1913.)

JUDGMENT (§ 585*)—BAR—IDENTITY OF CAUSES.

Where, pending defendants' appeal to the Court of Appeals from a decree in this action granting plaintiff's petition for a change of the point of diversion of a certain volume of water from a certain ditch to the head of a canal, defendants brought another suit against plaintiff, and obtained a decree by the Supreme Court adjudging that the water rights involved in the petition were abandoned before plaintiff acquired any rights in the land, such decree was conclusive of the matters involved in this suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1132; Dec. Dig. § 585.*]

Appeal from District Court, Costilla County; Chas. C. Holbrook, Judge.

Petition by the San Luis Valley Irrigated Land Company against the Monte Vista Land Company and others. From a decree granting the petition, defendants appealed to the Supreme Court, and the case was transferred to the Court of Appeals. Reversed and remanded, with directions to render judgment for defendants.

See, also, 22 Colo. App. 376, 123 Pac. 835.

Corlett & Corlett, of Monte Vista, Goudy & Twitchell, of Denver, and Ira J. Bloomfield, of Monte Vista, for appellants. Jesse Stephenson, of Monte Vista, for appellee.

KING, J. On June 8, 1909, the San Luis Valley Irrigated Land Company, appellee herein, filed its petition in the District Court of the Twelfth Judicial District in and for the county of Costilla for the purpose of obtaining a decree changing the point of diversion of 12.8 cubic feet of water per second of time, priority No. 237, from the Alamosa town ditch to the head of the San Luis Valley canal. After trial the petition was granted, and appeal taken to the Supreme Court, and the cause transferred to this

court as provided by chapter 107 of the session laws of 1911.

On the 7th of October, 1909, the appellants here brought their suit in the district court aforesaid against the appellee herein and others to obtain a decree declaring an abandonment of the water right decreed to the Alamosa town ditch, being the same water involved in the petition herein. That cause reached the Supreme Court, by which it has been finally decided and adjudged that said water right had been abandoned prior to the time appellee herein acquired its alleged interest therein. San Luis Valley Irrigation District, Rio Grande & Piedra Valley Ditch Co., and Monte Vista Canal Co. v. Town of Alamosa, John W. Yates, Jesse O. McLain, Yates & McLain Realty Co., and San Luis Valley Irrigated Land Co. (Sup.) 135 Pac. 769.

That decision of the Supreme Court holding that the Alamosa town ditch has no water rights is conclusive of all matters involved herein, and makes any further consideration of this appeal unnecessary, and, predicated thereon, the judgment of the district court in this cause is reversed, and the cause remanded, with directions to the trial court to enter judgment denying the petition.

GREAT WESTERN SUGAR CO. v. F. H. GILCREST LUMBER CO.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. MECHANICS' LIENS (§ 99*)—SUBCONTRACTORS—PAYMENT TO CONTRACTOR—STATE OF ACCOUNTS.

Rev. St. 1908, § 4025, provides generally that subcontractors shall have a lien upon the property of the owner or person benefited, that contracts for work or materials in excess of \$500 shall be in writing, and that the contract or a memorandum thereof, together with the statement of the general character of the work and the total to be paid thereunder, with the times of payment, shall be filed by the owner with the county recorder before the work is commenced, and that on failure to do so the work done and material furnished shall be deemed to have been done and furnished at his personal instance. Section 4026 provides that any payments made before the dates fixed therefor shall not affect the subcontractors' liens, and that subcontractors may notify the owner in writing of an agreement to do work or furnish material and the estimated value thereof, whereupon he shall withhold from the principal contractor sufficient money to satisfy the claim. Section 4033 requires a lien statement to be filed for record within two months after the completion of the building and a copy served on the owner. *Held*, that it is only when the contract or memorandum is required to be in writing and filed that the owner may limit his liability by filing it or a memorandum thereof, and that where the contract is for \$500 or less he cannot limit his liability, and a subcontractor would have a lien regardless of notice to owner or the state of accounts between him and the principal contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. MECHANICS' LIENS (§ 99*)—SUBCONTRACTORS' LIENS—NOTICE.

Under Rev. St. 1908, § 4026, providing that labor done and materials furnished by subcontractors at the instance of the owner or the persons benefited gives a lien for the value thereof, and that subcontractors may give the owner a written notice that they have performed labor or furnished material, stating the estimated value thereof, whereupon the owner shall withhold from the principal contractor enough to satisfy the claim, no notice is necessary where the contract is for \$500 or less or, if for a greater sum, is not in writing, or a sufficient memorandum thereof is not filed for record by the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.*]

3. MECHANICS' LIENS (§ 94*)—GROUNDS OF SUBCONTRACTORS' LIENS.

Subcontractors' liens are allowed directly because of the enhanced value of the property from the labor and material so contributed to it by the consent of its owner through his agent, the principal contractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 126; Dec. Dig. § 94.*]

4. MECHANICS' LIENS (§ 5*)—STATUTORY PROVISIONS—CONSTRUCTION.

Mechanics' lien statutes are to be construed favorably to subcontractors and materialmen.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.*]

5. MECHANICS' LIENS (§ 100*)—SUBCONTRACTORS' LIENS—BURDEN OF PROOF.

Under Rev. St. 1908, § 4025, providing that subcontractors shall have a lien upon the property of the owner, that contracts in excess of \$500 shall be in writing, and that a contract or a memorandum thereof with a statement of the work and the total amount to be paid thereunder, together with the times for payment, shall be recorded by the owner before the work is commenced, and that on failure to do so the work done and material furnished shall have been deemed to have been done and furnished at his personal instance, and section 4026 providing that payments before the dates fixed therefor shall not affect subcontractors' liens, and that they may give the owner written notice of their agreement to do work and the estimated value thereof, whereupon he shall withhold from the principal contractor sufficient money to pay the claim, the burden of watchfulness in protecting the subcontractors' liens is upon the owner, except so far as he may shift such burden by having the contract filed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 133; Dec. Dig. § 100.*]

6. MECHANICS' LIENS (§ 100*)—SUBCONTRACTORS' LIENS—CONTRACT NOT IN WRITING—NOTICE.

Under such statutes, where a contract being for less than \$500 could not be filed by the owner to limit liability, and no notice of intention to perform work or material was served by a subcontractor, the owner, who in good faith paid the contractor in full according to the contract, could not protect himself against claims of a subcontractor, since the requirement as to notice by the subcontractors refers only to written contracts for a price in excess of \$500 which the statute permits to be recorded as by the owner as notice of its terms and as a limitation of liability.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 133; Dec. Dig. § 100.*]

7. STATUTES (§ 226*)—CONSTRUCTION WITH REFERENCE TO STATUTES OF OTHER STATES.

The incorporation into the lien law of Rev. St. 1908, §§ 4025, 4026, relating to the

recording of the contract by the owner in limitation of liability to subcontractors and to notice by subcontractors requiring the owner to withhold sufficient to satisfy their claims, must be construed in harmony with the entire law and the general policy and purpose thereof in this state and not necessarily in conformity with the decisions of another state whence they were adopted.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 307; Dec. Dig. § 226.*]

Cunningham, P. J., dissenting.

Error to District Court, Weld County; Harry P. Gamble, Judge.

Action by the F. H. Gilcrest Lumber Company against the Great Western Sugar Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. N. Haynes, of Greeley (Charles W. Waterman, of Denver, of counsel), for plaintiff in error. R. G. Strong and C. E. Southard, both of Greeley, for defendant in error.

On rehearing, former opinion withdrawn and the following substituted; MORGAN, J., delivering the opinion of the court:

Writ of error to reverse a judgment of the Weld district court in an action against the sugar company hereinafter called the owner, and its principal contractor, Eggleston, to foreclose a mechanics' lien upon a building which the contractor agreed orally to construct for the owner, purchasing his material from the lumber company, hereinafter called the claimant, and which filed its lien statement and began this action within the required time thereafter. The lien law of 1899 is involved. No evidence was abstracted. There is some controversy over service by publication on the principal contractor and default thereupon, but the principal contention is over the court's ruling on two general demurrers: One to the complaint overruled, one to the answer sustained.

The owner contends that in case of a contract between the owner and contractor, regardless of the amount of the contract price, subcontractors and materialmen, in order to maintain a lien for any more than may be owing to the contractor when the lien statement is filed for record, must serve on the owner a written notice that they have performed labor or furnished material, etc., independent of the service on the owner of a copy of the lien statement, and claims the right to pay the contractor, in the absence of such notice, or until such notice is served, at such times as the contract may provide, and in full, at the expiration of 35 days after the completion of the contract, if no such notice has been served prior thereto. The claimant contends that no such notice is required, in any case, if the contract price is \$500 or less, and, as a broader contention, not in any case unless the contract or a memorandum thereof is filed with the county recorder. These contentions must be

determined from the lien act of 1899, and particularly from sections 1 and 2, being sections 4025 and 4026 of the Revised Statutes 1908.

Section 4025, after providing generally that mechanics, subcontractors, and materialmen, although dealing with the contractor alone, have a lien upon the property of the owner benefited, states: "In case of a contract for the work, between the reputed owner and a contractor, the lien shall extend to the entire contract price and such contract shall operate as a lien in favor of all persons performing labor or services or furnishing materials as herein provided under contract, express or implied, with said contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of such contract price in favor of the contractor. All such contracts shall be in writing when the amount to be paid thereunder exceeds five hundred dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, together with the times or stages of the work for making payments, shall, before the work is commenced, by the owner or reputed owner be filed in the office of the county recorder of the county where the property, or the principal portion thereof, is situated; and in case such contract is not filed, as above provided, the labor done and materials furnished by all persons aforesaid before such contract or memorandum is filed, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

Section 4026, after providing that the contract must provide for payments in installments after work is begun, that 15 per cent. must be held for 35 days after the completion, that any payments made prior to dates set shall not affect liens of subcontractors and materialmen, that as to them the amount of the contract shall be paid in money and shall not be affected by any indebtedness of the contractor to the owner, states: "In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons other than the principal contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the principal contractor, and they shall have a lien for the value thereof. Any of the persons mentioned in section 1, except a principal contractor, may at any time give to the owner or reputed owner or to his superintendent of construc-

tion, agent or architect, a written notice that they have performed labor or furnished materials or both to or for a principal contractor, or any person acting by authority of the owner or reputed owner, or that they have agreed to and will do so, stating in general terms the kind of labor or materials and the name of the person to or for whom the same was or is to be done or performed, or both, and the estimated or agreed amount in value, as near as may be, of that already done or furnished or both, and also of the whole agreed to be done or furnished, or both. Such notice may be given by delivering the same to the owner or reputed owner personally, or by leaving at his residence or place of business with some person in charge; or by delivering it either to his superintendent of construction, agent or architect, or by leaving it either at his residence or place of business with some person in charge; no such notice shall be invalid or insufficient by reason of any defect of form, provided it is sufficient to inform the owner or reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters. Upon such notice being given, it shall be the duty of the person who contracted with the principal contractor, to, and he shall, withhold from such principal contractor, or from any other person acting under such owner or reputed owner, and to whom, by said notice, the said labor or materials, or both, have been furnished or agreed to be furnished, sufficient money due or that may become due, to said principal contractor, or other persons, to satisfy such claim, and any lien that may be filed therefor for record under this chapter, including reasonable costs provided for in this act; and the payment of any such lien, which shall have been acknowledged by such principal contractor, or other person acting under such owner or reputed owner, in writing to be correct, or which shall have been established by judicial determination, shall be taken and allowed as an offset against any moneys which may be due from the owner, or reputed owner to such principal contractor, or the person for whom such work and labor was performed."

Section 4033 provides that a lien statement must be filed for record, and that subcontractors and materialmen must file such statement within two months after completion of the building and serve a copy of the same upon the owner at or before the time of filing.

The provisions for filing the contract, service of notice, etc., were added to the law of 1889 by the act of 1893 and retained in 1899 to enable the owner to limit his liability to subcontractors and materialmen and to protect himself from the broad provisions of the law of 1889 and, with few changes, retained in the law of 1898 and 1899,

which gave them a direct lien, regardless of the state of the account, except the limitation to the contract price, between the owner and his contractor. By filing his contract or a memorandum, as the law of 1893 and 1899 provides he may do, the owner may pay the contractor, in installments by the terms and provisions thereof, without fear of liens, unless the subcontractor give him written notice of intention or, as the statute says, written notice that he has "performed labor or furnished material * * * or agreed to and will do so."

[1] If the owner fail to file the contract or memorandum as the law provides he may do, or if the law does not require it to be filed, as in instances where the contract price is \$500 or less, then, in either instance, there is no way for the owner to so limit his liability. The owner, in order to profit by these provisions in his behalf, must have a written contract, provide in it that payments will be made in installments at times named, that nothing shall be paid in advance of the work, that at least 15 per cent. of the price shall be made payable at least 35 days after completion of the contract, and then file it, or a memorandum thereof, so that subcontractors and materialmen may know that he intends to avail himself of the privilege given.

It has been held in the case of *Willamette Co. v. Los Angeles Co.*, 94 Cal. 229, 237, 29 Pac. 629, 632, that: "Where the owner does not choose to avail himself of the mode of limiting his liabilities provided in this section, labor done and materials furnished shall be deemed to have been done and furnished at his personal instance."

In *Small v. Foley*, 8 Colo. App. 435, 451, 47 Pac. 64, 70, the court said: "It seems manifest that the provision [as to notice] was intended for the owner's personal benefit."

Our statute gives to subcontractors and materialmen a direct lien regardless of the state of the account between the owner and the contractor, subject only to the aforesaid provisions in the first two sections of the act, which extend (not reserve) to the owner a mode of limiting his liability.

The contention that under the Constitution and the common law the owner may pay his contractor as he may choose, regardless of a subcontractor's right to a lien, is recognized by our statute only to the extent of the privilege granted in the provisions aforesaid. Prior to the law of 1889, the owner's claim in this respect received greater consideration at the hands of our Legislature than since that time. By the law of 1889, amending prior laws, no consideration or recognition whatever was given to it, but all provisions concerning notice of intention were eliminated, and all the subcontractor or materialman was required to do was to file his lien statement for record and serve a copy on the owner at or before the filing and bring his suit to foreclose within the time required. The 1889

act (Laws 1889, p. 251, § 7), leaving no room for critical construction, provided as to subcontractors that: "Any payments made by the owner to the contractor, either before or after making such contract, or during the erection of such building and during the time provided * * * in which to file liens, shall be at the risk of the owner; and no such payment shall be a set-off against the claim of any subcontractor, * * * who shall file his statement for lien and serve a copy thereof, as herein provided." An examination of the amendments of 1889 discloses a studied and effective determination to eliminate every feature of what is known as the New York system of mechanic's lien statutes from our law and to substitute what is known as the Pennsylvania system; the former making the subcontractor's lien subject to the state of the account between the owner and his contractor, the latter disregarding it, both subject to modifying provisions in the statutes of the different states, following one or the other. This 1889 act, and all acts prior thereto, were repealed in 1893 by another entire lien act which reenacted many sections of the prior law but again introduced features of the New York system, shown in sections 4025 and 4026, supra. This 1893 act is the same as the 1899 act, now under consideration, with slight modifications.

It is concluded for reasons hereinafter stated that the claimant had a lien regardless of notice to the owner or reputed owner, or state of the account between the owner and contractor, unless the owner or reputed owner filed his contract and otherwise availed himself of the privilege extended by the statute; claimants limited, of course, to the contract price. Therefore it was not error to overrule the demurrer to the complaint and leave the owner to plead in its answer the matters, if any, relieving it from liability. The owner answered, pleading the same matters involved in the demurrer to the complaint, that the contract between it and its contractor was verbal, for \$310, that it had paid him in full, in good faith, under the terms of the contract, without notice that the claimants had furnished material or intended to claim a lien, or that the contractor had not paid for the materials furnished. A general demurrer to this answer raised the same contention that arose on the demurrer to the complaint, and for the same reasons it is concluded the court did not err in sustaining it.

It is only where the contract or a memorandum is required to be in writing and to be filed that any privilege is extended to the owner whereby he may limit his liability except the limitation on claimants to the contract price. In this case the contract was not in excess of \$500, was not filed, and the statute did not require it to be filed. All contracts of \$500 or less are governed and

controlled under the general provisions of the lien act giving the claimant a direct lien to the full extent of the contract price regardless of the state of the account between the owner and the contractor and regardless of payments made before the time expires for filing the lien statement.

The owner's contention that the provisions of sections 4025 and 4026 are privileges granted to materialmen and other subcontractors, and that they must comply with the requirements thereof in all cases where there is a contract, although the owner is not required to file the same and thus furnish the data upon which the claimant may rely, is contrary to the spirit of an act to "secure liens to mechanics and others" and not in accord with the trend of recent decisions of the supreme and appellate courts of this state, construing the same.

[2] It may be assumed but it is unnecessary to decide that, where the contract exceeds \$500, is in writing, and otherwise complies with the law, and it, or a sufficient memorandum thereof is filed, it is necessary for a subcontractor to serve a notice upon the owner in order to maintain a lien upon the property for any more than what may be unpaid by the owner on the contract when a copy of the lien statement is served and the statement itself is filed for record; but it is concluded that if the contract is for \$500 or less, or if for a greater sum and is not in writing or otherwise not in compliance with law, or it, or a sufficient memorandum thereof, is not filed, then, and in either such case, no notice is necessary, and all payments to the contractor are at the owner's peril if made prior to the expiration of the time given for the subcontractor to serve and file for record a statement of the lien. And as the answer in this instance relied upon a necessity of notice but alleged that the amount of the contract price was less than \$500, it did not state a good defense.

Prior to the act of 1889 the subcontractor was required to give notice of an intention to claim a lien with no exception as to amount of the contract; the contract was not required to be in writing or to be filed; and he could not maintain a lien unless at the date of his notice of lien or of his intention to file the same "there was something due or to become due from the owner to the contractor." *Jensen v. Brown*, 2 Colo. 694 (Law of 1872, p. 147); *McIntire v. Barnes*, 4 Colo. 285 (Law of 1872, p. 147); *Epley v. Scherer*, 5 Colo. 536 (Law of 1876, p. 89); *Tabor v. Armstrong*, 9 Colo. 285, 12 Pac. 157 (General Laws of 1877, § 1637); *Greeley S. L. & P. R. R. Co. v. Harris*, 12 Colo. 226, 20 Pac. 764 (Law of 1881, p. 168); *Spangler v. Green*, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259 (Law of 1883, p. 225).

As above stated, in 1889 the lien statute was amended, repealing and amending all sections of the prior act requiring notice of any kind except the copy of the lien state-

ment to be served on the owner at or before the time of filing the statement for record. And all payments made before the time expired for such filing were at the owner's peril. *Spangler v. Green*, 21 Colo. 505, 42 Pac. 674, 52 Am. St. Rep. 259 (Law of 1889); *Jarvis v. State Bank, etc.*, 22 Colo. 309, 316, 45 Pac. 506, 55 Am. St. Rep. 129 (Law of 1889); *Sayre-Newton Lumber Co. v. Union Bank*, 6 Colo. App. 541, 546, 547, 550, 41 Pac. 844 (Law of 1889). From an examination of these authorities in connection with the lien act of 1889, it appears that the provisions of that act are fully recognized, giving subcontractors direct liens, without regard to the state of the account between the owner and his contractor. The law of 1883 and 1899 gives the subcontractor and materialman the same direct lien limited only to the amount of the contract price but incorporates by sections 4025 and 4026 certain provisions whereby the owner, on complying therewith, may pay the principal contractor as the work progresses. This is a departure from the lien law prior to 1889 and eliminates the former legal conception that subcontractors and materialmen's liens were subject to the state of the account between the owner and his contractor on the contract between them.

[3] There are two distinct conceptions of the right to a subcontractor's lien, recognized by the statutes of the various states, one that such liens are allowed by statute through a species of equitable subrogation to the contract between the owner and his contractor, the other because of the enhanced value of the property caused by the labor and material so contributed to it by the consent of the owner through his contractor, made his agent by statute. The latter is the conception adopted in the law of 1889 and continued in the law of 1893 and 1899 and illustrated by the following authorities:

The latest announcement in this state is in the case of *Curtis v. Nunns*, 54 Colo. 554, 556, 131 Pac. 403, 404, wherein *Scott, J.*, said: "It would be a singular state of the law if *Curtis*, the owner, could by words of acceptance addressed to his principal contractor, with no recorded contract to guide subcontractors, thus change the actual time of completion and in this way defeat the honest claim of a subcontractor."

The provisions of sections 4025 and 4026, supra, do not change the theory or policy of the law of 1889 in this respect but continue it, as held in the case of *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 271 to 275, 74 Pac. 786, 788 to 789, where it is said: "The construction of a building involves the co-operation of a variety of agencies. It is not built by the original contractor himself. It is true that he undertakes its construction, but to enable him to execute his contract he must rely to a greater or less extent upon others. The accomplishment of the work requires the purchase of material and the employment of mechanical and other

labor, of all of which the owner receives the benefit. The purpose generally of laws providing for mechanics' liens is to afford some measure of security to those whose property and services have entered into the improvement; and such laws have, as a rule, been upheld by the courts. * * * It does not impair the obligations of contracts but provides a method for securing payment to those whose labor or material goes into the building and at the same time protects the owner and contractor, if the provisions of the act are complied with. The doctrine upon which such liens are founded is the consideration of natural justice that the party who has enhanced the value of the property by incorporating therein his labor or materials shall have a preferred claim, in a certain sense, on such property, for the value of his labor or materials. * * * The foregoing sections provide the form of contract which must be entered into by the owner and the principal contractor to enable the latter to secure a lien for himself and to enable the former to confine the liabilities, to which his property may be subjected, to the contract price. * * * By virtue of the law the contractor is invested with the power to charge the property for the reasonable value of the labor and materials supplied to it by subcontractors. The right of lien arises from the statute, which applies, by its own force, to every transaction that parties, by their voluntary action, bring within its terms. No one is deprived thereby of the gains of his own industry. The legislative purpose is quite the contrary. It is rather to prevent one man from enjoying, without compensation, the gains of another's industry in circumstances which the law-makers regard as imposing a duty on the former to see that the latter is paid therefor. * * * Without express provision the contractor would possess the powers of an agent. It is in virtue of his power to encumber the property by procuring material and labor that the right to a lien accrues to persons furnishing him with those things. In *O'Neill v. St. Olaf's School*, supra [26 Minn. 329, 4 N. W. 47], it is said that 'the statute gives, as an incident to a contract for erecting, altering, or repairing a house, power to the builder or contractor to charge the house and the land with debts for labor and materials incurred by him in performing the contract. The owner consents to this power conclusively and irrevocably, so far as others than the builder or contractor are concerned, by making the contract while such is the law.' See, also, *Laird v. Moonan*, 32 Minn. 358 [20 N. W. 354]."

In the case of *Lindemann v. Belden C. M. Co.*, 16 Colo. App. 342, 346, 65 Pac. 403, 404, it is said also: "The leading idea of mechanics' lien statutes, the basic principle upon which they are founded, the object which they seek to subserve, and to which all their provisions tend, is to secure the mechanic

and materialman upon values they have directly contributed to create, to give to such, who by their labor and material have enhanced the value of property, the security of a lien thereon, to the extent they have thus added to its value. *Barnard v. McKenzie*, 4 Colo. 253; *Bolsot on Mechanics' Liens*, § 7; *Phillips on Mechanics' Liens*, §§ 9-13."

In the case of *Sierra N. L. Co. v. Whitmore*, 24 Utah, 130, 66 Pac. 779, and *Cary-Lombard Lumber Co. v. Partridge*, 10 Utah, 322, 37 Pac. 572, it is held, under a statute requiring notice of intention to claim a lien besides the filing of the lien statement by subcontractors, that the owner is charged with notice as of the date of commencing to work or furnishing materials by subcontractors of their lien by virtue of the original contract, together with the statute making the lien relate back to the commencement of the work or the furnishing of materials by the subcontractors; and that the notice of intention refers only to subcontractors who intend in the future to do work or furnish materials and not to those who are furnishing or have furnished the same.

In the case of *Gilchrist v. Anderson*, 59 Iowa, 274, 13 N. W. 290, it is held that, if the owner knew that material was obtained from some one by the contractor, such knowledge put the owner upon inquiry and that no notice was necessary of intention to claim a lien. These cases serve to illustrate that the courts desire to uphold the direct provisions of a lien given to subcontractors and materialmen.

[4] It is unnecessary to cite further authorities so construing lien statutes favorable to subcontractors and materialmen, but the following may be consulted: 2 Jones on Liens, § 1304 et seq.; 27 Cyc. 89 et seq.; *Jones v. Great Southern Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108; *Hightower v. Bailey et al.*, 108 Ky. 198, 56 S. W. 147, 49 L. R. A. 255, 94 Am. St. Rep. 350; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Colter v. Frese et al.*, 45 Ind. 96; *Henry-Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846.

In the case last cited the court, in considering the law of 1893 with reference to liens of subcontractors, suggests, without deciding, that the lien statute of 1893 gives a direct lien to such persons and calls attention to the case of *Jarvis v. State Bank*, supra, in which the Supreme Court expresses the view that a subcontractor's right to a lien cannot be cut off and destroyed by the terms of the contract between the owner and the principal contractor; both opinions citing the following cases upholding the direct lien theory of our statute: *Clough v. McDonald*, 18 Kan. 114; *Chicago Lumber Co. v. Woodside*, 71 Iowa, 359, 32 N. W. 381; *Lonkey v. Cook*, 15 Nev. 58; *Gull River L. Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743; *Albright*

v. Smith, 2 S. D. 577, 51 N. W. 590; Laird v. Moonan, supra; Hall v. Mullanphy, P. M. Co., 16 Mo. App. 454. The decisions to the contrary upholding the first theory aforesaid are numerous, strong, and conclusive but under statutes favoring the owner and following the New York system. See 2 Jones on Liens, supra, 22 Cyc. supra, and the case of French v. Bauer, 134 N. Y. 548, 32 N. E. 77, 20 L. R. A. 560, and extended note.

[5] Preliminary to the final question involved herein, the question may be considered whether the acts of 1893 and 1899 so changed the law of 1889 as to shift the burden of watchfulness back to the subcontractor and materialman as it was prior to 1889, or whether by those later acts such burden was left upon the owner as in 1889, except as to the provision granted to the owner in sections 4025 and 4026, by complying with which he could thereby shift such burden to the subcontractor and materialman so that they would have to serve their notice of intention upon him. The latter is the more reasonable. The first paragraph of section 4025 gives a direct lien in plain language. In the second paragraph it is provided, "in case of a contract," such lien is limited to the contract price whatever it may be; then follows the privilege given the owner to make payments as the work progresses by making the contract as provided and by putting it in writing and filing it; then, the owner having done this and thus given the data to the claimant, a privilege is thereafter given the claimant whereby he may stop those payments or enable the owner to do so by serving on him the notice upon which the owner must protect himself by retaining the money necessary to satisfy the claim or the subsequent lien.

[6] Now, the vital question in this case is reached as to the claim of plaintiff in error that, as alleged in the answer, because the contract was for less than \$500, it could and did in good faith pay the contractor in full according to the contract; no notice of intention being served upon it by the claimant or lien filed before the payment was made. In other words, it is contended that the claimant must serve the notice and do so before the owner pays the contractor, even though the contract is not in writing and not filed and no other notice of it or its contents, amount, dates of payments, etc., are given to the claimant so that he may know when to serve the same, and whether it will avail him anything if he should serve it. It is true that he could inquire as to the contract and possibly ascertain in some way what it contained, but his information so obtained would not be so unchangeable and certain as the filing would give him in case he succeeded in obtaining any information at all. The law would not force such uncertainty upon him. The very purpose of the requirement as to filing the contract or a memorandum is to give notice to a claimant so

that he may act intelligently in reference to serving the notice on the owner. Such purpose plainly appears from the quotation, supra, from the case of Curtis v. Nunns and also from the following from the case of Chicago Lumber Co. v. Newcomb, supra: "The purpose of recording the contract prescribed by the statute is to advise persons dealing with the contractor of its contents, so that, as they have no remedy against the property for claims in excess of the contract price, they may act intelligently and be able to determine whether the security is sufficient to justify them in parting with their material or expending their labor. It is asserted that the cross-complainants had such knowledge of this contract; and, if it had been a contract for the recording of which the statute provides, it may be that their knowledge would take the place of a record. But it was not the contract to which the requirement was intended to apply. The contract to be recorded is a contract, the terms of which are contained in the statute."

It would seem, therefore, that if by the statute no notice from the owner is required, so that the subcontractor may act intelligently, then it was intended that no notice is required from the subcontractor to the owner; and, as the statute does not require the contract to be filed in cases where it is \$500 or less, then the subcontractor is not required to serve a notice in such case. Hence the contention of appellant, owner, is untenable that it may have a contract of \$500 or less, not in writing, and no memorandum filed or other notice given of it; yet the claimant must nevertheless gain his intelligence to guide him from some other source and serve the notice the same as if the contract was in writing and filed. It must be assumed that the Legislature intended that in case of small contracts of \$500 or less, or where there was none, that the owner must protect himself from liens of subcontractors and materialmen as he was required to do, in all cases, by the law of 1889, from the commencement of building up to the last day of filing for record the lien statement. It seems plain also, from the phraseology of all that part of sections 4025 and 4026 following the requirement that all contracts over \$500 shall be in writing, that such part refers only to written contracts (that is, contracts over \$500); and that the written notice required therein refers only to written contracts. As suggested by Scott, J., in the case of Curtis v. Nunns, supra, it would be a strange requirement of the law that a subcontractor should be required to give a written notice of intention to claim a lien when the contract between the owner and his contractor is not required to be in writing, not required to be filed, nor any other requirement made of the owner to furnish data upon which the subcontractor could act, and at the same time destroy his right to a lien if he should fail to act intelligently or within the proper time.

Such is the only reasonable construction of this statute, fair between the owner and the subcontractor, unless it be held, according to the broader contention of the defendant in error, the claimant herein, that even contracts of \$500 or less, or a memorandum thereof, if oral, should also be filed by the owner. Though the latter construction may appeal to the legal mind, it cannot be said that such was the intention of the Legislature, because, if so intended, it would not be necessary to separate such contracts into two classes; furthermore our courts are more or less committed against it, as shown from the cases of *Curtis v. Nunns*, supra, 54 Colo. at page 557, 131 Pac. 403, and *Foley v. Coon*, 41 Colo. 432, 435, 93 Pac. 13, wherein the opinion indicates that "in certain cases" only must contracts be filed.

It is contended that, as the Supreme Court of California, under a similar statute from which it appears our statute was derived, has held, prior to our adoption of it, that the subcontractor must serve on the owner the notice of intention in all contracts, whether oral or in writing, and regardless of the amount thereof, therefore our courts should follow such California decisions. The following reasons are given for not following the California construction:

First. The courts of that state have continuously followed the New York system and held that subcontractors' liens are subordinate to the state of the account between the owner and the contractor under statutes of that state similar in all material respects to our statute of 1889, while our courts in construing that statute have followed the Pennsylvania system and held the contrary. Prior to 1885 the lien statutes of California, back as far as 1872, were practically the same as our statute of 1889 giving a direct lien to subcontractors, not requiring the contract to be in writing or to be filed and not requiring any notice of intention; yet its court held that, even under those statutes, the owner could pay the principal contractor according to his contract, and that the subcontractors' lien was limited to whatever might still be owing at the time the lien statement was required to be filed by the subcontractor. *Wiggins v. Bridge*, 70 Cal. 437, 439, 11 Pac. 754; *McCants v. Bush*, 70 Cal. 125, 126, 11 Pac. 601. Our courts, on the contrary, have duly recognized the legislative enactment of 1889 and have held that under that act the owner could not pay the contractor except at his peril until after the time expired for the subcontractor to file his lien statement; and, when such lien statement was filed, the lien related back to the commencement of the work and extended to the full amount of the contract price, regardless of the payments made by the owner to the contractor. *Spangler v. Green*, 21 Colo. 505, 509, 42 Pac. 674, 52 Am. St. Rep. 259; *Jarvis v. State Bank*, 22 Colo.

309, 316, 45 Pac. 505, 55 Am. St. Rep. 129; *Sayre-Newton Lumber Co. v. Bank*, 6 Colo. App. 541, 549, 41 Pac. 844.

Furthermore, in the case of *Aste v. Wilson*, 14 Colo. App. 328, 59 Pac. 846, the court construing the decision of *Bowen v. Aubrey*, 22 Cal. 566, said: "In that case it was held that the subcontractor knew that there was a contract between the owner and the general contractors, and this was sufficient to put him upon inquiry, and he was to be considered as affected with notice of the contents and stipulations of this contract. In that case also the original contractor had expressly by his contract waived his own right to file a lien, and the court said that the subcontractor had no higher rights than the original contractor. How far these considerations affected the decision does not appear. In a subsequent case (*Dore v. Sellers*, 27 Cal. 594) the court, speaking of the right which the employes of a contractor have to assert a lien under the statute, said that they had the right, not for the reason that the employer's property had been benefited by the labor or materials furnished by the employes, but because they had furnished the labor or materials for the contractor to whom the law had granted a lien for the amount which became due to him under the contract in consequence of their labor and material. It would seem, therefore, that under the statute of that state, as construed by the Supreme Court, the lien of a subcontractor or other employe was not direct but depended upon the contract of the owner with the principal contractor." In the same case the court, referring to *Jarvis v. State Bank*, supra, says that the court in that case intimates quite strongly that there may be serious doubt as to the soundness of such doctrine in this jurisdiction; the court then cites several cases following the Pennsylvania system contrary to the California doctrine.

It would be expected, therefore, that the California courts would construe the 1885 law of that state (which is the law from which sections 4025 and 4026, supra, were derived) in conformity with their previous decisions; but, considering the opposite view taken by our courts of the same kind of a law, it would not be expected that they would now adopt the view of the California courts in construing said sections.

Second. The doctrine in California so construing the law of that state to 1885 has been repudiated by the courts of several states that had adopted such statutes, and they have held that the subcontractor's lien under such statute was not subject to the state of the account between the owner and his contractor and have distinctly refused to follow the California construction. *Hunter v. Truckee Lodge*, 14 Nev. 24; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *Spokane v. McChesney*, 1 Wash. 609, 21 Pac. 198; *Hobbs v. Spiegelberg*, 3 N. M.

(Johns.) 222, 5 Pac. 529; Allen et al. v. Redward, 10 Hawaii, 151, 156. The courts of those states have, like the courts of this state, construed a similar law to ours of 1889 and California's prior to 1885 differently from the California courts, although those states had adopted the California law existing prior to 1885. It would be natural for our courts to continue in their own footsteps and in the footsteps of the courts of other states traveling the same highway. It is true those other states have not adopted the California law of 1885, as this state has done, by taking from it sections 4025 and 4026, supra, and they have not therefore construed the provisions of these sections, but it is safe to say, from their foregoing decisions, that, if ever called upon, they would construe such provisions the same as construed herein. Our court will now be the first outside of California to construe them.

The first construction of these provisions by the California courts occurred in September, 1890, less than three years prior to our adoption of them, in the case of Kerchoff-Cusner Co. v. Cummings, 86 Cal. 22, 24 Pac. 814 (three judges out of seven dissenting). The opinion was based wholly upon a former opinion that did not warrant the advanced view announced; the construction in that case, however, has been followed since, with it as a precedent. The following quotation is given from the opinion in the Kerchoff Case to show the California construction: "No part of the contract price under such a contract (\$1,000 or less, \$500 or less in Colorado) need be withheld by the reputed owner; and he may pay the whole of it to the contractor before the commencement or after the completion of the work unless the notice prescribed is given." It will be seen that such construction is that no part of sections 4025 and 4026, following the provision as to contracts necessary to be in writing, applies to contracts of \$500 or less except the provision requiring notice to be given by a subcontractor and materialman. What good would notice do if the owner could pay the contractor in full before the commencement of the work? And why should the burden of these requirements be sustained by the subcontractor in all cases and the owner be relieved therefrom where the contract is \$500 or less? Such construction practically deprives a subcontractor and materialman of any lien where the contract price is \$500 or less. It is contrary to the spirit and purpose of such lien laws and contrary to the general view of our courts.

[7] Furthermore, the incorporation of these two sections into our lien law, then existing, must be construed in harmony with the entire law and the general policy and purpose thereof in this state, and not necessarily in conformity with the decisions of another state following lines parallel with a different view and a different system. The conclusions herein reached meet the demands of justice

so that liens may be had by subcontractors and materialmen when the contract is for \$500 or less, the same as when it is for a greater sum, without requiring them to give a prescribed written notice without any certain information or recorded data upon which to rely, especially so as our statute does not require the owner to retain the 15 per cent. of the contract price until after the date for filing the lien statement as the California law requires.

In regard to the owner's contention concerning personal service upon the contractor and the necessity of a personal judgment against him, it is concluded that the constructive service had and provided by the lien act was sufficient to enforce the lien, and that the publication of the alias summons was without substantial injury to the owner.

Judgment affirmed.

CUNNINGHAM, P. J. (dissenting). Our Lien Act here under consideration is almost an exact duplicate of the Mechanic's Lien Act of California, as the same existed in 1899 (St. 1899, p. 33), the date of the adoption of our act (Laws 1899, c. 118); the chief difference in the two acts being that in California building contracts exceeding \$1,000 are required to be recorded, while in our act the amount of such contracts was reduced from \$1,000 to \$500. No one can read the California act and our own without coming to the conclusion that whoever prepared the bill which our Legislature passed must have had constantly before him the California statute. I believe the statute of no other state is so nearly like our own. Before our act had been adopted, the California courts had frequently placed a construction upon their statutes quite contrary to the conclusion reached in the majority opinion in this case. Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932; Kerchoff-Cusner Co. v. Cummings, 86 Cal. 22, 24 Pac. 814; Denison v. Burrell, 119 Cal. 180, 51 Pac. 1. Upon an examination of these cases it will be seen that that state had at least thrice held that a contract under \$1,000 (\$500 in our state) need not be recorded, but that laborers and materialmen, where the contract was less than that sum, could acquire no right whatever as against the owner without first serving a preliminary notice (or, as it is sometimes called in California, a "stop notice"), and that, when such preliminary notice was served, the right of the claimant was limited to the money in the hands of the owner intercepted by this notice or to the amount to become due the contractor after the serving of the same.

In *Re Inheritance Tax v. Macky's Estate*, 46 Colo. 79, at 92, 102 Pac. 1075, at 1079, our Supreme Court, in a unanimous opinion, participated in by the entire bench, gave to this rule of statutory construction great force, referring to it in this language: "As our law was adopted after that decision was rendered, the utterances of the Illinois court

come to us with a force like unto that of a legislative enactment."

The majority opinion is, in my judgment, arrived at by violating the rule of statutory construction here under consideration and by refusing to follow the doctrine touching this rule as announced in the Macky Case.

For these reasons I am compelled to dissent.

GREAT WESTERN SUGAR CO. v. F. H. GILCREST LUMBER CO.

(Court of Appeals of Colorado. Nov. 10, 1913.)

1. MECHANICS' LIENS (§ 281*)—ACTION TO ENFORCE—SUFFICIENCY OF EVIDENCE—SERVICE OF LIEN STATEMENT ON AGENT.

Where the answer, in an action to enforce a mechanic's lien, admitted that defendant's alleged agent, to whom a copy of the statement of lien was delivered, was cashier and book-keeper of his sugar factory at the place where the building was constructed, and there was no contention that he was not fully informed by the service as made or was in any way injured or prejudiced, the proof of agency was sufficient.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

2. MECHANICS' LIENS (§ 281*)—ACTION TO ENFORCE—SUFFICIENCY OF EVIDENCE—USE OF MATERIALS.

Evidence, in an action to enforce a mechanic's lien, held sufficient to show that the materials were used in the construction of a certain building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

Cunningham, P. J., dissenting.

Error to District Court, Weld County; Harry P. Gamble, Judge.

Action by the F. H. Gilcrest Lumber Company against the Great Western Sugar Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. N. Haynes, of Greeley (Charles W. Waterman, of Denver, of counsel), for plaintiff in error. R. G. Strong and C. E. Southard, both of Greeley, for defendant in error.

MORGAN, J. On rehearing; original opinion withdrawn and the following substituted:

This case involves a writ of error similar in every material respect to case No. 3870 (136 Pac. 553), of this court, just decided, except that in this case the answer of the owner does not state the contract price between it and the contractor for the construction of the house, and with the further exception that in this case the owner contends, in addition to the errors assigned in the other case, that the lien claimant did not prove that the person on whom the copy of the lien statement was served was the agent of the owner, such agency being an issue and the

burden being upon the lien claimant; and that the evidence of the claimant was insufficient to prove that all material for which the lien is claimed was received by the contractor and used in the building. The absence of a statement in the answer as to the amount of the contract price renders the answer less sufficient to constitute a defense, under the conclusions reached in the other case, than the answer in that case; hence the views announced in that case govern the contention here.

[1] As to the proof concerning the agency of Crawford, the person on whom the copy of the lien statement was served, it is sufficient to warrant the foreclosure of the lien. This contention is highly technical because there is no statement in the answer nor any contention in the record or the briefs that the owner was not fully informed by the service as made or that it was in any way injured or prejudiced. The answer itself states that, when the copy of the statement was delivered to said Crawford, the owner was not indebted to the contractor in any sum whatever, and that long prior thereto the owner had paid the contractor in full. The answer admits that Crawford was cashier and book-keeper of the owner's sugar factory in the town where the evidence showed the building was constructed; and, as the sugar company was a foreign corporation and was constructing this building as such, the proof was sufficient in this regard under the circumstances.

[2] The proof was also sufficient that the materials were used in the construction of the building. It appears from the evidence introduced by the claimant that none of the items of account for which the lien is claimed were delivered elsewhere than "at the job," and that no other structure was being built by the said contractor or his men near said job at the time of the deliveries. The evidence shows that the entries of the items were just and true and made in the regular course of business. One witness testified that he would not say that every one of said pieces went into the building, but he would say: "All that I know about it is they were delivered there." "I knew that practically the quantity of repairing and alterations done there required about such deliveries as I made. I saw the porch columns and windows put in; also many other things hauled I saw in the house there, put into the building." This, together with other testimony identifying the building with the materials furnished, was sufficient; the owner introducing no testimony.

For these reasons, together with those given in case No. 3870, the judgment is affirmed.

CUNNINGHAM, P. J., dissents.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**McCOMB v. FOURTH JUDICIAL DIST.
COURT IN AND FOR ELKO COUN-
TY et al. (No. 2,093.)**

(Supreme Court of Nevada. Nov. 11, 1913.)

1. GRAND JURY (§ 19*)—OBJECTIONS TO JURORS—WAIVER—UNTIMELY OBJECTION.

Under Rev. Laws, § 7005, permitting an individual grand juror to be challenged on the ground that he is an alien, and section 7010 providing that an accused can take advantage of any objection to the panel or to an individual grand juror "in no other mode than by challenge," an accused waived his right to object that one of the jurors was a resident of another state by waiting until time for pleading to the indictment, more than two weeks after the impaneling of the grand jury, when opportunity was given his counsel to challenge, though accused was not then present.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 53-55; Dec. Dig. § 19.*]

2. GRAND JURY (§ 19*)—OBJECTIONS—TIME OF MAKING—KNOWLEDGE OF LAW.

One held to answer to the grand jury was bound to know the provisions of the Code relating to the time challenges must be interposed to the grand jury.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 53-55; Dec. Dig. § 19.*]

3. CRIMINAL LAW (§ 1166*)—APPEAL—HARMLESS ERROR.

Since the state could have prosecuted the offense of horse stealing by information, special injury will not result to accused by trying him upon an indictment, though one of the grand jurors who found it was a nonresident.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. § 1166.*]

4. PROHIBITION (§ 9*)—PURPOSE OF WRIT.

Under Rev. Laws, § 5708, providing that the writ of prohibition arrests the proceedings of any tribunal which are without or in excess of its jurisdiction, the writ will only issue where there is an exercise of functions without or in excess of the jurisdiction of the prohibited tribunal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 35; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5668-5674; vol. 8, p. 7767.]

McCarran, J., dissenting.

Application for writ of prohibition by F. B. McComb against the Fourth Judicial District Court of the State of Nevada in and for the County of Elko and Honorable E. J. L. Taber, Presiding Judge. Application denied.

A. J. Weber, of Salt Lake City, Utah, and James Dysart and R. C. Van Fleet, both of Elko, for petitioner. George B. Thatcher, Atty. Gen., and E. P. Carville, Dist. Atty., Curlier & Gedney, and Henderson & Caine, all of Elko, for respondents.

TALBOT, C. J. This is an application for a writ of prohibition to enjoin the Fourth judicial district court, Elko county, and the Honorable E. J. L. Taber, presiding judge thereof, from trying F. B. McComb because one of the grand jurors was a resident of the state of Wyoming at the time of the finding of the indictment against him for grand larceny.

Under a criminal complaint charging horse stealing, and after hearing and taking of testimony continuing from the 26th to the 30th day of August, 1913, Phil S. Triplett, justice of the peace for Wells township, on the 24th day of September ordered the applicant held to answer and admitted to bail. On September 23, 1913, a grand jury was drawn, returnable October 8th. Upon the impaneling of the grand jury on that day, in the absence of McComb and in the presence of his attorney, the court asked if there were any challenges to the panel or to any individual juror, and, no challenge being interposed, the accused persons who were in the custody of the sheriff and who had been brought into court were remanded to jail. On the following day the grand jury returned an indictment for grand larceny against the applicant and the arraignment was set for October 10th. At the time of the arraignment a copy of the indictment was handed to him, and he was asked whether he pleaded guilty or not guilty, and on motion of his attorney the court ordered that he be given until October 16th in which to plead to the indictment. On that day he presented affidavits indicating that one of the members of the grand jury that found the indictment was a state senator in Wyoming, and that, although he had been in Nevada much of the time for the past two years, he had declined to register here as an elector and retained his residence in Wyoming. Thereupon the defendant moved the court to set aside the indictment because it was not found by a grand jury of 17 men having the qualifications of grand jurors under the statute of this state, and because the court was without jurisdiction to proceed with the trial. The motion was resisted upon the ground that the reasons advanced for setting aside the indictment had been waived by the defendant.

The Constitution gives the district court jurisdiction over all felonies. Horse stealing having been made grand larceny by an act of the Legislature, the trial of persons accused of that offense comes within the jurisdiction of the district court and no other. Persons charged with the commission of felonies are entitled to be tried by an indictment found by a grand jury consisting of duly qualified electors resident in the county, who are citizens of the United States and have been in the state six months, except that prosecutions may be had upon information under the late amendment to our Constitution, which now conforms to the provisions in other states for prosecutions by information.

Is this right of the accused to be indicted by a legal grand jury, as well as other constitutional rights, such as that of having counsel, being present at the trial, being confronted by the witnesses, and having witnesses produced in his behalf, one so vital

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the jurisdiction of the court that it may not be waived or regulated by act of the Legislature? It may be conceded that neither by statute nor by judicial decision can an accused person be deprived of his right to be indicted by a regularly constituted grand jury, unless charged by information, before being tried for a felony. But may not the Legislature, and in the absence of statutory regulation the courts, require that challenges to a grand jury be seasonably made, so that undue delay and unnecessary expense may be avoided in the administration of justice?

If the constitutional right of an accused person to be indicted by a grand jury composed of the requisite number of qualified resident electors is a jurisdictional one which he cannot waive, logically he might raise the objection any time after conviction and appeal and before full service of sentence. The rights of persons who are so unfortunate as to be charged with crime should be carefully guarded, but not to the extent of allowing them to cause unnecessary delay and useless expense. They cannot be deprived of their constitutional rights by the Legislature or the courts but should be limited to a reasonable time in which to interpose challenges or make objections.

It is not strange that the decisions relating to the time at which an objection may be made or a challenge interposed or waived are not uniform in various jurisdictions without legislative enactment. Some have held that the right of challenge is waived by pleading to the indictment or by going to trial, and in rare instances that the objection to the grand jury may be made after trial and upon appeal. If in the absence of statutory regulation the courts may determine the time within which the challenge must be made, the matter may be regulated by statute, and the Legislature may provide that, if the challenge is not interposed within a reasonable time, it shall be waived, as has been done in this state, so long as the accused is not deprived of a fair opportunity to interpose a challenge. To allow the objection to be made after trial might necessitate the calling of a new grand jury and trial jury and the recalling of the witnesses, officers, and persons engaged in the trial. To allow the objection to be made after the indictment, as is sought to be done in this case, may necessitate the calling of a new grand jury. This is necessary only in cases where the accused has been indicted without being previously held to answer and where he could be given no opportunity to challenge the grand jury until after the indictment was returned, and the Code has provided accordingly. Revised Laws, § 7090.

[1] There is no good reason why an accused person should be allowed to wait until after an appeal or after a trial and the chance of securing favorable verdict to challenge the grand jury, nor why the Legisla-

ture may not provide that such challenges must be exercised earlier if a reasonable opportunity is given to interpose his objection to being deprived of his constitutional right or of being put on trial unless indicted by a legal grand jury. No one has any vested right in the common law, except in so far as it is carried into the Constitution. By legislative enactment it is in force in this state when not in conflict with the Constitution or statutes. As the decisions constituting the common law regarding the time and method for taking objections to grand juries are conflicting, our Legislature has wisely provided that a person who has been held to answer by a committing magistrate may by challenge interpose his objection to the grand jury at the time it is impaneled, and in no other mode. Revised Laws, §§ 7004, 7005, 7010. No good reason is apparent for holding that this statute may not control such a matter of practice. This is evidently intended to give the accused person an opportunity, with fair diligence, to timely assert his constitutional rights and prevents the delay in the administration of justice and the useless expense which might be incurred if the challenges were allowed to be interposed after trial or after the grand jury has been impaneled, acted upon the case, and returned an indictment. The grand jury was drawn two weeks in advance, and it is not shown that with reasonable diligence or effort the accused could not have ascertained regarding the disqualification of grand jurors and interposed his challenges at the proper time. His absence while on bail when the grand jury was impaneled is no fault of the state.

[2] He was bound to know the specific provisions of the Code, that challenges may be interposed at the time the grand jury is impaneled, and that objections to the grand jury or a member thereof can be made in no other mode. He was required to be present at all the proceedings in which he was interested, and he was as much bound to appear and interpose the challenges, or have his attorney do so, at the time the court asked if any were to be made, as persons who were brought into court by the sheriff for the purpose of giving them an opportunity to interpose challenges. At section 112, vol. 1, Bishop's New Criminal Procedure (2d Ed.), that reliable author states: "Since accused persons may waive constitutional rights, they may doubtless, under some circumstances, waive the protection of this provision. They cannot when the effect would be to create a jurisdiction which the court did not otherwise possess, as to try one wholly without accusation. But formal objections may by statute be required to be taken at an early stage of the proceeding, in the absence whereof they will be treated as waived."

At section 996, 997, Bishop's New Criminal Law, it is said: "It is a doctrine to which there are few exceptions that a party in a

cause may waive any right which the law has given him, even a constitutional one. The courts will refuse to hear objections to the persons composing the grand jury, or to the manner in which it is impaneled, after the case has been tried by the petit jury, or, indeed, after proceedings earlier than the trial."

In volume 10, *Ency. P. & P.*, at pages 355, 404, 406, it is said: "The incompetency of one grand juror is sufficient to render the body illegal and findings by it void. This rule is subject, however, to the requirements in the various states in respect of the time and manner of raising such an objection. But the manner of raising various objections is not the same in all jurisdictions, and the extent of the foregoing rule as to waiver is more or less dependent upon local practice. On the other hand, when the defendant is held to answer, he is entitled to challenge, and his right cannot be denied him unless he waives it; but the challenge being, under such circumstances, his only remedy in many states, he must take advantage of his privilege in proper time or his right will be waived, even if, at the time of his privilege, he did not know of the existence of the objections."

It is said in 24 Cyc. p. 129, that "alienage is a disqualification to act as a juror and was such at common law, and one which the parties may waive."

Bierly, in his work on *Juries and Jury Trials*, at page 85, states that after arraignment and plea it is too late to challenge, indicating that in his opinion such objection does not go to the jurisdiction so as to vitiate subsequent proceedings. The conclusion is that any error in this regard cannot be corrected by special writ.

In *Commonwealth v. Freeman*, 166 Pa. 332, 31 Atl. 115, it was held that a motion to quash the panel after four jurymen had been selected and sworn came too late.

In *Commonwealth v. Penrose*, 27 Pa. Super. Ct. 111, 112, it was said in the opinion: "The disqualification of the juror was a purely legal one which did not at all tend to impeach his capacity, integrity, or impartiality. It would have been disclosed, if he had been interrogated at the time he was sworn, but the defendant voluntarily omitted to avail himself of the means at his hand for informing himself and the court upon the subject. He preferred, perhaps, to hold them in reserve to be used in the event of an adverse verdict, as he had a perfect right to do, if the position of his counsel is correct. We think, however, that their position is not tenable. In *Hollingsworth v. Duane*, 4 Dall. 353 [1 L. Ed. 864], as the report of the case goes, 'the court after a long advisement upon the subject seemed to think that alienage might have been a cause of challenge before the juror was sworn; but upon an extensive review of the authorities

they decided that advantage could not be taken of it after verdict.' * * * In *Commonwealth v. Thompson*, 4 Phil. 215, it was held that, although the alienage of a juror is good cause of challenge, the court will not set aside the verdict of the jury in a criminal case on that ground, where the trial has been allowed to proceed without any objection having been made to the juror's disqualification, even where there is evidence, from the affidavits of the juror and the prisoner, that the fact of alienage was not disclosed by the one, nor known to the other, before the trial. This decision is not binding upon us, it is true. We cite the case because the reasoning of Judge Allison in support of the above conclusion commends itself to our judgment as a sound and convincing exposition of the law upon the subject. The decisions of the courts of the other states upon the subject are not harmonious, but the weight of authority seems to be in favor of the conclusion we have reached, namely, that, under the circumstances to which we have alluded, the court below wisely exercised the discretion committed to it in holding the alienage of the juror to be an insufficient reason for setting aside the verdict. A collection of many of the decisions will be found in *State v. Pickett*, 103 Iowa, 714, 73 N. W. 346 [39 L. R. A. 302]."

In *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750, the Montana statute provided for the challenging of the grand jury before it was sworn, and that a failure to make the challenge should be deemed a waiver of the right to object, and it was held that defendant had waived his right of challenge and could not afterwards object that one of the grand jurors was not a citizen of the United States, although he did not learn that fact until after the indictment was found and returned into court.

In *Territory v. Hart*, 7 Mont. 58, 14 Pac. 774, and 7 Mont. 496, 17 Pac. 720, the court said: "The juror Doniothy, who was challenged on account of alienage, was permitted by the defendant to sit in this case, through a failure to exercise his right of peremptory challenge; the accused having two peremptory challenges unexhausted when he accepted the jury. He thereby waived the objection of alienage, if it were otherwise a good objection, and there was no error of which he could properly complain. It has been repeatedly decided that alienage is a disqualification of a juror which the defendant may waive either expressly or by failure to object at the proper time. *Territory v. Hart* [7 Mont. 42], 14 Pac. 774." This position was held by the court after thorough investigation and long consideration of the authorities.

Following provisions relating to challenges, the Code provides that, if the challenge to the panel is allowed, the grand jury are prohibited from inquiring into the charge

against the defendant by whom the challenge is interposed, and that, if a challenge to an individual grand juror is allowed, he cannot be present or take part in the consideration of the charge against the defendant who interposed the challenge. Rev. Laws, §§ 7008, 7009. Section 7010, which provides that "a person held to answer for a public offense can take advantage of any objection to the panel or to an individual grand juror in no other mode than by challenge," is similar to the California statute. Kerr's Cyc. Pen. Code, § 901.

In *People v. Arnold*, 15 Cal. 479, the court said: "The defendant was held to answer before the finding of the bill. He was then bound to make his objection to the grand jury on their being impaneled. It is argued that the defendant cannot, by the Constitution, be tried unless and until indicted by a grand jury; and that this means a grand jury constituted according to law; and that a bill by a grand jury not so constituted is a nullity. But the answer is that the Legislature may constitutionally prescribe rules of practice in criminal or civil cases, and that among these is the provision as to the time and mode of excepting to irregularities of proceeding; and it is ordained that exception to the grand jury shall be made at a particular time. In many of the states, exceptions to particular jurors or to the panel are required to be made by plea in abatement and cannot be heard unless so made; yet the same constitutional provisions in substance obtain in those states, and the same argument would hold that this practice, long acquiesced in and upheld without objection by the courts, is unconstitutional."

In *State v. Romero*, 18 Cal. 94, it is said in the opinion: "If the prisoner were refused the privilege of challenging the grand jury in and by the court of sessions, the indictment is insufficient and worthless; it is not, in other words, a legal indictment, because not found by a body competent to act on the case; but, to have this effect, the prisoner must have applied for leave or requested permission to appear and challenge the jury. It was not the duty of the court of sessions to bring him into court for the purpose of exercising this privilege. It is the prisoner's business to know when the court meets and, if he desires to challenge the jury, to apply, if in custody, to the court, to be brought into court for that purpose; and, if he fails to do this, he waives his privilege of excepting to the panel or any member."

However, the better practice prevails in this state of having persons held to answer brought into court and given an opportunity to challenge the grand jury at the time it is impaneled.

In *People v. Henderson*, 28 Cal. 469, the defendant, under indictment for murder, moved to set aside the indictment on the ground that one of the grand jurors was not a taxpayer and one of them was not a citizen

at the time the grand jury was summoned, although he was naturalized before it was impaneled. The court said: "Conceding the point to be otherwise good, under these circumstances the objection came too late, when taken for the first time after indictment found. The objection should have been made by challenge at the time of the impaneling of the jury. *Crim. Prac. Act*, §§ 183, 189, 297; *People v. Colmere*, 23 Cal. 632; *People v. Arnold*, 15 Cal. 479; *People v. Chung Lit*, 17 Cal. 322; *People v. Romero*, 18 Cal. 93."

In *United States v. Gale*, 109 U. S. 67, 69, 3 Sup. Ct. 3, 4, 27 L. Ed. 857, it is said in the opinion: "We have no inexorable statute making the whole proceedings void for any such irregularities. * * * It seems to be requisite that all ordinary objections based upon the disqualification of particular jurors, or upon informalities in summoning or impaneling the jury, where no statute makes proceedings utterly void, should be taken in limine, either by challenge, by motion to quash, or by plea in abatement. Neglecting to do this, the defendant should be deemed to have waived the irregularity. It would be trifling with justice and would render criminal proceedings a farce, if such objections could be taken after verdict, even though the irregularity should appear in the record of the proceedings."

In *Foreman v. Hunter*, 59 Iowa, 550, 13 N. W. 659, it was held that a verdict rendered by a jury, two of whose members were aliens, was erroneous but not void; that the objection might be considered on appeal but could not be taken by writ of habeas corpus.

In *Kaizo v. Henry*, High Sheriff of Hawaii, 211 U. S. 148, 29 Sup. Ct. 42, 53 L. Ed. 125, it was said that the objection that eight of the grand jurors were not citizens of the United States could not be taken by writ of habeas corpus but by writ of error, which is equivalent to a writ of appeal in the state courts. The court said: "Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U. S. 782 [7 Sup. Ct. 780, 30 L. Ed. 824]; *In re Wood*, 140 U. S. 278 [11 Sup. Ct. 738, 35 L. Ed. 50]; *In re Wilson*, 140 U. S. 575 [11 Sup. Ct. 870, 35 L. Ed. 513]. See *Matter of Moran*, 203 U. S. 96, 104 [27 Sup. Ct. 25, 51 L. Ed. 105]. * * * The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization, and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law com-

mitted in the course of the proceedings, they can only be corrected by writ of error."

In *State v. Larkin*, 11 Nev. 325, Chief Justice Hawley, speaking for this court, said: "From these facts it appears that at the time the grand jury was impaneled defendant was not held to answer before it for any offense. He, however, had the privilege, under the ruling of the court, as well as by virtue of the provisions of section 276 of the criminal practice act, to move to set aside the indictment 'on any ground which would have been good ground of challenge either to the panel or any individual grand juror.'"

* * * Having refused to exercise this privilege, he is not in a position to complain of the ruling of the court. *People v. Romero*, 18 Cal. 93." This is equivalent to saying that the accused is required to interpose his objection to the grand jury at the time provided by the statute, which in that case was before pleading to the indictment because he had not been held to answer, and which in this case is at the impanelment of the grand jury because petitioner had been held to answer.

[3] As the state is disposed to prosecute and could have proceeded by information, it is not apparent that special injury will result to the accused by allowing the trial to proceed upon the indictment. Differently from a foreigner who might be unfamiliar with our language or methods, or without sympathy for our institutions, the fact that the member of the grand jury to whom objection is so seriously made is a senator in a sister state leads to the conclusion that he is a citizen of the United States and of more than ordinary ability and understanding of our laws. It appears that he has been living and following industrial pursuits in this state for the most of the time during the last year or two, and that his only disqualification for being a good grand juror is his intention to retain his residence in Wyoming. Men sometimes maintain residences in different places, although allowed only one legal residence as an elector.

In order to sustain the contention of the petitioner, we would have to hold contrarily not only to numerous decisions which are in conflict with others but to the opinions of textwriters as generally expressed, and we would have to set aside the plain provisions of our Code. The district judge reviewed a number of authorities and properly held that the accused had waived his right to challenge the grand jury.

[4] The writ of prohibition will issue only when there is an exercise of functions without or in excess of jurisdiction. *Rev. Laws*, § 5708; *Knight v. District Court*, 32 Nev. 346, 108 Pac. 358, Ann. Cas. 1912D, 143; *Turner v. Langan*, District Judge, 29 Nev. 281, 88 Pac. 1083.

The application for the writ is denied.

NORCROSS, J., concurs.

McCARRAN, J. (dissenting). I regret that I cannot concur in the opinion rendered by my learned Associates. My investigation of this vital and important matter leads me to reason it out along different lines from that followed in the prevailing opinion.

On September 24th the petitioner was held by the justice of the peace of Wells township to answer to the charge of grand larceny and admitted to bail. On the 23d of September, 1913, the judge of the district court, in and for Elko county, and Isaac Griswald, one of the county commissioners of the county, proceeded, as the record discloses, to select a grand jury for the fall (October) session of the district court; that the judge and commissioner as a result of their proceedings certified to the clerk a list of 24 names, as the certificate set forth, selected from the qualified jurors of said county as grand jurors for the fall (October) session of the district court. On the list so certified appears the name of W. A. Hyde. On the 24th of September, the clerk, pursuant to order, issued a venire directed to the sheriff of the county commanding him to summon the 24 persons named in the list certified to him by the judge and commissioner, commanding them to be present at the district court on the 8th day of October, at 10 o'clock a. m. On the day designated in the venire, to wit, the 8th day of October, the court selected from the number responding to the summons 17 members, among which was W. A. Hyde. The court then asked if there was any challenge to the panel of the jury or to any individual juror. It appears from the testimony of the district attorney that at this time Mr. Jas. A. Dysart, one of the attorneys for the petitioner, was in court. The minutes of the court set forth: "There being no challenges, the court appoints Frank Fernwald, Sr., as foreman of said grand jury and instructed them as to their duties; the grand jury then retired for deliberation and investigation." The grand jury so impaneled returned an indictment against petitioner in which indictment he is charged with the crime of grand larceny. After the filing of the indictment the petitioner appeared in court, with his attorneys, and moved to quash the indictment upon the ground that it was found by a body of men which was not in law and in fact a constitutional grand jury, and that said accusatory paper returned to said court was worthless and void as an indictment and the court had no jurisdiction to try the defendant upon it. In support of their motion to quash several affidavits were filed, the most significant of which is that of C. E. Gundlach, which reads as follows: "C. E. Gundlach, being duly sworn, deposes and says: That he is a duly appointed, qualified, and acting constable of the town of Metropolis, county of Elko, state of Nevada, and was, during all the time hereinafter mentioned, such constable; that he has known one W. A. Hyde, who appeared

and acted as one of the members of the grand jury, who returned an indictment against the above-named defendant on the 9th day of October, 1913, A. D., in the county of Elko, state of Nevada, for more than two years last past; that he has seen the said W. A. Hyde at various and divers times in and about the town of Metropolis, county of Elko, state of Nevada, for the past two years; that during the year 1912, A. D., your affiant was deputy registration officer, duly appointed and qualified for the precinct of Metropolis, in the county of Elko, state of Nevada; that in the discharge of his duties as such registration officer, a few days before the closing of the list of registered voters, in the month of October, 1912, A. D., your affiant approached the said W. A. Hyde and asked him if he wished to register as an elector of the county of Elko, state of Nevada, for the coming general election of 1912, A. D.; that in reply to said request of your affiant the said W. A. Hyde stated to your affiant that he did not wish to register as an elector in the county of Elko, state of Nevada, for the reason that he did not reside in the county of Elko, or the state of Nevada, or the precinct of Metropolis; that rather at the time of said conversation he was a resident of the state of Wyoming; that he was at said time of said conversation the duly elected, qualified, and acting state senator of the state of Wyoming; that he intended to attend the session of the Legislature of that state, which would convene in January of the year 1913, A. D.; that an attempt would be made at that time to unseat him as a member of said Legislature upon the ground that he was a nonresident of the state of Wyoming; that if he signed the registration roll in the county of Elko, state of Nevada, he would legally become a resident of the state of Nevada, which it was his intention not to do; that thereafter your affiant saw the said W. A. Hyde in and about the town of Metropolis, state of Nevada, until the beginning of the year 1913, A. D., when he departed from said town of Metropolis to attend the session of the Legislature then beginning in the state of Wyoming; that your affiant lives in the town of Metropolis, in the county of Elko, state of Nevada, and has so lived during the times herein mentioned; that he was in the town of Metropolis, county of Elko, state of Nevada, continuously from the first of the year 1913 to the 1st of March, 1913, and that during said two months he never saw the said W. A. Hyde in or about the town of Metropolis, county of Elko, state of Nevada; that on or about the 1st of March, 1913, A. D., he met the said W. A. Hyde in the town of Metropolis, county of Elko, state of Nevada, and that the said W. A. Hyde told your affiant that he had just returned from the session of the Legislature in the state of Wyoming, which had just adjourned in that state, sine die, and the said W. A. Hyde at the said time told your affiant

that the Legislature of the state of Wyoming had failed to unseat him as a member of said body and that he was at the time of said conversation a member of said body and a state senator of the state of Wyoming and would continue so to be until the next general election in the state of Wyoming, in the year 1914, A. D." No counter affidavits were filed by respondent.

Section 8 of article 1 of the Constitution of Nevada prescribes: "No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service, and the land and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny under the regulation of the Legislature) except on presentment or indictment of a grand jury," etc.

Section 27 of article 4 of our Constitution prescribes: "Laws shall be made to exclude from serving on juries, all persons not qualified electors of this state, and all persons who shall have been convicted of bribery, perjury, forgery (forgery), larceny or other high crimes, unless restored to civil rights," etc.

As to who are qualified electors within the state of Nevada, section 1 of article 2 of the Constitution prescribes: "Every male citizen of the United States (not laboring under the disabilities named in this Constitution) of the age of twenty-one years and upwards who shall have actually and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now are or hereafter may be elected by the people," etc.

Following the provisions and directions of the Constitution heretofore quoted, the Legislature of this state in 1873 (St. 1873, c. 65) enacted a statute entitled "An act concerning juries," section 1 of which reads as follows: "Every qualified elector of the state, whether registered or not, who has not been convicted of treason, felony, or other infamous crime, and who is not rendered incapable by reason of physical or mental infirmity, is a qualified juror of the county in which he resides, or of the county to which it is attached for judicial purposes."

From the record in this case it is manifest that the district judge and commissioner in attempting to select the grand jury in question herein sought to follow section 4940 of the Revised Laws, which in part reads as follows: " * * * Grand jurors may be selected from the qualified jurors of the county whether their names are or are not upon the list selected by the board of commissioners," etc.

It is the contention of respondent in this case that, admitting that the juror was not a qualified elector in this state and was in fact by his own act, choice, and declaration a citizen of another state, this disqualification could only be taken advantage of by pe-

tioner by challenge to the jury at the time of the impanelment of the grand jury. In this respect it must be observed that the statute (section 7010, Rev. Laws) prescribes: "A person held to answer for a public offense can take advantage of any objection to the panel or to individual grand jurors in no other way than by challenge."

The grounds of challenge to the panel and the only grounds prescribed by statute at all are those specified in section 7004, Rev. Laws, as follows: "A challenge to the panel may be interposed for one or more of the following causes only: (1) That the requisite number of ballots was not drawn from the jury box of the county as prescribed by law. (2) That the notice of the drawing of the grand jury was not given as prescribed by law. (3) That the drawing was not had in the presence of the officers or officer designated by law."

Section 7005 prescribes the grounds upon which challenge may be interposed to the individual grand juror as follows: "A challenge to an individual grand juror may be interposed for one or more of the following causes only: (1) That he is a minor; (2) that he is an alien; (3) that he is insane; (4) that he is a prosecutor upon a charge against the defendant; (5) that he is a witness on the part of the prosecution, and has been served with process or bound by an undertaking as such; (6) that a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging," etc.

The contention of respondent is that, as petitioner was present by his attorney at the time of the impanelment of the grand jury, it was his duty, if he saw fit, to challenge either the panel or the individual members of the jury, and especially in this instance it was his duty to challenge the juror Hyde upon the ground that he was not a qualified elector, and they contend that, having failed to challenge at the impanelment of the jury and before the indictment was found, petitioner has waived his right of challenge and cannot prevail herein.

It is fundamental, in cases of this kind, that an indictment must be found and presented by a lawful grand jury. The intention of the Legislature, and, moreover, the intention of the framers of the Constitution of this state, is too clearly expressed in the sections of the Constitution and Code above quoted to be misunderstood. It was the intention of the framers of the Constitution to safeguard life and individual liberty, and to that end they wisely provided and expressly prescribed as to who should be eligible for jury duty in this state and as to who should be excluded. Section 27, article 4, of the Constitution, is mandatory in its exclusion. It provides that laws shall be made to exclude from service all persons not qualified electors of this state. In an issue of such

moment as the one at bar a defendant is entitled to demand the observation of all the formalities of the law. It is his constitutional privilege to stand upon his strict legal rights, and he is entitled to strict compliance, on the part of judicial and ministerial officers, to the legal formula prescribed.

In the case of *State v. McNamara*, 3 Nev. 75, this court said: "An indictment found by a jury not legally constituted cannot be valid." In that case this court quoted approvingly from the Supreme Court of California in the case of *People v. Coffman* (24 Cal. 234): "The defendant is entitled to have all the formalities observed that are prescribed by law for the summoning, drawing, and impaneling of the jury, and, if any omission or irregularity in that respect occurs, he is entitled to have the same corrected, and, if not so corrected upon its being pointed out by the defendant, it is error."

The contention of respondent, in my judgment, is answered by the fundamental proposition that it is the right of the accused to have the question of his guilt passed upon by a competent grand jury, before he can be called upon to answer to the charge of crime, and a competent grand jury means one composed of good and lawful men and a grand jury composed of men not excluded by constitutional provision. A man should not be put upon his trial upon a charge preferred by a body of men who are precluded by constitutional provision and by statutory enactment from preferring a charge against him.

Section 27, art. 4, of the Constitution, excluding from service on juries persons not qualified electors, either means exactly what it says or it means nothing. It either means that none but qualified electors can constitute a valid jury or else it has no force or effect whatever. By that constitutional provision qualified electorship is made a prerequisite for every member of a valid jury. It cannot, in my judgment, be successfully argued that this constitutional provision could be waived by one accused even by stipulation, much less by silence. At common law it was necessary that indictments should be found by a grand jury composed of good and lawful men. 2 Hawkins P. C. 309. In this respect Chitty in his treatise on Criminal Law says: "It is perfectly clear that all persons serving upon a grand jury must be good and lawful men, by which it is intended that they must be liege subjects of the King and neither aliens nor persons outlawed even in a civil action," etc.

At common law, as will be seen by the earlier authorities and text-writers on the subject, none but those who were liege subjects of the King and who possessed this prerequisite could serve as grand jurors. This principle has been carried down to the present time by constitutional and statutory enactment, and it is the same principle that is expressed in our Constitution, wherein it expressly excluded from service on juries all persons

not qualified electors of the state. Section 27, art. 4, Constitution of Nevada. By our Constitution and by the laws enacted under it providing for the selection of jurors, qualified electorship is made a fundamental prerequisite for the right and privilege to serve on jury duty. By this prescription the class from which good and lawful jurors may be selected is limited and defined, to the exclusion of all others. It is a constitutional demand of elimination which no one affected thereby can waive either expressly or by silence.

As was said by the Supreme Court of Utah in the case of *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262, that which the law makes essential in proceedings involving the deprivation of life or liberty cannot be disposed of or effected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.

Eliminating everything in this case save the validity of the jury itself, would any one seriously contend that the district judge in this case might have impaneled a valid grand jury of 17 men, every one of whom was a citizen of Wyoming, sojourners in this state? Manifestly not. The mere suggestion is ludicrous. But why not if the members themselves made no demurrer and were willing to serve? When we pause to ask the question, the reason appeals to a more serious condition. The whole body of such a grand jury would be void by reason of a fundamental defect, by reason of the fact that by the Constitution of this state they were excluded from the right or privilege of being summoned or to serve as jurors, although qualified in every other respect. Such a body would be devoid of that fundamental requisite which had its origin in the ancient precept that each to be qualified must be a liege subject of the King and which, carried down into modern times and embodied in the Constitution of this state, is prescribed to be qualified electorship. If the whole panel under such conditions would be void will the mere fact that 16 good and lawful men are impaneled and one not possessed of that qualification is impaneled with them constitute a valid jury, when the law says that 17 men possessing the qualification of electorship shall constitute a grand jury panel? If 17 disqualified men would constitute a void jury, how many less than 17 disqualified men will constitute a valid jury panel? If a jury is void by reason of constitutional and statutory provision, how can a mere waiver of objection to its void nature make it valid? The statute provides that grand jurors may be selected from the qualified jurors of the county, and the qualified jurors of the county are limited to those who are qualified electors. If, by statutory enactment, the field from which grand jurors might be selected was not limited to the qualified elect-

ors of the county, or if the court had general powers in the selection of grand jurors, or if the Constitution did not exclude from jury duty all persons not qualified electors, a different reasoning might follow, and statutes such as ours might be considered as directory in their nature. But the Legislature had no power to go beyond the limit prescribed for it by the Constitution, even if it had been so inclined, which is not the case here, and, in my judgment, the courts have no authority to sanction a departure from that which is an imperative provision of the Constitution. In the selection and impaneling of grand jurors, courts should be strict in discountenancing and discouraging irregularities, and a more strict compliance with the plain provisions of the statute, in matters of this kind, would avoid much of what is termed "the law's delay."

The Supreme Court of Tennessee, in the case of *State v. Duncan*, 7 Yerg. 275, speaking through Mr. Chief Justice Catron, said: "Suppose an indictment was found by a grand jury, no person composing of which was qualified? All will admit the indictment would be merely void in fact and ought not to be answered if the fact was made legally to appear. So, if any one be incompetent, it is equally void, because the proper number to constitute the grand inquest is wanting, and because he who is incompetent shall not be one of the triers of the offense at any stage of the prosecution."

Section 1025 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 720) provides: "No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be effected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

In speaking upon the application of this statute, Mr. Justice Harlan, in the case of *Crowley v. U. S.*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075, speaking for the Supreme Court of the United States, said: "The disqualification of a grand juror is prescribed by statute and cannot be regarded as a mere defect or imperfection in form; it is a matter of substance which cannot be disregarded without prejudice to an accused."

The prevailing opinion in the case at bar states: "As the state is disposed to prosecute and could have proceeded by information, it is not apparent that special injury will result to the accused by allowing the trial to proceed upon the indictment. Differently from a foreigner who might be unfamiliar with our language or methods, or without sympathy for our institutions, the fact that the member of the grand jury to whom objection is so seriously made is a senator in a sister state leads to the conclusion that he is a citizen of the United States and of

more than ordinary ability and understanding of our laws. It appears that he has been living and following industrial pursuits in this state for the most of the time during the last year or two, and that his only disqualification for being a good grand juror is his intention to retain his residence in Wyoming. Men sometimes maintain residences in different places, although allowed only one legal residence as an elector." If we were to follow this reasoning to its logical conclusion, the judge of the district court of Elko county might have impaneled the entire Legislature of the state of Wyoming, if by chance they happened to be sojourning in the community, or being enticed by the fertility of our soil or the glory of our scenery they came to Elko county to remain between sessions. The seriousness of the proposition before this court will admit of no such reasoning in my judgment. It is not a question of prejudice to the defendant, or to any person, nor is it a question of overriding the constitutional prohibition, so that citizens of another state, however eminent they may be, can be impaneled to sit as members of a body, the functions and powers of which invade every avenue of our social compact and by which any one of our people may be put upon trial for his liberty or life. The question is not how it may affect any one or every one; it is rather: Is the panel legally constituted? Are its members drawn from that class within the county possessed of the constitutional demand of qualified electorship? The Constitution and the statutes prescribe the limits to which a court may go in selecting grand jurors, the manner of selection, and, above all, the citizenship from which the individual members of the panel may be selected and limits the court in its selection to that class of individuals of the county who, by act and intention, have brought themselves within the roll of electorship. A grand jury is not a body, the importance of which should be lightly regarded; it has its sanction in the Constitution, and the Constitution prescribes the qualifications for its component membership; its functions and offices are sacred to the institutions of our government; it investigates our public officers; it invades the operation of the government closest to the people and inquires into the efficiency and honesty of public servants; but most of all its investiture gives it the right to indict and thereby to challenge the individual to his right of liberty or life. The fundamental laws having prescribed strict rules for the selection, summoning, and impanelment of such a body and having declared that the prime requisite of every member of that body is qualified electorship in the county, is it within the province of courts to say that anything less than the demand and prerequisite of the Constitution and the laws enacted under it will suffice?

The reasoning laid down in the case of

Doyle v. State, 17 Ohio, 224, in a proceeding almost identical to this, and where the statute relating to jurors provided that they should have the qualification of electors, is especially applicable here; it having been contended there, as in this case, that the objection was interposed too late. That court said in substance: No objection can come too late which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights. The doctrine of waiver has nothing to do with criminal prosecution. A person can be put upon his defense on a charge of crime and be convicted of crime only in the exact mode prescribed by law; and, whenever it shall be made manifest that the legal rights of the person charged have been violated, the court should permit the accused to have the benefit of the error. The courts have the power only to try a person who has been indicted for crime. What an indictment is a matter of law. Who shall constitute a grand jury, how it shall be summoned, composed, and organized is all matter of constitutional and statutory provisions. No man can by his consent or will constitute a grand jury; no man by express consent can confer jurisdiction upon a court to try him for crime; no man, by express consent, can make that an indictment which is not an indictment.

The trial judge in his able decision rendered on this point, and which is before us in the record, said that, if the objection had been raised to the juror Hyde in time, he would have been excused. How could the petitioner's waiver or silence, or failure to raise the objection, make that a grand jury which was not a grand jury in law? It was not for petitioner to make the grand jury but for the statute, and that which was void as being without qualification could create nothing more valid than itself; hence the indictment was void. To say that a person charged, by entering a plea of "not guilty" to a void and invalid indictment, could confer upon the court power to try and sentence him does not ring true either in reason or in law. Doyle v. State, 17 Ohio, 224; Crowley v. U. S., 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075; U. S. v. Lewis (D. C.) 192 Fed. 633.

The respondent contends, and the prevailing opinion holds that petitioner should have made this objection at the time of impanelment of the grand jury. How can this be true when the objection here raised, being that the juror Hyde was not a qualified elector, is not embraced in any of the grounds prescribed by statute for challenge to the individual grand juror. It cannot be successfully argued that the ground of challenge prescribed by statute under section 7005 "that he is an alien" can apply to cover the objection raised here. The term "alien," by its general acceptance and in contemplation of statutes, generally means a citizen of a foreign country, one born out of the United States and not naturalized. Hennessy v.

Richardson, 189 U. S. 25, 23 Sup. Ct. 532, 47 L. Ed. 697; Words and Phrases Judicially Defined, vol. 1, 299.

The objection here raised is one that comes from lack of compliance with specific constitutional provision; hence there is no provision of statute limiting the time in which or prescribing the time at which this question may be raised. It is not embraced within any of the grounds set forth in section 7005. It being a constitutional provision, bearing upon the constitutional rights of the individual, he has the right to raise it at any time the same as that of jurisdiction. In my opinion the question here raised is not controlled by any statute. The time in which it may be raised or at which it may be raised is not limited by our Code, and it must depend on principles of general law applicable to criminal proceedings in civilized countries, and the whole question falls squarely within the rule as laid down by the Supreme Court of the United States in the case of *Crowley v. U. S.*, supra, and in that case, under laws and conditions very much analogous to those presented in the matter at bar, the court granted the relief prayed for.

I recognize that the prevailing opinion in this case is in some respects supported by authority; but in view of our constitutional provisions and the statutes enacted under it, and reading them in the light of what in my judgment was the true intention of the framers of our government, I cannot reach any other conclusion than that, in view of all the facts presented by the record here, the writ prayed for in this case should have been granted.

UTAH ASS'N OF CREDITMEN v. BOYLE FURNITURE CO.

(Supreme Court of Utah. Nov. 17, 1913.)

1. PLEADING (§ 8*)—PREFERENCES—ACTIONS TO RECOVER—ALLEGATIONS OF COMPLAINT—CONCLUSIONS.

An allegation of the complaint, in an action to recover a preference under the federal Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), that the effect of the transfer was to enable defendant to obtain a greater percentage of his debts than any of the other creditors of the same class, was not objectionable as a conclusion of law; having substantially followed the language of the bankruptcy act.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

2. BANKRUPTCY (§ 160*)—RECOVERY OF PREFERENCES—"INSOLVENT."

A person is deemed "insolvent" whenever the aggregate of his property, exclusive of that which may be conveyed, concealed, or removed with intent to defraud creditors, and all property exempt to him under state laws, shall not at a fair valuation be sufficient to pay his debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 249; Dec. Dig. § 160.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

3. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error, in an action to recover preferences under the federal Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), in admitting in evidence schedules filed in the bankruptcy proceedings as evidence of the bankrupt's assets and liabilities, was not prejudicial to defendant, where they were not considered by the appellate court on the question of insolvency, and the trial court's finding thereon is sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

4. APPEAL AND ERROR (§ 1099*)—LAW OF CASE—RULING ON FORMER APPEAL.

A ruling as to the admissibility of evidence made on a former appeal is the law of the case on a second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

5. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting in evidence, in an action to recover preferences under the bankruptcy law, the schedules filed by the bankrupt as evidence of his assets and liabilities, was not injurious to defendant so far as the statements therein were confirmed by the bankrupt's testimony for defendant at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

6. WITNESSES (§ 392*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

In an action to recover a preference given by an insolvent contrary to the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), the schedules of assets and liabilities filed in the bankruptcy proceedings are admissible in evidence on the issue of insolvency, to contradict evidence for defendant given by the bankrupt; his attention having been first called to the conflict.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251, 1257; Dec. Dig. § 392.*]

7. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

Instructions should be considered together.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

8. BANKRUPTCY (§ 303*)—PREFERENCES.

Where the inevitable result of a transaction between a debtor and creditor is to create a preference, it is presumed that the creditor as well as the debtor intended to bring about that result.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

9. BANKRUPTCY (§ 4*)—PURPOSE OF BANKRUPTCY LAW.

The object of the bankruptcy law is to enforce equality among the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 3, 4; Dec. Dig. § 4.*]

10. BANKRUPTCY (§ 166*)—PREFERENCES—NOTICE OF INSOLVENCY.

One of the officers of defendant corporation, which received a part of a bankrupt's stock of goods originally purchased from it, inspected the stock before it was transferred and was told the amount of the bankrupt's unsecured liabilities, and that there were mortgages amounting to a certain sum on the real estate, and could have ascertained the exact condition of such real estate from the county records, which would have showed that the bank-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rupt had conveyed all of his interest in the realty subject to the mortgages thereon. *Held*, that a finding was authorized that defendant's officer had or could have had full information concerning the bankrupt's insolvent condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 168.*]

11. BANKRUPTCY (§ 303*) — PREFERENCES — EVIDENCE—SIMILAR TRANSACTIONS.

In a suit to recover an alleged preference consisting of a return of purchased merchandise to the seller while insolvent, evidence that on previous occasions the bankrupt had returned merchandise to defendant and received credit therefor was not admissible.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

12. BANKRUPTCY (§ 168*)—PREFERENCES—INTEREST.

Upon recovering a preference made contrary to the federal Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), interest should be allowed from the time a demand is made upon defendant for the return of the preference, and, if no formal demand is made, from the time suit is instituted to recover the property; the commencement of the action constituting a demand.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. § 168.*]

Appeal from District Court, Box Elder County; W. W. Maughan, Judge.

Action by the Utah Association of Creditmen against the Boyle Furniture Company. From a judgment for plaintiff, defendant appeals. Affirmed as modified, and remanded, with directions.

Halverson & Pratt, of Ogden, for appellant. Stephens, Smith & Porter, of Salt Lake City, for respondent.

FRICK, J. This action was brought under the federal Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) to recover an alleged preference. This is the second appeal. See 39 Utah, 518, 117 Pac. 800, for first appeal. This appeal was argued and submitted during the February, 1913, term. An opinion affirming the judgment was handed down before the commencement of the May term of that year, but pending the latter term appellant's counsel filed a petition for a rehearing, which was granted, and the judgment of affirmance was set aside, and the case was again thrown at large. During the present October term the case was again argued by both sides and resubmitted. We have again carefully gone over the evidence and considered the arguments of counsel, and this opinion is substituted for the former one and will be the only one published in this case.

[1] The first contention made by counsel for appellant is that the complaint is deficient in substance, and hence does not support the verdict and judgment rendered and entered against the appellant. In this connection it is contended that the allegation that "the effect of said transfer was to enable the said defendant (appellant) to ob-

tain a greater percentage of his debt than any of the other creditors of said W. B. Jensen (the bankrupt) of the same class" is a mere conclusion of law, and hence leaves the complaint in this case as if no allegation upon that subject had been made. In making the foregoing statement in the complaint the pleader substantially followed the language of the Bankruptcy Act. It has repeatedly been held by the courts that, among other things, it is essential to allege in the complaint that the transfer or payment complained of will have the effect of giving the creditor to whom it was made a greater percentage of his claim out of the bankrupt's estate than other creditors of the same class will obtain. The only question is whether an allegation substantially in the language of the statute is sufficient. This question was squarely presented for decision in *Crooks v. People's Nat. Bank*, 46 App. Div. 335, 61 N. Y. Supp. 604, 3 Am. Bankr. Rep. 243, and it was there held that the statement aforesaid is not a statement of a legal conclusion, but that it "is an allegation of a resultant fact, and it is such facts and not evidentiary facts that are to be alleged in a pleading." The allegation substantially in the language of the statute was accordingly held to be sufficient. The subsequent cases of *Schreyer v. Citizens' Nat. Bank*, 74 App. Div. 478, 77 N. Y. Supp. 494, and *West v. Bank of Lahoma*, 16 Am. Bankr. Rep. 733, 16 Okl. 328, 85 Pac. 469, merely make it clearer that the rule as laid down in *Crooks v. People's Nat. Bank*, supra, is the proper one. Counsel for appellant have cited no case in support of their contention. We are of the opinion that upon principle, and according to the rules of pleading, the allegation is sufficient; and hence this objection is not tenable.

It is further contended that no demand for the goods which are the subject of the action was proved. In view of appellant's claim and contentions it was not necessary to prove a demand. It is manifest from the record that if a demand had been made it would have been refused by appellant. The law does not require a demand to be made when it is clear that it would have been useless to make it. 1 Cyc. 698; *Kimball v. Farmers' & Mechanics' Bank*, 50 Wash. 610, 97 Pac. 748; *Coreland v. Kilpatrick*, 38 Colo. 208, 88 Pac. 472.

[2] One of the principal reasons assigned in the petition for a rehearing why a rehearing should be granted was that we had erred in holding that there was not sufficient evidence of the bankrupt's solvency to require a submission of that question to the jury. In *Loveland on Bankruptcy* (3d Ed.) 186, in referring to what constitutes insolvency, the author says: "A person is deemed insolvent whenever the aggregate of his property exclusive of any property which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may be conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." In the foregoing statement must be included all property that may be exempt to the bankrupt under the state laws. At the last hearing we took special pains to have counsel for appellant point out to us all of the property, either exempt or otherwise, which they claimed was owned by the bankrupt at the time the transfer in question was made. We have again carefully gone over the whole list of the property claimed by counsel and the valuation put upon it by them, and, without going into details or setting forth the several items, we are more firmly convinced than ever that under no possible view of the evidence could a jury of reasonable men have found that the bankrupt's property, taken at a fair valuation at the time of the transfer, was sufficient to pay his debts which were undisputed. Indeed, from a consideration of the evidence most favorable to appellant, all reasonable minds must arrive at but one conclusion, and that is that the whole of the bankrupt's property would have fallen far short of paying the admitted claims against him. In making the foregoing statement, we desire to say that we do not do so with the intention of reflecting upon the sincerity of counsel or upon their good faith in making their contention, but we make it because we are fully convinced that there is not sufficient evidence in the record from which a jury could find that the bankrupt was solvent at the time of the transfer. In view that after a second argument we are all convinced of the correctness of the foregoing statement, we shall refrain from setting forth the evidence or any part of it here. The only purpose that could be subserved in doing so would be to show from the evidence itself that our conclusions are justified. Where, as in this case, we are thoroughly convinced that but one result is permissible, we must determine what the result shall be. Where counsel and this court disagree, we must assume the responsibility of deciding who shall prevail. We therefore adhere to our former conclusion that the district court committed no error in determining as a question of law that the bankrupt was insolvent at the time of the transfer.

It is again contended, as it was on the former appeal, that the bankrupt and his wife owned certain real property as copartners, and that although the title to the same was held in the name of the wife alone the bankrupt nevertheless had an interest therein. We fully considered that question on the first appeal, and there held that there was not sufficient evidence to justify a finding that the relation of business partners existed between the bankrupt and his wife at

any time. The evidence upon that subject was even more meager on the last trial than it was on the former. In view of that fact, and for the reasons stated in the former opinion handed down on the first appeal, we adhere to the ruling there made.

[3-5] It is next contended that the court erred in admitting in evidence the schedules filed by the bankrupt in the bankruptcy proceedings as evidence of his assets and liabilities. We left these schedules out of consideration in arriving at our conclusions, and hence, if any error has been committed by the trial court in that regard, it is error without prejudice. Apart from this, however, the weight of authority clearly supports the ruling of the district court and the rule laid down by us in the former opinion, which, in any event, is the law of this case. But in no event could appellant have been prejudiced by the introduction of the schedules on the last trial, for the reason that the statements therein contained were, to say the least, declarations of the bankrupt, who was a witness for the appellant at the trial. This much he conceded. His testimony on the trial in some respects confirmed the statements contained in the schedules, and in others it was in conflict therewith. So far as the statements were confirmatory their admission could not have injured the appellant, and so far as they were in conflict the respondent had a right to show such conflict after directing the bankrupt's attention thereto.

[7, 8] It is further strenuously insisted that the court erred in charging the jury with respect to the question of appellant's intention to receive a preference by the transfer of the property to it. While the district court perhaps might have chosen language which would have been clearer and better adapted to inform the jury upon that question, yet we are of the opinion that when all the instructions are considered together, as they must be, the charge as a whole could not have misled the jury. In instruction No. 4 the court specifically informed the jury what respondent was required to prove in order to recover. No exception was taken to that instruction and no fault is found therewith. Counsel, however, contend that the court charged the jury that a specific intent to make and receive a preference need not be proved, and that this constituted error. In this connection it is insisted that under the law in force when the transfer in question occurred a specific intent to give and receive a preference was necessary. The court gave two instructions relating to that subject. Those two instructions must be considered together, as no doubt the jury considered them. If both are so considered, we are of the opinion that the appellant has no cause for complaint. The court did not charge the jury that an intent to prefer was not necessary; but what the court in

effect told the jury was that it was not necessary to prove such an intent by direct evidence, and that from certain circumstances, if found to exist, the intent might be presumed. The court, in charging the jury upon this subject, evidently attempted to follow the law as laid down by the United States Circuit Court of Appeals of the Sixth circuit in the recent case of *Kimmerle v. Farr*, 189 Fed. 300, 111 C. C. A. 32. In that case, after holding that the intent to prefer must be shown, it is said: "The intention to give a preference may be shown not merely by proof of actual intent, but by its equivalent in law—that is, by proof that the necessary result of the transaction was to create a preference—in which case the intention to give a preference will be presumed. Where the inevitable result of a transaction between a debtor and a creditor is to create a preference, the law will conclusively impute to the debtor the intention to bring about the result necessarily arising from the nature of the act which he does." What is to be presumed with regard to the debtor, where the circumstances governing them are the same, must also be presumed with respect to his creditor. The district court, in the instruction criticised, in effect told the jury just what is contained in the foregoing quotation, but did so in different language.

[8] The object of the bankruptcy law is to enforce equality among the bankrupt's creditors. That such is the case is clearly stated in *Re Blount* (D. C.) 142 Fed. 263, in the following words: "The main object of the Bankruptcy Act is to secure an equal distribution of the assets of an insolvent among all his creditors and prevent preferences. And it is the duty of the courts to carry this purpose into effect to the extent which the language of the act justifies. Schemes and artifices to evade the letter and spirit of the law will not be tolerated." See, also, *In re John J. Coffey*, 19 Am. Bankr. Rep. 148.

[10] The facts in this case are beyond dispute that one of the officers of the appellant corporation personally inspected the stock of merchandise the bankrupt had on hand and was told the amount of the bankrupt's unsecured liabilities at the same time, or about the time the transfer in question was made. He was also told that there were mortgages amounting to at least \$2,600 on the real estate. This officer was therefore charged with notice that the real estate was incumbered, and if he had either sent some one to inspect the county records or had taken the trouble to go the distance of a few blocks to inspect them himself he would have ascertained all about the condition of the real estate. He would have found that the bankrupt owned no interest in the real estate, but that he had conveyed it all subject to the mortgages upon it; that is, that the purchaser had agreed to pay the mortgages to the extent of \$2,000. The jury on that branch of the

case were fully justified in finding from the evidence that the officer in question had full information, or was apprised of sufficient circumstances which if followed up would impart to him full information, concerning the bankrupt's insolvent condition. Moreover, from the overwhelming weight of testimony coming from disinterested witnesses the jury were not only justified in finding, but were almost compelled to find, that appellant had received from the bankrupt about all of the salable or desirable goods he had in stock. The evidence is all but conclusive that after appellant had removed the furniture transferred to it there was not sufficient left in the bankrupt's store to continue in business, and in fact he discontinued it within a very few days thereafter. When the fact that the bankrupt was heavily indebted to others for goods purchased by him is kept in mind, and that all this was known to appellant's officers, the conclusion is unavoidable that both the bankrupt as well as the appellant's officers intended that appellant should be protected regardless of whether the other creditors received payment for their claims or not. The jury, therefore, could have arrived at but one conclusion, namely, that a preference was intended by the transfer in question.

[11] It is also contended that the court erred in refusing to allow appellant to prove that it had on other occasions taken goods back from the bankrupt and had given him credit therefor. The district court in that regard simply followed our decision on the former appeal, and, although counsel have assailed the correctness of that decision and have cited several cases which they claim hold to the contrary, we, after carefully examining those cases, are of the opinion that they are not in point. Moreover, we can see no good reason why the rule laid down in the former opinion is not the right one. We are of the opinion that it is the right one, and it is therefore adhered to, not only because it is the law of this case, but because in our opinion no other rule would be permissible under the circumstances disclosed by this record.

[12] Complaint is also made that the court erred in charging the jury with respect to the allowance of interest. Counsel for appellant devoted just six lines in their printed brief to this question, and perhaps for that reason the matter was inadvertently overlooked in our former opinion, and that fact was one of the reasons which induced us to grant a rehearing. The court charged the jury that if they found for the plaintiff they should allow interest on the amount found by them to be owing by appellant at the rate of 8 per cent. per annum from the date of the transfer of the property, which was conceded to have taken place on February 14, 1909. Counsel contend that interest should be allowed only from the time a demand is made

for the restoration of the goods, and, as in this case no demand was shown, interest should have been allowed only from the commencement of the action. In the case of *Kaufman v. Tredway*, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190, it is held that interest should be allowed at least from the date the action was commenced. It is not determined in that case, however, whether or not interest might be recovered for a period anterior to the commencement of the action. In *Ommen v. Talcott* (D. C.) 175 Fed. 261, it is held that interest is recoverable from the date on which the goods that were transferred as a preference were sold by the transferee. In *Collier on Bankruptcy* (9th Ed.) 827, it is said: "The judgment should include interest from the date of the preference." *Traders' Nat. Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832 is cited in support of the statement. An examination of the opinion in that case, however, discloses that the court did not pass upon the question. We are of the opinion that in view of the authorities interest should be allowed from the time it is shown the transferee wrongfully held the property or money received by him. That is, from the time a demand is made upon him to return the same, and, in case no formal demand is made, then from the time a suit is instituted to recover back the money or property, since the commencement of an action in itself constitutes a demand. This rule seems to be based upon the theory that before demand for the property or money is made the party receiving and holding the same, although it may constitute a preference, is, nevertheless, not holding it wrongfully, and that he is not chargeable with interest until he does so. In this case, therefore, the court permitted respondent to recover excessive interest. It is conceded that the transfer of the property which constituted a preference was made on the 14th day of February, 1909. The record shows that this action was commenced on the 30th day of March, 1910, or one year, one month, and sixteen days after the transfer was made. The jury found the value of the property which appellant wrongfully received and held to be \$735.90. Under the charge of the court the jury in their verdict allowed "interest thereon (said sum) at 8 per cent. per annum from the 14th day of February, 1909, to date," to wit, March 29, 1912. The interest at the rate of 8 per cent. per annum from February 14, 1909, the date of the transfer, to March 30, 1910, the date of the commencement of this suit, amounts to the sum of \$65.37. The judgment is therefore in excess of what it should be in the sum just stated, and hence should be reduced.

There are two other assignments relating to the admission of evidence. An examination of the record discloses that the rulings complained of, even though they were con-

ceded to be technical error, were, nevertheless, of that character which could in no event have prejudiced the appellant in any substantial right.

For the reasons stated, the judgment of the district court dated the 29th day of March, 1912, should be, and it accordingly is, affirmed with the exception of the allowance of the excessive interest as before stated. To that extent the judgment should be, and it accordingly is, modified. The cause is remanded to the district court of Box Elder county with directions to set aside the judgment heretofore entered on the 29th day of March, 1912, and to enter a judgment for the plaintiff as of that date for the amount found by the jury, to wit, the sum of \$735.90, with interest on said sum at the rate of 8 per cent. per annum from the 30th day of March, 1910, to the 29th day of March, 1912, amounting to \$117.60; said judgment to bear interest from said 29th day of March, 1912, at the legal rate until paid. It is further ordered that neither party recover costs in this court.

MCCARTY, C. J., and STRAUP, J., concur.

TAYLOR v. COX.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

COURTS (§ 163*)—COUNTY COURT—JURISDICTION—TITLE TO REAL ESTATE—PLEADING CONCLUSION.

In an action in a county court on a plain promissory note, where the petition clearly states a cause of action, and the defendant answers that such note is for the balance of the purchase price of real estate, title to which is defective, the court will not be ousted of jurisdiction on the ground that title to real estate is involved, by the mere statement of a conclusion without any definite statement of facts or offering of evidence which would make the title to real estate a material issue in the case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410, 411, 443, 479, 1294; Dec. Dig. § 163.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Harmon County; C. W. King, Judge.

Action by John B. Cox against I. M. Taylor. Judgment for plaintiff, and defendant brings error. Affirmed.

Madden & McGee, of Hollis, for plaintiff in error. Stewart & Stewart, of Hollis, and Gray & McVay, of Oklahoma City, for defendant in error.

HARRISON, C. This was an action in the county court of Harmon county by John B. Cox against I. M. Taylor upon a promissory note for the sum of \$250, attorney's fees, interest, and costs. Defendant answered by general denial and by pleading want of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

consideration, alleging that said note was given in part payment for certain town lots in the town of Looney; that the title to said lots was evidenced by warranty deed from plaintiff, but that said title was worthless for the reason that the plats of said town site had not been filed of record as required by law; that, the title to said lots being defective, the consideration on said note had failed. Wherefore judgment was asked for defendant. Plaintiff filed reply denying new matter set up in defendant's answer. Whereupon defendant moved to dismiss the action on the ground that the title to real estate was involved. The court overruled the motion to dismiss, and defendant excepted to the ruling and elected to stand on the motion. Whereupon the court rendered judgment in favor of plaintiff, to which judgment defendant appealed to this court, upon the ground that, the title to real estate being an issue in said action, the county court had no jurisdiction thereof and erred in rendering judgment on the note.

This contention cannot be sustained. The suit was upon a plain promissory note. Defendant filed his answer, thereby endeavoring to put in issue the title to real estate, and then moved to dismiss the action because the title to real estate was involved. Upon the overruling of such motion, however, defendant refused to proceed further and elected to stand on the motion and offered no testimony in support of the issues raised in his answer. This was not sufficient to oust the court of jurisdiction to render judgment on the note. In *Sevy v. Stewart*, 31 Okl. 589, 122 Pac. 544, which was an action begun in the justice court of Tulsa county by Ella J. Sevy against George A. Stewart et al. for rent due on a certain theater building which plaintiff alleged she was the owner of, the cause was afterwards appealed to the county court and judgment rendered in favor of Sevy. Whereupon defendant moved to set aside the judgment on the ground that title to real estate was involved and that under section 12, art. 7, of the Constitution, the county court had no jurisdiction. The court sustained the motion and set aside the judgment. This court reversed the order setting the judgment aside and sent it back with instructions that the original judgment be reinstated. Following *Bramble v. Beidler*, 38 Ark. 200, in the *Sevy* Case, this court quotes with approval the following: "An answer in a justice court to an action for the purchase price of land, setting up a want of title to the land, is not, of itself, sufficient to oust the jurisdiction of the court without evidence on the trial tending to bring the title into question." Then resuming consideration of the questions involved in the *Sevy* Case, this court said: "The petition in this cause stated a cause of action of which the county court had jurisdiction. The general denial

put in issue not only the alleged ownership of the land by the plaintiff, but also the allegations that defendants occupied the premises with the assent of the plaintiff. * * * There is no substantial evidence in this record showing any conflict in the title."

The case of *Bramble v. Beidler* is exactly in point with the case at bar, and the construction therein placed on a law similar to ours has been followed by this court. We see no reason for disturbing the rule. In the case at bar there is no apparent defect of title in the pleadings neither by exhibits nor by definite allegations. The petition in error and transcript was filed August 30, 1911, and the cause was assigned for submission in June, 1913. No briefs having been filed within the time allowed by law, the appeal is dismissed, and, as there are no apparent errors in the transcript of the record, the judgment is affirmed.

PER CURIAM. Adopted in whole.

EDWARDS et al. v. STATE.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. BAIL (§ 93*)—DECISION NEGATING DEFENSES.

In order to state a cause of action on a forfeited bail bond, it is not necessary to allege in the petition that the sum written in the bond has not been paid.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 409, 410, 413-417; Dec. Dig. § 93.*]

2. EVIDENCE (§ 158*)—BEST EVIDENCE—FORFEITURE OF BAIL BOND—SURRENDER OF PRINCIPAL.

In such an action parol evidence to prove a surrender of the principal to the sheriff is inadmissible in support of the claim of discharge by the surety.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 158.*]

3. EVIDENCE (§ 158*)—BEST EVIDENCE—BAIL—SURRENDER OF PRINCIPAL.

Section 6109 of the Criminal Code (Rev. Laws 1910) prescribes the manner in which a surety may be released from liability on a bail bond, and a strict compliance with the terms of this statute is necessary to effectuate a release.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 158.*]

4. BAIL (§ 77*)—FORFEITURE—JUDGMENT—VARIANCE FROM BOND.

Section 6110 of the Criminal Code (Rev. Laws 1910) prescribes the steps necessary to be taken in declaring a forfeiture on a bail bond, and it is not necessary that the amount of the bond should be found or recited in the order declaring a forfeiture, and if the amount of the bond is recited in the order and it is different from the amount written in the bond, such recital is surplusage, and an objection to the admission of the bond, when offered in evidence in an action on the bond, on the ground of variance, is not well taken, since the variance is immaterial.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 335-349, 379, 403; Dec. Dig. § 77.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—37

*(Additional Syllabus by Editorial Staff.)***5. BAIL (§ 80*)—SURRENDER OF PRINCIPAL.**

The surety on a bail bond is technically considered as the custodian of the principal, and he may discharge himself by surrendering the principal in the manner prescribed by statute.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 328-334; Dec. Dig. § 80.*]

6. BAIL (§ 84*) — FORFEITURE — ACTION ON FORFEITED BOND—DEFENSES.

Where the principal and surety on a bail bond made no appearance in the county court when it was forfeited and did not thereafter apply to that court to vacate or set aside the forfeiture, they could not complain, when sued on the forfeited bond, that the surety thereon was discharged by a surrender of the principal.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 379-381; Dec. Dig. § 84.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Okfuskee County; John Caruthers, Judge.

Action on behalf of the State of Oklahoma against Will Edwards and Jas. L. Rudd. Judgment for plaintiff, and defendants bring error. Affirmed.

W. A. Huser and C. B. Conner, both of Okemah, and A. L. McRill, of Oklahoma City, for plaintiffs in error. Jas. O. Wright, Co. Atty., and Thos. H. Wren, Asst. Co. Atty., both of Okemah, for the State.

GALBRAITH, C. This was an action in the district court of Okfuskee county, instituted by the county attorney on behalf of the state of Oklahoma against the plaintiffs in error, Will Edwards, as principal, and Jas. L. Rudd, as surety, on two appeal bonds. The petition contained two counts. In one it was alleged: That on the 14th day of July, 1909, in the county court of Okfuskee county, the principal, Will Edwards, was convicted of the crime of unlawfully selling and furnishing intoxicating liquor, and was sentenced by the court to pay a fine of \$50 and to serve a term of 30 days in the county jail. That Edwards prayed an appeal from the judgment and sentence to the Criminal Court of Appeals of the state of Oklahoma, which appeal was allowed and a supersedeas bond fixed in the sum of \$450.00, and it was ordered by the court that the case-made and petition in error be filed within 70 days from the 17th day of July, 1909. That said supersedeas bond was duly executed by Will Edwards, as principal, and Jas. L. Rudd, as surety, and was approved by the court and filed therein, and said defendant was discharged by reason of giving said supersedeas bond. That the condition of the bond was that the principal therein "shall appear, submit to, and perform any judgment rendered by said Supreme Court, or by said county court, in the further progress of said cause, and shall not depart without leave of the court, then this obligation shall be void; otherwise to remain in full force

and effect." That the principal in said bond failed to perfect his appeal, as provided in the order of the court and the statutes of Oklahoma, and that on April 10, 1910, on the application of the county attorney praying for a commitment for the principal on account of a breach in the condition of the bond, in having failed to perfect his appeal, and failure to appear in the county court, and his departure without leave. That a forfeiture of said bond to the state of Oklahoma was duly declared and entered on the journal of said court. That a copy of the bond was set out as an exhibit to the petition, as well as the certificate from the clerk of the Criminal Court of Appeals, showing that the case-made and petition in error had not been filed in that court, and that a copy of the order of the county court forfeiting the bond was also attached as an exhibit, and the number and style of the cause in which the bond was taken being set out. The second count declared upon a bond similar in form, and charged a conviction of a similar offense, in a different numbered case in the same court, and on the same day, and also charging that the sentence in the second case was a fine of \$100 and a term in the county jail of 60 days; that the supersedeas bond made in this case was in the sum of \$600, and also alleging a forfeiture and attaching corresponding exhibits as in the first count. The prayer was for judgment against the principal, Will Edwards, and the surety, Jas. L. Rudd, in the sum of \$1,050 and interest at 6 per cent. per annum from the date of the forfeiture, and costs of suit. The surety appeared by counsel and interposed a demurrer to the petition, which was by the court overruled. He then answered and admitted the conviction and sentence of the principal, the execution and approval of the bonds, and the discharge of the principal, as alleged in each count of the petition, but alleged by way of defense that before a forfeiture had been declared on either of the bonds, the principal, Will Edwards, voluntarily surrendered himself to the sheriff of Okfuskee county in execution of said judgments, and claimed that he was thereby released from liability as surety on said bonds. A reply to this answer, denying the new matter set out therein, was filed. The cause was tried before the court and jury, and a verdict returned in favor of the plaintiff for \$1,050.

Error is assigned: First, in overruling the demurrer to the petition; second, in excluding evidence offered in support of the affirmative defense set out in the answer; third, in admitting evidence offered by the plaintiff and objected to by the defendant.

[1] It is contended in support of the first assignment that the petition did not state facts sufficient to constitute a cause of action, inasmuch as it was not alleged that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sum written in the bond had not been paid. Counsel for plaintiffs in error argues with apparent seriousness that this is still an open question, and attempts to draw an analogy between a suit on a promissory note and one on a bail bond. The similarity between such actions is not apparent. In the execution of a promissory note the maker assumes an obligation to pay a sum certain at a time certain, and in stating a cause of action on the note it is necessary to allege a failure to pay—that is, a breach of the obligation assumed by the maker in executing the note—while in executing a bail bond the obligation assumed by the surety, in the instant case, was to pay to the state of Oklahoma the amount written in the bond, upon condition that the principal “shall appear, submit to and perform any judgment rendered by said Supreme Court, or by said county court, in the further progress of said cause, and shall not depart without leave of court.” The failure to appear in the county court and the departing without leave was a breach of the condition of this bond, and a violation of the obligation assumed in its execution, and the allegation of failure to pay the amount of the bond would not seem to be necessary in order to state a cause of action thereon. This is a matter of defense. However, this question, we take it, has been settled in this jurisdiction since the decision in the case of *Shriver v. State*, 32 Okl. 507, 122 Pac. 160, where it was squarely held that a petition on a forfeited bail bond need not allege that the amount of the bond had not been paid. See, also, *State v. Grant*, 10 Minn. 39 (Gil. 22); *State v. Biesman*, 12 Mont. 11, 29 Pac. 534; *People v. Love*, 19 Cal. 677; *Gay v. State*, 7 Kan. 394; *Barkley v. State*, 15 Kan. 99; *McLaughlin v. State*, 10 Kan. 581; *Ingram v. State*, 10 Kan. 634; *State v. Hines*, 131 Pac. 688.

[2, 3] The second error complained of was the sustaining of objection to the offer of proof made in support of the surrender of the principal. The offer was to prove by the oral testimony of the surety that the principal voluntarily surrendered himself to the sheriff of Okfuskee county prior to the entry of default on each of these bonds, and the sheriff had taken the principal into custody. The objection to this offer was that it was incompetent, irrelevant, and immaterial and not the best evidence.

[5] When a principal has been discharged on bond, the surety is technically considered as his custodian, and as having control and dominion over him, and may discharge himself by surrendering the principal in the manner prescribed by statute. 5 Cyc. 44. The dominion a bail has over his principal has been quaintly expressed as follows: “The bail have their principal on a string, and may pull the string whenever they please and render him in their discharge; they may take him up even upon Sunday, and confine

him till the next day, and there render him, for the entry in this court, is traditur in ballium, etc., and the doing it on Sunday is no service of process.” *U. S. v. Stevens* (C. C.) 16 Fed. 105.

Section 6109 of the Code of Criminal Procedure provides the way in which a surety may release himself from the obligation of a bail bond. This section reads as follows: “Any party charged with a criminal offense and admitted to bail may be arrested by his bail at any time before they are finally discharged, and at any place within the state, or by a written authority indorsed on a certified copy of the recognizance, bond or undertaking, may empower any officer or person of suitable age and discretion, to do so, and he may be surrendered and delivered to the proper sheriff or other officer, before any court, judge or magistrate having the proper jurisdiction in the case; and at the request of such bail the court, judge or magistrate shall recommit the party so arrested to the custody of the sheriff or other officer, and indorse on recognizance, bond or undertaking, or certified copy thereof, after notice to the county attorney, and if no cause to the contrary appear, the discharge and exoneration of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.” The manner of the surrender of the principal is regulated by this statute. The general rule is that the provisions of the statute must be strictly followed by the surety seeking to be released from the bond.

It was said by the Supreme Court of Oregon, on this question. “What the defendant here suppose or believe as to the surrender of the defendants in a criminal action does not affect the case. The statute itself provides the manner in which a defendant may be surrendered and bail exonerated, and that is the rule to be observed. It excludes all other methods of reaching that result.” *Cameron v. Burger*, 60 Or. 458, 120 Pac. 12; *Roberts v. State*, 4 Tex. App. 129; *Knight v. State*, 35 Okl. 375, 130 Pac. 282; *State v. Hines*, 131 Pac. 688. At common law the surety could not show by parol the surrender of his principal. “At common law, therefore, a defense to an action on the bail bond by way of surrender could only be established by showing from the record that such surrender had been made, either of the principal himself voluntarily, or by his sureties; and the record entry of the fact, whether made on the bailpiece filed in court or otherwise properly noted, was styled ‘the discharge and exoneration of the bail.’” *United States v. Stevens* (C. C.) 16 Fed. 104.

Nor can such surrender be shown by parol under our statute. In Texas the statute provides two ways the surety may be relieved from liability. One is that the surety may be released by surrendering the bail to the sheriff of the county where the prosecution

is pending, and the other provides that he may make written affidavit of his intention to surrender and cause a warrant for the arrest of the bail to issue, and to be executed as in other cases. The Supreme Court of Texas, in discussing these statutes, said: "These are the modes, and the only ones known to our law. The procedure is fully and explicitly stated in the articles 2741 and 2750, inclusive, and, according to our construction, must be pursued strictly." *Roberts v. State*, 4 Tex. App. 129.

The case of *Whitener v. State*, 38 Tex. Cr. R. 146, 41 S. W. 595, from the Texas Criminal Court of Appeals, is not an authority in support of the contention of the plaintiff in error, for the reason that the Texas statute specifically authorizes the bail to surrender his principal to the sheriff. Nor is the case of *Walton v. People*, 28 Ill. App. 645, an authority, for the same reason. The Illinois statute quoted in this opinion specifically authorizes the surety, at any time before default upon a bond, to surrender his principal to the sheriff.

[4] The next assignment urged is that the trial court admitted, over the objection of plaintiff in error, the bonds sued on, and the judgment of forfeiture taken thereon, and contends that there is a variance between the bonds and recitals in the judgment of forfeiture, inasmuch as one of the bonds was taken for \$450 and the other in the sum of \$600, while the judgment of forfeiture recites that each of the bonds was taken in the sum of \$500, and it is contended that this constituted a variance, and this evidence should have been excluded.

It is true that it was a variance, but was it a material variance, or was the defendant misled or in any way injured by this evidence? Section 6110 of the Criminal Code provides the manner of taking a forfeiture on a bond. This section reads as follows: "If, without sufficient excuse, the defendant neglects to appear according to the terms or conditions of the recognizance, bond or undertaking, either for hearing, arraignment, trial or judgment, or upon any other occasion when his presence in court or before the magistrate may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the recognizance, bond or undertaking of bail, or the money deposited instead of bail, as the case may be, is and shall be thereupon declared forfeited. But, if at any time before the final adjournment of court the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture to be discharged upon such terms as may be just. After the forfeiture, the county attorney must proceed with all due diligence, by ac-

tion against the bail upon the instrument so forfeited. If money deposited instead of bail be so forfeited, the clerk of the court or other officer with whom it is deposited, must, immediately after the final adjournment of the court, pay over the money deposited to the county treasurer."

It will be observed that the statute does not require the court, in declaring and entering a forfeiture on a bail bond, to find the amount of the bond or to enter a judgment for the amount thereof. The essential requirements are that the court should find as a fact that a certain bond had been given in a particular case, and that there had been default in some one of the conditions written in the bond. These are the essential facts that must be found and entered in order to declare a forfeiture. The recital of the amount of the bond which constituted the variance complained of was not essential, and it was not required under the statute, and at most it should be considered an irregularity. It does not appear that the plaintiff in error was injured in any way, or could possibly have been injured, by this misrecital of the amount of the bonds in the order entering the forfeiture. The order gave the number and style of the case, and the offense of which the principal had been convicted, and the date of the giving, filing, and approval of the bond. And then, again, the plaintiffs in error admitted in their answer the execution of the identical bonds offered in evidence. *Barkley v. State*, 15 Kan. 100. See 5 Cyc. 103; *Saxton v. State*, 8 Blackf. (Ind.) 201; *Ditto v. State*, 30 Miss. 126. The objection to the admission of this evidence was properly overruled.

[5] It does not appear from an examination of the record in this case that the plaintiff in error appeared in the county court when the forfeiture of the bonds was taken, or afterwards made application to that court to vacate or set aside the forfeiture, or made any effort in that court to relieve himself from the consequences of the forfeiture. He seemed to have remained passive until after action was commenced in the district court, when he attempted to show as a defense, by oral testimony, a surrender of the principal. This could not avail him as a defense in such action. He might have secured his discharge by complying with the provisions of the statute above quoted, by proper steps taken in the county court. That he did not do this seems to have been his own fault, and he should not now complain of the result.

It follows from the foregoing that none of the assignments are well taken, and that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

MEHLIN v. SUPERIOR OIL & GAS CO.
(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEAL—LAW OF THE CASE.

Where, on a former appeal, the rights of the parties under a contract sued upon, and under the issues made by the pleadings and facts disclosed by the record, have been determined in a former opinion, such determination becomes the law of the case, and on second appeal involving the same questions this court will be controlled by the conclusions reached in the former opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—SUBSEQUENT PAROL AGREEMENT.

Where an action is brought for reformation and specific performance of a written contract, and also for compensation for improvements made under a subsequent and distinct parol agreement which formed no part of the consideration in the written agreement, then in order for plaintiff to recover upon the parol agreement, the terms and conditions of same should be alleged in such language as to enable the court to form some conclusions as to what the agreement was, in order to justify the admission of testimony in reference thereto.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

3. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—SUBSEQUENT PAROL AGREEMENT.

Where recovery is sought upon a verbal agreement and the petition fails to state what the agreement was in sufficient language to enable the court to determine what the rights or obligations of the parties were under such agreement, it is error to admit any testimony as to what the agreement was.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Nowata County; T. L. Brown, Judge.

Action by the Superior Oil & Gas Company against James G. Mehlin. Judgment for plaintiff and defendant brings error. Reversed.

W. H. Kornegay, of Vinita, for plaintiff in error. Eugene B. Lawson, of Nowata, for defendant in error.

HARRISON, C. This action was originally begun at Nowata in the United States Court for the Northern District for the Indian Territory, November 6, 1906, by the Superior Oil & Gas Company against James G. Mehlin, for specific performance of a contract to lease certain tracts or parcels of land for oil and gas purposes. The defendant, Mehlin, was an intermarried citizen of the Cherokee Nation, and the contract sued upon was entered into between Mehlin and the Superior Oil & Gas Company before it had been determined whether Mehlin would be allotted the land in question. The terms and conditions of the contract, after describ-

ing the parties thereto and the land contracted to be leased, are as follows: "And whereas the legal rights of said Mehlin to receive the allotment of the said lands is not settled, it is mutually agreed as follows: That as soon as the rights of said Mehlin are settled, if in his favor he will at once make an oil and gas lease to the party of the second part in accordance with the same terms and conditions required by the Secretary of the Interior, or if they not be required a regular oil and gas lease such as is used in the state of Kansas. In the event however, that within a reasonable time from date hereof the case has not been settled, or the party of the second part may desire to drill for oil said Mehlin agrees to provide for the filing of some one else on the land who will execute said lease. Jas. G. Mehlin, Superior Oil & Gas Co., F. C. Henderson, President. Witness: C. H. Hammett." After this contract had been entered into, Mehlin, having been enrolled as an intermarried citizen, was allotted certain tracts of land, which, it seems, were not the tracts described in the contract, but Mehlin refused to make the lease which plaintiff claimed he contracted to make. In the meantime plaintiff erected certain improvements on some of the land in question, which, it is alleged, were placed there by Mehlin's consent. Plaintiff further alleged that it had paid \$300 to Mehlin on said contract, all of which was denied by Mehlin. After statehood the cause was transferred from the United States court to the district court of Nowata county, where in March, 1908, judgment was rendered by the district court in favor of the defendant. From such judgment plaintiff appealed to this court. The cause, entitled "Superior Oil & Gas Company, Plaintiff in Error, v. James G. Mehlin, Defendant in Error," was decided by this court in an opinion handed down March 8, 1910 (25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942), by Chief Justice Dunn, wherein the judgment of the court below was reversed and the cause remanded, with instructions to "set aside the order denying plaintiff's motion for a new trial and take evidence upon plaintiff's claim for compensation and damages against the defendant, making any judgment, should one be obtained, a lien on the land involved. Should the pleadings herein be insufficient, amendments should be allowed, and issues framed, with the costs of the litigation abiding and following the judgment." The cause, being sent back under proper mandate from this court, was tried again in the district court of Nowata county, March, 1911, and judgment rendered in favor of the Oil & Gas Company for the sum of \$1,200 and costs. From which judgment the defendant, Mehlin, appeals to this court upon 27 separate assignments of error.

[1] But the rights of the parties, under the contract sued upon, and under the issues

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made by the pleadings and facts disclosed by the record, were determined in the former opinion, and therefore have become the settled law of this case. Hence the assignments of error which relate to questions which were settled in the former opinion will be determined here by the conclusions reached in such opinion.

In *Sovereign Camp of the Woodmen of the World v. Bridges*, 132 Pac. 133, it is held: "It is well settled that all questions of law determined in a former appeal become the law of the case, both for the trial court and the court of appeals on a second hearing, provided the facts presented in the second hearing are substantially the same as presented in the first. *Okl. C. Elec. G. & P. Co. v. Baumbhoff*, 21 Okl. 503 [96 Pac. 758]; *Metropolitan Ry. Co. v. Fonville*, 125 Pac. 1125; *A. T. & S. F. Ry. v. Baker* [130 Pac. 577], not yet officially reported."

In determining the rights of the parties under the law in the former opinion, the court said: "The lease contract here sought to be enforced presents terms which preclude its favorable consideration at our hands. The principles enunciated in the foregoing authorities to our minds are conclusive of plaintiff's rights. Under this lease defendant would be required to turn his land over to plaintiff, so far as oil and gas exploitation was concerned, and defendant could be deprived of this valuable property right forever." And, further expressing its conclusions, the court adopts from *Munroe v. Armstrong*, 96 Pa. 307, in *Federal Oil & Gas Co. v. Western Oil Co.*, 121 Fed. 674, 57 O. C. A. 428, the following language: "Certainly the contract is most unfair, and it would be unconscionable for a court of equity to place the appellant in a position to forever deprive the owner of the soil of the right to use his land, or to drill for such treasures as the earth may contain." And, after deciding that the contract sued upon was nonenforceable, the court further said: "Notwithstanding the fact, however, that we are unable to grant to plaintiff the primary relief for which it prays, there is no fraud shown, and there are manifest equities in its behalf which we cannot pass without noticing. Plaintiff had paid defendant money in an effort on its part to carry out the terms of the contract as it assumed them to be, and defendant has received and retained this money, and apparently has made no offer of return. In addition thereto plaintiff, with the consent of defendant, entered upon his allotment, and erected a house on the same for a residence or office building; the exact cost of the same being uncertain. Plaintiff's petition contains a prayer for general relief, and in such cases the trend of authorities is that, where the equitable relief specifically prayed for cannot be given, the plaintiff's action will not be dismissed, but in some proper manner he will be given an op-

portunity to obtain relief to the extent to which he is shown a right." In summing up the issues made by the pleadings and the evidence admitted without objection, and the facts thereby developed in the former trial, this court further said: "The actual issues made by the pleading were, in a great measure, ignored and abandoned by the parties on the trial, and evidence covering the entire subject-matter of the controversy, without reference to whether the same was put in issue or not, was generally, without objection, offered, heard, and by the master and court adjudicated."

From what we have quoted from the former opinion it is plainly apparent that the grounds upon which the court remanded the cause for a new trial were that, under the pleadings and the evidence, the record disclosed that the contract sued upon was not enforceable. But inasmuch as evidence had been admitted without objection which disclosed that certain improvements had been put on the land by the oil company apparently pursuant to the interpretation which the parties had given the contract, the court took the view that the plaintiff might have certain equities in the matter which had not been considered by the trial court, and that by proper amendment of the pleadings and prayer the plaintiff, by being given another trial, might be able to show the value of such equities. Hence the case was sent back to the court below for the purpose of giving plaintiff the opportunity of so amending his pleadings and prayer as to allow evidence which would show the value of his equities.

[2, 3] Pursuant to the theory upon which the cause was remanded, and the suggestions therein made, plaintiff filed an amended complaint, alleging the contract between it and defendant, setting out the contract, and declaring that defendant had refused to fulfill same, and prayed for a specific performance of the contract the same as it had in the former complaint at the former trial, except that in the amended complaint a part of paragraph 4 is as follows: "Plaintiff states that after making the said agreement with defendant, and with the consent of the defendant, it took possession of the said lands covered by said contract and erected thereon at its own expense, with the knowledge and consent of the defendant, a frame dwelling house at a cost of \$1,600, which said dwelling house is still on said lands, and in possession of said plaintiff, and the said lands covered by said contract are now in the actual possession of said plaintiff." This is the only declaration made in the amended complaint in reference to the improvements made by plaintiff. He then concludes with the prayer: First, that the contract be reformed so as to correctly describe the land which the complaint alleged was intended to be described in the contract. Second, it prayed for a specific performance of

the contract, although this court had decided that specific performance of such contract could not be enforced. But the second section of the prayer concludes as follows: " * * * or in the event, for any reason whatsoever, specific performance of said contract, or, any part thereof, is denied, and specific performance is not decreed, then that the plaintiff be awarded compensation to the extent of the money by it paid and interest thereon, and also compensation for all beneficial and lasting improvements which in carrying out the terms of the contract it has, in good faith, made upon the premises of it." In the third section of the prayer plaintiff prays that defendant be enjoined from entering upon or occupying any of the premises for the purpose of drilling for oil or gas, and for such other and further relief as to the court may seem just and meet. Plainly the whole theory of recovery was upon the written contract, and the theory of the prayer was for specific performance. The question then arises whether under this pleading the oil company, over the objection of defendant, was entitled to introduce evidence to show the amount of compensation it should receive in the premises.

It will be observed from the language of the allegation in the complaint in reference to the building of the house, that the building was placed thereon with the consent of defendant after the making of the agreement. This language of itself implies that after the written contract sued upon had been made and executed, then at a subsequent time, by virtue of a subsequent agreement, distinct from the original agreement, and so far as the language of the contract and the allegations of the complaint show, formed no part of the consideration in the written contract, plaintiff built the house on part of the land. It is not clear from the language of the complaint what the agreement was, or whether there was any definite agreement in reference to the house; whether plaintiff was to have the privilege of removal or compensation therefor at the termination of the lease, or whether defendant should keep the house, or what defendant's obligations were under this agreement, or whether, in fact, he was under any obligations in the premises, and had refused to perform same. Under these allegations the plaintiff should not have been permitted, over the objection of defendant, to prove the terms of an agreement in reference to the house, for the complaint as a whole shows no intimation, either from the language of the contract sued upon, or from the allegations of the complaint, that the building of the house formed any part of the consideration in the original contract, and that such contract in any wise contemplated the build-

ing of a house. In fact, as it appears from the language above quoted from the complaint, the house was placed upon the premises by virtue of a parol agreement made subsequently to the execution of the written contract sued upon, and formed no part of the original contract nor of the consideration which moved the parties in making same. In order to entitle plaintiff to reimbursement for the money paid out on the building, it should have alleged the terms of the agreement in reference thereto in such language as to enable the court to know what the agreement was, and to justify the admission of testimony in reference thereto. The allegations are insufficient for such purpose. To entitle plaintiff to recover at all on this agreement, he must have recovered as upon a separate contract the breach of which constituted a separate cause of action to the cause of action alleged for breach of the written contract, and the allegations in reference thereto are not sufficient upon which to base a judgment. We think the court erred in admitting any testimony over the objection of defendant in reference thereto, and that it erred in rendering judgment upon such testimony against defendant. Defendant objected to the introduction of any testimony under the amended complaint, and urges the overruling of same as error here. We think the objection should have been sustained and judgment rendered in favor of defendant.

The theory upon which the former opinion held that plaintiff probably had some equities which had not been considered by the trial court was that the improvements had been made pursuant to the written contract, and that by proper amendment of the complaint proof that the improvements were so made, and the value thereof, would be admissible, but the amended complaint shows that the improvements were not made pursuant to the written contract, nor as any part of the consideration thereof, but were made under a wholly distinct agreement subsequently entered into, without alleging what the agreement was or what were the obligations or rights of either of the parties thereto. Inasmuch, however, as defendant, Mehlin, laid no claim to the house, but had demanded its removal by plaintiff, we think plaintiff should be permitted to remove the house upon payment of costs of this action.

The judgment is therefore reversed, with instructions that it be so modified as to allow plaintiff, Superior Oil & Gas Company, to remove the house in question, if it so desires, and that defendant be discharged of all liability in this action.

PER CURIAM. Adopted in whole.

WALTON et al. v. KENNAMER et al.
(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 966*)—CONTINUANCE (§ 7*)—REVIEW—DISCRETION—CONTINUANCE.

The granting or refusing a motion for a continuance rests largely within the sound judicial discretion of the trial court, and its action in reference thereto will not be disturbed on appeal, except where this discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966;* Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.*]

2. APPEARANCE (§ 24*)—WHAT CONSTITUTES—EFFECT.

Where a defendant comes into a case, even though he has not been properly summoned therein, and alleges and submits to the court for decision nonjurisdictional questions, it is a recognition of the general jurisdiction of the court and operates as a waiver of all irregularities that may have intervened in bringing him into court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR (§ 286*)—PROCEEDINGS BELOW—MOTION FOR NEW TRIAL.

Where defendant on the overruling of his motion for a continuance merely objected to the order of the court and proceeded with the trial, the action of the court will not be reviewed in the absence of a motion for a new trial involving such ruling and an appeal from the denial thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1680-1683, 1713-1717, 3024; Dec. Dig. § 286.*]

4. APPEAL AND ERROR (§ 1073*)—HARMLESS ERROR—JUDGMENT.

Though the court erred in including in the judgment relief not prayed for in plaintiff's petition, the error was not available to defendant where the court by a nunc pro tunc order corrected the judgment so as to make it conform to the pleading.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by W. L. Kennamer and others against Sarah E. Walton and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

Baker, Pursel & Leith and C. A. Mountjoy, both of Muskogee, for plaintiffs in error. Wm. F. Tucker and Hulette F. Aby, both of Tulsa, for defendants in error.

BREWER, C. This appeal is to review the action of the court in denying a motion or petition to vacate and set aside a final decree foreclosing a mechanic's lien and a mortgage. It was filed more than a year after the rendition of the final decree.

On November 14, 1908, Kennamer, as plaintiff, filed suit against plaintiffs in error,

claiming \$700 for labor and material used in constructing a house on lots 1 and 2, block 81, in the city of Tulsa, and asking that his mechanic's lien on said lots be foreclosed. On July 12, 1909, plaintiffs in error filed their answer. On April 10, 1910, with leave of court, G. S. Kemble filed a plea in intervention, claiming a lien under a mortgage on the same lots, to secure a note, both note and mortgage having been executed by plaintiffs in error, praying for an adjustment of the liens, foreclosure, etc. On April 18, 1910, the attorney for plaintiffs in error, Sarah E. Walton, the owner of the lots in controversy, filed a motion for continuance, unverified, which was on the same date overruled by the court. No appeal was prosecuted from this order. On the same date a trial was had and judgment rendered for Kennamer for \$700, and his mechanic's lien was established and foreclosed. Kemble as intervener was awarded judgment for \$193.75 on his note and mortgage, his lien established and declared to be junior to that of Kennamer's, and ordered foreclosed. This judgment was not appealed from, nor was a motion made to disturb it during the term. The property was appraised at \$1,400 and sold by the sheriff under orders of the court for \$1,210 on March 1, 1911. On March 2, 1911, plaintiffs in error joined in a motion to set the sale aside; the following being among the grounds set up in the motion viz.: Insufficiency of the notice of sale. Illegal appraisement. That the property did not bring two-thirds of its appraised value. This motion was denied. On May 6, 1911, plaintiffs in error joined in a second motion to vacate and set aside the sale and among others urged as a ground: Improper advertisement of the property. This motion being overruled, the plaintiffs in error, on May 10, 1911, filed the motion or petition involved here to vacate and set aside the judgment originally rendered. The same alleges as grounds in substance that: "(1) Because judgment was rendered in the action in favor of G. S. Kemble, intervener, without notice of said intervention upon plaintiffs in error, and without appearance or trial of the issues as to Kemble. (2) Because of unavoidable casualty and misfortune in this: That Sarah E. Walton was sick in bed and her regular attorney was out of town and the attorney who handled it did not understand her case and the application she made for a continuance before the trial was overruled. (3) Because the petition of Kennamer, the original plaintiff below, did not state a cause of action against Louis F. Walton and is entirely void. Prayer that the entire judgment be set aside."

As has been pointed out, the appeal in this case is based on the refusal of the court to vacate its judgment and annul all former proceedings and grant a new trial on the motion (treated as a petition) filed more than

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a year after such final unappealed from judgment was rendered.

[2] We will consider the grounds upon which this motion is predicated in the order in which we have summarized them above.

1. Whether or not it was a fundamental error to proceed to trial and judgment on the intervention of Kemble, filed in the case, with leave of court, after plaintiffs in error had been regularly summoned in the original case and had answered, without a summons or other court notice of the intervention, does not require consideration or decision for the reason that after the trial and judgment the plaintiffs in error joined in two separate motions in the case, attacking the proceedings in each, upon nonjurisdictional grounds. This was equivalent to a general appearance in the case. Where a defendant comes into a case, even though he has not been properly summoned, and alleges and submits to the court nonjurisdictional questions—questions which could not be raised in a special appearance—he recognizes the general jurisdiction of the court and waives all irregularities that may have intervened in bringing him into court. This is a question that seems to be well settled in this jurisdiction, as well as in Kansas, from whence our procedure came. The case of *Ziska v. Avey*, 122 Pac. 722, reviews many of the cases of this, as well as the Kansas, court. *Rogers v. McCord Collins Merc. Co.*, 19 Okl. 115, 91 Pac. 864; *Lookabaugh v. Epperson*, 28 Okl. 472, 114 Pac. 738; *Welch v. Ladd*, 29 Okl. 93, 116 Pac. 573. This determines the first ground. The only point made is that the court had not, as to the intervention, acquired jurisdiction of the persons of plaintiffs in error because of a lack of notice. It is not even suggested that they did not owe the note nor that they had any defense to either the note or the mortgage securing it, and which they had both executed.

[3] 2. The second ground of the motion to vacate was based on unavoidable casualty, which consisted of the claim that at the date of the trial, more than a year previous to the filing of the motion, Mrs. Walton, one of the plaintiffs in error and the owner of the land, was too sick to attend court; that her regular attorney was out of town; and that the attorney who did appear and handle her case, and who applied for its continuance upon the ground of her inability to attend, did not understand the same, etc. This ground is untenable. It is asserted too late. No claim of fraud or mistake is made; it is simply an attempt to review the action of the trial court in overruling her motion for a continuance, with all the facts fully before it more than a year before, and after the passage of several terms of court. Her attorney objected to the overruling of the motion for a continuance but did not appeal. He could have done so. Section 5236, Stat. 1910. He

went on with the trial and to judgment but, so far as is shown, filed no motion for a new trial and took no appeal from the judgment, thus bringing up for review the action of the court on the motion. Had an appeal been taken and the point properly brought here, this court would inquire into the discretion used by the court in refusing the motion.

[1] The granting or refusing a motion for a continuance rests largely within the sound judicial discretion of the trial court, and its action in reference thereto will not be disturbed, except where this discretion has been abused. *Standifer et al. v. Sullivan*, 30 Okl. 367, 120 Pac. 624.

[4] 3. This ground (i. e., that the original judgment is void, because the petition of plaintiff Kennamer, declaring on his mechanic's lien, did not state a cause for personal action for deficiency judgment, as against L. F. Walton, the husband and codefendant of the owner of the homestead) is without merit. The original petition did not ask a deficiency judgment against L. F. Walton, nor did the facts warrant such a judgment; and, while the journal entry decreed him liable, the court, upon having its attention called to the error, corrected the judgment by a nunc pro tunc order and relieved him of the liability unintentionally and erroneously adjudged against him. The other questions discussed in the brief depend upon the three main points discussed above and need no further consideration in detail.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

HOMELAND REALTY CO. v. ROBISON.
(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 671*)—RECORD—APPEAL BY TRANSCRIPT.

Unless an alleged error appears in the record proper, it cannot be considered in an appeal by transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

2. APPEAL AND ERROR (§ 544*)—NECESSITY OF BILL OF EXCEPTIONS OR CASE.

Errors of law occurring at the trial must be presented for review in this court, by incorporating same into a bill of exceptions or case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.*]

3. JUDGMENT (§ 279*)—RECITALS AS TO REASONS FOR DIRECTED VERDICT.

Ordinarily the reasons which may have influenced a court to direct the verdict of a jury have no place, and perform no function, in a formal journal entry of the judgment based on the verdict of the jury.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 546-551; Dec. Dig. § 279.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. TRIAL (§ 178*)—DIRECTION OF VERDICT—STATE OF THE EVIDENCE.

Whether or not a court is justified in directing a verdict in a particular case depends upon the state of the evidence at the time of such action.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

5. APPEAL AND ERROR (§ 854*)—REVIEW—REASONS FOR DECISION.

If a court directs a jury to return a verdict for plaintiff in a case, and such action was proper under the evidence, the action will be sustained, even though the court gives a wrong reason for the course taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

6. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTION.

Where the evidence and the record of the proceedings occurring at the trial of the cause are not brought to this court for review, and all that is before this court are the pleadings, findings, judgments, and motions made after judgment, the presumption is that all the proceedings of the trial court are regular, that evidence was introduced without objection sufficient to support the findings of the court, and that the pleadings were treated as amended, where the case is one in which an amendment is proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

7. APPEAL AND ERROR (§ 889*)—REVIEW—AMENDMENT REGARDED AS MADE.

Though there be a variance between the allegations of a petition and the facts proven without objection at the trial, yet, if it is a case where an amendment to conform to the proof should have been allowed, the judgment will not be reversed solely because of such variance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

(Additional Syllabus by Editorial Staff.)

8. TRIAL (§ 178*)—DIRECTION OF VERDICT—WHEN REQUIRED.

Where plaintiff introduces sufficient evidence to prove his case, and defendant's evidence does not conflict therewith, or where, considered in its most favorable light, with all legitimate inferences in its favor, it fails to present a defense, the court should direct a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by W. R. Robison against the Homeland Realty Company. There was a directed verdict for plaintiff, and defendant brings error. Affirmed.

Allen & Nichols, of Muskogee, for plaintiff in error. Roach & Bradley, of Muskogee, for defendant in error.

BREWER, C. This appeal is prosecuted on a transcript of the record duly certified. Two specifications of error are urged in the brief as follows: "(1) Said court erred in instructing the jury to return a verdict for

defendant in error, and not permitting said issue to be determined by the jury, for the reason that the recovery asked for by defendant in error was for money only. (2) Said court erred in finding that the pleadings in said cause and the facts showed the issue to be joined by the parties herein upon a written contract, when the theory of the attorneys for both the plaintiff in error and defendant in error was that the pleadings joined the issue upon an oral contract, and defendant in error had pleaded an oral contract, which had been denied by plaintiff in error, and the proof of plaintiff in error all went to the denial of an oral contract."

[1] The first assignment of error is clearly unavailable to appellant, for the reason that the proceedings of the court and matters occurring at the trial, together with the evidence heard, are not brought here in such a way as to be considered by the court; in fact, none of the evidence is before us. From an examination of the transcript, it does appear that evidence was submitted, and that at the close of same the jury returned a verdict in favor of the defendants in error by direction of the court. The evidence not being before us, we cannot consider whether the court acted correctly or not. Unless an alleged error appears in the record proper, it cannot be considered in an appeal by transcript. *Tribal Development Co. v. White Bros.*, 28 Okl. 525, 114 Pac. 736.

[2] Errors of law occurring at the trial must be presented for review in this court, by incorporating same into a bill of exceptions or case-made. *Menten v. Shuttee*, 11 Okl. 381, 67 Pac. 478; *McCarthy v. Bentley*, 16 Okl. 19, 83 Pac. 713; *Green v. Yeager*, 23 Okl. 128, 99 Pac. 906; *St. L. & S. F. Ry. Co. v. McCollum*, 23 Okl. 899, 101 Pac. 1120; *McCoy v. McCoy*, 27 Okl. 371, 112 Pac. 1040; *Ballinger v. Von Weise*, 32 Okl. 114, 121 Pac. 250. We do not exactly understand what the appellant means in this assignment of error, when he gives as a reason why it ought to be sustained "that the recovery asked for by the defendant in error was for money only," unless it be to point out that such causes are triable by a jury. Section 5785, Comp. L. 1909.

[3] The recovery allowed was for "money only," and it is certainly the law that, where plaintiff introduces sufficient evidence to prove his case, and defendant's evidence does not conflict therewith, or where the evidence of the defendant, considered most favorably to him, together with all legitimate inferences that may be drawn from it, utterly fails to present a defense, the court should direct a verdict for the plaintiff. *Moore v. First Nat. Bank*, 30 Okl. 623, 121 Pac. 626; *Neeley v. Southwestern Cotton Oil Co.*, 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145, and authorities cited in these cases.

[3-6] 2. The second assignment grows out

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of a claim that there was a fatal variance between the evidence and the pleadings. This is predicated on a statement made by the court and incorporated in the journal entry of judgment by a nunc pro tunc entry, made July 15, 1911, correcting the original judgment of December 8, 1910. This statement seems to be for the purpose of explaining why the court directed a verdict in the case. Ordinarily the reasons which may have influenced a court to direct the verdict of a jury have no place, and perform no office, in a formal journal entry of a judgment based on the verdict of a jury. The right of the court to direct a verdict depends upon the state of the evidence when such action is taken. And, if such action was proper, it would be sustained, even though the court might give a wrong reason for the course taken. *Martha Leahy v. I. T. Illuminating Oil Co.*, 135 Pac. 416 (not yet officially reported); *Hodgins v. Hodgins*, 23 Okl. 625, 103 Pac. 711; 3 Cyc. 221, and notes and cases cited; *Hancock v. Youree*, 25 Okl. 460, 106 Pac. 841.

The nunc pro tunc order referred to must have been allowed for the sole purpose of bringing into the record the reasons for directing a verdict, after it became impossible to appeal by case-made, and thus have reviewed this action of the court. This statement of the court is as follows: "That this cause proceeded upon the theory of the attorneys, both for the plaintiff and the defendant, that the pleadings joined the issue between the parties upon an oral contract; but the court further finds that the pleadings themselves and the facts show the issue to be joined upon a written contract, the principal of which was paid and the interest on which still remained and now remains unpaid in the sum of \$718.85, with accrued interest on said amount from the 13th day of February, 1908, said accrued interest being in the sum of \$125.06. The court further finds that the defense in this cause goes entirely to the denial of an oral contract for said amount; that the question of agency as raised in said pleadings in making said oral contract is immaterial for the reason, above mentioned, that said facts disclose that the recovery herein should be on a written contract. The court further finds that no defense to said written contract and interest due thereon has been made by defendants, and, upon the motion of plaintiff for a peremptory instruction in his favor, the court instructed the jury to render a verdict in favor of the plaintiff, and the following verdict was rendered by the jury," etc.

[8] We have examined all the written contracts in this case in the light of the pleadings, and we believe it to have been possible to have based the recovery on an oral promise to pay this earned interest, which had admittedly accrued under the terms of the writings. But if it is assumed that the court was right in thinking the recovery proper

only under the terms of the writings, then, in the absence of the record of what occurred at the trial, it will be presumed that evidence sufficient to sustain such recovery was introduced without objection, and that it was sufficient to support the findings the court made, and that the parties treated the pleadings as amended, so as to raise the proper issue.

The case of *Mulhall v. Mulhall*, 3 Okl. 304, 41 Pac. 109, is peculiarly in point. In that case, as here, the appeal was by transcript. The plaintiff had sued for money loaned, and the answer, after denying this, set up the special plea that, while he had received this money from plaintiff, it had been invested by agreement of the parties in a partnership cattle business, and that the cattle were still on hand. This special plea was denied by plaintiff. The court found that in fact the money had been invested in a partnership business as defendant claimed, but that later he agreed to return the investment to the plaintiff. The claim was made there, as here, of fatal variance. The court in the opinion say: "The evidence taken upon the trial, and the rulings thereon, not being brought into the record, we must presume that the evidence which was offered upon the trial was offered without any objection thereto, and that it was such as would support the findings of facts which the court has made. We must presume, therefore, that the disputes between the plaintiff and defendant, involving the defendant's liability to plaintiff for this \$1,500, were fully gone into upon the merits, and that, although the plaintiff had made no amendment to his petition alleging that after this \$1,500 had been invested in cattle the defendant agreed to repay him the amount of this investment and take the plaintiff's interest in the cattle, the proof was directed to this allegation, as well as to the plaintiff's allegation that he had loaned this money to the defendant in the first instance on February 16, 1893, and that no question was raised on account of the defect in the pleadings. The money involved in the controversy was evidently but the one sum. It is stated to be \$1,500 in plaintiff's petition, and as having been loaned to the defendant on the 16th day of February, 1893. It is stated in defendant's answer as being \$1,500, and as having been invested in cattle on the 16th day of February, 1893. The prayer of the plaintiff's petition was for the recovery of the sum of \$1,500, with interest thereon, and the finding of the court is that this identical sum of money in dispute was invested in cattle on the 16th day of February, 1893, and a contract was subsequently made for the repayment of this same sum by defendant to plaintiff, and that it all grew out of the original transaction entered into by the parties on the 16th day of February, 1893. The merit of the matter laid in the question as to whether defendant owed the plaintiff the sum of \$1,500, and it is but fair to pre-

sume, in the absence of the evidence, that the facts of these parties' dealings were fully inquired into on the trial, and that the proof was freely and willingly directed by both parties to the question as to whether or not the plaintiff was entitled to receive from the defendant the sum of \$1,500 on account of the business transactions which they had had concerning this \$1,500. * * *

So in the case at bar plaintiff claimed \$718.85 as interest due at a certain date, under the terms of two certain writings relative to two tracts of land, placed in the hands of a trustee to be sold for town-site purposes; that at the date this sum of interest had accrued a new writing was executed, which included both tracts of land, and which named a new trustee and extended the time of the performance of the contract; and that, when this new writing was executed, this accrued interest was left out of the new contract, and that defendant agreed orally to pay it to him. Defendant filed a general denial, and then set up the two first writings, also the later one, and, while admitting that \$718.85 had accrued as interest on the two original writings at the date of the later one, claimed that this item of interest was taken into account in the later writing, and that it had been paid. To this plaintiff filed a general denial. So there can be no doubt but that these parties were fully aware that the only dispute between them was the answer to the question: Did defendant owe plaintiff \$718.85 as interest? Plaintiff said: You do; that this sum was due under your writings, and you agreed orally when we made other writings to pay me. Defendant answers: Not so; I did owe you under the writings the exact sum you claim, but I paid you. The court says, after examining the writings and hearing all the evidence bearing on the dispute (and the third writing referred to was, as to the point involved here, so ambiguous as to admit of oral evidence to explain the intent of the parties), the defendant certainly owes plaintiff this item of interest, in the exact sum sued for, and a recovery should be had, not on the oral promise, but on the true interpretation of the writings themselves.

[7] We do not know that oral evidence was received to explain the intent of the parties in the third writing, but it might have been, and probably was, needed to justify the court in finding what it did. This certainly presents a situation in which an amendment could have been properly allowed plaintiff, without either injury or surprise to defendant. And we think the rule announced in the syllabus of *Mulhall v. Mulhall*, supra, to be applicable to this case. It is thus stated: "Where the evidence and the record of the proceedings occurring on the trial of the cause are not brought to this court, but only the pleadings, finding, and conclusions of

the court and the motions made after judgment, the presumption is that all of the proceedings of the court are regular, and that the pleadings were treated by the parties as amended where the case is one where an amendment may be allowed." This case has been followed in *Love v. Kirkbridge Drilling Co.*, 129 Pac. 859, where the court uses the following excerpt from the *Mulhall Case*: "The language of this section 135 of the Code of Procedure (Comp. Laws 1909, § 5675) does not say that allegations of the pleadings must be proved or else there is a failure of proof, but it is that the allegations of the claim or defense to which the proof is directed must be supported by the evidence. It matters not how informal or inaccurate the pleadings may be, if they pray the judgment which is rendered, and if the proof supports the claim or defense to which it is directed, then there is no fatal variance." After which Commissioner Sharp uses the following language in the headnotes to the *Love Case*, supra: "Though there be a variance between the allegations of a petition and the facts proved on the trial, yet, if it be a case where an amendment of the petition ought to be allowed to conform it to the facts proved, the judgment will not be reversed on account of such variance." See, also, *Robinson Co. v. Stiner*, 26 Okl. 272, 109 Pac. 238; *Alcorn v. Dennis*, 25 Okl. 137, 105 Pac. 1012; *Ryndak v. Seawell*, 13 Okl. 737, 76 Pac. 170.

The case should be affirmed.

PER CURIAM. Adopted in whole.

SCHOOL DIST. NO. 13 OF LATIMER COUNTY v. WARD.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE.

Where the evidence reasonably tends to support the verdict and there is no error in the charge to the jury, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Error from County Court, Latimer County; L. K. Pounders, Judge.

Action by Daisy Ward against School District No. 13 of Latimer County. Judgment for plaintiff, and defendant brings error. Affirmed.

H. T. Church, of Wilburton, for plaintiff in error. Jones & Lester, of Wilburton, for defendant in error.

TURNER, J. This is an action by Daisy Ward, defendant in error to recover from School District No. 13 of Latimer County \$195, alleged to be due her for three months'

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

services under and by virtue of a contract in writing, made part of her petition, wherein the district agreed to employ her as a primary teacher in its schools for nine months, at \$65 per month, beginning September 5, 1910. After a general and a "special demurrer" had been overruled to her petition, defendant answered and denied the debt and alleged the contract to be invalid for the reason that C. J. Wishart, treasurer, was not notified of and was not present at the meeting of the board when the contract was made, and that the same was signed by Doyle and Guest, the other two members of the board, without his consent. After reply filed there was trial to a jury and judgment for plaintiff, and the district brings the case here.

For the reason that the briefs fail to set forth the petition, we cannot consider whether the court erred in overruling the demurrer thereto, but will consider the remaining assignment of error only, which is that the court erred in overruling defendant's motion for a new trial. The case turned upon the validity of the meeting of the board at which the contract was made; it being contended on one side that Wishart had verbal notice and was present and participating, and on the other that he was not present and had no notice of the meeting. Upon the point the court charged the jury: " * * * You are

instructed that the written contract introduced in evidence is valid, unless you find from the testimony that same was not authorized at a legal meeting of said board of directors of the defendant. You are further instructed that the minutes of said meeting are prima facie evidence of what took place at said meeting. (Excepted to by defendant.)

(4) You are instructed that if you find by a fair preponderance of the testimony that there was a meeting of the school board of the defendant herein on May 11, 1910, and that at said meeting all the directors of said district were present, or had notice in writing of the meeting, and the matter of employing the plaintiff was brought up in the presence of all of said members, and that at said meeting and before same adjourned two members of the board voted in favor of employing the plaintiff at \$65 per month, as alleged in her petition, and that thereafter the said contract was signed by two members of the board, and by the plaintiff herein, and that plaintiff presented herself on September 5, 1910, and at subsequent dates as hereinbefore mentioned at the place where she was employed to teach, and that the plaintiff at all times and up to the time she filed the action herein, which was November 29, 1910, stood ready to perform the services enumerated in the contract sued upon, then it will be your

duty to find for the plaintiff, unless you should find that at said meeting of said board of directors one or more members of said board was made to understand that no action with reference to plaintiff's contract would be taken at said meeting, and at such point in the meeting went away from the place of meeting and was not notified to return to said meeting for the purpose of acting upon plaintiff's application. (Excepted to by defendant)"—which seems to correctly state the law. But whether it does or not, defendant is now bound thereby, since the same was not excepted to in the manner provided by statute (Rev. Laws 1910, § 5003), and, as there was evidence reasonably tending to support the charge, we decline to disturb the verdict.

It seems there was no error in the admission or rejection of evidence, but if there was we cannot consider it, as defendant has failed to comply with rule 25 of this court (95 Pac. viii).

Defendant requested the court to charge: "You are instructed if you find from the evidence that the contract sued on herein by the plaintiff, Daisy Ward, was made, executed, and entered into by the defendant, School District Board No. 13 of Latimer County, prior to the annual district meeting of said school district, on the first Tuesday of June, 1910, then plaintiff cannot recover, and your verdict should be for defendant"—which was refused and defendant duly excepted. In support of the contention that the court erred in so refusing, counsel cite *Jones v. School Dist. No. 144, Elk Co.*, 7 Kan. App. 372, 51 Pac. 927. There in the syllabus the court said: "The powers conferred by law upon the electors at an annual school district meeting are inconsistent with the existence of authority in the school board of such a district to enter into a binding contract for the employment of a teacher prior to the meeting for a term commencing after such meeting." While the statutes there under construction (Gen. Stat. 1905 Kan. § 6637 et seq.) are substantially the same as ours (Comp. Laws 1909, § 8051 et seq.), for the reason that as no authority is cited in that case in support of that opinion and counsel has cited none, we refuse to follow it, especially as counsel have failed to point out, and we cannot see, wherein the powers thus conferred upon the electors at such annual meeting are inconsistent with the existence of authority in the school board to make a contract employing a teacher to teach for a term commencing after such meeting.

There is no merit in the remaining assignments.

Affirmed. All the Justices concur.

GREER et al. v. AUSTIN et al.

(Supreme Court of Oklahoma. Nov. 4, 1913.)

*(Syllabus by the Court.)***1. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—REMEDY OF TAXPAYER—DISCHARGE OF TEACHER—INJUNCTION.**

At the instance of resident taxpayers of a school district, the powers of equity may not be invoked to enjoin the officials of the school district from discharging a teacher employed by contract to teach a school for a specified time.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 266-268; Dec. Dig. § 111.*]

2. INJUNCTION (§ 60*)—GROUNDS—REMEDY AT LAW—SCHOOLS AND SCHOOL DISTRICTS.

The powers of equity may not be invoked by such teacher to enjoin the school board from discharging him before he had taught the school pursuant to the terms of said contract.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 117-119; Dec. Dig. § 60.*]

Error from District Court, Jackson County; Frank Mathews, Judge.

Action by Thos. C. Greer and others against F. H. Austin and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Lawson & Dabney, of Altus, for plaintiffs in error. W. T. McConnell, of Altus, for defendants in error.

WILLIAMS, J. [1] The only question essential for determination under this record is as to whether the powers of equity may be invoked to enjoin the officers of a school district from discharging a person employed by said officials under a valid contract to teach a school for said district for a definite term. It has been settled in this jurisdiction that a taxpayer without showing a special private interest may maintain an action to prevent an illegal disposition of money of a municipality or school district or the illegal creation of a debt which he, with other property owners and taxpayers in such municipality or district, may be compelled to pay. It is a general rule that for wrongs against the public, whether actually committed or only apprehended, the remedy, whether civil or criminal, is by a prosecution instituted by the state in its political character, or by some officer authorized by law to act in its behalf, or by some of those local agencies created by the state for the management of such of the local affairs of the community as may be intrusted to them by law. The individual citizen does not in his own name interfere in behalf of the interest of society, but society acts through and by its properly constituted agencies. *Kellogg v. School District No. 10*, Comanche County, 13 Okl. 285, 74 Pac. 110, and authorities therein cited; *Marlow v. School District*, 29 Okl. 304, 116 Pac. 797, and authorities therein cited. In *Thompson v. Haskell*, Governor, 24 Okl. 70, 102 Pac. 700, it is said: "The case of Kel-

logg v. School District No. 10, supra, does not appear to go to the extent of permitting private individuals to restrain public officers to correct purely public wrongs, but to restrict the right of a private individual to that class of cases which involve the creation of debts illegally against, or the wrongful expenditure of moneys of, the taxpayers." The question involved in that case was as to the creation of or addition to or subtraction from political subdivisions of a county and involved political acts. The question here, so far as the action is brought on the part of the taxpayers, is a public act involving the discharge of a teacher of a public school.

[2] The teacher is also joined in this action. The question as to misjoinder of parties does not seem to be urged, but the joining of him in this action does not add merit to the case, for if his discharge is wrongful he has his action at law to sue for the recovery of his salary or for damages on account of the breach of contract. *School Dist. No. 13*, Latimer County, v. Ward, 136 Pac. 588, not yet officially reported.

The action of the lower court is affirmed. All the Justices concur.

ST. LOUIS & S. F. R. CO. v. NELSON.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 284*)—PRESENTATION BELOW—MOTION FOR NEW TRIAL.**

Where a case is submitted to a trial court upon agreed statement of facts, a motion for new trial is unnecessary to enable this court on appeal to review the judgment rendered upon such agreed statement of facts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1669-1672; Dec. Dig. § 284.*]

2. APPEAL AND ERROR (§ 345*)—TIME FOR APPEAL—EXTENSION—MOTION FOR NEW TRIAL.

Where a motion for new trial is unnecessary to enable this court to review the action of the trial court in rendering a judgment, the filing of such motion and decision thereon by the court is ineffectual for the purpose of extending the time within which to perfect an appeal; and the time begins to run from the rendition of the judgment complained of, and not from the order overruling the motion for new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.*]

Error from District Court, Jackson County; Frank Mathews, Judge.

Action by Gertrude Nelson against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Dismissed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. Guy P. Horton, of Altus, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

HAYES, C. J. On the 12th day of March, 1912, defendant in error, as administratrix of the estate of Gertrude Nelson, deceased, filed a supplemental petition in the district court of Jackson county for the purpose of reviving a certain judgment recovered in that court on the 1st day of January, 1908, by Gertrude Nelson against plaintiff in error for the sum of \$3,000. After answer had been filed by plaintiff in error, the parties entered into a stipulation as to the facts, which was reduced to writing and filed with the clerk of the court. Upon the case being reached for trial, both parties waived a jury, and the cause was tried upon the facts agreed to in said stipulation; and the court, on the 28th day of September, 1912, rendered judgment reviving the judgment as prayed for by defendant in error in her petition. On the same date plaintiff in error filed a motion for a new trial, which was overruled on June 23, 1913. Upon the last-mentioned date an extension of 90 days was granted to plaintiff in error within which to make and serve case-made. The case-made was afterwards served and settled, and plaintiff in error's petition in error, with case-made attached, was filed in this court on the 15th day of September, 1913, which was within six months from the date on which the motion for new trial was overruled, but more than six months had expired since the rendition of the judgment before the motion for new trial was overruled. During this time an act of the Legislature, approved February 14, 1911 (page 35, Sess. Laws 1910-11) was in force, by which one who seeks to reverse a judgment or final order of any court is required to commence his proceeding in error in this court within six months from the rendition of the judgment or final order complained of.

[2] By previous decisions of this court, it has been determined that where a motion for new trial is unnecessary to present to this court for review the matters complained of in the petition in error, the filing of such motion and decision thereon by the court is ineffectual for the purpose of extending the time within which to perfect an appeal; and the time begins to run from the rendition of the judgment appealed from, and not from the order overruling the motion for new trial. *Manes v. Hoss*, 28 Okl. 489, 114 Pac. 698; *Healy v. Davis*, 32 Okl. 296, 122 Pac. 157.

[1] That a motion for new trial is unnecessary to enable this court to review a judgment of the trial court rendered upon an agreed statement of facts was settled by Board of Co. Comm. of Garfield Co. v. Porter et al., 19 Okl. 173, 92 Pac. 152. It therefore follows that this appeal, in order to have been perfected within the time prescribed by the statute, should have been commenced in this court within six months

from the time the judgment was rendered upon the agreed statement of facts; and, since it was not commenced within that time, this court is without jurisdiction to review the judgment complained of; and the appeal should be, and is, dismissed. All the Justices concur.

CHICAGO, R. I. & P. RY. CO. v. CITY OF SHAWNEE et al.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 284, 564*)—TIME FOR APPEAL—INSUFFICIENCY—MOTION FOR NEW TRIAL.

Where case is tried upon agreed statement, which eliminates all questions of fact, a motion for new trial is unauthorized by statute; and the time for making and serving a case for this court runs from the date of the judgment, unaffected by such motion or the order overruling the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1660-1672, 2501-2506, 2555-2559; Dec. Dig. §§ 284, 564.*]

2. APPEAL AND ERROR (§ 564*)—TIME FOR APPEAL—EXTENSION.

An order made extending the time and a case-made served in accord therewith after the expiration of the time specifically given by statute, in which to make and serve a case, are nullities; and a petition in error with such case-made attached gives this court no jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by the City of Shawnee against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Dismissed.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error. W. T. Williams, E. E. Hood, and W. M. Engart, all of Shawnee, for defendant in error.

THACKER, C. This case was tried upon an agreed statement of facts, judgment was entered on August 19, 1911, motion for new trial was filed on August 22, 1911, and on September 2, 1911, the motion for new trial was overruled and an order entered purporting to extend the time in which case for this court might be made and served to September 7, 1911. On September 6, 1911, case-made was served, settled, and signed; and the jurisdiction of this court depends upon whether this order of September 2, 1911, was within the three days specifically allowed by statute (section 4444, Stat. 1893, now changed by section 5242, Rev. Laws 1910, to 15 days) within which a case might be made and served; and this question, in turn, depends upon whether the appeal should have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

been from the judgment or from the order overruling the motion for new trial, which, in turn, depends upon whether a motion for new trial is authorized by the statute when all questions of fact have been eliminated by agreed statement of facts.

[1, 2] These questions seem to be definitely settled by the decisions of this court; and it thus appears: (1) That a motion for new trial is unauthorized in such cases, and the appeal should have been from the judgment (Board of County Commissioners of Garfield County v. Porter et al., 19 Okl. 173, 92 Pac. 152; Schnitzler v. Green, 5 Kan. App. 656, 47 Pac. 990; Ritchie et al. v. Kansas N. & D. Ry., 55 Kan. 36, 39 Pac. 718); and (2) that, the time within which to make and serve a case having expired on the expiration of the third day after such judgment without order extending the same, the case-made was not served in time, and this court has not acquired jurisdiction. Boulanger v. Midland Valley Mercantile Co., 128 Pac. 113; Reed v. Woolly, 31 Okl. 783, 123 Pac. 1121; Doorley v. Buford & George Mfg. Co., 5 Okl. 594, 49 Pac. 936; Williams v. New State Bank, 132 Pac. 1087; American Nat. Bank of McAlester et al. v. Mergenthaler Linotype Co., 31 Okl. 533, 122 Pac. 507.

The appeal should be dismissed.

PER CURIAM. Adopted in whole.

**NELSON-BETHEL CLOTHING CO. v.
SAMUELS et al.**

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—FAILURE TO SERVE AND FILE BRIEFS—DISMISSAL.

Where plaintiff in error fails to comply with the rules of this court, requiring it to serve a brief on counsel for defendant in error, and at the same time to file 15 copies of its brief with the clerk of the court, its case, on being reached for submission, will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 1. Error from Pottawatomie County Court; Ross F. Lockridge, Judge.

Action by the Nelson-Bethel Clothing Company against William Samuels and another, partners as Samuels & Phillips. Judgment for defendants, and plaintiff brings error. Dismissed.

Frederick King, of Tecumseh, for plaintiff in error.

SHARP, C. The petition in error and case-made in this case were filed in this court on May 8, 1911. Plaintiff in error has filed no brief and made no effort to comply with the rules of this court. Upon the au-

thority of Douglas v. Clayton Townsite Co., 29 Okl. 9, 115 Pac. 1016, and other cases cited therein, the appeal should be dismissed.

PER CURIAM. Adopted in whole.

THOMPSON v. YOUNT.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—FAILURE TO FILE BRIEF—DISMISSAL.

Where plaintiff in error has filed no brief, as required by rule 7, of this court (20 Okl. viii, 95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion. Division No. 1. Error from County Court, Ellis County; A. L. Squires, Judge.

Action by J. M. Yount against E. H. Thompson, to recover a money judgment on a promissory note. Judgment for plaintiff, and defendant brings error. Appeal dismissed.

S. A. Miller, of Arnett, for plaintiff in error. Perry J. Morris, of Shattuck, and J. G. Aubuchon, of Shattuck, for defendant in error.

ROBERTSON, C. This appeal was filed in this court October 16, 1911. Neither party has filed a brief, nor have they offered any excuse for the failure to do so. It is evident that the proceedings have been abandoned. The appeal should therefore be dismissed for want of prosecution under rule 7 of this court (20 Okl. viii, 95 Pac. vi). Streeter v. McCoy, 34 Okl. 490, 126 Pac. 216; Thompson v. Murray, 34 Okl. 521, 125 Pac. 1133; Streeter v. Huene, 34 Okl. 491, 126 Pac. 216; Reliable Ins. Co. v. Newcomber, 34 Okl. 759, 127 Pac. 280; M., O. & G. Ry. Co. v. Johnson, 34 Okl. 816, 127 Pac. 386; First Nat. Bank v. Baldwin, 34 Okl. 825, 127 Pac. 260; Snow v. Frye, 34 Okl. 828, 127 Pac. 422.

PER CURIAM. Adopted in whole.

HINES et al. v. STATE.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. BAIL (§ 79*)—ACTION ON BOND—DEFENSE.

In an action brought by the state in the county court against the principal and sureties on a forfeited bail bond, to enforce payment thereof, where the bond was duly declared forfeited at a former term of said court, illness of the principal on the day of forfeiture constitutes no defense against either the liability of the sureties or the principal.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 350-369; Dec. Dig. § 79.*]

2. BAIL (§ 77*)—COLLATERAL ATTACK—FORFEITED BAIL BOND.

The final order of the trial court, declaring a forfeiture of the bail bond, cannot be collaterally attacked in a subsequent action against the principal and sureties on the bond.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 335-349, 379, 403; Dec. Dig. § 77.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Sequoyah County; W. N. Littlejohn, Judge.

Action on a statutory bail bond by the State against Frank Hines and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. M. Frye and Robert E. Jackson, both of Sallisaw, for plaintiffs in error. Wm. L. Curtis, of Sallisaw, for the State.

SHARP, C. This is an appeal prosecuted by plaintiffs in error from a judgment rendered by the county court of Sequoyah county on a certain bail bond, on which the said Frank Hines was principal and J. A. Bradshaw, H. Dunn, and W. L. Sharp, were sureties. The petition alleged the execution and conditions of said bail bond and the failure of the principal to appear in court according to the conditions thereof and charged that a forfeiture upon said bond was duly taken. The sufficiency of the petition was not attacked, and the defendants' answer sets up as a defense that on the date of said forfeiture the principal therein was ill at his home in Ft. Smith, Ark., and physically unable to be and appear in the county court of Sequoyah county; that on account of his said illness a motion for continuance was presented by his attorney, which was by the county court overruled, and thereupon a forfeiture upon his said bond was taken; that thereafter a motion was made in said court to set aside said forfeiture, which motion was likewise by the court overruled and denied. The case coming on to be heard, the state presented a motion for a judgment on the pleadings, which motion was sustained and judgment rendered against the defendants.

[1] The questions presented for review in this court on the plaintiffs in error's appeal have been heretofore determined in *State v. Hines et al.*, 131 Pac. 688, where it was held that in an action on a bail bond, duly declared forfeited by the county court to which it was made returnable, sickness of the principal on the day of forfeiture was no defense against the sureties' liability thereon, in a subsequent action brought on the bond. In that case the order of forfeiture was taken in the county court, and, on account of the amount of the bond, suit thereon was brought in the district court. In the case at bar both the forfeiture was declared and the subsequent action brought in the county court. The principle fixing the liability of the sureties is, however, not af-

fected by the question of what court has jurisdiction of a subsequent action against the bail upon the forfeited bond.

[2] The order of the county court, declaring a forfeiture of the bond, cannot be collaterally attacked in a subsequent action brought against the principal and his sureties on the bond. We think that the statute (section 7112, Comp. Laws 1909) was correctly construed by this court in *State v. Hines et al.*, supra. If the remedy provided by the statute does not afford proper relief, when fully availed of, appeal must be made to the Legislature and not to the courts.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

AVANTS v. BRUNER.

(Supreme Court of Oklahoma. Nov. 18, 1918.)

*(Syllabus by the Court.)***1. FORCIBLE ENTRY AND DETAINER (§ 11*)—NOTICE TO VACATE—SUFFICIENCY.**

Notice, in a forcible entry and unlawful detainer action, to vacate real estate examined, and held sufficient under the statute.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 52-56; Dec. Dig. § 11.*]

2. APPEAL AND ERROR (§ 757*)—BRIEF—RULINGS ON EVIDENCE.

Where a party complains on account of the admission or rejection of testimony, he shall set out in his brief the full substance of the testimony, to the admission or rejection of which he objects, stating specifically his objection thereto, and a failure to do so precludes a consideration of such assignment of error under rule 25 (20 Okl. xii, 95 Pac. viii) of this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3092; Dec. Dig. § 757.*]

3. APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE.

Where issues of fact have been properly framed by the pleadings, and submitted to a jury under proper instructions by the trial court, this court will not interfere with the finding of the jury on the issues of fact thus submitted, if there is any evidence in the record reasonably tending to support the verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Seminole County; T. S. Cobb, Judge.

Action of forcible entry and unlawful detainer by Thomas J. Bruner, guardian of Douglas Bruner, against C. M. Avants. Judgment for plaintiff, and defendant brings error. Affirmed.

H. C. Thompson, of Seminole, and Davis & Davis, of Wewoka, for plaintiff in error. James E. Gresham, of Wewoka, Hunter L. Johnson, of Holdenville, and J. A. Patterson, of Wewoka, for defendant in error.

ROBERTSON, C. This was an action of forcible entry and unlawful detainer brought originally in the justice court of Seminole county by Thos. J. Bruner, as guardian for Douglas Bruner, an incompetent, against C. M. Avants to recover possession of certain described real estate belonging to his ward. The judgment in the justice court was for the plaintiff. The defendant appealed to the county court, where the case was tried before a jury, and resulted in a verdict for the plaintiff, upon which verdict judgment was again entered for the possession of the land and costs of suit.

[1] We will consider the various assignments of error raised in the petition in error in the order in which they are treated in the brief. The first is that the court erred in permitting the notice to vacate the land in controversy to be read in evidence, for the reason that it failed to show the county and state wherein the land is located. This assignment is purely technical, and entitled to no serious consideration at our hands. On page 3 of the case-made is found the notice complained of, which is in words and figures as follows:

"Notice.

"State of Oklahoma, Seminole County—ss.:

"C. M. Avants: You are hereby notified to quit, and leave, and deliver up to me at once the premises described as follows: West half of the northwest quarter of the northeast quarter and the east half of the northeast quarter of the northwest quarter of section 29, township 10 north, range 6 east—for the possession of which I shall bring suit after three days under the forcible entry and detainer act. You will govern yourself accordingly.

"Witness my hand this 28th day of February, 1911. Thomas Bruner, Guardian of Douglas Bruner, Owner of Said Premises.

"State of Oklahoma, Seminole County—ss.:

"I, Thomas Bruner, being first duly sworn on oath depose and say that on the 28th day of February, 1911, I delivered a true copy of the above notice to the defendant, C. M. Avants. Thomas Bruner, Guardian of Douglas Bruner.

"Subscribed and sworn to before me this 9th day of March, A. D. 1911. Frank Grall, Justice of the Peace."

Indorsed: "Filed April 3, 1911. W. N. Stokes, Clerk County Court."

This notice was attached to the complaint as an exhibit, and during the trial was offered in evidence by the plaintiff, and admitted by the court over objection of defendant, who insists that it does not properly describe the premises, in that it does not give the state and county wherein the land was located, and does not describe the premises on which it was served. The primary purpose of a notice to vacate, in such a proceeding as the one under consideration, is to

apprise the party to whom the notice is given of the description of the land desired to be vacated with such reasonable certainty that he could not be mistaken as to what land was meant. The above notice is a sufficient compliance with the requirements of the statute in this respect, and, while it would have been better practice to have added to the description of the land in the body of the notice the name of the county and state where the same was located, yet this notice shows by the caption and the description of the premises that no other land could have been meant than that for which this action was brought to recover. The objection is frivolous, and the trial court committed no error in overruling the same.

The second, third, and fourth assignments of error have been abandoned, and are not mentioned in the brief, and therefore we need not concern ourselves further with them.

[2] The fifth assignment of error is that: "The court erred in allowing testimony of the plaintiff on cross-examination as to the place being in litigation at the time of defendant's purchase." We are unable to give this assignment consideration, for the reason that no compliance whatever has been made by plaintiff in error in his brief with the requirements of rule 25 (20 Okl. xli, 95 Pac. viii) of this court, which provides that: "Where a party complains on account of the admission or rejection of testimony, he shall set out in his brief the full substance of the testimony, to the admission or rejection of which he objects, stating specifically his objections thereto." We are unable to say, upon an examination of the record, what testimony the plaintiff in error complains of, or whether or not its admission was error, for the reason that none of it is set out in the brief, nor is it identified in any manner so as to enable us to pass upon its competency.

[3] The sixth assignment of error complains of the action of the court in rendering judgment in favor of the defendant in error on the verdict of the jury, for that there was no evidence to show want of consent at the time of the entry, or that the same was by force, violence, threats, fraud, or stealth; while the seventh assignment complains that the court erred in overruling the motion of defendant below for a new trial, for the reason that the verdict is not sustained by sufficient evidence, and is contrary to law. These two propositions involve a question of fact under the issues framed by the pleadings. The undisputed testimony of Caesar Bruner, one of the witnesses for the plaintiff, was that he had been in possession of the land for the past ten years. Avants, the defendant below, testified that he used no force, threats, or stealth in entering upon the land. The testimony shows that the land was inclosed by a fence, and that at the time the defendant made entry

thereon there was cattle belonging to Caesar Bruner on the land in question, that the fence was cut, and that the defendant entered the land without the knowledge or consent of Bruner. There was testimony to show that the land was the allotment of Douglas Bruner, and that, since its allotment in 1901, it had been in the continuous and open peaceful possession of the parents of the said allottee. Avants testified that he purchased the land from one Mrs. Lula J. Turlington, and went into possession under instructions from one Dr. Turlington, under a verbal contract, and later they gave him a bond for title.

The jury was required by instructions from the court to pass upon these conflicting claims and statements of the parties and the witnesses. These issues were submitted to them by the court under proper instructions, to which no objection was lodged by the defendant. The jury resolved the issues in favor of the plaintiff below, and with this finding of the jury we find no fault. It is a fundamental rule of this court, so well established that citation of authority is unnecessary, that, where issues of fact have been properly framed by the pleadings, and submitted to a jury under proper instructions by the trial court, this court will not interfere with the finding of the jury on the issues of fact thus submitted, if there is any evidence in the record reasonably tending to support the verdict. Such is the condition of the record in this case under assignments 6 and 7.

Having thus disposed of all the assignments of error raised by plaintiff in error in his brief, we are of opinion that there is no error in the record sufficient to warrant a reversal, but that, on the contrary, the judgment of the trial court is correct, and should be in all things affirmed.

PER CURIAM. Adopted in whole.

**WESTERN TERRA COTTA CO. et al. v.
BOARD OF EDUCATION OF CITY
OF SHAWNEE et al.**

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 13*)—PROPERTY SUBJECT—PUBLIC BUILDINGS.

In the absence of a statute in express terms authorizing it, there can be no mechanic's lien on the public buildings of a state, or the subdivision thereof, since such lien would be contrary to public policy and incapable of enforcement.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 14, 15; Dec. Dig. § 13.*]

2. STATUTES (§ 226*)—CONSTRUCTION—LAW ADOPTED FROM ANOTHER STATE—MECHANICS' LIENS.

While it is the general rule that the Legislature of one state, in adopting a statute of

another state, is presumed to have adopted the construction placed on such statute by the highest court of such other state prior to its adoption, yet this rule has its exceptions: First, where the construction is contrary to the Constitution or the well-defined legislative policy of the adopting state; second, where the adopted statute exists in many other states, and such construction is contrary to the decided weight of authority in such states having substantially the same statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 307; Dec. Dig. § 226.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by the Western Terra Cotta Company against the Board of Education of the City of Shawnee and others. From a judgment in favor of defendant Board of Education, both plaintiff and defendant the Warren-Smith Hardware Company bring error. **Affirmed.**

J. H. Woods, of Shawnee, for plaintiff in error Western Terra Cotta Co. L. G. Pitman and E. E. Hood, both of Shawnee, for plaintiff in error Warren-Smith Hardware Co. Blakeney, Maxey & Miley, of Muskogee, for defendant in error Board of Education of City of Shawnee.

SHARP, C. On the 31st day of June, 1911, plaintiff, Western Terra Cotta Company, filed its petition in the superior court of Pottawatomie county against the defendants, board of education of the city of Shawnee, state of Oklahoma, H. F. Van Orden, H. F. Van Orden & Son, Warren-Smith Hardware Company, I. C. Wood, A. M. McDonald and C. F. Wishart, a copartnership, trading as McDonald & Wishart, Shawnee Planing Mill Lumber Company, H. G. Newcomb, Taylor Lumber Company, J. S. Peoples, and Sam W. Currie, the object and purpose of which was to foreclose an alleged mechanic's lien, claimed by it on lots 26, 27, 28, 29, 30, and 32, block No. 7, of the amended plat to the city of Shawnee, owned by the said board of education, and on which it was at the time engaged in the erection of a school building, under a contract by it theretofore let to the defendants H. F. Van Orden and H. F. Van Orden & Son. The petition charged that plaintiff had sold, furnished, and delivered to said contractors certain building material used by them in the construction of the said school building. The petition is skillfully drawn, and it appears that all the steps necessary to the acquiring of a lien were complied with, if a mechanic's lien could attach on account of the public nature of the school property. The defendant Warren-Smith Hardware Company filed its answer and cross-petition, also claiming and asserting a lien upon the premises owned by the said defendant board of education. Demurrers were filed to both the petition and cross-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

petition by the board of education and, coming on to be heard, were sustained upon the ground that neither the said petition nor answer and cross-petition stated facts sufficient to constitute a cause of action in favor of the demurrants.

[1] As stated by counsel for plaintiffs in error, the single question presented by this appeal is: Can the property of the defendant board of education be subjected to a mechanic's lien? Under section 8011, Comp. Laws 1909 (section 7745, Rev. Laws 1910), the public schools of each city organized in pursuance of law are made a body corporate and given the usual power of corporations for public purposes. It is admitted that the property upon which it was sought to fix the liens, and the action to foreclose, was public property, devoted exclusively to the use of the public schools. The great weight of authority is to the effect that in the absence of a statute there can be no mechanic's lien on the public buildings of the state or subdivisions thereof on the ground that such lien would be contrary to public policy and incapable of enforcement.

[2] Conceding the general rule to be as stated, it is insisted, however, by counsel for plaintiffs in error that the territorial Legislature, having adopted the Kansas statute on the subject of mechanic's liens, and it having, prior to its adoption, been construed by the Supreme Court of Kansas so as to permit mechanic's liens to be filed against property devoted to the public use, such decisions are binding upon this court. The same contention was urged in *Hutchinson v. Krueger et al.*, 34 Okl. 23, 124 Pac. 591, 41 L. R. A. (N. S.) 815. It was there held by this court that, while it is a general rule that the Legislature of one state, in adopting the statute of another, is presumed to have adopted the construction placed on such statute by the highest court of such other state prior to its adoption, yet the rule is subject to the following exceptions: (1) Where the construction is contrary to the Constitution or the well-defined legislative policy of the adopting state; (2) where the adopted statute exists in many other states, and such construction is contrary to the decided weight of authority in such other states having substantially the same statute.

It is unnecessary to review or cite the authorities upon either of the questions presented, in view of the recent expression of this court in the foregoing case. The opinion is one that shows careful consideration and meets our hearty approval and enunciates the correct rule of decision governing and controlling the questions presented here.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

LARRY v. STATE.

(Criminal Court of Appeals of Oklahoma. Nov. 29, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 112*)—SELF-DEFENSE—FREEDOM FROM FAULT.

One who kills another under an apprehension of death or great bodily harm from assault must have been free from fault in bringing on the difficulty in order to justify the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.*]

2. HOMICIDE (§ 114*)—SELF-DEFENSE—MUTUAL COMBAT.

Where the killing is done in mutual combat, entered into willingly, and in the knowledge of its liability to cause death to one or the other of the combatants, the defendant cannot justify on the ground that it was committed in self-defense, and it will be manslaughter at least unless the defendant can prove that before the fatal shot was fired he had refused any further combat and had retreated as far as he could with safety, and that he killed his adversary of necessity to save his own life or his person from great bodily harm.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 153, 154; Dec. Dig. § 114.*]

Appeal from District Court, Pittsburg County; Preslie B. Cole, Judge.

Shelly Larry was convicted of manslaughter in the first degree, and appeals. Affirmed.

Arnote & Rogers, of McAlester, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error, herein after referred to as the defendant, was convicted of manslaughter in the first degree on an indictment returned by the grand jury at the October, 1908, term of the district court, charging him with the murder of one Frank Jackson on the 7th day of September, 1908, and in accordance with the verdict of the jury the court sentenced the defendant on the 18th day of December, 1911, to imprisonment in the penitentiary for the term of 15 years. The defendant appealed by filing in this court on April 19, 1912, a petition in error with case-made.

It appears from the record that the deceased and the defendant were negroes, and the homicide was the result of a drunken row engendered by jealousy over the affections of a negro woman of ill repute. The tragedy occurred at Dow, a mining town in Pittsburg county. Immediately after the killing the defendant fled to parts unknown and was not seen in that county until early in the year 1911, when he surrendered.

Lee Bertha, the negress, lived in a small house at Dow, together with one or two others of her sex and race, and was employed at a negro restaurant at which numerous negro miners took their meals, among them being the deceased and the defendant. On the evening of September 7, 1908, Frank Jackson, the deceased, was talking to Lee

Bertha when the defendant approached them and remarked, "What are you doing standing there talking to my wife." The deceased became somewhat offended and left the restaurant and shortly thereafter the defendant left also. Shortly afterwards the deceased and the defendant met across the street from the restaurant and went to the place where Lee Bertha stayed. She was standing on the porch. The defendant said, "Now, here is the woman, ask her what I said;" and the deceased said, "Looks like you boys want to run over me," and pulled a pistol and threw it down on the defendant. Defendant said, "You can kill me, but you cannot eat me;" and the deceased grabbed him by his vest. The defendant slipped out of his vest and ran down the street. The deceased remained in front of the house talking to Lee Bertha. In about 20 minutes the defendant returned with a shotgun; coming around the corner of the house he shot Frank Jackson, the deceased, in the back of the head, killing him instantly. There were several eyewitnesses to the shooting.

The defendant, as a witness in his own behalf, testified: That after talking with Frank Jackson in the restaurant he met him on the street and Jackson said he wanted him to go with him to see Lee Bertha. That they went there together. Jackson drew a gun on him and said, "I ought to kill you," and grabbed hold of his vest, and he ran away from him and went home. That his parents lived at Hartshorn and he decided to go over there, so he put on his clothes and took a gun with him and started for Hartshorn. That he went by Lee Bertha's to get his vest. The transcript of his testimony as to how the killing occurred is as follows: "Q. Did you see Frank Jackson before you got there? A. No, sir. Q. Did you hear him? A. No, sir. Q. Did you know he was there? A. No, sir; I never knew he was there. Q. Well did you see him after you got up there to the house? A. I never seen him until after I got right up in the shape I seen his gun. Q. You got up in the shape that you saw his gun? A. Yes, sir. Q. What position was he in when you first saw him? A. Why, he was to say facing me when I first saw him. Q. How was his gun? A. Why he had his gun up looked to me in position to shoot. Q. Do you know whether he was holding it with one hand or both hands? A. I could not say whether he had it pulled with one or both, but it looked to me like he had both up. Q. When you saw him with his gun up that way what did you do? A. Why, I shot. Q. You shot? A. Yes, sir. Q. Well, why did you shoot, Shelly? A. Why, he had his gun pointed towards me and I thought maybe that he would, he would— Why did I shoot? I seed he had his gun up pointed towards me and I thought he was aiming going to shoot me, and I shot my

gun, to keep him from shooting me. I tried to shoot first, anyhow. Q. Tried to shoot first? A. Yes, sir."

[1] In the view we take of this case, we do not think it necessary to discuss the questions raised by the defendant. The testimony of the state shows a case of deliberate assassination. While the defendant's own testimony shows a case of killing on mutual combat, willingly entered into by the defendant, if we consider the case in its most favorable aspect for the defendant, he is upon his own testimony guilty at least of manslaughter in the first degree.

[2] Where the killing is done in mutual combat, entered into willingly, and in the knowledge of its liability to cause death to one or the other of the combatants, the slayer cannot justify on the ground that it was committed in self-defense, and it will be manslaughter at least, unless the survivor can prove that before the fatal shot was fired he had refused any further combat and had retreated as far as he could with safety, and that he killed his adversary of necessity to save his own life or his person from great bodily harm. *Evans v. State*, 8 Okl. Cr. 78, 126 Pac. 586.

No question is raised as to the sufficiency of the indictment. The charge of the court is full and correct and more favorable to the defendant in some particulars than the evidence demanded. After a careful examination of the various questions raised, we are satisfied that, under well-settled rules sustained and upheld by the decisions of this court, no prejudicial error was committed.

The judgment of the district court of Pittsburg county is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

Ex parte WILLIAMS.

(Criminal Court of Appeals of Oklahoma. Dec. 1, 1913.)

(Syllabus by the Court.)

EXTRADITION (§§ 30, 39*) — "FUGITIVE FROM JUSTICE"—REVOCATION OF PAROLE.

(a) To be a fugitive from justice under the laws of the United States, it is not necessary that the person charged with having left the state in which the crime was alleged to have been committed should have done so for the purpose of avoiding prosecution anticipated or begun, but simply that, having committed a crime within the state, he leaves such state, and, when he is sought to be subjected to its criminal process to answer for his offense, he is found within the territory of another state.

(b) A convicted prisoner, who has a parole, and who goes into another state, is a fugitive from justice within the provisions of the United States Constitution and laws, and as such is subject to extradition if his parole is revoked.

(c) The legality of the revocation of a parole in the state of Indiana is a question for the courts of Indiana, for they alone have the right

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to construe the Constitution and laws of that state.

(d) Whenever the action of the Governor of Oklahoma in any matter is authorized by law, and comes before the court for review, it is our duty to sustain the Governor, and we take great pleasure in doing so.

[Ed. Note.—For other cases, see *Extradition*, Cent. Dig. §§ 32, 45, 46; Dec. Dig. §§ 30, 39.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 2995, 2996.]

Petition for writ of habeas corpus by Eugene Williams. Denied.

It appears from the record in this cause that the petitioner, Eugene Williams, was legally charged by indictment, and was tried and convicted for the crime of grand larceny in the circuit court of Vanderburgh county, in the state of Indiana, on the 12th day of July, 1909, and was sentenced to imprisonment in the penitentiary of Indiana from one year to 14 years; that before the expiration of said sentence petitioner was paroled by the board of commissioners of the Indiana State Prison, and removed from the state of Indiana to the state of Oklahoma; that on the 1st day of December, 1912, petitioner was declared a delinquent, and his parole was revoked. On this state of facts the Governor of Indiana presented requisition papers for the said Eugene Williams to the Governor of Oklahoma, which were honored by the Governor of this state, and his warrant issued for the arrest of petitioner, to be returned to the state of Indiana, as requested by the Governor of that state.

J. G. Harley, of McAlester, for petitioner. Munden & Staley, of Oklahoma City, for State of Indiana.

FURMAN, J. (after stating the facts as above). When this matter was presented to the Governor of Oklahoma, he properly referred it to the Attorney General for legal advice. The Attorney General advised the Governor that, to be a fugitive from justice under the act of Congress, it is not necessary that the person charged with having left the state in which the crime was alleged to have been committed did so for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed a crime against the laws, leaves such state, and, when he is sought to be subjected to its criminal process to answer for his offense, he is found within the territory of another state. In support of this proposition, the Attorney General cited the following authorities: *Ex parte Dickson*, 4 Ind. T. 481, 69 S. W. 943; *Op. Gov. Fairfield* (Me.) 24 Am. Jur. 226; *State v. Richter*, 37 Minn. 436, 35 N. W. 9; *In re Voorhees*, 32 N. J. Law, 141; *People v. Pinkerton*, 17 Hun (N. Y.) 199; *Johnson v. Ammons* (Ohio) 7 Am. Law Rec. 662; *Hibler v. State*, 43 Tex. 197; *Roberts v. Relly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; *In re Bruce* (C. C.) 132

Fed. 390; *In re Bloch* (D. C.) 87 Fed. 981; *In re White*, 55 Fed. 54, 5 C. C. A. 29; *Ex parte Brown* (D. C.) 28 Fed. 653.

We are of the opinion that the advice of the Attorney General to the Governor states the law correctly. In further support of this proposition, we desire to cite the case of *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 530, 38 L. R. A. 486. In that case the Supreme Court of Connecticut held that a prisoner who violates a parole, and goes into another state, is a fugitive from justice within the provisions of the United States Constitution and laws, and that such person is subject to extradition.

There is but one question in this case, and that is the legality of the revocation of the parole of petitioner; but this is a question for the courts of Indiana, for they alone have the right to construe their Constitution and laws. When the Governor's action in any matter is authorized by law, it is our duty to sustain such action, and we take great pleasure in doing so. We find that the Governor's action in this case is entirely proper, and within the law, and it is therefore upheld and sustained, and the writ is denied, and any officer of the state of Oklahoma who may now have petitioner in his custody is directed to surrender him to the duly authorized representative of the state of Indiana, in obedience to the Governor's warrant issued in this proceeding. It is further ordered that the extradition papers may be withdrawn from the files by the attorneys representing the state of Indiana.

Mandate will issue without delay.

ARMSTRONG, P. J., and DOYLE, J., concur.

BUSBY v. STATE.

(Criminal Court of Appeals of Oklahoma. Nov. 29, 1913.)

(Syllabus by the Court.)

WITNESSES (§ 337*)—CROSS-EXAMINATION OF ACCUSED—PRIOR CONVICTION.

The state, in a criminal case, has the right to ask the defendant, as a witness in his own behalf, upon cross-examination, whether or not he has been convicted of a crime for the purpose of affecting his credibility.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.*]

Appeal from County Court, Jefferson County; B. T. Price, Judge.

Smith Busby was convicted of pointing a pistol, and Affirmed.

W. E. Sayle, of Okemah, and E. Huser, of Hastings, for plaintiff in error. Smith C. Matson and C. J. Davenport, Asst. Atts. Gen., for the State.

PER CURIAM. This appeal is prosecuted from a judgment of conviction entered on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

14th day of October, 1912. The charge was that the defendant, on or about the 27th day of June, 1912, did willfully and unlawfully point a pistol at another, to wit, M. F. Laird. The jury left the punishment to the court. The sentence of the court was that the defendant serve 3 months in the county jail, and pay a fine of \$50.

The information is sufficient, and no contention is made that the verdict is not sustained by the evidence; the sole ground of complaint being that the court erred in admitting certain evidence.

The defendant was a witness in his own behalf, and was asked upon his cross-examination if he had ever been convicted of a felony. He answered that he had been so convicted 17 years ago. Counsel now contend that the conviction was too remote to be considered, and that the court should not have permitted this evidence to go to the jury. Our statute provides (section 5046, Rev. Laws) that a witness may be discredited by showing on cross-examination his conviction of a criminal offense, and section 5882, Rev. Laws, provides that "the rules of evidence in civil cases are applicable also in criminal cases." The defendant had elected to testify as a witness in his own behalf, and, having done so, the county attorney had a right to ask him on cross-examination any question pertaining to the matter at issue, or that would go to his credibility as a witness. *Key v. State*, 10 Okl. Cr. —, 135 Pac. 950, and cases cited.

Upon a careful consideration of the record, there seems to be no reason to doubt that the verdict of the jury in this case was entirely in harmony with the interests of justice.

The judgment of conviction is therefore affirmed.

WILLIAMS v. STATE.

(Criminal Court of Appeals of Oklahoma.
Nov. 29, 1913.)

(Syllabus by the Court.)

1. RAPE (§ 53*)—ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF EVIDENCE.

To constitute a good charge of attempt to commit the crime of rape under section 2803, Rev. Laws 1910, some act done towards the commission of the crime and the failure must be alleged, and it is also necessary to allege an intent to feloniously have sexual intercourse by committing a rape as defined by section 2414, Rev. Laws 1910.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 37-41; Dec. Dig. § 34.*]

2. CRIMINAL LAW (§ 1183*)—APPEAL—MODIFICATION OF JUDGMENT.

Under section 6003, Rev. Laws 1910, of the Code of Criminal Procedure, this court, in the furtherance of justice, has the power to modify any judgment appealed from by reducing the sentence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3195-3198; Dec. Dig. § 1183.*]

3. RAPE (§ 53*)—ASSAULT WITH INTENT TO COMMIT RAPE—SUFFICIENCY OF EVIDENCE. The evidence in this case considered, and held sufficient to show an assault with intent to commit rape.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 78-81; Dec. Dig. § 53.*]

Appeal from District Court, Caddo County; Frank M. Bailey, Judge.

James Williams was convicted of attempt to commit rape, and appeals. Modified and affirmed.

W. W. Vaughn and Bristow & McFadyen, all of Anadarko, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a judgment of conviction entered on the 10th day of April, 1912, in which the defendant was adjudged guilty of the offense of attempt to commit rape, alleged to have been committed on or about the 17th day of February, 1912.

The charging part of the information is as follows: "One James Williams, then and there being, did then and there intentionally, unlawfully, willfully, and feloniously make an assault upon one Mrs. W. W. Hyden, a female person over the age of 18 years, and of previous chaste and virtuous character, with an intent, her, the said Mrs. W. W. Hyden, unlawfully and feloniously to rape, ravish, and carnally know, and he, the said James Williams, did then and there attempt to unlawfully and feloniously rape, ravish, and carnally know the said Mrs. W. W. Hyden; the said Mrs. W. W. Hyden not being the wife of the said James Williams."

The verdict of the jury, omitting formal parts, is as follows: "We, the jury impaneled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find the defendant James Williams guilty as charged in the information herein, and submit his punishment to the court."

The judgment and sentence of the court was that the defendant serve a term of 25 years' imprisonment in the penitentiary.

The petition alleges various assignments of error; but the defendant's counsel, in their brief, say: "This case is brought to this court upon the one proposition, that of the punishment being for a greater period than authorized under the information and the law governing the punishment in this case, in that by said information the defendant is charged with the offense of assault with intent to commit rape, under section 2319, Snyder's Sta. (section 2338, Rev. Laws), providing that: 'Any person who is guilty of an assault with intent to commit any felony, except an assault with intent to kill, the punishment for which assault is not otherwise prescribed in this Code, is punishable by imprisonment in the state penitentiary not exceeding five years, or in a county jail

not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment"—and conclude by saying: "If we are right in this contention, then this case should be reversed, or the punishment should be reduced in keeping with the law, and such error should be corrected by the judgment and finding of this court."

The only question presented is the sufficiency of the information to charge an offense under section 2803, Rev. Laws, providing: "Any person who attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows."

The Attorney General has filed a confession of error, which, after reviewing the record, concludes as follows: "Our Code recognizes two separate and distinct crimes in this respect, each punishable under separate provisions of the law. It follows then that, in order for this judgment to stand, the information should have been sufficient to charge the crime of an attempt to commit rape. In this respect we think it fatally defective, in that it does not set out the facts which constituted the alleged attempt. It is, however, perhaps sufficient to charge the crime of assault with intent to commit rape, and, as the trial court instructed on the law applicable to such an assault, and as the jury returned a general verdict of guilty as charged in the indictment, we think the court should have pronounced judgment, and sentenced the defendant under section 2338, *supra*."

[3] It appears from the record that about the hour of 7 o'clock, p. m. on the date alleged Mr. W. W. Hyden left his wife and family at his home on the Engle ranch, about two miles southeast of Binger, and went to town, and on his way stopped where the defendant stayed, and told him that he was going to Binger to arrange for Mr. Engle to pay him for picking cotton. Shortly afterwards the defendant, a negro, went to his home, and, standing in the road, called Mrs. Hyden, and told her that her husband had fallen from his horse, and was lying in the road with a broken leg, and asked her to come and help carry him home. The night was dark, and she went with him some distance before she discovered he was a negro. She then ran to a nearby neighbor's house; the defendant followed her, and called to her to stop. Shortly afterwards her husband returned. The defense was an alibi.

[1] In a prosecution for attempt to commit rape under section 2803 (Rev. Laws) of the Penal Code, in order to constitute a good charge of attempt to commit the crime of rape, it is necessary to aver in the infor-

mation some act done toward the commission of the crime and the failure. It is also necessary to aver, where the female is over the age of 18 years, an intent to feloniously have sexual intercourse by committing a rape as defined by the Penal Code. Section 2414, Rev. Laws.

In the case of *Cunningham v. Commonwealth*, 88 Va. 37, 13 S. E. 309, the Supreme Court of Appeals of Virginia held that to aver that accused "violently and feloniously made an assault" is sufficient to aver an act done in the attempt. However, we cannot follow this case as a precedent, as the provisions of our Penal Code in this respect are different. The sufficiency of the information to charge the crime of attempt to commit rape was not challenged by proper demurrer or by motion in arrest of judgment. The information is sufficient to charge the crime of assault with intent to commit rape, and the evidence is sufficient to sustain a conviction of either offense.

[2] Our Criminal Procedure Act provides that: "The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial." Section 6003, Rev. Laws. Under this statute, this court, exercising its revisory jurisdiction, has the power and authority to modify any judgment appealed from by reducing the sentence. *Fritz v. State*, 8 Okl. Cr. 342, 128 Pac. 170.

From a careful examination of the record, we are satisfied that the confession of error should be sustained, in that upon the verdict returned the trial court should have considered it a verdict of guilty of assault with intent to commit rape. For this reason, the judgment appealed from will be modified, and the sentence reduced to five years' imprisonment in the penitentiary, the maximum punishment prescribed for assault with intent to commit rape as defined by section 2338 of the Penal Code.

The judgment and sentence of the district court of Caddo county, as thus modified, will be affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

STATE v. ANALLA.

(Supreme Court of New Mexico. Oct. 4, 1913.
On Motion for Rehearing, Dec. 2, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1121*)—APPEAL—RECORD—EVIDENCE.

Where appellant relies upon a failure of proof as to ownership of an alleged stolen animal, it is incumbent upon him to present a complete transcript of all the evidence adduced in the trial court. Failing to do so, the appellate court will presume that the facts necessary to support the verdict were disclosed by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

evidence not incorporated in the bill of exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2938, 2939; Dec. Dig. § 1121.*]

2. CRIMINAL LAW (§ 603*)—CONTINUANCE—SUPPORTING AFFIDAVIT—MATERIALITY OF TESTIMONY.

Nothing is to be presumed in aid of an affidavit in support of a motion for a continuance, and it is incumbent upon the party applying for a continuance to show the materiality of the facts which he claims the absent witness will substantiate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

3. CRIMINAL LAW (§ 1152*)—APPEAL—DISCRETIONARY RULINGS—DRAWING OF JURORS.

In the absence of a showing of abuse of discretion vested in the trial judge by section 12, c. 116, Session Laws 1905, the appellate court will not review the action of the court in returning to the jury box the names of veniremen, drawn to complete the panel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.*]

4. CRIMINAL LAW (§§ 1038, 1056*)—APPEAL—PRESENTATION BELOW—INSTRUCTION.

Appellant cannot avail himself of alleged errors by the trial court in giving, or refusing to give, instructions, where he interposed no objection to the action of the court and failed to save exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2846, 2868, 2870; Dec. Dig. §§ 1038, 1056.*]

(Additional Syllabus by Editorial Staff.)

5. CRIMINAL LAW (§ 603*)—CONTINUANCE—SUPPORTING AFFIDAVIT—SUFFICIENCY.

The affidavit supporting a motion for a continuance in a criminal case was fatally defective where it failed to aver the truth of the facts which the absent witness would substantiate, or defendant's belief that such facts were true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

6. CRIMINAL LAW (§ 1111*)—APPEAL—RECORD—CONCLUSIVENESS.

The appellate court is bound by the record, though counsel for accused contend in his brief that certain exceptions made and saved are not shown by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2894-2896; Dec. Dig. § 1111.*]

On Motion for Rehearing.

7. CRIMINAL LAW (§ 430*)—EVIDENCE—PROOF OF BRAND.

In a prosecution for the larceny of a horse, compliance with Comp. Laws 1897, §§ 67, 107, relative to proof of brand, requires only the introduction in evidence of a certified copy of the recorded brand, where the evidence of ownership depends upon the brand on the animal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1019; Dec. Dig. § 430.*]

Appeal from District Court, Lincoln County; before Justice Medler.

Pedro Analla was convicted of the larceny of a horse, and he appeals. Affirmed, and rehearing denied.

Prichard & Howard, of Santa Fé, for appellant. Frank W. Clancy, Atty. Gen., and H. S. Clancy, Asst. Atty. Gen., for the State.

ROBERTS, C. J. Appellant was indicted, tried, and convicted in the district court of Lincoln county of the larceny of a horse. The indictment contained two counts, the first of which alleged ownership of the horse by Esequiel Sandoval, while the second count states the owner of the horse to be "Pablo Fresquez, the legally appointed, qualified, and acting guardian of Esequiel Sandoval, a minor, and as such guardian has the care, custody, control, and possession of the property of the said Esequiel Sandoval."

[1] The first ground urged for a reversal by appellant is that there was no proof of ownership of the animal alleged to have been stolen, as charged in the indictment. In support of his contention appellant sets out in his brief portions of the transcript of evidence which seemingly support his contention. We have gone over the transcript carefully, and find that the district attorney failed to ask the various witnesses who testified in the case the Christian name of the boy who was alleged to be the owner of the horse. He, as did the witnesses, always referred to him as "Mr. Sandoval," or "the Sandoval boy," but while this is true, the evidence clearly shows that the Sandoval referred to was the ward of Pablo Fresquez, and said Fresquez, who testified as a witness, clearly identified the stolen property as belonging to his ward, and the state caused the witness to produce a certified copy of his letters of guardianship of the boy, which were admitted in evidence. It is true the letters do not appear in the transcript of evidence, but it was incumbent upon the appellant, relying as he does upon a failure of proof, to present a complete and full transcript of all the evidence. Not having done so, the appellate court will presume that the facts necessary to support the verdict were disclosed by the evidence not incorporated in the bill of exceptions.

[2] Appellant moved the court to grant him a continuance of this cause upon the ground of the absence of a witness, and in support of such motion filed his affidavit, the material portion of which reads as follows: "That said witness is an important witness for the defendant in this: That if said witness were present he would testify that on the 30th day of November, 1911, he was at the camp of this defendant, some few miles north of Tinnie, and remained there the whole of said day; that he saw this defendant leave said camp about the hour of 12 m., on said day, and when he left said camp he was riding a sorrel horse and leading a gray horse that belonged to Santiago Lucero; that the witness was familiar with both the horse that this defendant was riding and the gray horse

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the defendant was leading, and knows that the sorrel horse belonged to the defendant, and that the gray horse was owned by the said Santiago and has been owned by him for some time heretofore; that said witness, if he were present, would identify said horse, which the defendant at this time has in his possession in the town of Carrizozo, and is ready and willing to exhibit the same to this court, and could prove by said witness, if he were here, that it is the same identical horse that the defendant led away from said camp on the said 30th day of November, 1911. The witness would further testify, if he were present, that said gray horse was to be delivered by the said defendant at the house of one Felipe Vigil near Tinnie under direction of said Santiago Lucero as the witness has been advised. Defendant further states that he knows of no other witnesses by whom he can prove the facts above stated, viz., the fact that the defendant left defendant's camp riding said sorrel horse and leading said gray horse, and the further fact that he returned to the said camp on the said day without said gray horse."

[5] Appellant failed to show in his affidavit how the above facts were material, or might become material, upon the trial of the case. The witness might have testified to all the facts alleged, and still such testimony would have had no bearing upon the guilt or innocence of the defendant. In the indictment appellant was charged with the larceny of a horse, but no description of the horse was set forth, and it was incumbent upon him, in his affidavit for a continuance, to show in what manner such facts were material to his defense. Nothing is to be presumed in aid of an affidavit in support of a motion for a continuance. The presumption is that where a party applies for a continuance he makes as strong a case as the facts will warrant. Another fatal objection to the sufficiency of the affidavit was the failure of appellant to aver therein the truth of the facts which he claimed the absent witness would substantiate, or his belief that such facts were true. 9 Cyc. 203. From the above it is apparent that the trial court did not err in overruling the motion for a continuance.

[3] Appellant assigns as error the action of the court below in refusing the names of a number of persons drawn from the jury box to complete the panel, who resided at points distant from the place where court was in session. The court acted under the provisions of section 12, chapter 116, of the Session Laws of 1905, which authorizes a judge in his discretion to return to the box the name of any person drawn to fill a vacancy, or as a talesman, who, in the opinion of the judge, resides so far from the place where the court is held as to render it inexpedient to summon such person. No showing has been made of any abuse by the

judge of the discretion vested in him by the statute; and, in the absence of such a showing the appellate court will not review the question.

[4] Appellant complains of the refusal of the court to give a requested instruction, and of the action of the court in sending for the jury and further instructing the jurors as to their duty to arrive at a verdict if possible. Appellant cannot avail himself of these alleged errors, however, because he interposed no objection to the action of the court and saved no exceptions.

[6] In the brief filed on his behalf the contention is made that exceptions were saved, but that such exceptions are not shown by the record. The appellate court is bound by the record, however, and will not therefore review the action of the court in giving and refusing instructions.

Finding no reversible error in the record, the judgment of the lower court will be affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

On Motion for Rehearing.

ROBERTS, C. J. [7] Appellant has filed a motion for rehearing, wherein he contends that the court overlooked a point raised in his brief, upon the former hearing of the case, viz., that there was no proof of brand, as required by sections 87 and 107, C. L. 1897, and therefore no sufficient proof of ownership of the animal alleged to have been stolen. We have re-examined the record, and find that the witness Romualdo Fresquez testified that he saw the appellant leading or driving the horse away, and that he recognized the horse as the property of Sandoval. Other witnesses testified to the same effect; and, so far as we have been able to find, no one of the witnesses for the state predicated his knowledge of the ownership of the animal upon the brand. It is only necessary to introduce a certified copy of the recorded brand in evidence, where the evidence of ownership depends upon the brand on the animal. *Gale & Farr v. Salas*, 11 N. M. 211, 66 Pac. 520.

For the reasons stated, the motion for rehearing will be denied; and it is so ordered.

HANNA and PARKER, JJ., concur.

STATE ex rel. FORNOFF v. SARGENT,
State Auditor.

(Supreme Court of New Mexico. Oct. 16, 1913.
Rehearing Denied Dec. 1, 1913.)

(Syllabus by the Court.)

1. STATES (§ 131*)—SALARIES—APPROPRIATIONS—CONSTRUCTION OF CONSTITUTION.

Where the Constitution of a state creates an office and prescribes the salary for such office, the necessity for legislative appropriation for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such office is dispensed with, on the ground that such provision in a state Constitution is proprio vigore an appropriation.

[Ed. Note.—For other cases, see States, Cent. Dig. § 129; Dec. Dig. § 181.*]

2. STATES (§ 181*)—SALARIES—APPROPRIATIONS—CONSTRUCTION OF STATUTE.

This rule has been extended to a general law fixing the salary of a public officer, and prescribing its payment at particular periods.

[Ed. Note.—For other cases, see States, Cent. Dig. § 129; Dec. Dig. § 181.*]

3. STATES (§ 57*)—MOUNTED POLICE—SALARIES—APPROPRIATION—MANDAMUS.

Held, that the act of 1905 (chapter 9), creating a force of mounted police, fixing salaries of its members, and providing for payment thereof, was repealed by the act of the Legislature of 1909 (chapter 127, § 4), in so far as it provided for salaries and membership of the force, and that therefore a writ of mandate directed to the State Auditor, requiring him to make a levy to pay such salaries, is not issuable, because the appropriation by the act of 1905 has ceased to be a continuing appropriation, and the Legislature has failed to make appropriation for the present fiscal year.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 37, 61; Dec. Dig. § 57.*]

4. STATUTES (§ 172*)—EFFECT OF REPEAL—REVIVAL OF PRIOR LAW.

When a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the Legislature to that effect be expressed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 252; Dec. Dig. § 172.*]

(Additional Syllabus by Editorial Staff.)

5. STATES (§ 181*)—PUBLIC FUNDS—APPROPRIATIONS—SALARIES OF PUBLIC OFFICERS.

The rule that, where a general law fixes the amount of a public officer's salary and prescribes its payment at particular periods, this constitutes a continuing appropriation, and dispenses with the necessity for subsequent legislative appropriations for such salaries, is not violative of Const. art. 4, § 30, providing that "except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the Legislature."

[Ed. Note.—For other cases, see States, Dec. Dig. § 181.*]

Appeal from District Court, Santa Fé County; before Justice Abbott.

Mandamus by the State, on relation of Fred Fornoff, Captain Mounted Police, against William G. Sargent, Auditor of the State. From a judgment sustaining a demurrer to the answer, respondent appeals. Reversed and remanded, with directions.

This is an action in mandamus to compel the State Auditor, William G. Sargent, to make a tax levy, sufficient to raise \$12,000 for the support and maintenance of the Mounted Police of the State, upon the theory that by the legislative act (chapter 9, Laws of 1905) creating such force, a continuing appropriation was made for the salaries and expenses of said force, and the failure of the Legislature, at the session held this year, to appropriate for the salaries and

expenses of said force does not justify a failure, upon the part of the State Auditor, to make a levy for the purpose aforesaid. To the petition for the writ an answer was filed by respondent, setting up, among other things, that section 4, c. 127, of the Laws of 1909 repealed the provisions of chapter 9 of the Laws of 1905, under which it was claimed by relator that a continuing appropriation had existed, and that he was only under the duty of making tax levies to meet the appropriation made by the legislative session of the year 1913. A demurrer to this answer was filed and sustained by the lower court, from which judgment the respondent appealed.

Ira L. Grimshaw, Asst. Atty. Gen., for appellant. Francis C. Wilson, of Santa Fé, for appellee.

HANNA, J. The first error assigned is predicated upon the action of the district judge in sustaining the demurrer to the answer.

By the act of 1905 (chapter 9) providing for the organization and equipment of the mounted police, it was provided that the Governor be authorized to muster into service one company of police, to consist of one captain, who should receive \$2,000 per annum as salary; one lieutenant at \$1,500 per annum, one sergeant at \$1,200 per annum and not more than eight privates at \$900 per annum. After providing for the equipment and duties of the officers and men, the act provided (section 12) that "it shall be the duty of the auditor of this territory to draw his warrant on the territorial treasurer at the end of each month for the pay of each officer and man in said company," and by section 13 of the same act, it was further provided that there should be annually levied and collected a tax of one-half mill, to constitute a fund known as the "New Mexico Mounted Police Fund," upon which warrants should be drawn.

By section 14 of the act of 1905 the total cost and expense of the organization, equipment, and support of said company was limited to \$13,000 for any one year.

The act of 1905 continued in force unamended until the Legislature of 1907 (Laws 1907, c. 89, § 20), as a part of the appropriation bill passed at that session, increased the salary of members of the force by \$25 monthly, in lieu of expenses and railroad fare, for each member, and making appropriation for the fifty-eighth, fifty-ninth and sixtieth fiscal years to cover such increase of salary.

This act of the Legislature recognized the continuing character of the appropriation provided by the act of 1905, except so far as it impliedly repealed the appropriation for expenses of members of the force, which was covered by section 14 of the 1905 act, thus leaving that act providing only for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

salaries as increased by the act of 1907, and contingent fund of not to exceed \$12,000 per annum provided for by section 15 of the act.

In 1909 the Legislature made provision for the mounted police in the appropriation bill of that session, by appropriating for the support and maintenance of the force, \$12,000, or so much thereof as might be necessary; it being further provided by this act that the force should consist of one captain, one sergeant, and four privates, and the salaries of each were fixed at \$2,000, \$1,500, and \$1,200 per annum respectively. It is to be noted that this was a departure from the terms of the act of 1905, providing for the organization of the force, in that the force was reduced by the elimination of the lieutenant and four privates.

The act of 1909 also provided for the payment of actual and necessary expenses of members when necessarily absent from their stations, and for authority in the Governor to appoint additional members temporarily, when necessity therefor existed, to be paid at the same rate as privates of the regular force. The provisions thus contained in the appropriation bill of 1909 for the mounted police concluded with the proviso "that chapter 9, Laws of 1905, in so far as the same is in conflict with the above provisions, is hereby repealed and section 13, of said act, directing the Territorial Auditor to make a levy for the support of the mounted police of one-half mill is hereby specifically repealed, and the Territorial Auditor is hereby directed, when making levies for other purposes, to include a levy sufficient to cover the appropriation above named for the support of the mounted police herein." This last-mentioned act of the Legislature continued in full force and effect until the session of the first state Legislature, which met in 1912, when the same provisions of the appropriation bill, as passed by the Legislature of 1909, with reference to the mounted police, were re-enacted as a part of the appropriation bill of 1912, except that the provision of the 1909 act, directing the Auditor to make a levy sufficient to cover the appropriation, was omitted from the act of 1912. The appropriation bill thus passed by the Legislature of 1912 (chapter 83, Laws of 1912) was limited to the first fiscal year under statehood, and in 1913 the Legislature failed to make any provision or appropriation for the support and maintenance of the mounted police. The question of whether resort cannot be had to the act of 1905, and whether that act created a continuing appropriation such as will justify a writ of mandate directed to the State Auditor, requiring him to make a levy of \$12,000 for the support and maintenance of the mounted police, is therefore presented.

[1, 2] It is contended by appellee in support of this proposition that it has been held that where the Constitution of a state creates an office and prescribes the salary for such

office, the necessity for legislative appropriation for such office is dispensed with, on the ground that such provision in a state constitution is *proprio vigore* an appropriation. *Thomas v. Owens*, 4 Md. 189; *State ex rel. Rotwitt v. Hickman*, 9 Mont. 370, 23 Pac. 740, 8 L. R. A. 403; *State ex rel. Buck v. Hickman*, 10 Mont. 497, 26 Pac. 386; *State ex rel. Roberts v. Weston*, 4 Neb. 260; *Weston v. Herdman*, 64 Neb. 29, 89 N. W. 384. And that this rule has been extended to a general law fixing the amount of the salary of a public officer, and prescribing its payment at particular periods. *Reynolds v. Taylor*, 43 Ala. 420; *Goodykoontz v. Acker*, 19 Colo. 360, 35 Pac. 911; *State v. Louis Bordelon et al.*, 6 La. Ann. 68; *McCauley v. Brooks*, 16 Cal. 11; *Terrell v. Sparks*, 104 Tex. 191, 135 S. W. 519; *State v. King*, 108 Tenn. 271, 67 S. W. 812; *Ristine v. Indiana*, 20 Ind. 323; *Falk v. Strother*, 84 Cal. 544, 22 Pac. 676, 24 Pac. 110; *Menefee v. Askew*, 25 Okl. 623, 107 Pac. 159, 27 L. R. A. (N. S.) 537; *State ex rel. Norcross v. Eggers (Nev.)* 128 Pac. 986; *State ex rel. Wade v. Kenney*, 10 Mont. 485, 26 Pac. 197; *State ex rel. Brainerd v. Grimes*, 7 Wash. 191, 34 Pac. 833; *State ex rel. Henderson v. Burdick*, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266.

[5] It has been generally conceded and frequently held that the rule, last referred to, is not violative of a constitutional provision similar to that of ours (section 30, art. 4) that "except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the Legislature." In *re Continuing Appropriations*, 18 Colo. 192, 32 Pac. 272.

With the principles, or rules, enunciated we fully agree, and believe them to be fully supported by the great weight of authority.

[3] The question remains, however, as to whether they are applicable to the state of facts here presented for our consideration. There can be no doubt that the rule would be applicable if we were considering the act of 1905 standing alone, and unaffected by subsequent legislation. We find, however, that the compensation or salary of each officer and member of the force was changed by the act of 1907, which provision clearly operates as a modification of the provisions of the act of 1905 relative to salary, and substitutes the larger amounts provided by the act of 1907. We do not lose sight of the contention of appellee that the act of 1907 recognized the continuing charter of the appropriation contained in the act of 1905, and by amendment increased the salary of each man, and were we to adopt this view of the matter, and disregard the fact that the appropriation bill of 1907 was limited in its effect to the fifty-ninth and sixtieth fiscal years, we would still be confronted with the fact that in 1909 the Legislature again changed the salaries of the officers of the force and abolished one officer, as well as reduced the number of privates from eight to four, by the

terms of this act repealing all provisions of the act of 1905 in conflict with its provisions, and specifically repealing section 13 of the act of 1905 relative to a levy of one-half mill.

We, therefore, find that the act of 1905, while unrepealed as to many of its provisions respecting the duties of the force, etc., is silent as to the matter of the salaries of officers and men, and a clear intention shown on the part of the Legislature to make changes in salaries and organization of the force, by the provisions contained in the appropriation acts of the Legislatures of 1907 and 1909. We believe it is indisputable that the life of the Acts of 1907 and 1909 is to be limited to the fiscal years for which their enacting clauses purport to make appropriations, at least so far as the appropriations in question are concerned, and that with the expiration of those years these acts ceased to have any force or effect.

[4] In this connection we find that in an early case in the Supreme Court of the United States (*Minis v. United States*, 15 Pet. 445, 10 L. Ed. 791) it was said by Justice Story that: "It would be somewhat unusual to find ingrafted upon an act making special and temporary appropriations any provision which was to have a general and permanent application to all future appropriations." With this view we fully agree. The act of 1905 having been repealed so far as the salaries of the officers were concerned and the number of the force changed by an act of the Legislature which was subsequently lapsed, can it be said that the former act—i. e. that of 1905—was only suspended, and therefore subsequently restored to life, as to those provisions which had been repealed, when the repealing acts expired by limitation? We think not, in the absence of any evidence of intention on the part of Legislature to revive the former provisions, of the act of 1905, as to the salary and membership of the force. To hold otherwise would be to construe an intention, on the part of the Legislature of 1913, which failed, or refused, to appropriate for the mounted police, to revive the act of 1905 in all its terms, increase the force from four privates, to which it had been limited by two later acts, to eight, to provide for an additional officer, and further that all salaries should be as first fixed by the act of 1905. Such would be a violent presumption as to the intention of the Legislature. By the act of 1905 a continuing appropriation was clearly created, and was so recognized by the Legislature of 1907, but in 1909 the Legislature in effect created a new force and definitely fixed salaries for the fiscal year covered by the act, repealing all parts of the act of 1905 in conflict with said act of 1909. Had the Legislature of 1909 simply amended the act of 1905, the principle would be different, but the positive repeal of these es-

sential provisions of the act of 1905, with only a temporary provision substituted, which has since lapsed, cannot be held to suspend the repealed provisions, or revive them upon the expiration of the repealing provisions. To construe the intention of the Legislature otherwise would do violence to the rule that when a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited only until a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the Legislature to that effect be expressed. 38 Cyc. 1101.

Believing that the provisions of the act of 1905 with respect to salaries and officers and men constituting the force had been repealed by the act of 1909, we do not think that the principles of law referred to are applicable to this case, and we hold that the district court was in error in sustaining the demurrer.

We, therefore, reverse the judgment of the district court, and remand the case, with instructions to dismiss the petition.

ROBERTS, C. J., and PARKER, J., concur.

HUFTON v. HUFTON.

(Supreme Court of Idaho. Nov. 6, 1913.)

APPEAL AND ERROR (§ 1011*)—FINDINGS OF FACT—EVIDENCE.

Where there is a substantial conflict in evidence, the findings of fact and judgment based thereon will not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by Hester B. Hufton against William Hufton. From judgment for defendant, plaintiff appeals. Affirmed.

Pence & Koelsch, of Boise, for appellant. D. T. Miller and Ira E. Barber, both of Boise, for respondent.

SULLIVAN, J. This action was brought by the appellant to obtain a divorce from the defendant. The action was tried by the court and findings of fact, conclusions of law, and judgment entered in favor of the defendant. The appeal is from the judgment.

The only error assigned is the insufficiency of the evidence to support the findings and judgment. Upon a careful examination of the evidence we find that there is a substantial conflict upon all of the material issues made by the pleadings. That being true, on the well-established rule of this court, the findings and judgment must be affirmed. *Friedrich v. Donahue*, 20 Idaho, 92, 116 Pac. 1029; *Weeter Lumber Co. v. Fales*, 20 Idaho, 255, 118 Pac. 289, Ann. Cas. 1913A, 403;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bank v. Crisler, 20 Idaho, 379, 118 Pac. 775; Thomason v. Lane-Potter Lumber Co., 20 Idaho, 771, 119 Pac. 875; Coe v. McGran, 23 Idaho, 582, 131 Pac. 1110; Griffith v. Griffith (Wash.) 133 Pac. 443.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the appellant.

— AILSHIE, C. J., and STEWART, J., concur.

FAIRVIEW INV. CO., Limited, v. LAMBERSON et al.

(Supreme Court of Idaho. Nov. 4, 1913.)

1. QUIETING TITLE (§ 34*)—SUFFICIENCY OF COMPLAINT.

Complaint examined in this case, and *held* to state sufficient facts to constitute a cause of action for the purpose of determining adverse claims to real property, and quieting plaintiff's title thereto.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.*]

2. PARTIES (§ 56*)—AMENDMENTS—SERVICE OF AMENDED COMPLAINT—BRINGING IN NEW PARTY.

Where a trial court orders persons who have not been made parties to the action to be brought in and made parties to the action, such order does not amount to an amendment of the pleadings so as to require the service of the amended complaint upon the parties who had already been brought in or appeared in the case, and who were parties to the action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 87; Dec. Dig. § 56.*]

3. JURY (§ 14*)—QUIETING TITLE (§ 47*)—DETERMINATION OF ADVERSE CLAIMS—RIGHT TO JURY TRIAL—SUBMISSION OF ISSUE TO JURY.

An action to determine adverse claims to real property and quiet title thereto is a suit in equity, and the parties are not entitled to a jury as a matter of right. In such a case it is a matter addressed to the discretion of the trial court as to whether he will submit any question of fact to the jury for their finding thereon.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14; Quieting Title, Cent. Dig. §§ 95-97; Dec. Dig. § 47.*]

4. MORTGAGES (§ 554*)—FORECLOSURE SALE—CONVEYANCE BY SHERIFF—RIGHT TO COMPLAIN—LACHES.

Where a sheriff conducted a foreclosure sale in 1875 under the statutes of the territory as they then existed, and, instead of giving the purchaser a certificate of sale, gave him a sheriff's deed, and it appears that there was no attempt ever made to redeem the property, and no offer was ever made to redeem, and that neither the owner of the property nor his successors were in any way prevented or precluded from exercising their right of redemption by reason or on account of the sheriff having given a deed instead of a certificate of sale, and the parties take no proceeding for more than 35 years thereafter, *held*, that no one has been prejudiced by reason of the giving of the deed instead of the certificate of sale, and that it is now too late for the original owner or his successor to complain of the error and mistake.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1582-1591; Dec. Dig. § 554.*]

5. CORPORATIONS (§ 28*)—"DE FACTO CORPORATION"—TRANSACTIONS OF BUSINESS.

Where incorporators have attempted to form a corporation, and the company has thereafter proceeded on the theory that it was duly and regularly incorporated, and exercised the rights and powers of a corporation, and acquired property, and transacted business, even though it has failed to comply with the law in some particular in the matter of its incorporation, still these acts constitute it a de facto corporation, and it will be so treated in considering its subsequent business transactions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1841-1843.]

6. CORPORATIONS (§ 14*)—PURPOSE FOR WHICH ORGANIZED—"AGRICULTURAL PURPOSE."

Where the statute authorizes the formation of corporations for "agricultural purposes," a corporation, formed for the purposes of making agricultural exhibits, and exhibiting horses and cattle and live stock, and giving exhibitions of the speed of horses, will be *held* to come within the purview of the law, and be for "agricultural purposes."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 16-22; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 1, p. 288.]

7. CORPORATIONS (§ 387*)—RIGHT TO QUESTION CORPORATE POWERS.

As to whether the question of the right of a corporation to exercise powers outside of and in excess of the powers conferred by the statute authorizing its organization may be raised in a collateral way by a private litigant, *quere*.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1548-1553; Dec. Dig. § 387.*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by the Fairview Investment Company, Limited, a corporation, against Jay G. Lamberson, Ward Lamberson, and others. From a judgment for plaintiff, defendant Ward Lamberson appeals. Affirmed.

A. C. Vaughan, of Boise, for appellant. Hawley, Puckett & Hawley, Wyman & Wyman, and B. F. Neal, all of Boise, for respondent.

AILSHIE, C. J. This action was instituted for the purpose of quieting plaintiff's title to the tract of land described in the complaint. Judgment was entered in favor of the plaintiff, and one of the defendants appeals. The lands involved in this action are contiguous, and form an addition to Boise City.

It appears that on the 10th day of February, 1870, patent issued from the United States to Nicholas Lamberson for 120 acres of land, and that the tract of land involved in this action is a part of that tract. Nicholas Lamberson and wife had the following children: Jay G. Lamberson, Charles G. Lamberson, Elbert S. Lamberson, Lella L. Smith Lamberson, and Julia J. Coyle Lamberson, who constituted the heirs at law of Nicholas and Sarah Lamberson. In April and June, 1869, Nicholas Lamberson mortgaged the land to David N. Hyde to secure

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the payment of \$555.16. In October, 1869, Hyde commenced an action in the district court in and for Ada county for the foreclosure of the mortgage executed in April of that year, and decree of foreclosure was entered, and the case was subsequently appealed to the Supreme Court. See *Hyde v. Lamberson*, 1 Idaho, 539. Following the decision of the Supreme Court, such proceedings were had in the trial court that on the 20th of March, 1875, a final decree of foreclosure was granted, and the order of sale theretofore issued was ordered corrected, and sheriff sale was had on April 26, 1875, and sheriff's deed was issued to John Huntoon as purchaser for the sum of \$1,500. On April 30, 1875, defendant Lamberson filed a notice of intention to move for a new trial, and on the June following filed a statement asking for a new trial, and on September 11th a stipulation was filed to dismiss the action. On August 27, 1875, the Lambersons executed and delivered to John Huntoon a quitclaim deed to the property which had been covered by the mortgage and the foreclosure sale. In August, 1875, there was organized, either as a de jure or a de facto corporation, what is known as the Idaho Agricultural Park Association, and about the 21st of September, 1875, John Huntoon and wife conveyed the property to the Idaho Agricultural Park Association. This corporation held, occupied, and used the property from 1875 until August, 1902, when it conveyed the same to the respondent corporation. On the 29th day of August, 1907, the Fairview Investment Company, respondent, procured a quitclaim deed to the entire tract of land here in dispute from the surviving widow of Nicholas Lamberson, and on the 25th day of March, 1908, procured a further deed of conveyance particularly describing the land, and setting out various transactions previously had in reference to the title.

[1] 1. It is first contended that the complaint in the action does not contain facts sufficient to constitute a cause of action. This was clearly an action prosecuted under the provisions of section 4538, Rev. Codes, for the purpose of determining adverse claims to the property, and quieting the plaintiff's title thereto. The objections raised by appellant to the procedure herein in the matter of service of process and amendment of pleadings are not well taken. The court did not err or abuse its discretion in its rulings on these matters.

[2] 2. The objection that the court erred in ordering the Huntoons and all unknown heirs and devisees to be brought in is without merit. The mere fact that a court orders additional parties brought in to an action does not of itself work an amendment of the pleadings so as to require new service of the pleadings in the case.

[3] 3. The court did not err in refusing to submit this case to a jury. It was an equity case, and the court properly so treated it.

It is true in this case, as it is in most all equity cases, that there are some questions of fact which a court may properly and sometimes wisely submit to a jury. That is a question, however, addressed to the discretion of the trial court. *Shields v. Johnson*, 10 Idaho, 476, 79 Pac. 391, 3 Ann. Cas. 245.

[4] 4. One of the points most seriously urged is the alleged lack of corporate existence of the Idaho Agricultural Park Association through which the respondent traces its chain of title. To our minds, many reasons occur why this contention is wholly without merit. In the first place, the Lambersons had parted with all their title. First, they had lost title through the foreclosure of the mortgage given in 1869, and, second, through the quitclaim deed executed in favor of Huntoon in 1875. While the sheriff should have given a certificate of sale instead of a deed, it is now too late after the lapse of more than 30 years for the mortgagors to raise that question, when they never offered to redeem or attempted to redeem within the time prescribed by the statute as it was then in force, or as it has existed at any time since. Where a sheriff gives a deed instead of a certificate of sale, the deed will have no other effect than that of a certificate of sale for such time at least as the right of redemption would exist. After the lapse of 30-odd years, and no offer having been made in the meanwhile to redeem, it can certainly make no difference to the mortgagor whether the sheriff executed a deed or a mere certificate of sale. If, however, he did show that he has lost any right or been deprived of the right of redemption by reason of this deed, then a different question would arise. In the second place, the quitclaim deed from the Lambersons to Huntoon passed all the title the makers of the deed had at that time. Section 44, p. 603, Rev. Laws of 1874, 1875; *Myers v. City of Oceanside*, 7 Cal. App. 87, 93 Pac. 686; 13 Cyc. 652. See *Whitney v. Dewey*, 10 Idaho, 657, 80 Pac. 1117, 69 L. R. A. 572. Whether the Idaho Agricultural Park Association was regularly incorporated in accordance with law or not, it certainly became a de facto corporation (*Continental Trust Co. v. Toledo, etc., Co.* [C. C.] 82 Fed. 642), and for the purposes of this case it would be treated the same as a de jure corporation.

[5, 6] The contention that has been so urgently made, that this corporation could not be formed for the purposes designated in its articles under section 1 of the act of the Legislature of 1874, authorizing the formation of corporations, is not well taken. See page 618 of the Statutes of 1874, 1875. It appears that a corporation was formed for the following purposes: "The company is formed for the purpose of owning ground, erecting buildings and improvements thereon, making a driving track, and holding and conducting agricultural exhibitions, fairs, horse and cattle shows, and trials of speed of

horses." The statute, on the other hand, authorized the formation of corporations for "agricultural purposes." A fair, conducted for making agricultural exhibits, the exhibiting of horses and cattle, and giving exhibitions of the speed of horses, has been frequently and quite generally recognized as a proper exercise of the powers of an organization and corporation formed for "agricultural purposes." See *Dillard v. Webb*, 55 Ala. 468; *Downing v. Indiana State Board of Agriculture*, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664; *Dunn v. Society*, 46 Ohio St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556.

[7] Still another objection as to appellant's contention has suggested itself to our minds, and that is, if this corporation undertook to exercise powers outside of or in excess of the powers conferred by statute or contemplated by its charter, the appellant here would not be in a position, in a collateral way, to question its existence or authority to act or exercise such powers. That would have been a proper question for the state to raise. See *Seymour Opera House Co. v. Wooldridge* (Tex. Civ. App.) 31 S. W. 234.

We do not deem it necessary to further review or consider the other points raised by appellant in this connection.

There is only one other point that has been raised that we will give special attention. It is contended by appellants that Nicholas Lamberson and wife, subsequent to executing the mortgages in 1869, and prior to the execution of the quitclaim deed to Huntoon in 1875, executed a warranty deed in favor of the children of Nicholas Lamberson by a former wife, in which deed they reserved to the grantors a life estate. It is contended that this deed was executed in 1873, and that the children who were named as grantees resided in Wisconsin, and that the acknowledgment to this deed was taken before Jeremiah Brumback, and left with him to be recorded. No such deed, however, was produced, and no such deed appears of record. Other parol evidence was introduced to the effect that this deed was witnessed by Thomas Cahalan, and that about the year 1882 it was in the possession of Milton Kelly, at one time a justice of this court. Cahalan was not called, and did not testify. But little of the evidence on this question was either competent or admissible, and it was all of an uncertain and doubtful character. The execution and delivery of this deed was not satisfactorily shown, and the trial court did not believe that such a deed had been executed, and made his findings accordingly.

The motion made in the trial court to strike the cost bill from the files and the ruling of the court thereon are not properly in the record, and cannot therefore be considered on appeal. Section 4456, Rev. Codes, as amended 1909 Sess. Laws, 76; *Williams v. Boise*

Basin Mining Co., 11 Idaho, 233, 81 Pac. 646; *Swanson v. Groat*, 12 Idaho, 148, 85 Pac. 384; *Bissing v. Bissing*, 19 Idaho, 777, 115 Pac. 827.

Many other questions have been argued; but we shall not deal with them separately in this opinion. No error has been presented which requires or would justify the reversal of the judgment in this case. Upon a view of the whole record, we are satisfied that the judgment of the trial court is just and equitable, and that it should be affirmed, and it is so ordered. Costs awarded in favor of respondents.

SULLIVAN and STEWART, JJ., concur.

A. B. MOSS & BRO. v. RAMBY.

(Supreme Court of Idaho. May 17, 1913.

On Rehearing, Nov. 6, 1913.)

1. NAVIGABLE WATERS (§ 42*)—TITLE TO ISLAND—RIGHT OF RIPARIAN OWNER.

Under the holding of the Supreme Court of the United States, an island in Snake river of dry land which is surrounded by well-defined channels of the stream, and which island existed at the time the state was admitted into the Union, and which was not included in the public land survey and comprised an area larger than a legal subdivision authorized under the United States land surveys, did not pass from the government to the state on the admission of the state, and did not pass to the upland or riparian proprietor by a patent to the abutting lots or subdivisions meandering the channel of the stream.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 253-255; Dec. Dig. § 42.*]

2. COURTS (§ 97*)—JUDICIAL PRECEDENCE—DECISIONS OF UNITED STATES SUPREME COURT.

The general rule of *res adjudicata* or law of the case as recognized and announced by this court in *Hall v. Blackman*, 9 Idaho, 555, 75 Pac. 608, does not apply in a case where a federal question is involved that may be reviewed on writ of error to the Supreme Court of the United States, and where subsequent to the decision by the state court the United States Supreme Court has held to a different rule and reversed the ruling of the state court prior to the hearing on a second appeal in another case involving the same question of law.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 329-333; Dec. Dig. § 97.*]

3. NAVIGABLE WATERS (§ 36*)—WATERS AND WATER COURSES (§ 89*)—RIGHT OF RIPARIAN OWNER—MEANDER LINE.

The rule of law heretofore adopted by the Supreme Court of this state is reaffirmed, to the effect that a riparian owner on a meandered stream or body of water, whether navigable or nonnavigable, takes title to the center or thread of the stream.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36; * *Waters and Water Courses*, Cent. Dig. §§ 01, 92, 107; Dec. Dig. § 89.*]

Appeal from District Court, Canyon County; Ed L. Bryan, Judge.

Action by A. B. Moss & Bro. against A. H. Ramey. Judgment for plaintiff, and defendant appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

R. B. Scatterday, of Caldwell, and Karl Paine, of Boise, for appellant. Richards & Haga, of Boise, for respondent.

AILSHIE, C. J. This case is here on appeal for the second time. See *A. B. Moss & Bro. v. Ramey*, 14 Idaho, 598, 95 Pac. 513. On the former appeal the judgment was reversed, and the cause was remanded for the purpose of having the trial court pass upon the question of adverse possession as presented by the pleadings. The trial court heard the case and found against the defendant and in favor of the plaintiffs, and the defendant has prosecuted this appeal.

On the former appeal this court held that the lands in dispute between the meander line and the thread of the stream in the main channel of Snake river passed by patent from the United States, issued for the lots and legal subdivisions abutting upon the meander lines, and that the holder of the title to the upland took title to all the land between the meander line and the center or the main channel of the stream. The trial court had found upon the first trial that the land in dispute comprised "a large island and islands," aggregating about 120 acres, and that between this island and the upland owned by the plaintiffs there is a "large channel of Snake river, with well-defined banks and channel, varying in width from 100 to 300 feet and in depth from 6 to 10 feet, through which the water of Snake river regularly flows during a large portion of the year, varying from three to six months, and some years the entire season." This court held that, notwithstanding the fact that there was a high-water channel between the main body of upland and this tract of land, still this was a part of the mainland, and that it passed by patent to the upland owner of the abutting lots and subdivisions, and that the title thereto had passed from the government to the upland patentees, and that the so-called island was no longer a part of the public domain. When the case went back for retrial, the pleadings were so amended as to reduce the issue merely to one of adverse possession, and the trial court found that issue against the defendant and in favor of the plaintiffs.

[1] Since the last trial of this case, the Supreme Court of the United States in *Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, has held that an island in Snake river which was not included in the public land survey, and which existed at the time Idaho was admitted into the Union, neither passed to the state by the admission of the state, nor passed by patent to the uplands abutting on the nearest channel of the stream, and that an island which "was fast dry land" at the time of the admission of the state into the Union, and at the time of the issuance of patent to the abutting upland, does not pass by patent to the upland pat-

entee. That holding is in conflict with the holding of this court in *Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47, and is in some measure contrary to the views entertained and expressed by the court in *Johnson v. Johnson*, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240, on the authority of which the case of *A. B. Moss & Bro. v. Ramey* was decided. To that extent this court must and does modify its holdings as announced in the above cases.

[2] The question is at once presented as to whether the rule of *res adjudicata* or law of the case as heretofore recognized by this court in *Hall v. Blackman*, 9 Idaho, 555, 75 Pac. 608, and *Hunter v. Porter*, 10 Idaho, 86, 77 Pac. 434, should be or can properly be invoked in the case before us. We are of the opinion that the doctrine of law of the case cannot properly be invoked in a case like this. Where this court is not the court of final resort in the determination of the question presented and a writ of error may be taken to the Supreme Court of the United States, and such a writ is prosecuted and that court expresses a different view as to the law applicable to a given state of facts from that entertained by this court, it is our duty, on a subsequent appeal in another case involving the same federal question, to reconsider the question previously determined and render our judgment in conformity with what we understand to be the rule announced by the court of last resort on such question. This principle seems to be recognized by the authorities. See *U. S. v. D. & R. G. R. R. Co.*, 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106; *Zeckendorf v. Steinfeld*, 225 U. S. 445, 32 Sup. Ct. 728, 56 L. Ed. 1156; *Messinger v. Anderson*, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; 3 Cyc. 395; 2 *Spelling, New Trial and Appellate Practice*, § 691.

Notwithstanding our previous decision in this case, we are of the opinion that the question as to whether or not this tract of land is an island or detached public domain, or, as stated by the Supreme Court in *Scott v. Lattig*, supra, is "fast dry land," should be determined upon all the evidence the parties desire to submit, and in the light of the decision of the Supreme Court in *Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490. For the foregoing reasons, we have concluded to reverse the judgment in this case, and remand the cause to the trial court for a new trial on all the issues presented in the original complaint, or that the parties may see fit to present by amended pleadings.

[3] In remanding this case, we think it proper to suggest to the parties and to the trial court that it is not the purpose of this court to in any way recede from the rule heretofore announced, to the effect that a riparian owner in this state on a meandered stream or body of water, whether navigable

or nonnavigable, takes title to the center or thread of the stream. *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784; *Johnson v. Johnson*, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240; *Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47; *Ulbright v. Baslington*, 20 Idaho, 539, 119 Pac. 292, 294. On the other hand, it is the equally well-fixed purpose of the court to follow the views expressed by the Supreme Court of the United States in *Scott v. Lattig*, in reference to such islands or tracts of land as may fall within the purview of that decision wherein it may appear that title has not passed from the government to any patentee.

Judgment reversed, and cause remanded for a new trial. Costs awarded in favor of appellant.

STEWART, J., concurs.

SULLIVAN, J. (concurring in part). I concur in the conclusion reached to the effect that the general rule of *res adjudicata* or law of the case does not apply in this case. I also concur in the conclusion to reverse the judgment and remand the cause for a new trial on all of the issues presented in the original complaint, or that the parties may see fit to present by any amendment to the pleadings, but dissent as to the rule heretofore announced by this court, to the effect that a riparian owner in this state takes title to the thread of the stream. My views upon that question are expressed in my dissenting opinions in the cases of *Johnson v. Johnson*, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240; *Lattig v. Scott*, 17 Idaho, 506, 107 Pac. 47. It has been held by the Supreme Court of the United States in *Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490, and other cases, that upon the admission of a state into the Union, the ownership of the bed of navigable streams passed to the state, and if the thread of such navigable stream was the boundary of the state, the ownership passed to the state to the thread of the stream, subject to certain limitations mentioned in said decision. In the case of *Scott v. Lattig*, *supra*, referring to this matter, the court said "that the subsequent disposal by the former [the United States] of the fractional subdivisions on the east bank carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership." It is there held that the disposal by the United States of the fractional subdivisions on the east bank of said river carried with it no right to the bed of the river.

We have no statute law whatever granting a private riparian owner the bed of the stream. In my view of the matter, the Supreme Court of this state has not the right or authority to donate any land that belongs to the state to a riparian owner, or to any

one else. Under the rule laid down in all of the decisions of the United States Supreme Court on this question, the bed of Snake river, at least to the border line of the state, passed to the state and not to the riparian owner, and this court has no authority to donate the title thereof to any person.

On Rehearing.

SULLIVAN, J. A rehearing was granted in this case and a reargument was had at this term of our court. In our former opinion the court stated as follows: "For the foregoing reasons, we have concluded to reverse the judgment in this case and remand the cause to the trial court for a new trial on all of the issues presented in the original complaint, or that the parties may see fit to present by amended pleadings." That decision was rendered in view of the decision of the Supreme Court of the United States in *Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490. This court had held that the riparian owner was the owner of an unsurveyed island in Snake river. The Supreme Court of the United States held that an island, being in existence in Snake river when Idaho became a state, did not pass to the state upon admission to statehood, but remained the property of the United States, subject to disposal by it.

On a former appeal of the case at bar (see *Moss v. Ramey*, 14 Idaho, 599, 95 Pac. 513), this court reversed the trial court, and held that the riparian owners were the owners of the land in question because of being the riparian owners of the land bordering on said stream, opposite thereto, and a new trial was granted in order that the trial court might determine whether the plaintiffs' title had been divested by reason of the adverse possession of the defendant. The judgment was reversed, and a new trial ordered, with leave to both parties to amend their pleadings. The defendant amended his pleadings to conform to the order of the court, setting up title by adverse possession. The cause was tried by the court, and the court made findings of fact and conclusions of law in favor of plaintiffs, based on the ground that they were the owners of the land in dispute by reason of being the riparian owners of land bordering on Snake river opposite thereto, and that their title had not been divested by reason of the adverse possession of said island by the defendant. The trial court found that, by reason of the plaintiffs being owner of the lots of land bordering on Snake river, their title extended westerly to the thread of the channel of said river, and that the land in controversy was between the thread of the stream and said lots bordering thereon. There is here presented a federal question, and the Supreme Court of the United States held in a similar case (*Scott v. Lattig*, 227 U. S. 229, 33 Sup. Ct. 242, 57 L. Ed. 490) that the riparian owner did not

acquire title to this island by reason of being a riparian owner of land opposite thereto. The plaintiffs base their title to said island upon the fact that they are riparian owners opposite said island, and if this case is remanded to the trial court for a new trial, that court, under the decision of the Scott-Lattig Case, must hold against the plaintiffs in this action. Their right to have the title quieted in them depends upon whether the island passed with the mainland under or by virtue of the United States patent issued to their predecessors in interest. That is clearly a federal question, and is decided decisively against them under the rule laid down in the Scott-Lattig Case. The plaintiffs brought this action to quiet their title, and their right to recover depends upon the strength of their own title and not upon the weakness of the defendant's title. Before the defendant is required to defend his claim to the island, the plaintiffs must establish their right thereto, and in so doing must establish their title on the ground that their predecessor in interest acquired title to said land by reason of the patent issued to him by the government for the lots bordering on Snake river opposite said island. Under the decision of the Scott-Lattig Case, the plaintiffs cannot establish their title to said land. That being true, they could not have their title quieted in this action, for the reason that under the facts and the law they have no title, and the writer of this opinion has no doubt but that under the pleadings and decision in this case a federal question is involved, and that the final decision of this court may be reviewed by the Supreme Court of the United States upon a writ of error from that court. It would therefore be a useless act to remand the case for a new trial, as directed by this court in the opinion on the original hearing of this case.

We are not unmindful of the contention made by respondent that the decision of this court on the previous appeal is the law of the case, and that we are bound to adhere to the conclusion reached at that time. That rule prevails in this state, as was stated in the previous opinion, but the facts of this case are peculiar, and we believe it our duty to dispose of each case on its own facts and circumstances so as to meet the requirements of the law as nearly as possible. If this land in controversy is still a part of the public domain, as is undoubtedly the case under the decision of the Supreme Court of the United States in the Scott-Lattig Case, it is clearly our duty to take notice of that fact as it appears in the case and decide accordingly, even though we have previously decided to the contrary. This case turns solely on a federal question, and we are bound to follow the decisions of the federal Supreme Court as we understand them. This latter case runs counter to what this

court had understood the previous decisions of that court to hold, and it is our intention to follow it as far as we think it goes. For these reasons we do not think that the rule of res adjudicata, or law of the case, applies in this case as it would apply if no federal questions were involved.

The cause is therefore remanded to the trial court, with directions to enter a judgment dismissing the action. Costs are awarded to appellant.

AILSHIE, C. J., and STEWART, J., concur.

RIVERSIDE IRR. DIST. v. BLACK.

(Supreme Court of Idaho. Nov. 7, 1913.)

WATERS AND WATER COURSES (§ 156*)—IRRIGATION CONTRACT—CONSTRUCTION.

Evidence examined in this case, and held sufficient to support the findings and judgment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174-183; Dec. Dig. § 156.*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by the Riverside Irrigation District, a corporation, against W. A. Black. From a judgment for plaintiff, defendant appeals. Affirmed.

Griffiths & Griffiths, of Caldwell, for appellant. John C. Rice and Thompson & Buckner, all of Caldwell, for respondent.

AILSHIE, C. J. This action was prosecuted by the Riverside Irrigation District against the appellant for the recovery of a share of the costs and expense of maintenance and operation of a portion of the irrigation company's canal. The appellant admitted that it was his duty to pay a portion of the costs and expenses of maintenance and operation but denied that he was under any obligation to pay a share of the entire costs for which this action is prosecuted. There is no substantial difference between the parties as to the facts.

It appears that Judson Spofford in the year 1892 sold to the Boise Land & Water Company a water right and ditch for the consideration of \$1 and the assumption by the land and water company of a mortgage of \$6,000. The number of inches of water conveyed was 5,000, and the grantor Spofford expressly reserved to himself and his grantees, successors, and assigns a water right of 1,000 inches to be carried through this ditch or canal. The reservation contained in the Spofford grant is as follows: "The grantor herein reserving and excepting from this conveyance 1,000 inches of water out of the original 6,000 located, as hereinbefore described, and also reserving the right to convey the same through the ditch hereinbefore described, to be taken out of said ditch

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

above east line of section 15, township 4 north, of range 4 west. The grantor herein and his assigns, by reason of such reservation, and as a consideration therefor, agrees that such reservation shall be subject to its proportionate share of keeping said ditch and the headgate in good repair between the point of original diversion of all the said water and the point where such 1,000 inches of water is taken out of said ditch. Such reservation, however, gives to the grantor no rights or privileges in or about said ditch or its control or management, except the permissive right to have such water conveyed through said ditch."

The appellant in this action is the grantee and successor of the interest reserved by the Spofford conveyance to the extent of 600 inches. During the years 1907, 1908, and 1909 it became necessary for the irrigation company to straighten and repair the ditch and to repair the headgate and dam at the point of diversion. In order to accomplish this work to the best advantage and most profitably to the district, it was decided to seek a better point of diversion and construct a dam and headgate, and for that purpose to construct a new canal for a short distance. In doing this work, the newly constructed portions of the canal were made so as to carry a volume of 10,000 inches.

The real and only controversy in the case is as to whether or not the appellant should bear his pro rata share of the entire expense incurred in this change and improvement. The trial court, after hearing all the evidence, was of the opinion that this is a proper charge and that the appellant should pay his proportionate share of .06 of the entire expenditure.

We have examined the evidence of the witnesses in the matter, and it would seem to us that it justifies the finding and conclusion of the trial court. It appears that the water was originally diverted into a slough and thence into the old canal, and that the high water annually washed and broke down the dam and filled the slough with dirt, silt, and debris, so that there was an annual expenditure entailed so long as the point of diversion was maintained at the old place. The new point of diversion has obviated these annual expenditures, and it would seem from the evidence that in the long run the expenditure entailed by the change and improvement is no greater than it would have been in a series of years to have tried to maintain it at the old place.

It would seem to us that under the facts and circumstances of the case, as disclosed by the record, the trial court reached a fair and just conclusion, and that the expenditure incurred in this case was properly apportioned between the ditch company and appellant, and that appellant should bear his .06 thereof. It was specifically provided in the original deed from Spofford to the land

and water company that the reservation of 1,000 inches of water from the appropriation should be "subject to its proportionate share of keeping said ditch and the headgate in good repair between the point of original diversion of all of said water and the point where such 1,000 inches of water is taken out of said ditch." It is clear to us, on the other hand, that this reserved water right cannot be subject to any charge other or greater than that stipulated and provided for in the deed which reserved that right. *Knowles v. New Sweden Irri. Dist.*, 16 Idaho, 217, 101 Pac. 81; *Nampa & Meridian Irri. Dist. v. Gess*, 17 Idaho, 552, 106 Pac. 993; *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho, 1, 107 Pac. 989.

The judgment should be affirmed, and it is so ordered. Costs are awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

BROWDER v. ETCHERSOR.

(Supreme Court of Idaho. Nov. 12, 1913.)

JUSTICES OF THE PEACE (§ 159*) — APPEAL — DISMISSAL.

Held, that the trial court did not err in dismissing the appeal.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.*]

Appeal from District Court, Oneida County; Alfred Budge, Judge.

Action by O. W. Browder against John Etchersor for damages alleged to have occurred by the unlawful herding of defendant's sheep on plaintiff's land. From judgment for plaintiff, defendant appeals. Affirmed.

McDougall & Jones, of Pocatello, for appellant. Davis & Evans, of Malad, for respondent.

SULLIVAN, J. This is an appeal from the judgment of the district court dismissing an appeal from a justice's court.

It appears that an action was brought in the justice's court to recover from the defendant damages for herding his sheep on plaintiff's land, and the justice entered judgment in favor of plaintiff for \$50 damages and costs of suit. An appeal was taken, or sought to be taken, by the defendant to the district court. A motion was made in the district court to dismiss the appeal on the ground that the appeal had not been taken in the manner provided by law; the main contention being that an undertaking on appeal from the justice's court had not been filed within the time provided by law.

Upon an examination of the record, we are satisfied that the judgment of the court dismissing the appeal must be affirmed, and it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is so ordered. Costs of this appeal are awarded to respondent.

AILSHIE, C. J., and STEWART, J., concur.

McCORMICK v. BROWNELL.

(Supreme Court of Idaho. May 28, 1913.
On Rehearing, Nov. 29, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 20*)—APPOINTMENT—PROOF OF DEATH—SUFFICIENCY.

Under section 5364, Rev. Codes, upon the hearing of an application for the appointment of an administrator of an estate, it is necessary for the applicant to prove the death of the deceased by the testimony of the applicant or others. This requirement, however, is complied with where two separate applications are made and filed for the appointment of two different persons as administrator, and both petitions allege the death of the testator and the evidence supports the allegations.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.*]

2. EXECUTORS AND ADMINISTRATORS (§ 17*)—APPOINTMENT—PERSONS COMPETENT.

Under the provisions of section 5351, Rev. Codes, any person legally competent may apply and be appointed administrator of an estate, if no one of the first 10 classes of said section desires or makes application for such appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

3. EXECUTORS AND ADMINISTRATORS (§ 20*)—APPOINTMENT—PERSONS COMPETENT.

The provisions of sections 5351 and 5365 do not authorize or empower the probate judge of a county to appoint a person who is not of kin to the deceased as administrator, except, first, that no application is made by one of kin of the deceased, who is a resident of the state and competent and entitled to the appointment; and, second, upon nomination or written request of the person entitled to the appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.*]

4. EXECUTORS AND ADMINISTRATORS (§ 20*)—APPOINTMENT—PERSONS COMPETENT—APPOINTMENT BY REQUEST.

The law of this state clearly grants to the person entitled to administration the power to select some competent person to discharge the duties of administration, and the probate court is limited in his power by such request, and, if such person entitled to appointment applies for the appointment of a stranger or a person not of kin, the appointment depends wholly upon the request of the one who is of kin, if there is such kin, and such person of kin can control the appointment until the probate judge has acted upon the appointment by appointing the person so nominated, provided that such person must be a competent person, under the law.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.*]

5. EXECUTORS AND ADMINISTRATORS (§ 20*)—REQUEST FOR APPOINTMENT—RIGHT TO WITHDRAW.

The law recognizes the right of a person of kin to nominate and request the appointment of a competent person as administrator, where the

person of kin does not desire to be appointed, and where such application is filed with the probate judge for the appointment of a person to the office, until such petition is acted upon by the probate judge, such request may be withdrawn, and the one of kin has the right to make application for the appointment of himself as administrator, and the former nomination and request is of no force or effect.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.*]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by William McCormick against F. R. Brownell, administrator. From an order appointing Brownell administrator of the estate of Michael McCormick, plaintiff appeals. Reversed.

Joseph G. Hedrick, of Hailey, for appellant. Sullivan & Sullivan, of Hailey, for respondent.

STEWART, J. On the 12th day of July, 1912, a petition signed by William McCormick and L. L. Sullivan, attorney in fact, was filed in the probate court of Blaine county, alleging the death of Michael McCormick on the 11th day of July, 1912, in Hailey, Blaine county, Idaho; that said deceased was a resident of Blaine county, state of Idaho; that the deceased left an estate of real and personal property of about \$25,000.

The petition alleges that the next of kin of the deceased, in so far as the petitioners are advised and believe, were William McCormick, a nephew and resident of the state of Idaho, and certain other heirs living outside of the state, mostly in the state of Maryland; that an inquiry had been made to ascertain whether a will had been made or left by the deceased, and none was found, and according to the information and belief of the petitioners the deceased died intestate; that the petitioners are the nephew and attorney in fact for other nephews and nieces. The petition contains a request that letters of administration be issued to F. R. Brownell of Hailey, Idaho.

On July 15, 1912, William McCormick, who signed the petition filed on July 12th, filed with the probate court a petition asking leave to withdraw his name from the petition filed on July 12th, wherein he had requested that F. R. Brownell be appointed as administrator for the reason that at the time he signed the petition he was misinformed as to his rights as next of kin in the premises and signed the same under a misapprehension of the law and facts.

The probate judge, upon the filing of the above petition to withdraw, issued an order setting July 23, 1912, as the day for hearing the petition, which date was postponed until July 24th, and notice of such hearing was duly served. On July 24th William McCormick filed with the probate judge a revocation in writing of his request filed in the pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bate court on July 12th for the issuance of letters of administration to Brownell. On the same day William McCormick filed a petition with the probate judge setting forth the death of Michael McCormick, the date and place of death, and the fact that the deceased owned certain property, and the names of the heirs, etc., stating grounds for the appointment of an administrator, and wherein William McCormick asked and petitioned that he be appointed administrator of the estate of Michael McCormick. Notice of the filing of this petition was given and a day was set for hearing of said petition, August 5, 1912. The minutes of the probate court show that a hearing was had upon the application of William McCormick for his appointment as administrator, and the revocation of his request for the appointment of Brownell, and that the probate judge recorded the fact that on July 24, 1912, the court refused to allow McCormick to withdraw his name from the petition for the appointment of Brownell, and thereupon refused and denied the application of McCormick to revoke his request for the appointment of Brownell, and that upon the application of McCormick for his own appointment the court refused to consider the same and denied the application for the reason that it had heretofore decided, on July 24th, that McCormick had waived his right, and the court had refused his request to withdraw his name from the application for the appointment of Brownell. On August 5th the probate court made an order that letters of administration of the estate of Michael McCormick be issued to F. R. Brownell, and on the 8th of August an order was made appointing Brownell administrator, and Brownell qualified as such. An appeal was taken from the judgment of the probate court to the district court.

The case was tried in the district court, and the trial court in effect found: (1) That Michael McCormick died on the 11th of July, 1912, in Blaine county, Idaho, and that at the time of his death he was a resident of Hailey, Blaine county; that he left an estate consisting of real and personal property of the value of about \$25,000. (2) That July 12, 1912, William McCormick and L. L. Sullivan, as attorney in fact for certain heirs, made application to the probate court of Blaine county for issuance of letters of administration to F. R. Brownell in said estate. (3) That on the 15th day of July William McCormick filed in the probate court his petition for leave to withdraw his name from the petition filed on July 12, 1912, and revoking his request for the appointment of Brownell for the reason that at the time he signed the petition McCormick was misinformed as to his rights as next of kin and signed the same under a misapprehension of the law and the facts in the case. (4) That thereafter the probate court made an order setting July 23, 1912, for a hearing on the

petition of McCormick and also the petition of Brownell and Sullivan as attorney in fact, and that said date of hearing was duly postponed until July 24th, and that a hearing was then had, and the probate court refused to allow William McCormick to withdraw his name from the petition and refused and denied the application of McCormick to revoke his request for the appointment of Brownell. (5) That on the 24th day of July William McCormick made application for the issuance of letters of administration to himself in said estate and also filed a revocation revoking his request filed on the 12th day of July for the issuance of letters of administration to Brownell, declaring the same to be null and void; said revocation alleged that McCormick was not informed as to his rights under the law as next of kin, and that said request was signed by him under a misapprehension of the law and the facts in the case. (6) That both applications or petitions for letters of administration were brought on for hearing on the 5th of August and the probate court, after hearing, ordered that Brownell be appointed administrator of said estate. (7) That on the 6th of August the probate judge entered an order appointing Brownell administrator of the estate of Michael McCormick, deceased, and on the 8th issued letters of administration to Brownell. (8) That William McCormick at the time he signed the application for the appointment of Brownell as administrator was not misinformed as to his rights as next of kin, and that he did not sign the same under a misapprehension of the law and facts, but that McCormick signed the same freely and voluntarily, and that he was not acting under duress or undue influence in any manner whatever, and that within three months prior to the time of signing and filing said application for appointment of Brownell he had been duly advised and informed of his rights as next of kin in the estate of said Michael McCormick. (9) That Brownell prior to the time that McCormick withdrew his name from the petition to appoint Brownell, and with the understanding that his appointment as such administrator would be satisfactory and agreeable to McCormick, went to expense and trouble in said matters in applying for letters of administration in said estate. (10) That no fraud was practiced by Brownell or any one in his behalf in reference to matters connected with the appointment of Brownell as administrator.

From these facts the court concluded as a matter of law: (1) That William McCormick in signing his application renounced and waived any right or preference which he might have to be appointed administrator and, by his signing the application for the appointment of Brownell under the facts, is estopped from revoking or retracting his renunciation; (2) that McCormick has no right to withdraw his name from the peti-

tion requesting the appointment of Brownell as administrator; (3) that William McCormick is not entitled to have letters of administration issued to him in said estate; (4) that Brownell is entitled to have letters of administration issued to him in said estate of Michael McCormick.

Judgment was rendered accordingly. This appeal is from the judgment.

A number of errors are assigned and will be considered in the order in which they are presented by counsel for appellant and answered by counsel for respondent.

[1] It is first contended that the evidence is insufficient to show that Michael McCormick died intestate. Appellant relies upon section 5364, Rev. Codes. This section provides in part: "The fact of his dying intestate must be proved by the testimony of the applicant or others." There is no merit in this contention. The record shows that both appellant and respondent presented petitions to the probate court for appointment of such appellant and respondent as administrator of the estate of Michael McCormick, and in such petitions it is alleged that the deceased died intestate, and the evidence supports the allegations.

[2] Errors 2 and 3 will be considered together. Error 2 is to the effect that the evidence does not show that Brownell was competent, and without the request of William McCormick under the provisions of our statute he could not be appointed administrator; and error 3 is to the effect that no bona fide petition was ever filed in this case until William McCormick filed his application for letters of administration. It will be observed that the two errors assigned are so closely related that the determination of either one of such assigned errors in effect determines both assignments. There is no contention in this case that Brownell was an heir of Michael McCormick; but it appears that William McCormick was a nephew of Michael McCormick and was a resident of Hailey, Blaine county, Idaho.

Section 5351 enumerates the classes of people who, upon proper application, may be appointed as administrators of the estate of a person dying intestate. Such order is as follows: "(1) The surviving husband or wife or some competent person whom he or she may request to have appointed; (2) the children; (3) the father or mother; (4) the brothers; (5) the sisters; (6) the grandchildren; (7) the next of kin entitled to share in the distribution of the estate; (8) any of the kindred; (9) the public administrator; (10) the creditors; (11) any person legally competent." Thus it will be seen that any person legally competent may be appointed administrator of an estate, if no one falling in the other 10 classes desires appointment.

[3,4] In the present case Brownell was not of kin to the deceased and therefore could not have been appointed administrator ex-

cept upon nomination or written request of the person entitled to appointment as provided by Rev. Codes, § 5365. In the present case Brownell was competent upon nomination, by request made by William McCormick, who was a nephew, one within the classification specified by section 5351. The record shows that a petition was filed by William McCormick jointly with L. L. Sullivan, attorney in fact for other heirs, asking for the appointment of F. R. Brownell, and this petition was signed by one party who was interested in the estate and by the attorney in fact of other alleged heirs and was a proper application under the provisions of sections 5351 and 5365, Rev. Codes. If no other papers had been filed and proper legal notice had been given of such application and a hearing had, the probate judge would have been authorized to appoint F. R. Brownell as administrator.

It will thus be seen that, if no person falling within the first 10 subdivisions of section 5351 should apply, any person legally competent may apply and be appointed administrator. In the present case Brownell was not of kin to the deceased and therefore could not apply for appointment, except upon nomination or written request of a person entitled to appointment. On July 12, 1912, when the petition signed by William McCormick and L. L. Sullivan, attorney in fact, was filed, so far as the record in this case shows, F. R. Brownell was a competent person to make a petition for appointment as administrator, under the provisions of sections 5351 and 5365, upon the written request of the person entitled to the appointment.

[5] The record shows, however, that on July 15, 1912, three days after the petition of McCormick for the appointment of Brownell and before any action had been taken by the probate judge, McCormick filed with the probate judge a petition revoking his request for the appointment of Brownell, for the reason that at the time he signed said petition the petitioner was misinformed as to his rights as next of kin in the premises. This revocation was prior to the time when the order was made by the probate judge appointing Brownell administrator. At the time this petition for revocation was presented to the court, no action had been taken by the probate court and no right had been acquired by Brownell. There can be no question but that William McCormick on the 24th of July, 1912, made a proper application for the issuance of letters of administration to himself in said estate and on said day filed a revocation of his request filed on the 12th of July for the issuance of letters of administration to Brownell.

The sections of the statute cited show clearly that it was the intention of the Legislature to grant to the person entitled to administration the power to select some com-

petent person to discharge the duties of the office, and that the probate court is limited in its power and is required to act wholly upon the desire and request of the person who is entitled to the appointment, and, if such person applies for the appointment of a stranger or a person not of kin, the appointment depends wholly upon the request of one who is of kin, if there is such kin, and such person of kin can control the appointment until the probate judge has acted upon the appointment by appointing the person so nominated.

At the time that William McCormick filed his revocation of the request for the appointment of Brownell, nothing had been done by the probate court which in any way conferred any right upon Brownell or which took away from any other person, who could or was authorized to be appointed, any right bestowed upon any such person, by reason of the filing of the request to appoint Brownell. The action by McCormick revoking his application was simply the exercise of a right he had of withdrawing a privilege which was specifically granted to him under the statute. It follows, therefore, that, while Brownell was competent to be appointed, yet he could not be appointed administrator without a valid petition being filed, and upon the withdrawal of McCormick, who was the petitioner, there was no petition on file which would authorize the appointment of Brownell. *Estate of Shiels*, 120 Cal. 347, 52 Pac. 808; 18 Cyc. 98; 11 Am. & Eng. Enc. L. 757; *Rowell v. Adams*, 83 S. C. 124, 65 S. E. 207. Neither can the application filed by Sullivan, as attorney in fact, authorize the appointment of Brownell under the petition filed, because such petition clearly shows that McCormick was an heir and a resident within the state, and, that being true, he was the only person who could be appointed without his consent and nomination, so that, at the time that Brownell was appointed administrator of the estate of Michael McCormick, there was no petition or application on file in the probate court of Blaine county, Idaho, which empowered the probate judge to appoint the respondent administrator of the estate of Michael McCormick, deceased.

Section 5366, Rev. Codes, recognizes the right to revocation in certain classes of cases, and it provides: "When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them who is competent, or any competent person at the written request of any of them, may obtain the revocation of the letters and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration be issued to him." Under this provision a competent person at the request of any of the classes named in the section may obtain a revocation of a request to appoint any other person than those mentioned in the statute. *Estate of Daggett*,

15 Idaho, 504, 98 Pac. 849. This latter section, however, does not apply to the petition of McCormick for revocation of his request to appoint Brownell, for the reason that he does not belong to any of the classes provided for in said section. The right, however, to withdraw his application for the appointment of a person to the office to which he himself was entitled, under the law, is a right belonging to himself, and it did not belong to Brownell in any way whatever under the law but depends wholly upon the nomination and consent of McCormick.

The law recognizes the right of a person of kin to nominate and request the appointment of a competent person as administrator, where the person of kin does not desire to be appointed, and where a person of kin nominates and requests the appointment and the same is filed with the probate judge for the appointment of a person to the office, until such petition is acted upon by the probate judge, such request may be withdrawn and the one of kin has the right to make application for the appointment of himself as administrator, and the former nomination and request is of no force or effect.

Assignment of error No. 4 that McCormick was ignorant of his rights as next of kin at the time he signed the request for the appointment of Brownell is contrary to the evidence, as the evidence does support the fact that he was fully informed by counsel of his rights at the time. There is no evidence to support this assignment of error.

Error No. 5 does not require any discussion. Error No. 6 has been fully covered in the discussion of other questions heretofore. Error No. 7 has been fully discussed under error No. 3.

We think there can be no question in this case but that the district court erred in the first conclusion of law, wherein the court concluded that under the law William McCormick, in signing his application and request for the appointment of F. R. Brownell as administrator of the estate of Michael McCormick, deceased, thereby renounced and waived any right or preference which he might have to be appointed administrator, and by signing said application for the appointment of Brownell he is estopped from revoking or retracting his renunciation as aforesaid. Second, that the court erred in his second conclusion of law, wherein it is held that William McCormick had no right to withdraw his name from the petition which he signed requesting the appointment of Brownell as administrator. Third, the court erred in holding that William McCormick is not entitled to have letters of administration issued to him in said estate. Fourth, that the court erred in the fourth conclusion of law, wherein it is held that F. R. Brownell is entitled to have letters of administration issued to him in said estate of Michael McCormick.

For these reasons the judgment is revers-

ed, and the trial court is directed to make findings in accordance with this opinion and enter a judgment reversing the probate court and to order that the case be remanded to the probate court with directions to the probate court to make findings and enter judgment in accordance with the opinion of this court. Costs awarded to appellant.

AILSHIE, C. J., concurs. SULLIVAN, J., did not sit at the hearing or participate in the determination of the case.

On Rehearing.

STEVENS, District Judge. This case is before the court on a petition for rehearing filed by the respondent, F. R. Brownell. The opinion heretofore filed in this case sets forth the statement of facts fully and in concise language, and it will not be necessary here to reiterate it. The petition states two grounds on which it is urged the Supreme Court erred in the former opinion: First, that the court erred in holding that William McCormick could, as a matter of right, withdraw his name from the Brownell application, when he had not petitioned to withdraw his name as a matter of right, but for the reason that he had been misinformed as to his rights. Second, that the court erred in holding that William McCormick had a right to control the appointment of administrator until the probate judge had acted upon Brownell's application.

We have examined the cases cited by appellant and each seems to have been governed by the particular facts in issue. In *Estate of Kirtlan*, 16 Cal. 162, cited in appellant's brief, the request came from a brother, who was entitled to letters of administration. The opinion shows that his request to withdraw his writing requesting the appointment of D. was not made prior to the hearing on the petition and that the brother waived his right, having encouraged D. to go to the trouble and expense of applying for letters of administration. The last paragraph of the opinion seems to furnish the key for its interpretation: "The brother had a right to contest or not, as he chose. He chose not to do so when the application was made; indeed, he expressly waived his right and encouraged the petitioner to make application for the appointment."

In the case at bar the appellant seems to have acted without delay at the earliest moment, when he became cognizant of the law and facts and of his rights thereunder.

In the case of *In re Bedell*, 97 Cal. 339, 32 Pac. 323, the father first requested the appointment of G. as administrator, and a petition was also filed by the public administrator for letters of administration. Subsequent to his first request, the father, who was entitled to letters, requested the appointment of the public administrator; both being requests for one not at the time entitled to

administer the estate. The father, who was entitled to letters, did not himself apply for the appointment, and the court held that, having once waived and relinquished his right to administration in favor of the respondent, the court was not required to pay any regard to his subsequent request for the appointment of the public administrator.

In the case of *In re Sullivan's Estate*, 25 Wash. 430, 65 Pac. 793, the application was made for letters by creditors of decedent, and the court said: "Under the circumstances we believe the court was empowered to appoint any suitable and competent person" and refused to "interfere with the discretion exercised by the probate court." This case does not seem to be in point.

In the case of *In re Clute's Estate*, 37 Misc. Rep. 710, 76 N. Y. Supp. 456, the sole legatee for a valuable consideration, to wit, \$200, executed a renunciation and assigned all her interest in the estate to another who applied for letters, and the court held: "That the cases do not seem to go so far as to hold that in every case there is an absolute right of retraction which must be accepted by the surrogate without his consent"—but the refusal to allow such renunciation seems to be based on the fact that she had assigned her interest for a valuable consideration, which is not the fact in the case at bar.

In the very recent case of the *Estate of Blackburn* (Mont.) 137 Pac. 381 (not yet officially reported), where the widow had renounced her right to letters of administration and had nominated another who had been appointed and she thereafter sought to withdraw such renunciation and have letters granted to her, the court said: "Therefore her due was absolute frankness on the part of the person seeking her nomination, and if he, pending her assent to his appointment, so demeaned himself as to deceive or lull her into a false security concerning his attitude, and she, believing him friendly to her and not hostile to her claims, waived her right and assented to his appointment to her disadvantage, it cannot be said that her waiver was fairly procured or freely given"—and the court ordered his letters revoked and the issuance of letters to the widow.

In the case of *Rowell v. Adams*, 83 S. C. 124, 65 S. E. 207, the following language is used in the syllabus: "Waiver of right to administration may be retracted at any time before it is acted on"—and in this case for three years A. did nothing, so far as the opinion shows, until after petitioner had filed his petition, which is not analogous with the case at bar. The right to have letters of administration issued to the nominee (Brownell) was the right of McCormick, not Brownell.

In *Estate of True*, 120 Cal. 352, 52 Pac. 815, it is stated that: "One appointed as co-executor of a will, who renounces his right as such, may retract his renunciation at any

time prior to the grant of letters to the other. The fact of such renunciation, even if done in pursuance of an agreement with the other executor, cannot operate to estop him from withdrawing it."

At common law the rule was well settled that the renunciation of an executor might be retracted at any time before letters had been granted to another.

In *Casey v. Gardiner*, 4 Bradf. Sur. (N. Y.) 13, it is held that a renunciation may be retracted by the executors at any time before the grant of administration. This is rather a matter of right than a privilege within the discretion of the surrogate. This doctrine is sustained by numerous cases. In *re Shile's Estate*, 120 Cal. 347, 52 Pac. 808; 11 Am. & Eng. Ency. Law, 756; *Id.* 757; *Thomas v. Knighton*, 23 Md. 318, 87 Am. Dec. 571; *Estate of Keane*, 56 Cal. 407; In *re Wilson's Estate*, 92 Hun, 318, 36 N. Y. Supp. 882; *Abbott's N. Y. Cyc. Dig.* 6-235; *Rowell v. Adams*, 83 S. C. 124, 65 S. E. 207. The latter, and what seem to us the better considered cases, follow the doctrine heretofore announced by this court.

We see no reason for a modification of the original opinion herein, and judgment is ordered in accordance with the former opinion herein. Costs awarded to appellant.

AILSHUE, C. J., and STEWART, J., concur.

INDIAN COVE IRR. DIST. et al. v. PRIDEAUX.

(Supreme Court of Idaho. Nov. 11, 1913.)

1. WATERS AND WATER COURSES (§ 226*)—IRRIGATION DISTRICT—LANDS INCLUDED.

Under the provisions of the irrigation district laws of this state (Rev. Codes, § 2372 et seq.), agricultural lands that have been entered under any of the land laws of Congress may be included in an irrigation district.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 318; Dec. Dig. § 226.*]

2. PUBLIC LANDS (§ 35*)—HOMESTEAD OR DESERT "ENTRY."

A homestead or desert land entry is the initial step taken in the United States Land Office by the claimant toward acquiring ownership under the homestead or desert land laws and precedes the performance on the part of the claimant of the conditions required by the law.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2406-2408.]

3. WATERS AND WATER COURSES (§ 226*)—IRRIGATION DISTRICT—LAND INCLUDED—EVIDENCE.

Held, that it was the intention of the Legislature, in enacting the irrigation district law, to include the receipt of a register of the United States Land Office as evidence of title sufficient to serve the purpose of the act so far as title is concerned and to authorize the inclusion of the lands so entered in an irrigation dis-

trict and authorize the apportionment of to such land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 318; Dec. Dig. § 226.*]

4. PUBLIC LANDS (§ 35*)—DISPOSITION IN IRRIGATION DISTRICT.

The inclusion of such lands within irrigation district and the apportionment fits thereto cannot interfere with the disposition of such lands by the government.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

5. WATERS AND WATER COURSES (§ 226*)—"IRRIGATION DISTRICT"—"PUBLIC CATION."

"Irrigation districts" are "public cations," although not strictly municipalities, in the sense of exercising governmental functions other than those connected with raising money to defray the expense of constructing and maintaining irrigation systems and the conducting of the business of the district.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 315, 316; Dec. Dig. § 224.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3776; vol. 6, pp. 5781-5782, p. 7771.]

Appeal from District Court, Owyhee County; Chas. P. McCarthy, Judge.

Action by the Indian Cove Irrigation District, a public corporation, and against Marion H. Prideaux for a writ of mandamus and confirmation by the District Court of the proceedings of the Board of County Commissioners declaring the legality of the organization of the Indian Cove Irrigation District and of the issuance and sale of bonds. Judgment affirming such proceedings but excluding certain lands from said district. From a portion of the decree the irrigation district appeals, and from the decree George W. Smith, landowner, appeals. Judgment modified and reversed as to the exclusion of such lands, and remanded.

Richards & Haga and McKeen Law Firm, all of Boise, for appellant Indian Cove Irr. Dist. F. B. Ebbert, of Boise, for respondent George W. Smith. D. A. Dunning and R. L. Buckner, both of Boise, for respondent Marion H. Prideaux, of Caldwell, amici curiae.

SULLIVAN, J. This is an appeal from the judgment of the District Court in the Indian Cove Irrigation District in a proceeding brought by said district for the establishment, approval, and confirmation of the proceedings of the board of county commissioners leading up to the organization of the district and of the proceedings of the district authorizing the issuance and sale of \$400,000 issue of bonds. The trial court found that all of the proceedings of the board of county commissioners and the district were legal and valid in the organization of the district and other matters except in so far as the board of county commissioners had included in said irrigation district the lands of the respondent Prideaux held under the desert act of C.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's.

80 acres and as a homestead under the homestead laws of Congress 160 acres, to neither of which entries had he earned title or made final proof under the land laws of Congress. The trial court excluded said lands of the respondent from said irrigation district and directed that the boundaries of the district be changed accordingly. In all other respects the proceedings of the board of county commissioners and of said irrigation district were approved and confirmed. The irrigation district appeals from that portion of the decree excluding respondent's land from said district, and appellant George W. Smith, a landowner in said district, appeals from the entire decree.

The facts necessary to a decision of this case are not in dispute and are substantially as follows: On March 20, 1912, a petition for the organization of the Indian Cove Irrigation District was filed with the board of county commissioners of Owyhee county, Idaho, and on May 23, 1912, after due notice and after a full hearing, said board made an order describing the lands they had determined to include in said district and providing for its organization in case the electors of the proposed district voted in favor of such organization. The lands are fully described in said order. In pursuance of this order, an election was held on June 29, 1912, and, the vote being favorable to the organization of the district, the board of county commissioners, after a canvass of such vote, declared it duly organized. On December 10, 1912, the district authorized the issuance of its bonds to the amount of \$400,000 at a special election held for that purpose, but no apportionment of benefits has been made. The findings of the trial court are exceedingly full and cover every issue and show a substantial compliance with the terms of the statute in the organization of the district and in the issuance of the bonds; but the court in effect held that the lands of respondent Prideaux were not and never would be a part of the irrigation district and could not legally be included therein and were not now and never would be assessable for the payment of the irrigation system, acquired by said irrigation district at great expense, or for the maintenance thereof, although both the court and the board of county commissioners found, and there is no evidence or even contention to the contrary, that the lands of respondent and all other lands included in the district will be greatly benefited by such improvements. From this portion of the court's decision the irrigation district has appealed.

This proceeding was not brought to confirm an assessment or apportionment of benefits, as neither has been made. The district has made no attempt to levy any tax on respondent's land or even on his interest therein or to apportion any part of the costs of the irrigation system to such lands.

[1] Five errors are assigned and are all

to the effect that the court erred in holding that said lands of respondent, by reason of their being held under homestead and desert land laws of Congress, and because final proof had not been made to the government therefor, could not be legally included within said irrigation district.

Title 14, c. 1, of the Civil Code of this state, beginning with section 2372, provides for the organization of irrigation districts. Section 2372 is as follows: "Whenever fifty, or a majority, of the holders of title, or evidence of title, to lands susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, or when for other reasons they desire to organize the proposed territory into one district, they may propose the organization of an irrigation district under this title: Provided, said holders of title or evidence of title shall hold such title or evidence of title to at least one-fourth part of the total area of the land in the proposed district, which will be assessable for the purposes of the district. The equalized county assessment roll next preceding the presentation of a petition for the organization of an irrigation district shall be sufficient evidence of title for the purpose of this title, but other evidence may be received, including receipts or other evidence of the rights of entrymen on lands under any law of the United States or of this state, and such entrymen shall be competent signers of such petition, and the lands on which they have made such entries shall, for the purposes of said petition, be considered as owned by them." That section declares who may propose or initiate the organization of a district and includes therein those who have entered the land under the laws of the United States and of the state, thereby clearly indicating that the lands of such entrymen may be included in such district, although the entrymen have not as yet made final proof thereon or, as is sometimes stated, have not yet earned the title from the government or state but have initiated title, which, if prosecuted as required by law, will result in a legal title from the government or state.

[3] This court had under consideration the provisions of said section of the statute above quoted in *Gem Irr. Dist. v. Johnson*, 18 Idaho, 386, 109 Pac. 845, and the court said: "The only question that is argued or presented on this appeal is whether or not the expression 'the lands in the proposed district which will be assessable for the purposes of the district' has reference to lands to which the owners or occupants hold title and lands the title to which has passed from the state or general government, or whether this relates to and is satisfied by the latter part of the proviso to the section, which says, 'But other evidence may be received, including receipts or other evidence of the rights of entrymen on lands under any law of the United States or of this state.' We

do not think there is any room for doubt as to what the Legislature meant by the provisions of the last sentence of this proviso to section 2372. The concluding part of the sentence itself is clear and explicit. It says, 'And such entrymen [referring to the holders of the receipts from the state or the general government] shall be competent signers of such petition, and the lands on which they have made such entries shall, for the purposes of said petition, be considered as owned by them.' This measures the qualifications of a signer of such petition and the conditions under which he may sign and be counted as one of the number and one whose lands will constitute the required amount to be represented by such petition. The condition is that he shall hold an entryman's receipt, either from the state or the general government, for the lands claimed by him and which he seeks to have included in the district and subject to assessment for the purposes of an irrigation district. It is equally clear that irrigation bonds issued against such lands would be valid and binding to the extent at least of the title, interest, or claim of such entryman in and to such lands, whether acquired by him from the state or the general government."

[2] The court in that decision clearly contemplated that land entered under the laws of Congress might be included in such district. The question was whether entrymen under the desert or homestead land laws who had not earned title or made final proof under their entries were qualified signers of the petition and as to whether land so held could be held as a part of the required one-fourth total area of the land proposed in said district "which will be assessable for the purposes of the district." The court in effect held that such lands could be included in an irrigation district. The word "entry," as used in the public land laws of Congress, is evidently used in the sense that it means the initiatory step made in the United States Land Office for initiating proceedings to procure title to certain land. Webster in his dictionary defines the word "entryman" as one who enters upon public land with intent to secure an allotment under the homestead, mining, or other laws.

In *McCune v. Essig* (C. C.) 118 Fed. 273, the court said: "A homestead entry * * * is the initial step taken in the Land Office towards acquiring ownership under the homestead law, and precedes the performance on the part of the homestead claimant of the conditions of residence upon and improvement of the land."

It is contended in this case that by including such land in an irrigation district that the state or district cannot in any wise interfere with the government's ownership and disposition of such land, and this court in *Gem Irr. Dist. v. Johnson*, supra, said that: "As to what liability the bonds would im-

pose upon such lands beyond and in excess of the interest acquired or held by the entryman is another question and one that need not concern us in this case."

[4] The interest acquired and held by the entryman in such land, aside from the securing of title from the government, under said district irrigation act be subject to the provisions of said act by holding said land is within said irrigation district and will be benefited by the organization of the district; but any burdens imposed upon such lands by the government, and the order is conclusive upon the point that the organization of the district and the assessment proposed will benefit respondent. The board of county commissioners considered after a full consideration of all the lands connected therewith, and the trial court after a full consideration of all the facts that all the lands included within the boundaries of said irrigation district as proposed by said board were and are susceptible of being irrigated from a common source and under the same system of works and will be benefited by irrigation from the system described in said petition, but based its decision on the ground that the respondent had not acquired title to said land from the United States for that reason could not legally be included in said district. Whatever property interest respondent may have in the lands in question are subject to the laws of the state, not in conflict with the federal laws. The same question, and it was on this that the court said in *Gem Irr. Dist. v. Johnson*, supra: "It is equally clear that the bonds issued against such lands would be valid and binding to the extent at least of the title, interest, or claim of such entryman in and to such lands, whether acquired by him from the state or the general government." The Legislature evidently recognized the fact that the arid lands of the state are practically worthless without water for irrigation and domestic purposes, and individual owners cannot construct the works or incur the expense necessary to acquire title for their lands except in co-operation in conjunction with others, and with this in view have provided the organization of quasi municipal corporations in order to accomplish the development of the arid resources of the state. In many cases title to arid lands cannot be acquired from the general government without view to irrigation purposes, and in none of the irrigation districts organized in this state are the lands included therein all patented lands at the time the district was organized. If the district must be organized so as to include only lands that have been patented, or lands for which final proof has been made by the government, the development by irrigation districts would not be made, for it would increase the expense of the patented lands to such an extent that it would be prohibitive; and hence t

lature wisely provided for the organization of irrigation districts to include both patented lands and lands held by private parties under homestead or desert entries.

[5] It is settled law that irrigation districts are public corporations although not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray the expense of constructing and operating irrigation systems and the conduct of the business of the district. *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Pioneer Irr. Dist. v. Walker*, 20 Idaho, 605, 119 Pac. 304; *In re Bonds of Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

One of the essential attributes of a public corporation, as distinguished from a private corporation, is that membership in the former is involuntary and based upon some geographical or similar classification, while membership in the latter is based on consent. *Morawitz on Priv. Corp.* (2d Ed.) § 3; *Thompson on Corp.* § 21.

As illustrating the fundamental basis of the law of irrigation districts, the Supreme Court of the United States in *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, said: "If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit."

It is clear that irrigation districts as public corporations are not based upon consent of all the members and may include lands without the consent of the owner entryman. In *Gem Irr. Dist. v. Johnson*, supra, the court confirmed the organization of a district containing 30,000 acres of land within its boundaries, 10,000 acres of which was unsold state land, and only a few scattered governmental subdivisions of said land were patented at the time of the organization of the district and only a majority of the landholders had petitioned for the organization of the district.

It appears from the record that a full hearing was had before the board of county commissioners on the question of the organization of said district and that respondent, claiming to be the owner of the lands which the trial court excluded from the district, signed and filed with the board a written protest against the inclusion of his lands in the district. He was represented by counsel

at the hearing, and such protest was considered by the board and finally overruled, and the board found that respondent's land would be benefited by irrigation from the district's proposed irrigation system and by the formation of said district, and a similar finding was made by the court. It is a well-recognized fact that possessory rights to public land are frequently of great value and constitute valuable property rights. Desert entries are traded in and assigned for value in many parts of the state, and relinquishments of homesteads are readily salable where the land has become valuable. The entryman is entitled to the protection of the state and the local laws to the same extent as if he resided on patented lands. Then why may he not be taxed in proportion to the benefits received?

Under the provisions of our Constitution, § 19, art. 21, the state is prohibited from imposing taxes upon lands on property belonging to the United States, but the law is well established that, as soon as final certificate issues, he has the whole beneficial interest in the land and it may be taxed. *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671. The court held in *Cramer v. Walker*, 23 Idaho, 495, that under the statutes of this territory, which were in force in 1881, possessory claims were taxable.

It is clearly within the power of the state to tax homestead and desert entries such as those of respondent, and the necessity for so doing in case of local improvements is very clear, but in so doing the state is prohibited from in any manner interfering with the right of the government to transfer the title to said land.

In *State v. Moore*, 12 Cal. 56, in which case the only objection to the power of the Legislature to impose a tax arose from the fact that the mines involved in that case were the property of the government and were exempt from taxation, the court said: "This fact, however, if admitted, does not, in our view, militate against the right to levy a tax upon the interest of the possessor of such claim."

In *Elder v. Wood*, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. Ed. 464, the court upheld the validity of a tax deed based upon the assessment of an unpatented mining claim and concluded as follows: "The state therefore had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States."

There are many cases holding that rights to the possession of and qualified interests in lands are taxable notwithstanding the government's interest in the land. On a review of the authorities upon this question they show that property rights or interests of entrymen under the public land laws of the United States are within the taxing

power of the state, and the fact that the government retains an interest in the same property does not interfere with such right of taxation. See *City of San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 189, 41 Pac. 291, and note to the same case in 35 L. R. A. 33. No tax assessment or apportionment of benefits have been made by said irrigation district affecting the respondent's land, and the respondent should bide his time and invoke the aid and protection of the court if the law is actually violated and an attempt is made to collect an illegal tax. When the district comes to levy the tax or apportion the benefits, respondent may have parted with or forfeited whatever interests he may have in the lands in question, and the subsequent owner may be willing to work in harmony with the other landowners in said irrigation district for the general development of the community and be willing to bear his just proportion of the taxes levied for such purpose. The district court erred in excluding the respondent's land from said irrigation district.

George W. Smith, one of the plaintiffs in the case, also appealed. His appeal goes to the validity of the bond issue and assigns as error the holding of the court excluding Prideaux's land from said district. Is the bond issue invalid because based on a contract made with the Indian Cove Reclamation Company for water for said district? The record shows that at a meeting held July 29, 1912, the report of Horn, an engineer, and a form of contract with the Indian Cove Reclamation Company were submitted to the board of directors and taken under consideration. Action thereon was deferred from time to time until August 26, 1912. On that day the board voted to adopt the contract. This contract was the purchase of a certain irrigation plant for the sum of \$167,138. The board found that there was a reasonable amount to be paid for said plant and on the latter date proceeded to give notice of a special bond election to determine whether or not the district should issue \$400,000 worth of bonds to purchase and enlarge the system of the Indian Cove Reclamation Company. The election was held on December 10, 1912, and the vote was favorable to the bond issue. This question raised by appellant Smith, or substantially the same question, was raised in the courts of Oregon in the case of *Payette-Oregon Slope Irr. Dist. v. Peterson*. See decision of the Supreme Court of Oregon, 128 Pac. 837. The Oregon court held against the contention now made by Smith.

It is contended by Smith that the contract with the Indian Cove Reclamation Company was entered into before the board had received or considered the report of the state engineer. This contention is without merit. While it is true the state engineer's report bears date three days later than the con-

tract and was not considered by the board until October 1, 1912, the proceedings of the board at that meeting shows that the board approved the purchase of the works described in the contract and that the board, after having duly considered the report, ratified the contract and their former action in regard to it and proceeded to carry out such contract by calling for an election to authorize the issuance of \$400,000 worth of bonds to be used for purchasing said works and enlarging the same. The ratification of the contract was therefore complete, and it is immaterial in this case whether the board had authority to enter into the contract before receiving the state engineer's report or not. It is clear that the board of directors had authority to enter into said contract and to issue the bonds of the district in payment for the irrigation system in accordance with the terms of such contract.

The judgment of the trial court must therefore be modified and reversed so far as it excludes the lands of the defendant Prideaux from said irrigation district, and judgment entered including said land within said district. The cause is remanded for further proceedings in accordance with the views expressed in this opinion. Costs are awarded to appellants.

AILSHIE, C. J., and STEWART, J., concur.

SMITH v. YATES.

(Supreme Court of Idaho. Nov. 13, 1913.)

SUFFICIENCY OF EVIDENCE—QUIETING TITLE.

Held, that the evidence is sufficient to support the findings, and that the court did not err in rejecting certain evidence offered by the plaintiff.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Belle S. Smith against John E. Yates to quiet title to certain real estate. From judgment for defendant, plaintiff appeals. Affirmed.

B. F. Griffith, of Boise, for appellant. A. A. Fraser, of Boise, for respondent.

SULLIVAN, J. This is an action to quiet title to lots 13 and 14, block 19, of Hyde Park addition to Boise City; also the north 45 feet of the northwest corner of block 17 of Resseguie's addition to Boise City.

The complaint is in the usual form to quiet title, and prays that the defendant be required to set forth the nature of his claim and that the title be quieted in plaintiff. The answer of the defendant denied the possession or ownership of the plaintiff, admitted that the defendant claimed title to said lots, and alleged that the action is barred by sections 4036 and 4037, Rev. Codes; also alleged that defendant entered into possession of said lots under claim of title founded on

a written instrument, and that he had been in continuous possession for a period of more than five years, and had been in adverse possession for that length of time, and that plaintiff, her ancestors, grantors, or predecessors, were not, or any of them, seised or possessed of said lots at any time within five years before this action was brought, and that the defendant claims title under the provisions of sections 4040, 4041, and 4043, Rev. Codes; and by way of cross-complaint sets up his ownership and right and title to said lots, and prays to have the title quieted in him. The plaintiff answered the cross-complaint, denying the material allegations therein. The cause was tried by the court without a jury, and the court thereafter made findings of fact and conclusions of law, and entered a decree in favor of defendant, quieting the title to said lots in him. The appeal is from the judgment.

The errors assigned go to the refusal of the court to admit certain evidence offered by the plaintiff and to the sufficiency of the evidence to support the findings. Upon an examination of the record, we find that the evidence is sufficient to sustain the findings of the court, and that there was no reversible error in the action of the court in excluding certain evidence offered by the plaintiff.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the respondent.

AILSHIE, C. J., and STEWART, J., concur.

BEHRENSMEYER et al. v. GWINN, County Judge.

(Supreme Court of Idaho. Nov. 22, 1913.)

1. NEW TRIAL (§ 155*)—MOTION—JURISDICTION TO ENTERTAIN.

Section 4442, as amended by chapter 118, Laws 1911, provides that "the application for a new trial shall be heard at the earliest practicable period after notice of the motion. * * *

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. § 155.*]

2. APPEAL AND ERROR (§ 459*)—EXCEPTIONS, BILL OF (§ 43*)—STAY OF EXECUTION.

Section 4807, Rev. Codes, as amended Feb. 20, 1911 (Laws 1911, c. 111, par. 1), provides: "An appeal may be taken to the Supreme Court from a district court: (1) From a final judgment in an action or special proceeding commenced in the court in which the same is rendered * * * within sixty days after the entry of such judgment."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2218-2221; Dec. Dig. § 459; * Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

3. APPEAL AND ERROR (§ 459*)—EXECUTION—JURISDICTION TO STAY EXECUTION.

Section 4818, Rev. Codes, as amended (Laws 1911, c. 117) provides: "On an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll and of any bill of ex-

ceptions or reporter's transcript prepared and settled as prescribed in section 4434, upon which the appellant relies."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2218-2221; Dec. Dig. § 459.*]

4. EXCEPTIONS, BILL OF (§ 36*)—NEW TRIAL (§ 155*)—MOTION—TIME FOR HEARING.

While the statute fixes no time within which a motion for a new trial must be heard, the statute does require that notice of intention to move for a new trial shall be served within ten days after the decision of the court, and that the application for a new trial shall be heard at the earliest practicable period after the notice of motion. This contemplates that the party intending to move for a new trial shall with diligence prosecute such action. The fact that the judgment was rendered on June 20, 1910, and no attempt made to settle the bill of exceptions until October 18, 1913, does not show diligence on the part of the appellant to bring about a hearing upon the motion for a new trial and fails to show that the appellant is prosecuting the appeal in good faith; neither was the motion heard at the earliest practicable period after the notice of motion.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44-46, 48, 51-53, 56; Dec. Dig. § 36; * New Trial, Cent. Dig. § 315; Dec. Dig. § 155.*]

Ailshie, C. J., dissenting.

Application for writ of prohibition by Grace Behrensmeyer and another against James G. Gwinn, Judge of the Ninth Judicial District for the County of Bonneville. Writ directed to issue.

Otto E. McCutcheon, O. E. McCutcheon, Sr., and Linger & Hanson, all of Idaho Falls, for plaintiffs. E. M. Holden, of Idaho Falls, for defendant.

STEWART, J. This is an application for a writ of prohibition to Hon. James G. Gwinn, district judge of the Ninth judicial district for the county of Bonneville, commanding and restraining him from proceeding any further to settle any bill of exceptions in the case of Behrensmeyer et al. v. Plank or to entertain or hear any motion for a new trial therein or to further interpose the said stay of proceedings to prevent the plaintiffs from collecting their damages recovered by them and otherwise realizing the fruits of their judgment. The prayer of the application requests that a writ of prohibition be issued in the alternative in the first instance, to be followed by a peremptory writ after the hearing, and that a time be fixed for the return of the alternative writ with directions for notice to the district judge and a hearing on his answer. This petition was subscribed to by Otto E. McCutcheon, and attached to it are exhibits which we will hereafter refer to. Judge Gwinn filed an answer, verified by him, apparently intended to be denials of different allegations of the petition.

At the hearing the case was orally argued, and a brief was submitted by counsel for the plaintiffs. The defendant did not appear at the hearing, either personally or by counsel.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

except by the answer that was filed. The petition for the writ states the facts briefly as follows: That the action in the district court was an equitable action; that the answer in that case stated an issue which was submitted to the jury, and on November 15, 1909, the jury returned a verdict for the plaintiff for \$800 damages. June 9, 1910, Judge Stevens made his findings of fact and conclusions of law, adopting the verdict of the jury upon the issues submitted to them, and on June 20, 1910, entered a decree for plaintiffs, and on July 8, 1910, a copy of the decree was served on the attorney for the defendant and receipted for by him. The defendant and his counsel treated the proceedings before the jury as a trial of the case, and on November 18, 1909, Judge Stevens gave the defendant 90 days within which to prepare, serve, and file a notice of intention to move for a new trial and to prepare and serve his proposed bill of exceptions or statement. A similar order was made by Judge Stevens February 13, 1910, and a third on May 10, 1910, and a fourth on August 2, 1910, and the record shows that ten such orders altogether were made. These orders were granted without hearing and with no showing or cause so far as the record is concerned. Such orders purported to extend such time from the 18th day of November, 1909, up to and including the 28th day of March, 1912.

Otto E. McCutcheon has been attorney for plaintiffs throughout the proceedings, and Linger & Hanson came into the case by agreement to represent plaintiff Lords. On March 28, 1912, the defendant undertook to give notice of his intention to move for a new trial and serve his bill of exceptions. Service of papers was refused by McCutcheon on the ground of laches and lack of due diligence. Linger & Hanson accepted service. The papers were filed, and on the same day, March 28th, the clerk handed the purported bill of exceptions to Judge Gwinn of the Ninth judicial district. The defendant took an appeal from the judgment June 17, 1911. The appeal was dismissed by this court September 15, 1913, for laches. No stay bond was filed affecting the appeal. On July 31, 1913, an execution was taken out. The stay bond was filed August 11, 1913, and the execution withdrawn. Remittitur after dismissal of appeal came down from the Supreme Court October 8, 1913. On October 18, 1913, the district court for Bonneville county was in session, Judge Gwinn presiding. Mr. E. M. Holden, attorney for defendant, asked the court to take up the settling of his bill of exceptions and asked the court to enter an order staying execution taken out the same day. These proceedings were taken against the protest and objection of the attorney for plaintiffs. On October 28, 1913, Judge Gwinn stated to plaintiffs' attorney that he had decided in favor of his jurisdiction to settle the bill of exceptions and would settle the same

and entertain and hear a motion for trial. On October 28, 1913, motion for trial was filed by defendant.

Otto E. McCutcheon in his affidavit on information and belief, and for the reason of said motion and notice, that the intention of the defendant by his attorney to bring up said motion for hearing in the near future, and that it is the intention of the said Hon. James G. Gwinn, of the said district court as aforesaid, to hear the same unless restrained by the writ of prohibition to issue out of this court.

Thus it is shown in the affidavit that on the 18th day of October, 1913, the court ordered and took out an execution against the defendant for the payment of the judgment, and the attorney for the defendant moved the court for a stay of proceedings against the execution of the judgment in the presence of the deponent upon the deponent denied the jurisdiction of the court to stay proceedings, and that the court was entered by the clerk without a stay or other security to the plaintiffs' judgment. This application demands that the court restrain Judge Gwinn from the stay of proceedings on the ground that it will delay and interfere with the plaintiffs in collecting their damages recovered by judgment, and thereby realizing the fruits of judgment. There is no reason assigned for the part of the defendant that justifies the extension of time by the four orders made by Judge Stevens as jurisdictional, and that the action is an action in equity and that the action of the jury is merely advisory. Section 4396, Rev. Codes, provides: "The verdict of a jury is either general or special. * * * The above section recognizes a distinction between law and equity actions. See Yost, 6 Idaho, 273, 55 Pac. 542; O'Connell v. Kirkpatrick, 9 Idaho, 629, 75 Pac. 100; James v. McCann, 78 Cal. 107, 20 P. 100; Bell v. Marsh, 80 Cal. 411, 22 Pac. 100."

[3] By chapter 117, Laws of 1911, section 4818 of the Revised Codes was amended and now provides: "On an appeal from a judgment the appellant must furnish the court with a copy of the notice of appeal, the judgment roll and of any bill of exceptions or reporter's transcript prepared and settled as prescribed in section 4441, which the appellant relies."

[1] Section 4441, Rev. Codes, amended by chapter 118, Laws of 1911, p. 377, requires the required proceedings of a party intending to move for a new trial; and section 4442 provides that "the application for a new trial shall be heard at the earliest practicable period after notice of motion."

[2] Section 4807, Rev. Codes, amended February 20, 1911 (chapter 111, Laws of 1911), and paragraph 1 provides: "An appeal may be taken to the Supreme Court from a district court: (1) From a final judgment in an action or special proceeding."

menced in the court within which the same is rendered, * * * within sixty days after the entry of such judgment."

The record in this case shows very clearly that these various papers were not prepared as the law requires.

[4] It is also contended that the record shows want of diligence, delay, and laches on the part of the defendant, and that the entire record shows the appeal has not been prosecuted in good faith or with a view of reversing the judgment rendered in the case. *Smith v. American Falls, etc., Co.*, 15 Idaho, 89, 95 Pac. 1059, announces and considers the proper rule in considering appeals. "While the statute fixes no time within which a motion for a new trial must be heard, yet the statute does require that notice of intention to move for a new trial shall be served within ten days after the decision of the court, and that the application for a new trial shall be heard at the earliest practicable period after the notice of motion. This contemplates that the party intending to move for a new trial shall with diligence prosecute such motion. The fact that the judgment was rendered in July, 1906, and the statement was not settled until November 6, 1907, does not show diligence on the part of the appellant to bring about a hearing upon his motion for a new trial, and fails to show that the appellant is prosecuting the appeal in good faith. *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67." The following cases are also cited in the above case: *Lee Doon v. Tesh*, 131 Cal. 406, 63 Pac. 764; *Descalso v. Duane*, 3 Cal. Unrep. Cas. 893, 33 Pac. 328.

The rule announced by this court in the case of *Smith v. American Falls, etc., Co.*, supra, we approve as applicable in this case; and the present case, even more strongly than the *Smith Case*, supports the rule that the party intending to move for a new trial shall with diligence prosecute such motion; the record in the present case does not show diligence upon the part of the appellant to bring about a hearing upon his motion for a new trial and fails to show that the appellant has prosecuted the appeal in good faith.

We therefore hold in this case that Hon. James G. Gwinn, judge of the district court of the Ninth judicial district in and for the county of Bonneville, had no jurisdiction or authority to settle the bill of exceptions on the 3d day of November, 1913, at 2 o'clock in the afternoon of said day, or at any other time, as stated in the notice of E. M. Holden, attorney for defendant and cross-complainant, and served on the plaintiffs and their attorney, and also has no jurisdiction to proceed any further in this case.

The clerk of this court is directed to issue a writ of prohibition in accordance with the holding of this court. Costs awarded to petitioners.

SULLIVAN, J., concurs.

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AILSHIE, C. J. (dissenting from conclusion ordering peremptory writ). It occurs to me that the judgment and order of this court prohibiting a district judge from proceeding to settle a bill of exceptions or to hear a motion for a new trial in a case pending before him will strike the profession of this state with as much surprise as it does me. I am perfectly clear that this court has no right or authority to issue a writ of prohibition against Judge Gwinn restraining and prohibiting him from hearing and considering an application for settlement of a bill of exceptions or hearing and passing upon a motion for a new trial.

Now, preliminary to what I shall say in this case, I may observe that I am in entire harmony with what the majority of the court has said with reference to the neglect and laches on the part of the defendant in the case of *Behrensmeier et al. v. Plank*, and that under such circumstances, if his motion for a new trial should be denied by the trial court and he should appeal to this court, the appeal would undoubtedly be dismissed for the same reason that appeals were dismissed by this court in the cases of *Smith v. American Falls Co.*, 15 Idaho, 89, 95 Pac. 1059, and *McCrea v. McGrew*, 9 Idaho, 382, 75 Pac. 67. Litigants must act with reasonable diligence, and that certainly has not been done in this case. It must be remembered, however, that in the cases above cited, and all the other cases dealing with the question of laches, the point has been discussed by the court in the exercise of its appellate jurisdiction and in considering a case on appeal. The determination of the question as to when a party is guilty of laches involves the exercise of discretion. Indeed, its determination signifies the exercise of discretion. The majority of the court do not pretend to hold that Judge Gwinn has lost jurisdiction by reason of the lapse of some statutory period prescribed for the doing of a thing, but they rather hold that he has lost jurisdiction by reason of the laches of a party to the action. This, I presume, is the first time that it has been announced by a court that the alleged laches of a party to an action deprived the court of jurisdiction to act upon the matter in which the party is charged to have been guilty of laches.

The sole reason stated by the court for denying the jurisdiction of the district judge to hear or settle a bill of exceptions and to hear and pass upon the motion for a new trial is stated as follows: "The record in the present case does not show diligence upon the part of the appellant to bring about a hearing upon his motion for a new trial and fails to show that the appellant has prosecuted the appeal in good faith. We therefore hold in this case that Hon. James G. Gwinn, judge of the district court, * * * had no jurisdiction or authority to settle the bill of exceptions, * * * and also has no jurisdiction to proceed any further in this case."

Now, it is clear that the district judge has original jurisdiction to settle bills of exceptions and hear motions for a new trial. It is equally clear that the case of *Behrens-meyer v. Plank* is pending in the district court over which Judge Gwinn presides; and it is equally clear that he has jurisdiction of the subject-matter involved in the action; and it is likewise clear that this court has not pointed out any statutory limitation of time beyond or after which a trial judge cannot act in such matters. Who knows that the trial judge may not, when he comes to consider the settling of this bill of exceptions, conclude that the party is guilty of such laches as to justify him in denying the application and declining to certify the same? Or suppose he settles this bill of exceptions, who can say that he will not deny a motion for a new trial, in which event his judgment would be final unless the defendant appealed to this court? We are not confronted with the question as to whether or not the court is committing an error against one party or the other. We are confronted with the question as to whether he is acting without jurisdiction or not, and this court has so held so many times that it is needless to cite the authorities. If he commits an error in a case where he has jurisdiction, the aggrieved party has a plain, speedy, and adequate remedy to correct the same by appeal. If he has jurisdiction of the parties and the subject-matter, then he has jurisdiction to commit the error, if any is committed, of which the parties complain. If the determination of the question of when a party is guilty of laches is one that appeals to the discretion of a court, as it undoubtedly does, then certainly the trial judge has a right in the first instance to determine whether or not this party has moved with due diligence or whether his seeming negligence is excusable for any reason, and the action and decision of the judge thereon will be subject to review by this court, and under the uniform holdings up to the present time this court would not disturb the decision of the trial court thereon, unless it could say that the trial judge had abused the legal discretion which was called in operation in deciding upon the question.

It is said in the majority opinion that: "On October 28, 1913, Judge Gwinn stated to plaintiffs' attorney that he had decided in favor of his jurisdiction to settle the bill of exceptions and would settle the same and entertain and hear a motion for a new trial." The district judge, on the contrary, certifies in his return to the writ as follows: "That, prior to the service of the alternative writ of prohibition in this cause, this defendant found no time nor opportunity, on account of the press of court business, to examine into or consider any of the objections interposed by counsel for the plaintiffs to the settlement of said bill of exceptions, except the jurisdiction of the subject-matter as here-

inbefore set out, and that, up until the time of the service of the alternative writ of prohibition in this cause, this defendant had never decided nor considered such objections, had not decided that he would settle the said bill of exceptions or that he would entertain and hear the motion for a new trial on behalf of the defendant in said cause, and had given out no notice of any nature of any such decision, for the reason that no such decision had at that time been reached." The reporter's notes of the proceedings had in court tend to support the return of the judge on this point.

The question raised by the plaintiff in this court as to whether the defendant took the necessary action in the first place within the statutory time or secured a proper extension thereof is not considered or discussed by the majority of the court, and so I refrain from considering that at this time. Neither do they consider the more serious and important question presented here of the right of the trial court to stay proceedings or to recall the execution previously issued and stay the levy of execution and sale of property.

While I disagree with the majority of the court in issuing a writ of prohibition in this case, I agree that there has been such negligence and laches in the case as would justify this court in dismissing an appeal if the case were here on appeal.

MARINONI v. STATE.

(Supreme Court of Arizona. Nov. 26, 1913.)

1. HOMICIDE (§ 173*)—EVIDENCE—RES GESTÆ—OTHER OFFENSES.

On a trial for murdering B. in a fight in which accused also killed F. with a knife or other sharp instrument, witnesses who examined the wounds on both bodies could testify as to their kind and character to aid the jury in determining whether they were inflicted by the same instrument and by the same person, since evidence of another and distinct crime is admissible if it is committed as part of the same transaction and forms part of the *res gestæ*.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 374; Dec. Dig. § 173.*]

2. WITNESSES (§ 248*)—EXAMINATION—RESPONSIVENESS OF ANSWER.

Where a witness was asked to describe the wounds on the bodies of two persons killed in a fight, an answer that they were similar in nature and in the witness' opinion inflicted by the same instrument should have been stricken as unresponsive.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 861-863; Dec. Dig. § 248.*]

3. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE.

The testimony of a witness asked to describe the wounds on the bodies of two persons killed in a fight that they were similar in nature and in the witness' opinion made by the same instrument should have been stricken as a conclusion or inference of the witness.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.*]

4. CRIMINAL LAW (§ 1044*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE OUT—NECESSITY.

Where, in answer to a proper question, the witness by an unresponsive answer gave incompetent testimony which should have been stricken on a proper motion, but no such motion was made, error could not be based on the admission of the answer, since the court was not bound to strike the answer on its own motion but might assume that the adverse party was satisfied therewith.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. § 1044.*]

5. HOMICIDE (§ 234*)—EVIDENCE—SUFFICIENCY.

On a trial for murder committed in a fight, in which a number of persons were engaged, evidence held sufficient to support a conviction, though no eyewitness saw accused strike deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482-493; Dec. Dig. § 234.*]

6. CRIMINAL LAW (§ 1160*)—APPEAL—REVIEW—QUESTIONS OF FACT.

As a general rule, where there is material evidence tending to prove defendant's guilt, and the trial court refuses to set the verdict aside, an appellate court will not reverse the action of both the trial court and the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Appeal from District Court, Cochise County; Fletcher M. Doon, Judge.

Babstista Marinoni was convicted of murder in the first degree, and he appeals. Affirmed.

Baker & Baker, of Phoenix, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

ROSS, J. Appeal from a judgment of conviction of murder in the first degree, with punishment at life imprisonment.

The appellant assigns three errors: (1) The admission of evidence; (2) overruling motion for new trial; and (3) "that the evidence is insufficient to support the verdict and is contrary to the verdict in that it does not show that appellant killed the deceased or was in any manner implicated in his death."

The evidence discloses that appellant, who is an Italian, and two fellow countrymen between 11 and 11:30 o'clock at night on December 10, 1910, in Bisbee, became engaged with a like number of Americans in an altercation which immediately developed into a fight. The net result of the fight was two dead Americans and one seriously wounded. The wounds inflicted on the three Americans were all incisions, cuts, or jabs as if made by a knife or other sharp-pointed instrument. The Americans were named Parker Bowling and Don Faulk, who were killed, and Ernest Duber, who was wounded.

The appellant was indicted for the murder of Parker Bowling. There is no doubt of appellant's inflicting the wounds that caused the death of Faulk, as well as the wound on Duber. Eyewitnesses and the circumstances

indubitably mark him as guilty. No eyewitness saw appellant strike Parker Bowling. However, it was the theory of the prosecution that the same man, with the same instrument, inflicted all the wounds.

[1] To sustain that theory, John Bowling, who was a member of the coroner's jury, was asked by the prosecution, after stating without objection that he had examined the bodies of Parker Bowling and Faulk and the wounds thereon, to describe the wounds on the body of Bowling, which was done. The prosecution then asked, "Did you see the wounds or marks of violence on the body of Faulk?" and, although the same question had been asked and answered without objection just a moment before, the following colloquium took place: "Mr. Pickett: Object to any testimony about Mr. Faulk. Mr. Williams: This is a preliminary question, and we expect to show by this witness that the wounds were all inflicted at the same time, in the same place, and by the same man. Mr. Pickett: They are separate offenses, * * * and to present any testimony here about anybody else * * * except Bowling is immaterial. Mr. Williams: * * * It is a part of the res gestae. Mr. Pickett: The testimony of another offense is inadmissible. * * * We are not trying this man for anything except the death of Bowling; anything further we object to it. * * * Mr. Williams: * * * We are trying to show, and it is competent to show, that the wounds were inflicted by the same instrument, and for that purpose the evidence is introduced. Mr. Pickett: If inflicted upon the person for the death of whom this man is being tried, it is competent and we have no objection to it, but for any other person at any other time and under any other circumstances we object. He is not being tried for the other. The Court: * * * If you expect to prove that the wounds were inflicted at the same time and by the same instrument and by the same person, for that reason it would be admissible. * * * Mr. Pickett: We except to the ruling. * * * We think it is immaterial and incompetent. Q. Did you examine the wounds on both of those bodies, Mr. Bowling? A. Yes, sir; I did. Q. Describe as near as you can the wounds that you found? Mr. Pickett: Same objection, your honor, to each one of these questions. * * * A. Well, the nature of the wounds on both Mr. Faulk and Mr. Bowling, my judgment would be that they were made with the same instrument (that is, the wounds were very much similar in nature), and I would judge that the same instrument made both wounds on both men. Made the wounds on both men." We have quoted at large from the colloquy of counsel so that it may clearly appear what the objection insisted upon by appellant was.

It will be seen that the vice is in the an-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

swer and not in the question. The question was proper, and, had the answer been responsive and been confined to a description of the wounds, no grounds for complaint would exist. The objections to the question were in effect that the prosecution was limited to the introduction of evidence touching the specific charge in the indictment. The law, however, is that "evidence of another and distinct crime is admissible if it is committed as part of the same transaction and forms part of the *res gestæ*." 12 Cyc. 407. As both the dead men were killed at the same time and place and in the same fight and by means of cutting and stabbing, it was competent for the prosecution to show, by witnesses who examined the wounds on both bodies, the kind and character of the wounds, leaving the question as to whether they were inflicted by the same instrument and by the same person to the jury. The witness did not describe the wounds, as he was asked to do, but proceeded to give to the jury his opinion. While the prosecution's purpose doubtless was ultimately to secure the opinion of the witness (and we say this because of his offer), it was not sought in the question objected to.

[2,3] The answer of the witness should have been stricken for two reasons: (1) It was not responsive to the question; and (2) it was the conclusion or inference of the witness. No motion to strike the answer was made.

[4] It cannot be said that it was the duty of the court on its own motion to order the answer stricken, for, in the absence of any request to do so, it may be assumed that the appellant was satisfied with the answer. Anyway, appellant should have made the competency and relevancy of the answer an issue, thereby affording the trial court an opportunity to pass upon it. In order to base error on the admission of an answer not responsive to the question put, it is necessary that a motion should be made to strike the answer. The rule is the same in criminal as in civil cases. 12 Cyc. 564; Gould v. Day, 94 U. S. 405, 24 L. Ed. 232; Grisell v. Noel Bros., etc., 9 Ind. App. 251, 36 N. E. 452; Missouri Pac. Ry. Co. v. Shumaker, 46 Kan. 769, 27 Pac. 126; Marsh v. Webber, 18 Minn. 418 (Gil. 375); State ex rel. Friedman v. Purcell, 131 Mo. 312, 33 S. W. 13; German Nat'l Bank v. Leonard, 40 Neb. 676, 59 N. W. 107; 46 Century Digest, title "Trial," par. 238.

In Thompson on Trials (2d Ed.) vol. 1, it is said: "It will often happen that, although the question may be proper, the answer will be improper, not being responsive to the question. In such case objection to the answer must be taken by moving to strike it out. So, where a witness is asked a question and, instead of answering in a responsive manner, gives an expression of his opinion,

this may be properly stricken out of the trial."

To allow the competency of this question to be raised for the first time in the trial would violate the rule, well established in appellate courts will not review questions of competency judicially determined at the trial court.

[5] The other two errors complained of were the question of the sufficiency of the evidence to sustain the verdict. That the appellant was engaged in the mixed fight that resulted in the death of Bowling is not questioned. It was seen to strike Faulk while he was on top of his antagonist. He and Rav Duber in the back. He and Rav Duber was fighting Bowling, were the last to leave the scene of trouble, and they left. The evidence is conclusive that he used a knife and that he used it on two of the combatants. His opportunity to strike Bowling was unobstructed, as by that time he had dispensed with his antagonist. Faulk lay low. While at the beginning of the trouble an Italian was paired off with an American, so that three pairs were formed. The appellant made short work of the American and at once became a free lance and his attentions to relieving his companion.

[6] We think there was ample evidence justifying the jury in finding the appellant guilty. The lower court in considering the motion for a new trial had in view, not only the evidence, but the conduct of the witnesses, all of the evidence, the advantage of personal knowledge, the opportunity of observation. "The rule seems to be that, when there is conflicting evidence tending to prove guilt before the jury and the trial court refuses to set their verdict aside, the appellate court will not reverse the action of the trial court and the jury." 12 Cyc. 564. *Derson v. Territory*, 6 Ariz. 185, 56 P. 107.

The judgment of the trial court is affirmed.

FRANKLIN, C. J., concurs. CHAMBERLAIN, J., took no part in the decision.

BRANCH v. STATE†

(Supreme Court of Arizona. Dec. 30, 1913.)

1. CRIMINAL LAW (§ 90*) — JUSTICE OF THE PEACE—TERRITORIAL JURISDICTION

Civ. Code 1901, par. 2046, provides that justices shall have jurisdiction over all cases other than felonies when the punishment is a fine not exceeding \$300 or imprisonment in the county jail not exceeding six months. Pen. Code 1901, § 708, declares that all offenses shall be tried in the county in which committed, subject to the right to change venue of trial. Const. art. 2, § 24, gives the right to a speedy trial by a jury of twelve in which the offense is alleged to have been committed, and Pen. Code 1901, § 1187, provides that in case of bias of a justice of the peace the case may be transferred to another justice.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Reports.

† Rehearing denied December 30, 1913.

same or adjoining precinct, or a precinct where prejudice of the citizens does not exist. *Held*, that the territorial jurisdiction of a justice of the peace is not limited in criminal matters to the precinct in which he is elected, but extends throughout the county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129-136; Dec. Dig. § 90.*]

2. CRIMINAL LAW (§ 98*)—COURTS—JURISDICTION.

Where accused was arrested pursuant to a warrant issued on a certain complaint brought before a justice of the peace, and was present at his trial and conviction, the justice had jurisdiction of his person, and the superior court acquired jurisdiction on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 192-195; Dec. Dig. § 98.*]

Cunningham, J., dissenting.

Appeal from Superior Court, Graham County; A. G. McAllister, Judge.

Ed Branch was convicted of violating the local option law, before a justice of the peace, and on appeal to the superior court he appeals. Affirmed.

A. C. Baker, of Phoenix, and Stratton & Lynch, of Safford, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

FRANKLIN, C. J. The territorial extent of the jurisdiction of a justice of the peace in a criminal cause is the matter debated on this appeal.

The defendant was charged with the offense of violating the state local option law by selling intoxicating liquor within the boundaries of a prohibition district. The offense was committed in precinct No. 1 of Graham county. The complaint was made before a justice of the peace of precinct No. 17 of Graham county, which justice issued the warrant of arrest, and, the defendant being brought before said justice in precinct No. 17, a trial was had, resulting in his conviction. The defendant took an appeal to the superior court of Graham county, and there moved to dismiss the action for want of jurisdiction, both of the subject-matter (the offense) and of the person of the defendant. The motion being denied, a new trial was had in the superior court, again resulting in a conviction of the defendant. It is urged in support of the motion to dismiss that in the trial of criminal actions the jurisdiction of a justice of the peace is limited to those offenses which are committed within the boundaries of his precinct. Putting it in this wise, the contention is that a justice of the peace has no jurisdiction to try one charged with crime, though committed within the county, unless the same was committed within his particular precinct of that county, this latter requirement being of the essence of such jurisdiction. It is true that a justice of the peace is a precinct officer, and that such officer is elected for a particular precinct of the county, but it does not follow that the method of filling the office makes

any difference in the powers and extent of the jurisdiction of the officer.

[1] The powers, duties, and jurisdiction of justices of the peace are such as the law provides. To ascertain what are such powers and jurisdiction, much labor is lost in an effort to seek a solution of the question in the adjudications of other states, as the provisions of the law are almost as varied in their phraseology and effect as the different jurisdictions wherein the matter arises for determination. The laws of Arizona governing the case at bar provide that "justices of the peace shall have such jurisdiction only as may be affirmatively conferred on them by law." Paragraph 2046, R. S. Ariz. 1901. "They shall also have jurisdiction over all criminal cases, other than felonies, where the punishment is a fine not exceeding three hundred dollars, or imprisonment in the county jail not exceeding six months, or both." Paragraph 2048, R. S. Ariz. 1901. "Except as may be otherwise provided by law every offense committed against the laws of this state shall be tried in the county in which the offense is committed, subject to the right to change the place of trial as provided in this Code." Section 708, Pen. Code Ariz. 1901. In criminal trials the accused shall have the right to "a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed." Section 24, art. 2, Const. Ariz. "If the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences: (1) When it appears from the affidavit of the defendant that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before the justice about to try the case, by reason of the prejudice or bias of such justice, the cause may be transferred to another justice of the same or an adjoining precinct. (2) When it appears from affidavits that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the precinct, the cause must be transferred to a justice of a precinct where the same prejudice does not exist." Section 1187, Pen. Code Ariz. 1901.

From the foregoing provisions it quite clearly appears that the law does affirmatively confer upon justices of the peace jurisdiction over certain grades of offense which include the offense with which the appellant was charged. It is equally apparent that all such offenses shall be tried in the county in which the offense is committed, subject only to the right of the defendant to have the place of trial changed as provided by the statute.

If, as contended by the appellant, a justice of the peace has no jurisdiction to try, within his precinct, a person charged with the commission of an offense committed within the county, but not within his precinct,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

then a justice of the peace has no jurisdiction whatever to try a person charged with crime, because nowhere in the law is a justice of the peace affirmatively given jurisdiction over offenses committed within his particular precinct. The courts of justices of the peace are a part of the judiciary system of this state. Their duties are varied and their jurisdiction is somewhat extensive, and the process and judgments of such courts are entitled to the same respect, to the extent of their jurisdiction, as other judicial tribunals. Within the limitations of the Constitution it is confided to the legislative branch of the government to fix the powers and duties of justices of the peace, which may either enlarge or circumscribe the jurisdiction of such officers to the extent indicated. No legislative act relating to justices of the peace, conferring, defining, or limiting their powers and duties, has limited their jurisdiction to try and determine only such criminal offenses as shall be committed in the particular precinct for which each is elected. On the other hand, the law does affirmatively vest them with jurisdiction over certain offenses, the only limitation being that every such offense shall be tried in the county in which the offense is committed, subject only to change the place of trial as provided in the law. Until there be some special statutory provision which expressly limits the exercise of such jurisdiction to the particular precinct wherein the offense was committed, the jurisdiction thus conferred must be sustained, and this court must hold that a person charged with any such offense committed within the county may be tried in a precinct of the county other than the particular precinct within the boundaries of which the offense was committed, subject, of course, to a change of the place of trial as provided in the Code.

[2] That the court had jurisdiction of the defendant is evident. He was arrested pursuant to a warrant issued on a sworn complaint, brought before the justice, and was present at his trial and conviction both in the justice and superior courts.

We have examined the authorities cited by appellant. In *Brown v. State*, 55 Tex. Cr. R. 572, 118 S. W. 139, the point decided was that a justice of the peace has no authority as such to act out of his precinct, and in the precinct of another justice of the peace.

So, too, in *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188, the point involved was the power of a justice of the peace of one precinct acting as such in another precinct. The court drew a distinction between the functions and powers of such officer when acting as a justice of the peace and when acting as a committing magistrate. In the case before the court the officer was not acting as a justice of the peace, but as a magistrate. The court says: "When sitting as an 'examining court,' the law nowhere limits the magistrate, if he be a justice, to his particu-

lar precinct; and, not being limited in this regard, there is no reason why it was not intended that he should hold the court in any portion of the county most convenient to the purpose of the examination as to the commitment or discharge of the accused (Code Crim. Pro., c. 3) whether the place of the sitting be in the precinct of another justice, competent and qualified to act, or not."

The question before the court in *Moss v. State*, 47 Tex. Cr. R. 459, 83 S. W. 829, 11 Ann. Cas. 710, concerns the jurisdiction of a corporation court. By the statute the jurisdiction of this corporation court was limited to those cases arising within the territorial limits of the city wherein the corporation court exists. On appeal, and we think properly, it was held that the act of the Legislature having excluded all jurisdiction from the corporation court in criminal cases, except those of a certain class arising within its territorial limits, it could have no jurisdiction beyond its territorial limits. And in *State v. Sexton*, 141 Mo. App. 694, 125 S. W. 519, the statute is recited as follows: "Provided that, all prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed." Construing this statute, it is said: "It is a general rule that, inasmuch as the justice of the peace has only such jurisdiction as the statute confers upon him, the facts giving such jurisdiction must affirmatively appear on the face of the proceedings."

* * * It must also be conceded by this court that the Legislature has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others." *State ex rel. v. Brayman*, 35 Kan. 714, 12 Pac. 111, was a civil action. In that case the court stated: "There are restrictions not only upon the class and subject-matter of civil actions that may be brought before justices of the peace, but also upon the territorial extent of his jurisdiction. It is provided that: 'The jurisdiction of justices of the peace in civil actions shall be coextensive with the county wherein they may have been elected, and wherein they shall reside.' Justice's Code, § 1. Being thus limited to his own county, he cannot send a summons to another county, and thus acquire jurisdiction of persons who are beyond the limits of the county where the court is held."

It is obvious that these cases give not a twinkle of light upon the path before us, other than the pronouncement of a general rule—which in this state is a statutory provision and cannot be disputed—that a justice of the peace has only such jurisdiction as the law confers upon him.

Where the wording of a statute is ambiguous and uncertain and requires interpretation, or where the statute is in apparent con-

sist with another statute and requires construction, cases from other jurisdictions construing a like statute or interpreting its words are persuasive and helpful. If the Arizona statute provided, as those statutes recited from other states provide, that all criminal prosecutions before justices of the peace shall be limited to those cases arising within the territorial limits wherein the court exists, such language would hardly require interpretation; the language of the statute itself would express the meaning as clearly and convincingly as any authority reciting the statute could possibly express it. The Arizona statute does clearly vest jurisdiction of the offense. It plainly states where such offense shall be tried and determined, without any restriction or limitation, except the right to change the place of trial, and the manner of exercising this right is clearly defined. The language of the statute vesting such jurisdiction and fixing the territorial limits for its exercise is in no sense obscure, the very language of the statute interprets the meaning of the statute. There is no conflict in these provisions of the statute with any other, and therefore no room for construction.

We are of opinion that the justice court did have jurisdiction, and that the superior court did acquire jurisdiction on the appeal, and, finding no error, the judgment is affirmed.

ROSS, J., concurs.

CUNNINGHAM, J. (dissenting). I am of opinion that this court has no jurisdiction to affirm the judgment in this cause here on appeal, for the reason no appeal is permitted "from a judgment of the district (superior) court rendered in a case appealed from a justice, police or recorder's court." Paragraph 1067, Pen. Code, Ariz. 1901. Hall v. Territory, 8 Ariz. 409, 76 Pac. 476; Territory v. Moore, 9 Ariz. 122, 80 Pac. 316. Such was the law at the date of the rendition of the judgment, and so the law remains, with slight exceptions, since the amendments thereto became effective October 1, 1913. Section 1139, S. B. 108, an act entitled "An act to provide for the review of judgments and orders of the superior courts of the state of Arizona, and the practice and procedure in the Supreme Court upon such review." McNeil Co's Civil and Criminal Procedure, p. 463. This case is not within any of the exceptions mentioned in said statute.

In order that this court may affirm a judgment before it on appeal, jurisdiction of the subject-matter must have been acquired through the appeal. No appeal is allowed from such a judgment of the superior court, as the record in this case presents; therefore no jurisdiction of the subject-matter of the appeal was acquired by this court. This

court only acquired jurisdiction to dismiss the appeal. Thomas v. Speese, 132 Pac. 1137.

The power of this court to affirm a judgment of a lower court depends upon whether the court has acquired jurisdiction of the cause through an appeal. The power to dismiss a cause filed in this court depends upon the inherent power of the court to control its records and files. The ultimate effect upon the judgment of the lower court may be, and frequently is, the same whether the judgment is affirmed or the appeal dismissed; yet this court is required to exercise its powers within the requirements of the law, although some other course may have the effect to produce the same results.

Whether the law as it existed prior to October, 1, 1913, permitted a justice of the peace of precinct No. 17 to try and punish one charged with the commission of a misdemeanor in precinct No. 1 of the same county, in which precinct at the time the offense was committed and tried and a duly qualified and acting justice of the peace was residing, and no change of venue was ordered, I express no opinion. That question becomes unimportant since October 1, 1913; and now the law clearly limits the jurisdiction of justices of the peace to offenses committed within their respective precincts in which such courts are established. Subdivision 3, § 1291, S. B., supra. McNeil Co's Civil and Criminal Procedure, p. 498.

I cannot concur in the order affirming the judgment, for the reasons above stated. I am of the opinion that the appeal should be dismissed, and that this court has no authority of law to otherwise order.

YOUNG CHUNG v. STATE.†

(Supreme Court of Arizona. Nov. 26, 1913.)

1. CRIMINAL LAW (§ 850*)—JURY—OFFICER IN CHARGE—PREJUDICE.

On a trial for robbery, where the prosecuting witness testified that he was robbed of four \$5 bills and certain silver money aggregating \$53.15, the testimony of a deputy sheriff that accused, after his arrest, left with a friend a sum of money of which he saw four silver dollars, two halves, and two quarters, and some greenback bills, one of which was a five, that he could not see what the number was on the other, but that there were two and probably more, did not correspond so minutely with that of the prosecuting witness as to show such deep prejudice against accused as made it improper to place him in charge of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2033, 2034, 2038; Dec. Dig. § 850.*]

2. CRIMINAL LAW (§ 850*)—JURY—OFFICER IN CHARGE—DISQUALIFICATION.

A deputy sheriff was not disqualified to act as the jury bailiff merely because he arrested accused, thereby acquiring knowledge of facts as to which he was called as a witness for the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2033, 2034, 2038; Dec. Dig. § 850.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 30, 1913.

3. CRIMINAL LAW (§ 868*)—TRIAL—OBJECTIONS—WAIVER.

Where accused from the subpoena filed in the case might have had notice that a deputy sheriff would be called as a witness and had actual knowledge of such fact when he testified but made no objection to such deputy sheriff taking charge of the jury until after the verdict was returned, the objection that he was disqualified because a witness for the prosecution was waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2070; Dec. Dig. § 868.*]

4. CONTEMPT (§ 20*)—JURY—SEPARATION.

Under Pen. Code 1901, § 949, providing that the jurors at any time before the submission of the cause may in the discretion of the court be permitted to separate or be kept in charge of a proper officer, where the court ordered the jurors to be kept together it was the duty of the bailiff and the jurors to observe such order, and a failure to do so made them liable to punishment for contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 58-62; Dec. Dig. § 20.*]

5. CRIMINAL LAW (§ 854*)—JURY—SEPARATION.

Under Pen. Code 1901, § 949, providing that jurors at any time before the submission of the cause may in the discretion of the court be permitted to separate or be kept in charge of a proper officer, and that at the written request of counsel the court shall direct the jury to be kept together in charge of a proper officer, where no written request was made the court did not exhaust its discretion by ordering the jury to be kept together and could thereafter permit them to separate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

6. CRIMINAL LAW (§ 854*)—JURY—SEPARATION.

Under Pen. Code 1901, § 949, authorizing the court in its discretion to permit the jurors to separate or be kept in charge of a proper officer, where, though the court ordered the jurors to be kept together, the bailiff took one of the jurors apart from the others in order that his wife might dress a wounded arm, and during his separation no intimation of the case was made by any one to him nor by him to any one, and counsel with full knowledge of the facts made no objection thereto, the judge, who also knew thereof, did not abuse his discretion by permitting such separation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2039-2047; Dec. Dig. § 854.*]

7. ROBBERY (§ 24*)—EVIDENCE—SUFFICIENCY.

Evidence on a trial for robbery, where accused relied upon an alibi, held sufficient to support a conviction.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. § 24.*]

8. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—QUESTIONS OF FACT.

Under the law making the jury the sole judges of the credibility of the witnesses and the weight and effect to be given to their testimony, where, though the evidence is conflicting, there is substantial evidence in support of the jury's finding, the verdict will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

9. CRIMINAL LAW (§ 932*)—NEW TRIAL—CONDUCT OF JURY.

Under Pen. Code 1901, § 988, authorizing a new trial in a criminal case, the jury, after having retired to deliberate, received other testimony, and subdivided, authorizing a new trial when, from the conduct of the jury, the court is of opinion the defendant has not received a fair and impartial trial, a new trial on the ground one juror had stated to the others that the witnesses who testified as to accused's character were Chinese masons and would not testify to such character because of the same lodge, and that another juror had stated that he knew such witnesses were masons, was properly denied where it was shown that any juror was influenced by that accused was known to be a Chinese person, that it was common knowledge in the community that Chinese masons habitually defendants charged with crime a good character, or that the jury did or did not believe the testimony, a verdict of guilty being returned with a finding of previous good character under the statute misconduct of the jury requires a new trial only where the court is of opinion that defendant has not received a fair and impartial trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2238; Dec. Dig. § 932.*]

10. CRIMINAL LAW (§ 942*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Under Pen. Code 1901, § 988, authorizing a new trial in a criminal case, where new evidence is discovered material to the defense, and which he could not with due diligence have discovered and presented at the trial, a new trial would not be granted, nor would the introduction of impeaching evidence for which no foundation was laid at the trial, therefore would have been inadmissible at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.*]

11. CRIMINAL LAW (§ 417*)—EVIDENCE—IMPEACHMENT—DECLARATIONS OF INJURY—SON.

The prosecuting witness in a criminal case is not a party to the cause, and cannot make statements made by him when not under oath, and which are relevant and material only for the purpose of impeachment, and inadmissible when he is interrogated relative thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. § 417.*]

12. CRIMINAL LAW (§ 938*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Under Pen. Code 1901, § 988, authorizing a new trial in a criminal case, where new evidence is discovered material to the defense, and which could not with due diligence have been discovered and presented at the trial, a new trial will not be granted, nor would the introduction of impeaching evidence of a nature reasonably calculated to change the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.*]

13. CRIMINAL LAW (§ 1119*)—APPEAL—REVIEW—PRESENTATION OF ERRORS.

The misconduct of counsel in a criminal case could not be reviewed on appeal, where the only record disclosing such misconduct was contained in the motion for a new trial, and was also designated as one of the assigned errors.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Re-

of error, and verified only by appellant's attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. § 1119.*]

Appeal from Superior Court, Yavapai County; F. O. Smith, Judge.

Young Chung was convicted of robbery, and he appeals. Affirmed.

The appellant was charged with the crime of robbery alleged to have been committed upon one Gin Chung on or about November 6, 1912. He pleaded not guilty. Upon a trial on November 15, 1912, the jury returned its verdict of guilty. In due time the defendant moved for a new trial, assigning 20 grounds therefor. The first and third numbered grounds allege that the court misdirected the jury as to the law; the second, fourth, and fifth that the court erred in the decision of questions of law arising during the course of the trial; the sixth that during the trial the jury received evidence out of court other than that resulting from a view of the premises; the seventh that the verdict returned does not represent a fair expression of the opinions of the jurors; the eighth that the jury, after having retired to deliberate on the case, received other testimony than that given upon the witness stand, which was prejudicial to the defendant; the ninth that during the trial members of the jury were guilty of misconduct of such character as to deprive defendant of a fair and impartial trial; the tenth, eleventh, and fourteenth that the bailiff in charge of the jury caused the jurors to separate during the trial; the twelfth that during the course of the trial one of the jurors separated himself from the other jurors and from the bailiff in charge of the jury; the thirteenth that the bailiff in charge of the jury was guilty of such misconduct as to deprive the defendant of a fair and impartial trial; the fifteenth that the verdict was contrary to the law; the sixteenth that the verdict was contrary to the evidence; the seventeenth and eighteenth that during the course of the trial the county attorney was guilty of such misconduct as was calculated to and did deprive the defendant of a fair and impartial trial; the nineteenth that new evidence was discovered after the trial material to the defendant and which he could not have discovered with reasonable diligence before the trial; the twentieth that the court appointed a deputy sheriff as bailiff of the jury, and such bailiff was a material witness for the state.

In support of the grounds of misconduct of the jury in separating and receiving evidence out of court, and the misconduct of the county attorney, and the newly discovered evidence, appellant and respondent filed affidavits, which are sufficiently noticed in the opinion. The motion was denied, a new trial refused, and a judgment of conviction ren-

dered, fixing the punishment as the statute requires. From the judgment defendant appeals. Appellant as his assignment of error adopts his entire motion for a new trial without otherwise formally alleging error.

R. F. Talbot, of Prescott, for appellant. C. P. Bullard, Atty. Gen., Leslie C. Hardy, Asst. Atty. Gen., and P. W. O'Sullivan, Co. Atty., and Jos. H. Morgan, Asst. Co. Atty., both of Prescott (Robert E. Morrison, of Prescott, of counsel), for the State.

CUNNINGHAM, J. (after stating the facts as above). In criminal cases the law requires this court to review all decisions, opinions, orders, charges, rulings, actions, and proceedings made or had in the cause in the trial court, appearing in the record. Paragraph 1059 (Pen. Code) R. S. Ariz. 1901. Counsel for appellant can materially assist the court in the performance of this duty by pointing out in the record the exact error either by means of a formal assignment of error or errors or by affirmatively stating in his brief wherein the alleged error lies in each particular. Appellant on the trial of this appeal has not formally assigned errors, which we think is the logical course to pursue in such cases, but he has in his brief and in his oral argument at the bar pointed out to the court the errors principally relied upon for a reversal, so that his viewpoint as to such alleged errors clearly appears.

The first error noticed by appellant arises upon the testimony of witness Baker, relating to the character of the property found upon the person of the defendant at the time of the arrest. The testimony of this witness tends to corroborate the testimony of the prosecuting witness Gin Chung in the particular of the kind and class of money taken at the time of the robbery and in point of time of its introduction was offered subsequently to that of the said prosecuting witness. The witness Baker was by the court sworn as bailiff and placed in charge of the jury trying the case. It is contended by appellant that it was error for the court to place the jury in the charge of Baker for the reason he was a witness against this defendant on trial and his testimony shows he was a partial and prejudiced person.

The second error is based upon the conduct of the bailiff in charge of the jury in permitting the jurors to separate during the course of the trial and before the cause was finally submitted to them.

The third error is that the verdict was contrary to the evidence in the particular of the presence of the defendant at the place of the commission of the crime. It is contended that, from the evidence of defendant, he was at another place at the time when the crime was committed, and it was impossible for him to have been at the scene of the crime, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that such evidence is conclusive upon that fact.

The fourth alleged error is based on the order refusing a new trial because of the misconduct of the jury while deliberating upon their verdict. Juror Reilly stated in the presence of several other members of the jury, while considering certain testimony bearing upon the good character of the defendant, that the witnesses who testified to such good character were members of the Chinese masons and they would naturally testify to the good character of the defendant. Another juror stated: "Yes, he knew it to be a fact that these witnesses who testified as aforesaid, to the good character of defendant, were Chinese masons." That no evidence was offered or received upon the trial showing or tending to show that such witnesses belonged to the Chinese masons.

The fifth alleged error is based upon the order refusing a new trial, because of newly discovered evidence, in the particular shown in the affidavits in the record.

The foregoing alleged errors were discussed in the brief and at the bar and will be considered in the order stated above.

[1-3] Baker was a deputy sheriff and as such arrested the defendant upon a warrant placed in his hands for service. After the arrest was made, upon the request of the defendant, the officer accompanied him to the place of business of his friend, and while there the defendant left with his friend certain contents of his pockets, consisting of a sum of money, a comb, eyeglass, and a key. The witness was examined as to the character of money the defendant had in his possession, and he described the money as consisting of "four silver dollars, two halves, and two quarters, * * * and then he had taken out some greenback bills, one had the figure '5' and a 'V' on it, and the other one I couldn't see what the number was on it, but there was two and probably more, but there was two I am sure of, the one \$5 bill, and the other one, he laid them down also. * * * They were not in defendant's purse but were loose in his pocket.

The prosecuting witness had previously testified that at the time of the robbery he was robbed of four \$5 bills and certain silver money, all aggregating the sum of \$53.15. The defendant testified that he deposited with his friend, while in the custody of the deputy sheriff, \$9.90, all in silver. Appellant contends that the testimony given by the witness Baker as to the character of the money in the possession of the defendant corresponded minutely with that given by the prosecuting witness and therefore shows a feeling of deep prejudice against the defendant. The record fails to show a minute resemblance between the money described by the prosecuting witness and that described by the deputy sheriff, in amounts. To give the amounts mentioned by the deputy sheriff

the greatest possible sum, we have three \$5 bills and \$5.50 in silver, \$20.50 in all, while four \$5 bills and \$33.15 silver, \$53.15 in all, were testified to have been taken from the prosecuting witness. The record discloses a wide variance in the sum taken at the robbery and the sum found in the possession of defendant. No merit appears in this contention. Did the court err in placing the jury in charge of a bailiff because such bailiff is a witness for the prosecution and was the regular officer who arrested the defendant on the charge and acquired knowledge of all the facts to which he was called to testify only through making the arrest? Would these conditions disqualify the witness from acting as the jury bailiff? We think not. The mere fact that the deputy sheriff happened to be a witness for the prosecution would not disqualify him from keeping the jury in his custody. *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 881; *State v. Rosencrans*, 9 N. D. 163, 82 N. W. 422; 12 Cyc. 670, and note 36.

The defendant had notice that Baker would be a witness for the prosecution, or might have had such notice from the subpoena filed in the case. He had actual knowledge of that fact when Baker had been on the witness stand and had testified. No claim is made that defendant raised any objection to the witness taking charge of the jury until after a verdict was returned. The objection upon the grounds stated in the motion for a new trial, then, after the verdict was returned, came too late; defendant must be deemed to have waived the objection when the motion was made.

[4-6] The second grounds for complaint are based upon the misconduct of the bailiff in permitting the jury in his custody to separate during the course of the trial. The affidavits presenting the record upon this question are to the effect that during the course of the trial, and before the cause was submitted to the jury, the bailiff in charge took one Zook, a juror, from the room, where the jurors were being kept together, and separated him from the other jurors for from 20 to 30 minutes; and rebutting affidavits to the effect that Zook had an injured and wounded arm. That on the occasion referred to in the first-mentioned affidavits it became necessary to have the wounds dressed. That the wife of the juror was called to dress the wound and did dress the wound. That to dress the wound it became necessary to have the juror go to another room from that occupied by the jury. That the members of the jury, the judge of the court, and the counsel for both parties had full knowledge of these facts and no objections were raised thereto. That, during the time the juror was so absent and separated from the other jurors, no intimation of the case was made by any one to the juror nor by him to any person.

It is contended by appellant that, from the mere fact of separation, the court will presume prejudice resulted to the defendant. That, such fact appearing upon the hearing of a motion for a new trial, the order refusing a new trial is reversible error. "The jurors sworn to try an action may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. * * * At the written request of the district attorney or of counsel for defendant, the court shall direct the jury to be kept together in charge of an officer. * * *" Paragraph 949, Penal Code, Ariz. 1901.

The record nowhere indicates that any written request made it mandatory upon the court to keep the jury together. Appellant does not so contend, but he bases his contention of error upon the fact that the court ordered the jurors kept together during the progress of the trial; and, that order having been made, it was error for the bailiff to permit them to separate. In the first instance, no written request having been made, it lay in the sound discretion of the court whether or not the jurors would be kept together during the course of the trial. When the order was made, it became the duty of the bailiff and the jurors to observe it. A failure to observe the order would subject the person so failing to punishment for contempt.

The power to exercise the discretion to keep the jury together or allow the jurors to separate was not exhausted when the court made the order to keep the jurors together, but that authority continued during the course of the trial, until the cause was finally submitted to the jury to deliberate upon their verdict. In the exercise of the sound discretion, the court was acting wholly within its powers when the juror Zook was permitted to be separated from the other jurors. If the separation took place in violation of the order to keep the jurors together, the court's attention was directed to such violation by the motion for a new trial and, upon the hearing of such motion, was informed of the cause of such separation. In either instance this appellant was interested only in so much that his rights were not in the least prejudiced thereby, and he has not shown, nor attempted to show, wherein he has been prejudiced. We will not review an act of the lower court in the exercise of a discretion reposed in that court, except where an abuse of the discretion is made to clearly appear. Such abuse does not appear in this record.

[7] The third error of which appellant contends is that the verdict is contrary to the evidence. It is contended by the appellant that the evidence introduced by him in support of an alibi is conclusive of the fact that appellant was not and could not have been present at the time and place of the commis-

sion of the robbery. The record discloses that substantial evidence was given before the jury tending to prove that the defendant, with three friends, was engaged in a game of cards at a place distant from the scene of the robbery from about 10 o'clock p. m. to about 2 o'clock a. m., from which room defendant did not leave during that time, and that the robbery occurred in an alley, some distance from the house in which the card game was in progress, between 10 and 11 o'clock that same night. These facts were testified to by the defendant and fully corroborated by the three friends. Upon the other hand, the person robbed testified that, after he was struck and partially or wholly down on the ground, he recognized the defendant, by his features, bending over him and searching his pockets. Another witness came out of a door near the scene of the robbery shortly after he heard a call in Chinese for help and the word "robbed" in Chinese and recognized the defendant a short distance from where the person robbed lay, and the defendant was going away from such person. The testimony of three or four other witnesses was offered by the prosecution tending to contradict the witnesses for the defense and tending to prove that no game of cards was played at the place mentioned by the defendant and his witnesses, or by any persons, on the night in question. At different hours of that night between 9 p. m. and 2 a. m. the different witnesses visited the particular room, some of them hunting a game of cards, and they found no one at that room that night. The whole matter resolves itself into a case of conflict of evidence. The record presents substantial evidence in support of the fact that the defendant was present at the time and place of the robbery.

[8] In case of a conflict of the evidence upon a material question, such as here is present, it is the province of the jury to find the fact from all the evidence before them; and when they have so found, and the record discloses any substantial evidence in support of the finding of the jury, such finding will not be disturbed because of the conflict. The jury are made by law sole judges of the credibility of the witnesses and of the weight and effect to be given to the testimony to establish any fact in support of which such testimony is offered. The jury have all the witnesses before them and can observe their manner while testifying and therefrom better judge the truth of the statements made than any person who may read the words of the witnesses as found in the record. We are not justified in interfering with the verdict while the record contains substantial evidence in its support.

[9] The misconduct of the jury while deliberating upon a verdict is complained of as a fourth alleged error. The grounds for complaint are presented by affidavits disclosing

that, while the jury were deliberating upon their verdict and had under consideration the weight and effect to be given testimony relating to the previous good character of the defendant, Juror Reilly, contending that no effect should be given to such testimony, stated "that the testimony of Sidney Birch and Lenard Topp, and others who testified as witnesses on the part of the defense to the good character of the defendant, were members of the Chinese masons and would naturally testify to said character on account of being members of and masons of said lodge." Another juror, hearing this statement of Juror Reilly, said, "Yes, he knew it to be a fact that these witnesses who testified as aforesaid to the good character of defendant were Chinese masons;" and no evidence of the fact stated appeared in the evidence upon the trial. Defendant contends that the statements made by the juror to the other jurors were equivalent to the jury receiving evidence out of court upon a material issue in the case, for the reason no evidence was offered tending to establish the fact stated by the jurors as within their knowledge.

Paragraph 988, Penal Code Ariz. 1901, specifies the grounds upon which a new trial must be granted a defendant, when he has been convicted of a criminal offense, upon his applying therefor. The tenth ground set forth in that statute is, "(10) Where the jury, after having retired to deliberate upon the case, have received other testimony; * * *" and the eleventh, "When, from any misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial." Appellant has based his argument upon the assumption that the statements made by the jurors amount to the jury having received other testimony; that these statements made by the jurors must necessarily amount to receipt of other testimony. No attempt is made to show that any juror was influenced by the statements. Appellant cites *Ysaguirre v. State*, 42 Tex. Cr. R. 253, 58 S. W. 1005; *Hudson v. State*, 9 Yerg. (Tenn.) 408; *Donston v. State*, 6 Humph. (Tenn.) 275; *Booby v. State*, 4 Yerg. (Tenn.) 111; *Sam v. State*, 1 Swan (Tenn.) 61; *State v. Tilghman*, 33 N. C. 513; and *Crawford v. State*, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467—in support of the rule that, if a jury after retiring to consider their verdict hear other testimony, it will form a ground for a new trial, and that, the fact appearing, prejudice to the defendant will be presumed, and a new trial will be ordered. We think these authorities support the proposition that prejudice must be shown or sufficient ground must appear for presuming prejudice to authorize interference with the verdict on account of such matters. *State v. Woodson*, 41 Iowa, 425. However that may be, subdivision 11 of paragraph 988, supra, is controlling within this jurisdiction upon that question and clearly leaves the matter

of the misconduct of the jury to be inquired into and only requires the court to grant a new trial in cases of this kind when of opinion the defendant has not received a fair and impartial trial.

The affidavits in the cause at bar simply state the fact that the witnesses who testified to the good character of the defendant were Chinese masons, and in the opinion of one of the affiants they would naturally give the defendant a good character. The affidavits do not attempt to show that the defendant was known to be a Chinese mason, nor that it is common knowledge in the community that all Chinese masons habitually give defendants charged with a crime a good character. No attempt is made to show that the jury did or did not believe the good character of the defendant was established by the evidence of such witnesses. No proof was offered tending to establish such fact, and the court could not judge from the verdict of the jury as rendered, being that of guilty, any more than it could judge had it been not guilty, as to what conclusion the jury may have arrived at upon the question of good character of the defendant. The verdict of guilty is as consistent with a finding of previous good character as a verdict of not guilty. The appellant failed to show to the trial court that he had been in the least prejudiced by the alleged statements of the jurors, and therefore no error appears in the order refusing a new trial. *Austin v. State*, 42 Tex. 355; *State v. Olds*, 106 Iowa, 110, 76 N. W. 644; *State v. Woodson*, 41 Iowa, 425; *State v. Burton*, 65 Kan. 704, 70 Pac. 640; *State v. Beam*, 1 Kan. App. 688, 42 Pac. 394; *Irvine v. State*, 104 Tenn. 132, 56 S. W. 845; *Ray v. State*, 35 Tex. Cr. R. 354, 33 S. W. 869; *Hargrove v. State*, 33 Tex. Cr. R. 431, 26 S. W. 993; *State v. Lowe*, 67 Kan. 183, 72 Pac. 524; *State v. Duncan*, 70 Kan. 883, 78 Pac. 427; *Moore v. People*, 26 Colo. 213, 57 Pac. 857; *Taylor v. State*, 52 Miss. 84; *State v. Sprague*, 149 Mo. 425, 50 S. W. 1117; *Arnwine v. State*, 54 Tex. Cr. R. 213, 114 S. W. 796.

[10, 11] The next contention to be noticed is the claim that defendant's motion for a new trial ought to have been granted because of the new evidence discovered. One of the grounds for a new trial provided by paragraph 988, P. C. Ariz. 1901, subd. 13, is: "When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial," a new trial must be granted. The appellant in support of this ground of his motion produced the affidavits of Robert Birch and L. R. Duff to the effect that a few days before the date of the alleged robbery these witnesses saw the prosecuting witness, Gin Chung, who then seemed lame in his back, and when asked what was the matter with him replied that he fell down a cellar and injured his back so that

not been able to work for several days. The affidavits allege that defendant did not know of the existence of this fact after the trial was completed. The affidavits of Charles K. Scholey, C. D. Boyce, and N. Andrews were produced to the effect, on the day of and after conviction of defendant, the prosecuting witness, Glin Chung, in reply to a question by the attorney for the defendant as to who hit and robbed him, replied that he did not know who hit and robbed him.

The evidence in the case, upon the facts set forth by these affidavits, is to the effect that the prosecuting witness, Glin Chung, suffered an injury to his back at the time of the robbery, and also that he knew the defendant robbed him and he was hit immediately before he was robbed. The newly discovered evidence could have no other effect than to contradict the testimony of the prosecuting witness in these particulars. The fact that the prosecuting witness had been two or three days before the robbery, and he had fallen into a cellar and injured his back cannot be claimed as newly discovered evidence by the defendant, if it can be considered evidence at all. Defendant introduced that evidence by his witness Holt, who testified directly that Glin Chung had so and the evidence was admitted over the objection of the prosecution. The defendant must be presumed to have received the benefit of the evidence thus conflicting with the evidence of the prosecution upon that point. We find no rule that justifies a new trial upon the discovery of additional witnesses not presented at the trial. The evidence, as the record stands, is at most clearly cumulative upon this point. Its purpose was to impeach and contradict the testimony of Glin Chung. This witness had testified to a contradictory state of facts, it is true, but he was not interrogated concerning any statement made by him out of court conflicting with his evidence given in court, and therefore not being a party to the cause, his statements made out of court are strictly hearsay and inadmissible. Contradictory statements by a witness when not under oath are irrelevant and material only for the purpose of impeachment, unless the witness is impeached and the statements are against interest.

We know of no exception to the rule that would otherwise make them relevant. Unless the evidence is material, it furnishes no grounds for a new trial, under the statute. Paragraph 988, subd. 13, P. C. 1901.

The contradictory statement claimed to have been made by the prosecuting witness is not permitted to be shown by one of defendant's witnesses, when it ought to have been excluded; but because the court erroneously admitted the evidence in one instance there is no excuse for the court to vacate

the verdict and annul the trial in order that the former error may be repeated, or that defendant may lay a sufficient predicate for its proper introduction. The same is applicable to the statements made by the prosecuting witness after the trial in answer to the question who hit and robbed him, when he answered that he did not know. Such a statement was contradictory of his evidence given at the trial and could not have been introduced at the trial for the same reason as his other statements as to how his back became injured, and for the further reason that at the time of the trial he had not made this last contradictory statement, and no predicate could be laid so as to make it relevant at all.

[12] Beside these reasons, if we concede the alleged newly discovered witnesses and facts were admissible as evidence as contended by appellant, such facts as evidence are of an impeaching and cumulative character and not of a nature reasonably calculated to change the result of the trial. The rule is well settled that a new trial will not be granted for such newly discovered evidence. *Armstrong v. Yakima Hotel Co.* (Wash.) 135 Pac. 233.

[13] The appellant complains of the misconduct of the county attorney in his presentation of the cause to the jury in argument. The only record we have before us disclosing any such misconduct is the statement contained in the eighteenth paragraph of the motion for a new trial, and which is also designated as one of the assignments of error. This document was verified by appellant's attorney. The record is not otherwise preserved nor authenticated. The requirements of the law have not been observed so as to make the statement complained of a part of the record justifying our consideration of the question, and for that reason we presume the error, if any, has been waived by appellant; he not having preserved such record as we may examine.

A full, careful examination of the entire record before us has failed to disclose any reversible error, and the judgment appealed from is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

FARRELL v. GREENLEE COUNTY.

(Supreme Court of Arizona. Dec. 1, 1913.)

1. COUNTIES (§ 121*)—VALIDITY—MUTUALITY.

A resolution by the supervisors of a county, that plaintiff be engaged to superintend the construction of a courthouse at an agreed compensation, does not constitute a contract, but is a mere offer, and, where defendant did not agree to act as superintendent during the entire period of construction, although he entered

upon the discharge of the duties, the county may dismiss him.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 183; Dec. Dig. § 121.*]

2. CONTRACTS (§ 170*)—CONSTRUCTION—CONSTRUCTION OF PARTIES.

Where plaintiff acted as superintendent of the construction of a courthouse under a resolution employing him at a compensation equal to 5 per cent. of the contract price, and both plaintiff and the supervisors construed the resolution as providing that 75 per cent. of the compensation should become due upon the estimate of the work and material in place in the building as made by the superintendent, plaintiff, having been discharged, is entitled to recover as damages 5 per cent. of the estimated cost of labor and material put into the building during his superintendency.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

Appeal from Superior Court, Greenlee County; F. B. Laine, Judge.

Action by J. A. Farrell against the County of Greenlee, which counterclaimed. From a judgment for defendant, plaintiff appeals. Affirmed.

L. Kearney, of Clifton, for appellant. E. V. Horton, Co. Atty., and W. C. McFarland, both of Clifton, for appellee.

ROSS, J. The appellee had let a contract for the construction of a courthouse and jail at the agreed price of \$43,000. The board of supervisors employed appellant to superintend the work of construction by its resolution of date January 17, 1912, which resolution is as follows: "Upon motion of B. F. Billingsley, seconded by Geo. Webster, it was ordered that J. A. Farrell be employed to superintend the construction of the courthouse and jail at a compensation equal to 5 per cent. of the amount of contract price (less amount already expended). Said employment of J. A. Farrell shall be effective and become of force and virtue January 17, 1912. It is further ordered that the clerk of the board notify Mr. Farrell of the above motion in writing." The appellant performed services under the resolution until February 17, 1912, when he was discharged by the board. On February 29, 1912, appellant filed his demand against the county with the board of supervisors for a breach of the contract, claiming his damages at 5 per cent. of the contract price, less amount already in buildings. He showed in his demand that he had been paid \$469.51 on account, and claimed a balance of \$1,553.22. He filed this suit March 14, 1912, for the above-stated balance. The appellee, in its answer, among other things, set up a counterclaim for \$344.41, claiming that it overpaid appellant that amount in the estimate of \$469.51. The court found that there was no breach of the contract when the board discharged the appellant, and also found that appellant was overpaid in the sum of \$257.25. The appellant prosecutes this appeal from the judgment.

[1] The resolution of date January 17, 1912, cannot be said to be a contract of employment. At most it is an offer of employment. "A promise is a good consideration for a promise" (1 Parsons, Cont. [9th Ed.] 486); but the record fails to show that appellant promised to do anything. The complaint alleges that "the board of supervisors of said Greenlee county duly passed a resolution, wherein and whereby said county employed and entered into a contract with this plaintiff to superintend the construction of said courthouse and jail"; but there is no allegation that appellant agreed to accept such employment. In *Vogel v. Pekoc*, 157 Ill. 339, 342, 42 N. E. 886, 30 L. R. A. 491, 493, the court said: "It is a general rule, well understood, that a contract between parties must be mutual. *Weaver v. Weaver*, 109 Ill. 233; *Chitty, Contr.* 15; *Bishop, Contr.* § 78, p. 32; *Tucker v. Woods*, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305. In the case last cited it is said: 'In contracts, where the promise of the one party is the consideration for the promise of the other, promises must be concurrent and obligatory upon both at the same time.' 1 *Chitty, Cont.* 297; *Livingston v. Rogers*, 1 Caines (N. Y.) 584. In *Chitty on Contracts*, supra, the author says: 'The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing that, if the one party never was bound, on his part, to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality.' In *Wharton on Contracts*, § 2, the author says: 'The parties to a contract, therefore, must be both bound. Supposing that, if one promises in consideration of the promise of the other, the one is not bound unless the other is bound. A promise to do a thing on an executed consideration is not a contract, nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side. Without this reciprocal obligation no contract can be constituted.'"

[2] There is no provision in the board's resolution as to when or how appellant's compensation should be paid; but both parties construed the resolution as providing that 75 per cent. of the compensation should become due and payable upon the estimates of work and material in place in the buildings as made by the superintendent. The appellant so figured his compensation in his demand against the county, and it was allowed by the board of supervisors on that basis. Thus it is seen that the contract was divisible in the sense that it had been given the practical construction by both parties as requiring partial payments upon estimates as made by the superintendent. Therefore the damages sustained by appellant may be reckoned as 5 per cent. of the estimated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bor and material put into building is superintendency—from January 17, 1912. A finding of the court to that effect.

Employment of appellant was evidenced by minute entry on the records of the supervisors, and was a unilateral contract in that the board undertook to bind itself to employ the appellant to superintend the construction of buildings, and to pay him 5 per cent. commission therefor; and that is nothing in the contract binding appellant to render his services. The plaintiff also alleges a unilateral contract. There is a lack of mutuality in the contract. The appellant did not agree to do anything for the county. As we have seen, the parties to the contract are not equal. It is not a contract at all. It is a promise for a promise. This proposition is elementary, and needs no citation of authorities in its support.

The defendant county, in its answer, admits that its board of supervisors did enter the resolution pleaded by plaintiff, whereby they undertook to employ plaintiff as superintendent of construction of its courthouse and jail, and alleges that said order and employment were illegal and unauthorized, for the reason that E. C. Heck was then employed by defendant county as architect and superintendent of construction of its courthouse and jail, and his services had not been dispensed with, nor did the board have the authority to dispense with his services as such architect and superintendent without the consent and approval of the contractor constructing such buildings. It was admitted that plaintiff served in the capacity of such superintendent from January 17 to February 17, 1912. No defense is made to the action, for the reason the contract of employment was unilateral.

MR. LIN, C. J., concurs.

MR. NGHAM, J. (concurring specially). I am affirming the judgment; my reasons are from those stated by the majority. The action was commenced to redress the breach of a contract of employment. The wrongful discharge is made the basis of the action. As a general rule such an action may be commenced either before or after the expiration of the term, but after the expiration of the term. 26 Cyc. 111. This action was commenced immediately after the expiration of the term. The contract of employment relied upon by the plaintiff in his complaint was the resolution of the board of supervisors of defendant county January 17, 1912, acting for the county, and the immediate acceptance of the plaintiff of the employment. The contract is set out in full in the majority opinion and need not be repeated here. The contract cannot be considered a contract; it is clearly an offer to contract dependent upon acceptance of its terms and conditions by the offeree before it would be binding upon the county in any event. Consider the present purposes, that the supervisors were acting within their authority to bind their principal, by such a contract as offer-

ed through the resolution, when the plaintiff received that offer, and, acting upon it, assumed the duties of superintendent, he accepted the offer with all its conditions, and, if the board of supervisors knew he began the performance of such duties, the county had notice of his acceptance of the offered contract. By his commencing to perform his part of the offered contract with notice of that fact to the other contracting party before the offer was withdrawn, the plaintiff thereby promised to perform upon his part all the conditions required of him by such employment, and the offer and acceptance became a contract mutually binding upon both the parties, having for its consideration a promise for a promise. This proposition is elementary, and needs no citation of authorities in its support.

The defendant county, in its answer, admits that its board of supervisors did enter the resolution pleaded by plaintiff, whereby they undertook to employ plaintiff as superintendent of construction of its courthouse and jail, and alleges that said order and employment were illegal and unauthorized, for the reason that E. C. Heck was then employed by defendant county as architect and superintendent of construction of its courthouse and jail, and his services had not been dispensed with, nor did the board have the authority to dispense with his services as such architect and superintendent without the consent and approval of the contractor constructing such buildings. It was admitted that plaintiff served in the capacity of such superintendent from January 17 to February 17, 1912. No defense is made to the action, for the reason the contract of employment was unilateral.

Defendant sets forth a cross-complaint, alleging that defendant, on January 16, 1912, employed the plaintiff to superintend the construction of the courthouse and jail for a commission of 5 per cent. on the value of the materials placed and labor performed in said construction, while he was in the employment of the defendant; that the duration of his employment was at the pleasure of the defendant, and the plaintiff served in that capacity to and including February 16, 1912; that during the term of his service material and labor were placed in the buildings to the value of the sum of \$2,500. On February 6, 1912, plaintiff presented his demand to defendant for the sum of \$469.41, claiming that sum to be three-fourths of 5 per cent. of the value of labor and material placed in the construction of said courthouse to said date; that defendant, relying upon the correctness of the estimate made, and the correctness of the plaintiff's estimate of the commissions due him, audited and paid plaintiff said sum of \$469.41; that plaintiff knew that no more than \$2,500 had been expended on said buildings in labor and material at the date of his estimate; and he knew that

no greater sum than \$125 was due him on his commissions. A demand for judgment in the sum of \$344.41 is made against the plaintiff. Plaintiff filed no answer to the counterclaim.

The judgment is that the plaintiff take nothing, and that the defendant have judgment against the plaintiff for the sum of \$257.25. From which judgment, the plaintiff has appealed.

The defendant, in its answer and in its counterclaim set up in its cross-complaint, treats the transaction with this plaintiff as a contract of employment. It defends upon the grounds that the board of supervisors acted without the scope of their authority as agents for the county in making the contract; also, that the plaintiff was guilty of a breach of the contract upon his part in failing to perform the conditions of the contract; also, plaintiff was guilty of a dishonest performance of his duty under the contract in rendering a false certificate of the work and material placed in place in the buildings—any or all of which reasons appearing would justify the defendant in rescinding the contract, and justify his discharge. Defendant further alleges that when plaintiff was discharged the courthouse and jail were in course of construction, and at the date of the institution of plaintiff's action said buildings were incomplete.

The board of supervisors of a county may only act for the county within the scope of their authority as any other agent may act for his principal. The authority of the officers of a county, while acting as agents for their county, receive their instructions from the statutes, and, unlike the agent of an individual, all parties dealing with public officers, while acting as agents for the municipality, the county, or state of which they are officers, deal with such agents with notice of the limitations of the officers' authority. 11 Cyc. 468, and note 91.

The board of supervisors is given authority to erect county courthouses and jails by subdivision 9 of paragraph 973, Rev. St. Ariz. 1901. Their authority in this particular is limited by paragraph 986, Rev. St. Ariz. 1901, thus: "The board must not for any purpose contract debts or liabilities, except in pursuance to law, or under ordinances of their own, adopted in accordance with the powers herein [chapter 2, title 14] conferred."

Paragraph 976, § 49, of said chapter provides: " * * * And all erections of, repairs to and alteration in any county building exceeding in value the sum of one hundred dollars, shall be let by contract, after advertisement made for bids therefor for not less than ten days nor more than four weeks. * * * The board shall let the contract to the lowest bidder, or may reject all bids and readvertise."

Paragraph 3560 provides, where authority is given the board of supervisors " * * *

to erect or cause to be erected or constructed, any * * * county or other building or structure, it shall be the duty of said * * * board of supervisors * * * to advertise for plans and specifications in detail for said building or other structure, and to state in said advertisement the amount authorized by law or otherwise to be expended for the erection of said building or structure; and also the premium to be awarded to the architect whose plans and specifications for the same may be adopted."

Paragraph 3561: "Whenever the plans and specifications of any architect shall be adopted, such * * * board of supervisors, * * * so adopting the same, shall, before any premium shall be awarded for such plans and specifications, require such architect to execute and file with * * * board of supervisors * * * a good and sufficient bond, with two sufficient sureties thereto in the penal sum of five thousand dollars, to be approved by such * * * board of supervisors, * * * and conditioned that within sixty days from the date of said bond, he will, on presentment to him, enter into a contract containing such provisions and conditions as may be required by such * * * board of supervisors; * * * and also conditioned that he will give such further bond to secure the faithful performance of such contract, with such sureties as may be required of him, in the event that such * * * board of supervisors * * * should within sixty days require said architect to enter into such contract to erect such building or structure at the price named in the said advertisement to be expended for such purpose. In case said architect whose plan and specifications are adopted should enter into such contract, it shall be the duty of such * * * board of supervisors * * * to employ a competent architect or superintendent to superintend the erection of such building or structure and to see that such plans and specifications are faithfully carried out.

"3562. All contracts entered into by such * * * board of supervisors * * * in violation of the provisions of this act shall be null and void."

Heck's plans and specifications were adopted, and, nothing to the contrary appearing, I presume the advertisement was properly made, and his premium properly awarded. Paragraph 3561 authorizes the board of supervisors to employ a competent architect as superintendent to superintend the erection of such building or structure, and to see that such plans and specifications are faithfully carried out, in only one event—when the architect, whose plans and specifications have been adopted, has been required to and does enter into the contract to erect the buildings. No such event happened in this instance. The building contract was let to Kroeger, and not to the architect. In which event the

supervisors had no authority to employ a superintendent to superintend the work of the county buildings under the contract, and in attempting to do so the contract with plaintiff in violation of the provisions of such statutes, and such a contract is declared void.

that Heck was discharged created a liability for employing another superintendent. The county was amply protected by the contract of the builder. *Greene v. Co., 8 Ohio, 310.*

employment of a superintendent would create a liability, and no law authorizing such contract under the circumstances shown to exist at the time of the contract. The plaintiff did not allege that the board of supervisors prohibited the superintendent. The contract made by the board of supervisors without authority of law was not binding on the county. *Murphy v. Napa County, 7.*

Defendant, in its counterclaim, or in seeking to recover \$344.41, alleged that it was paid to the plaintiff under mistake, upon an erroneous certificate of the plaintiff as superintendent of construction which he estimated the value of the work and labor in the buildings and on the land, when the estimate should have been based on the value of the material in place in the building at the time of the sale. The sum paid him was \$469.41. Defendant pleads that the sum payable to him is only \$125. The court adjudged defendant recover \$257.51 of the sum paid in the first place the board of supervisors had no authority to pay plaintiff's claim upon a void contract. Waiving the contract, and, for the purpose of this action, conceding that the plaintiff had the power to and did properly claim of the plaintiff, and through overpayment him, the defendant was not to recover, upon a proper showing, that so overpaid. The plaintiff made no claim to this counterclaim set up against the county, as he is required to do under *Ariz. 1292, Rev. St. Ariz. 1901*, if he has such claim. While he has made no claim, and raised no issues, and the result against him is for a less sum than he claimed, and no question is raised of the evidence to support the claim upon the appeal as in this case, I find that the judgment of the lower court is correct. Such are the conditions of the case relative to this counterclaim.

When considered the other questions raised by the appellant; but, as they do not affect the result, I will not extend this opinion by discussing them. Suffice it to say that I find no reversible error in the record.

SLOTBOOM v. SIMPSON LUMBER CO.

(Supreme Court of Oregon. Nov. 25, 1913.)

1. BROKERS (§ 57*)—PERFORMANCE OF CONTRACT—INTRODUCTION OF PURCHASER.

A broker earns his commissions upon introducing a proposed purchaser to the owner, though a sale is made to such purchaser for a less sum or upon different terms than those originally contemplated.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

2. BROKERS (§ 55*)—COMMISSIONS—PERFORMANCE BY BROKER.

Where property is sold, after the expiration of the time limited for the procuring of a purchaser, by a third person and upon different terms, the original broker is not entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.*]

3. BROKERS (§ 56*)—COMMISSIONS—SALE AFTER TIME.

A broker is not entitled to commissions upon a sale of the property by the owner after the time allowed the broker for procuring a purchaser, though the sale resulted from efforts to procure a purchaser, begun before the expiration of such time.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.*]

4. BROKERS (§ 50*)—COMMISSIONS—CHANGE OF TERMS BY OWNER.

A broker who has fully performed his part of the contract is entitled to his commissions though the owner afterwards changes his mind as to making the sale or imposes additional terms so as to postpone a transfer until after the time limited to the broker for making the sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.*]

5. BROKERS (§ 50*)—PERFORMANCE BY BROKER—DELAY IN CONCLUDING SALE—NEGLIGENCE OF OWNER.

The fact that a broker was prevented, by the intoxication of the owner's agent, from informing the corporate owner, before the expiration of the time limited for procuring a purchaser, of the fact that a purchaser was procured would not entitle the broker to recover commissions on the theory that the owner was charged with its agent's neglect.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.*]

On petition for rehearing. Petition denied. For former opinion, see 135 Pac. 889.

MOORE, J. In a petition for a rehearing it is maintained by plaintiff's counsel that on January 5, 1912, and prior to the expiration of the time limited, their client went from Portland, Or., to North Bend, in this state, with William J. Wilsey, the proposed purchaser, to whom the town lots were subsequently sold, and though they did not on that occasion see the defendant's agent, L. J. Simpson, because of his extreme state of intoxication, Slotboom had thus secured a purchaser who was able, ready, and willing to buy the real property to secure which the journey was made, and such being the case the broker earned his commission, in refusing to grant which an error was committed by this court. As Wilsey paid only \$75,000

for the land which the plaintiff was authorized to sell for \$90,000, it is not reasonable to suppose the purchaser would have paid the sum first demanded.

[1] Whatever amount of money Wilsey would have given for the real property January 5, 1912, is not important, for the rule is well settled that, when a proposed purchaser has been introduced to the owner by a broker, the latter has earned his commission, though a sale is made to the person so produced for a less sum or upon different terms than originally suggested. Walker, Law R. E. Agency, §§ 450, 502, 532.

[2] Where, however, after the expiration of the time limited, a sale of property is made by a third person with new incidents, the broker is not entitled to a commission. Lunney v. Healey, 56 Neb. 313, 78 N. W. 558, 44 L. R. A. 593; Beauchamp v. Higgins, 20 Mo. App. 514.

[3] In the case at bar the testimony shows that the first information the defendant's agent obtained that Wilsey desired to purchase the lots was on January 30, 1913, when H. C. Diers, pursuant to a telegram from Wilsey, inquired of Simpson the lowest cash price that would be accepted for the land, and at Diers' suggestion Simpson went to Portland to confer with Wilsey about the matter. This was after the expiration of the time allowed the plaintiff to procure a purchaser, and in such case a broker is not entitled to a commission because efforts begun within that time bore fruit after its expiration. Mechem, Ag. § 965; 19 Cyc. 254. If, therefore, a recovery of a commission can be had herein, it must be predicated upon the ground that within the time specified the broker induced a person to take the property, but the delay in closing the sale was caused by the negligence, fault, or fraud of the defendant.

[4] If a real estate broker fully performs his contract, he cannot be prevented from recovering his commission because the owner subsequently changes his mind about making the sale or imposes such additional terms as to postpone a transfer of the title until after the expiration of the time limited. Brackenridge v. Claridge & Payne, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593. There must be no breach of faith by the owner of property towards the broker who has been employed to secure a purchaser thereof.

[5] It must be kept in mind that the defendant herein is a corporation and that L. J. Simpson is one of its directors and that neither the principal nor such agent was notified prior to January 15, 1912, when plaintiff's contract expired, that Wilsey had been secured as a purchaser. If Simpson's inebriety was adopted as a means of preventing a sale of the lots within the time limited, however liable he might be personally for the consequences of his conduct on January 5, 1912, it is difficult to perceive by what rule of

law the defendant was bound by his deportment on that occasion. The doctrine of respondeat superior applies to a corporation for its agent's torts resulting from negligence caused by his drunkenness. No such rule, however, can be invoked because the agent in consequence of his inebriety failed to effect a contract binding upon his principal.

The petition for a rehearing should be denied, and it is so ordered.

PILSON v. TIP-TOP AUTO CO.

(Supreme Court of Oregon: Nov. 25, 1913.)

1. LIVERY STABLE KEEPERS (§ 7*)—STORAGE—PLACE.

Where a contract for the storage of an automobile provided that it should be kept in a city garage, but the bailee removed it to a country garage, without the owner's consent, and it was there damaged by the collapse of the roof, the warehouseman would be liable for the damage sustained, independent of the question of negligence.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. LIVERY STABLE KEEPERS (§ 7*)—STORAGE OF AUTOMOBILE—COLLAPSE OF BUILDING—PLEADING—CONSTRUCTION.

In an action against a warehouseman for injuries to plaintiff's automobile by the collapse of the roof of the garage in which it was stored, plaintiff's complaint construed, and held to state a cause of action for damages to the automobile by defendant's negligence in permitting the roof of the garage to remain overloaded with snow and not for conversion of the property.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

3. BAILMENT (§ 14*)—BAILEE FOR HIRE—LIABILITY—LIMITATION—NEGLIGENCE.

A bailee for hire cannot by contract so limit his responsibility to the bailor as not to be liable for his own negligence or that of his agents and servants.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45-55; Dec. Dig. § 14.*]

4. BAILMENT (§ 33*)—INJURY TO PROPERTY—"NEGLIGENCE" OF BAILEE.

A charge defining negligence of a bailee as failure to exercise that care in protecting plaintiff's property that an ordinarily careful and prudent man would have exercised under the circumstances was correct.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 56; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

5. LIVERY STABLE KEEPERS (§ 7*)—INJURY TO VEHICLE—NEGLIGENCE.

Where plaintiff's automobile, while stored in defendant's garage, was injured by the fall of the roof due to its being overloaded with snow, an instruction that, in determining whether defendant had exercised ordinary prudence in caring for the machine, the jury should consider the snowfall, the construction of the roof, and the fact that the attention of defendant's agent was called to the amount of snow on the roof was proper.

[Ed. Note.—For other cases, see Livery Stable Keepers, Cent. Dig. § 6; Dec. Dig. § 7.*]

6. LIVERY STABLE KEEPERS (§ 7*)—INJURY TO STORED PROPERTY—NEGLIGENCE—INSTRUCTIONS.

Where plaintiff's automobile was injured by the collapse of the roof of the garage in which it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an instruction that, though the jury there was a latent defect in the of the garage which men of ordi- nance would not have discovered, plain- entitled to recover if defendant was a permitting snow to remain on the such negligence proximately caused , was correct.

—For other cases, see Livery Stable ent. Dig. § 6; Dec. Dig. § 7.*]

(§ 260*)—REQUEST TO CHARGE—IN- NS GIVEN.

ot error to refuse requests to charge, ice of which is contained in instruc-

—For other cases, see Trial, Cent. 659; Dec. Dig. § 260.*]

ent 1. Appeal from Circuit Court, r County; W. L. Bradshaw, Judge. y E. H. Pilson against the Tip- Company to recover judgment for an automobile caused by defend- ged negligence as bailee. Judg- plaintiff for \$720.80, and defend- s. Affirmed.

R. Wilbur, of Hood River, for ap- . J. Derby, of Hood River (Jesse d A. J. Derby, both of Hood River, ef), for respondent.

Y, J. On or about the 1st day of 1911, the defendant was engaged in ss of storing and taking care of s as a warehouseman for hire at r, Or., and it carried on its business ages. One of them was situate at and Seventh streets in the city of r, and the other was located on ty of Charles P. McCan, about a west of said city. Both of these ere owned and conducted by the for hire.

ber 1, 1911, the plaintiff owned a eeton automobile. He was going he made a contract with the de- store and keep said automobile r hire while he should be gone.

plaintiff alleges that the plaintiff said automobile to the defendant defendant received the same for its garage, located at Seventh and streets in the city of Hood River, upon the express agreement that mobile should be stored and kept and that said automobile so deliv- he plaintiff to the defendant, as was at the time of said delivery times thereafter, up and until the e damaging thereof through defend- gence, hereinafter referred to, of of \$1,500.00; that said automobile said delivery by plaintiff to de- o be by the defendant safely and ept for the plaintiff in its said (garage) at Columbia and Seventh delivered to plaintiff, on demand, asation for such keeping of \$3 per

month, to be paid by plaintiff to defendant in the regular course of business, upon de- mand, by defendant therefor.

The complaint further alleges that the plaintiff has duly performed all of the con- ditions of said contract on his part; and that the plaintiff upon the 18th day of March, 1912, paid to the defendant the sum of \$11.20 and demanded of the defendant the return of said chattels, said last-named sum being the amount due to and charged by the de- fendant for such safe-keeping up to the date of said demand, but the defendant then and ever since has neglected and refused to return said chattels, or any part thereof, to plain- tiff, except in the damaged condition herein- after set forth in this complaint.

The said complaint alleged also that the defendant, its servants and agents, careless- ly and negligently, and without the consent or authority of the plaintiff, removed said automobile from its storehouse and garage at Seventh and Columbia streets to its store- house and garage located about one mile southwest of the city of Hood River, on the property of one Charles P. McCan, such neg- ligent removal having been done by defend- ant, as aforesaid, shortly after the 1st day of October, 1911, and stored said automobile in said last-named storehouse and garage without the consent of the plaintiff; that, while said automobile was so stored in said last-named garage by defendant, the defend- ant, its servants and agents, carelessly and negligently permitted snow to accumulate, from day to day, for several days prior to the 12th day of January, 1912, upon the roof of said last-named garage where said automo- bile was stored, so that the roof of said ga- rage and storehouse became so overloaded with said snow that said roof, by reason of said overloading thereon, by reason of said ac- cumulation of snow and rain negligently per- mitted to accumulate on said roof, as afore- said, on the 12th day of January, 1912, gave away and caved in, wrecking said building and falling upon the automobile of plaintiff stored therein, breaking the spring and bot- tom thereof, etc., etc., so as to make said automobile of practically no value to the plaintiff or any one else; that by reason of the negligence of the defendant, its servants and agents, in removing said machine from its storehouse (garage) at Seventh and Colum- bla streets to its storehouse (garage) about one mile southwest of the city of Hood River, without the consent of the plaintiff, and in permitting said overload of snow and rain to accumulate on the roof of said last-named garage, while plaintiff's machine was stored therein, and neglecting to remove the same, although the defendant and its agents were informed and well knew that the roof of said last-named garage was in a dangerous condi- tion and likely to fall at any time, by reason of the excess weight thereon, said automo-

bile was injured as aforesaid, to the very great damage of plaintiff in the sum of \$1,000.

The answer denies most of the allegations of the complaint and admits some parts thereof. It admits that said automobile was removed from one garage to the other, but denies that it was done without the consent of the plaintiff or that it was negligently done, and alleges that it was done in accordance with the agreement with the plaintiff. The answer admits that, while the automobile was in the garage to which it was removed, said garage collapsed, but denies that the collapse was caused by the weight of snow and rain upon the roof thereof, and alleges that said collapse was caused by reason of said building's having been defectively planned and constructed, and that the defects therein were latent and unknown to the defendant and could not have been discovered by ordinary diligence.

The defendant alleges that, when said automobile was left with it by plaintiff, it was agreed by the plaintiff and the defendant that it should be kept at said garage on the McCan farm, and that the defendant assumed no liability whatever for its safety, preservation, or redelivery, save only as against its own willful and intentional misconduct.

The answer admits that the defendant received said automobile about October 1, 1911, and kept it at its garage in the city until about November 29, 1911, and then removed it to the other garage. The defendant admits also that the automobile was damaged by the collapse of the garage to the extent of \$120.

The plaintiff claims that the car was to have been kept in the garage in the city. The defendant denies this and asserts that it was agreed that it was to be kept in the garage that collapsed. The answer admits that it was kept in the garage in the city more than six weeks and then removed to the other garage.

[1] If it was the contract that the automobile should be kept at the garage in the city, and it was removed to the other garage outside the city without the consent of the plaintiff and there damaged by the falling in of the roof of the garage, the defendant would be liable for such damages without reference to the question of negligence, as such acts on the part of the defendant would be wrongful and a violation of such contract of bailment. *Kennedy v. Portman*, 97 Mo. App. 253, 70 S. W. 1099; *Hudson v. Columbia T. Co.*, 137 Mich. 255, 100 N. W. 402, 109 Am. St. Rep. 679; *McCurdy v. W. F. & Co.*, 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468. However, in this case it is doubtful whether the contract of bailment provided that the automobile should be kept in the garage in the city. It seems that the evidence on that point was conflicting.

[2] But it appears clearly from the complaint that the plaintiff did not base his right of action upon the alleged wrongful

act of the defendant in transferring the automobile from the garage in the city to the one outside of the city and the plaintiff's failure to deliver it in good condition to the plaintiff on his demand. The complaint does allege that the automobile was to have been kept at the garage in the city, and that it was negligently, without his consent, removed to the garage outside the city, the gist of the complaint being the negligence of the defendant in permitting wet snow to accumulate on the roof of the garage outside the city to such an extent that its weight caused the roof of the garage to give way and fall in upon the automobile, damaging it as stated in the complaint. The gravamen of the complaint is not the removal of the automobile from one garage to the other, contrary to the contract, but the negligence of the defendant in permitting snow to accumulate on the roof of the garage so that it fell in, crushing the automobile, doing the damage complained of. The complaint does not allege a conversion of the property but damages to it by the negligence of the defendant.

Our Code (section 85, L. O. L.) provides that, in the construction of a pleading, the purpose of determining its effect is that the allegations shall be liberally construed in favor of substantial justice between the parties. It ties litigant, and section 97, L. O. L., provides that no variance between the allegations and the proof shall be fatal to a pleading, unless it has actually misled the adverse party to his prejudice in preparing his action or defense on the matter.

The real issues in the case were whether the defendant was guilty of negligence in permitting the snow to accumulate on the roof of the garage to such an extent as to cause the roof to fall on the automobile and crush it, or whether a latent defect in the plan or construction of the building was the cause of the injury to the car, and the amount of damages that should be allowed.

2. The defendant excepted to the verdict and to the jury of the following charges:

"(1) If you find that the contract was claimed by defendant, viz., that the automobile was to be kept in the country garage, and that the owner's risk, the plaintiff is still liable for the recovery if defendant was guilty of negligence."

"(2) By negligence is meant the failure of the defendant to exercise that care in protecting plaintiff's property that an ordinary careful and prudent man would have exercised under the circumstances."

"(3) In deciding whether defendant was negligent, you must take into account the snowfall, the construction of the roof, and the fact that the attention of the plaintiff was directed to the amount of snow on the roof of the garage."

"(4) In case you find there was a defect in the construction, a defect

ordinary observation would not have led in an examination of the building the plaintiff is entitled to recover and that the defendant was negligent in letting the snow to remain on the roof, such negligence proximately caused the damage."

It is the better rule that a bailee for hire is not by contract so limit his responsibility as not to be liable for his negligence or the negligence of his employees and servants. *Railroad Company v. Stout*, 17 Wall. (84 U. S.) 357, 21 L. Ed. 102, 103; *W. & A. R. Co. v. Fay*, 126, 25 N. E. 869; *Pittsburg, P. & O. v. Higgs*, 165 Ind. 694, 76 N. E. 1081; *Camp v. H. & Co.*, 43 Conn. 333; *Davis v. C. & M. R. Co.*, 93 Wis. 470, 67 N. W. 16, 17; *L. R. A. 654*, 57 Am. St. Rep. 935; *Country National Bank v. Smith*, 100 Tenn. 517; 3 Am. & Eng. Ency. (Ed.) 750.

The second charge excepted to by the defendant was that the car was to be kept in the city garage at the owner's risk, the defendant was liable for damages if he was negligent. We are unable to see error in this instruction.

The second charge states that by negligence meant the failure of the defendant to use that care in protecting the plaintiff's property that an ordinarily careful and prudent man would have exercised under the circumstances.

The third charge instructed the jury to determine whether the defendant exercised ordinary prudence, they should take account the snowfall, the construction of the roof, and the fact that the attorney, McCan, who was acting for the defendant was called to the amount of snow on the roof of the garage.

The fourth charge instructed the jury that if they should find that there was a defect in the construction of the building, still the plaintiff is entitled to recover, if the jury should find the defendant was negligent in permitting the snow to remain on the roof and such negligence proximately caused the damage. The court did not err in giving these charges.

The court gave to the jury other proper instructions as to what the issues to be tried by the jury were; what degree of prudence the defendant was required to exercise in taking care of the automobile; as to the alleged defect in the plan and construction of the building in which the automobile was stored; in regard to the alleged accumulation of snow on the roof of the garage and the burden of proof's being on

the plaintiff to prove the negligence of the defendant by a "fair preponderance of the evidence," etc. We believe that the jury was properly instructed, and that the instructions were fair to the defendant and covered all questions that were to be passed on by the jury.

[7] The court refused to give some charges requested by the defendant that stated the law correctly, but the charges that were given covered all the issues properly. Trial courts have the right to instruct the jury in their own language, and it is not error to refuse to give requested charges that state the law correctly, if the instructions given cover all the disputed questions that the jury is required to determine.

The defendant requested the court to give the following charge, which was refused: "Before you can find a verdict for plaintiff in any event, you must believe from the evidence that the contract for storage provided for the car to be stored in defendant's city or Columbia street garage; that this contract was not canceled and still existed at the time the damage occurred; that without plaintiff's consent the car was removed by defendant to its country garage, and, while therein stored, it was damaged because of defendant's negligence in not properly caring for its safety."

The gist of the action being the defendant's negligence in permitting wet snow to accumulate upon the roof of the country garage to such an extent that it caused the roof to fall on the car, crushing it, it was immaterial whether the defendant had agreed to keep the car in the city garage or whether the plaintiff consented to its being stored in the country garage or not. The court properly refused to give said requested charge. We find no error in the proceedings of the court below.

The judgment of the court below is affirmed.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

CITY OF ASTORIA v. ASTORIA & C. R. R. CO.

(Supreme Court of Oregon. Nov. 25, 1913.)

1. CONTRIBUTION (§ 5*)—JOINT TORT-FEASORS OR PARTIES IN PARI DELICTO.

Joint tort-feasors, standing in pari delicto, cannot compel contribution, but the fact that the parties stand in delicto, each to the other, will not foreclose contribution.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 6-9; Dec. Dig. § 5.*]

2. MUNICIPAL CORPORATIONS (§ 762*)—TORTS—DEFECT IN STREET.

A city failing to perform its full duty by not requiring a street railroad to construct and maintain approaches to a crossing sufficient to protect the public, and in not seeing that proper barriers were placed along the tracks where injury was possible, was liable to a traveler, who

in the exercise of due care was injured in consequence thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1605-1611; Dec. Dig. § 762.*]

3. INDEMNITY (§ 13*)—RECOVERY FROM PARTY PRIMARILY LIABLE.

Where a traveler recovered damages against a city for personal injuries from a defect in a street crossing, the city could recover over against the street railway company whose nonperformance of its duty to lay its tracks even with the grade and to keep the crossing in good condition and repair was the efficient and primary cause of the injury.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

4. INDEMNITY (§ 14*) — CONCLUSIVENESS OF JUDGMENT AGAINST INDEMNITEE.

In an action by a city against a street railroad company to recover damages paid and expenses incurred in an action by a traveler for personal injuries from a defective street railroad crossing, the judgment in the action against the city was conclusive of the facts thereby established, and could not be litigated between the city and the company, if the latter was notified of the former action; the estoppel by judgment embracing all the issues determined thereby.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. § 41; Dec. Dig. § 14.*]

5. INDEMNITY (§ 13*)—EXTENT OF LIABILITY—COSTS AND ATTORNEY'S FEES.

A city entitled to indemnity from a street railroad company as the party primarily liable for personal injuries to a traveler could recover for the necessary costs and attorney's fees in defending the action in which such recovery was had.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

6. INDEMNITY (§ 14*)—NOTICE TO INDEMNITOR TO DEFEND—SUFFICIENCY.

Notice given by a city after suit brought against it for personal injuries caused by a defective street crossing, informing the city railway company primarily liable therefor that suit had been instituted accompanied by a true copy of the ordinance requiring such notice to be given in writing, and alleging the company's duty to keep such crossing in repair, and that it would be expected to defend the action, was legally sufficient.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. § 41; Dec. Dig. § 14.*]

Department No. 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by the City of Astoria against the Astoria & Columbia River Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Omar C. Spencer and Oscar Furuset, both of Portland (Carey & Kerr, of Portland, on the brief), for appellant. G. C. Fulton, of Astoria (A. W. Norblad, of Astoria, on the brief), for respondent.

McNARY, J. This action was instituted by plaintiff to recover over from defendant the amount of a judgment for a personal injury recovered by Annie Anderson against the plaintiff. In June, 1908, Miss Anderson commenced an action in the United States Circuit Court for Oregon, against plaintiff, to recover a judgment for damages in the sum

of \$20,000, which she alleged she sustained while walking along one of the streets within the confines of Astoria. The gravamen of her complaint is that during the month of and prior to September, 1907, Eleventh street was an improved public thoroughfare running north and south through the city; that the portion of the street where the accident occurred was improved by the construction of an elevated roadway about 15 feet above the Columbia river; that during the year 1906 the municipality granted a right of way to defendant, to construct, operate, and maintain a line of railway over and across Eleventh street; that, seasonably following such grant, defendant constructed its line of railway across the street; that in the construction thereof the railroad company placed its rails above the elevated street about 18 inches; that the grant to the company embraced a way 50 feet in width; that in constructing its line the railroad company built an approach or apron on either side of its track, starting at the level of the street and gradually rising until the approach came in line with the top of the rails of the railroad track; that, while this approach extended across the entire width of the street on the south side, it only covered a portion of the street on the north side, leaving on either side a perpendicular descent of about 18 inches; that no barrier was placed on the sides of the approach to protect the unwary from falling therefrom; that at nightfall on September 2, 1907, while moving along the street, and exercising due care, she fell from the apron or approach at a point about one foot north of the north rail of the railroad track, sustaining serious injuries. Promptly after the institution of the suit and service of process upon the plaintiff, the defendant was apprised thereof, and notified that it was primarily liable for the casualty to Miss Anderson. Receiving no word from defendant, the city appeared by answer and presented these issues: (1) It denied the accident in toto; (2) it denied that the place where the injury occurred was a street, but averred, on the contrary, that the locus was the private property of the railroad company, and for that account the city owed Miss Anderson no duty to keep the place in repair; and, lastly, that if she received any injury it was through her own carelessness and negligence.

After the issues had been formed by the pleadings and in the latter part of October, 1908, the city caused the following notice and resolution to be served upon the railroad company:

"The City of Astoria, Clatsop County, Oregon. Astoria, Oregon, Oct. 28, 1908. To the Astoria & Columbia River Railroad Company—Gentlemen: Acting under instructions from the common council of the city of Astoria as per resolution herewith, I respectfully inform you that an action has been in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against the city of Astoria by one Miss Anderson, to recover the sum of \$20,000 as damages alleged to have been caused by a fall on the right of way of the Astoria & Columbia River Railroad Company, said action is now pending in the United States Circuit Court for the District of Oregon, and of this take due notice. Very respectfully yours, [Signed] J. M. Anderson, Auditor and Police Judge."

Introduced by Councilman W. O. Be it resolved by the common council of the city of Astoria: That the auditor and police judge of the city of Astoria be and is hereby instructed to inform the Astoria & Columbia River Railroad Company that there has been instituted against the city of Astoria by one Miss Annie Anderson, an action in the United States Circuit Court for the District of Oregon, to recover the sum of \$20,000 as damages alleged to have been caused by a fall on the right of way of the Astoria & Columbia River Railroad Company, that as it was the duty of the said city of Astoria to maintain the right of way in repair, the said city of Astoria is hereby instructed to expect to take notice of said action and to defend the same."

County of Clatsop—J. M. Anderson, auditor and police judge of the city of Astoria, hereby certify that the foregoing is a true and correct transcript of the resolution adopted by the common council of the city of Astoria at its meeting on the 19th day of October, 1908, the original of which is on file in my office, to have hereunto set my hand and the seal of the City of Astoria, Oregon, this, the 19th day of October, A. D. 1908. [Signed] J. M. Anderson, Auditor and Police Judge."

On June 23, 1909, and eleven days prior thereto the city again notified the Astoria & Columbia River Railroad Company of the pendency of the action and the day appointed for the trial. It was given by the company to any of its attorneys. Miss Anderson recovered judgment for \$5,000.

On December 28, 1911, plaintiff filed a complaint against the defendant which alleged, in substance, that in December, 1895, plaintiff passed an ordinance granting to defendant the right of way upon and across certain streets of the city of Astoria, which franchise was, among other provisions and conditions, the following: " * * * That the street, inclusive of switches and side tracks, shall not be constructed above or below the established grade of the street or of the street where the same are traversed or crossed by said railroad switches and side tracks, but whenever any street or portion of a street is used or occupied by said railroad, and side tracks shall be ordered by said city, the said railroad company shall improve, at its own expense, the condition of said street and thereafter maintain the same in repair and in the manner

provided for the improvement of such street, so much thereof as shall be included between the rails of said railroad and within an area of three feet wide on each side of said rails on the outside of the track except at the crossings of cross streets, those running north and south to the ship's channel, at which place said railroad company shall improve said cross streets within the boundary lines of this franchise whenever the said cross streets shall be improved by the said city to the boundary lines of the franchise hereby granted. * * * " Continuing, the complaint asserts: "That at the time said line of railway was constructed and at the time of the adoption of said Ordinance No. 2,026 and for over ten years prior thereto the said Eleventh street was and has been and ever since has been and still is a public street in said city from its north terminus to its south terminus fully accepted by the said city and improved and used and employed by the public as such, and said city of Astoria has at all times maintained full and complete jurisdiction thereover as such street; and it was the duty of the said defendant under said ordinance No. 2,026 and under the laws of the state of Oregon, to construct and maintain the said Eleventh street within the said right of way of the said defendant's line of railway and the crossing of its line of railway thereover in a reasonably safe condition for travel, but the said defendant in the construction of its said crossing and its said line of railway over said Eleventh street wholly failed to and did not exercise any care or caution whatever and did not make said street within its right of way or at its crossing reasonably or at all safe from travel, and so carelessly and negligently conducted itself in that regard that it carelessly and negligently built and constructed its road-bed over 18 inches above the street grade of said Eleventh street and over 18 inches above the decking and grade of said street and for the purpose of providing a means for passage by the users of such street, travelers, and vehicles, said defendant carelessly and negligently constructed an apron or approach leading from the grade of said street and the planking and decking thereof from each side of its line of right of way crossing said street up to the top of the said railroad grade and the rails thereon and to an elevation of over 18 inches above the said Eleventh street and the grade thereof, and carelessly and negligently did not construct such apron or approach the full width of such street, but carelessly and negligently left a space of over 3 feet in width and 18 inches in depth between the west end of said apron or approach and the west boundary line of said street, and in the construction of said apron or approach said defendant carelessly and negligently failed to and did not construct any railing, barrier, or barriers on either side of said apron or approach and ever thereafter carelessly and negligently maintained said

crossing, apron, or approach without such railing or barrier as a protection to travelers on such street. That said crossing, apron, and approach as constructed and maintained by defendant was dangerous to travelers on said street to those traveling thereon in the nighttime, without railings or barriers on the sides thereof. That heretofore and on September 2, 1907, and whilst said crossing was so negligently maintained by defendant, one Miss Annie Anderson, a stranger in said city of Astoria, whilst lawfully traveling over said Eleventh street and said crossing in the nighttime as constructed and maintained by defendant as aforesaid, and whilst exercising due care and without fault on her part fell from off said crossing on the west side thereof near the said railway track of said defendant aforesaid and about one foot north of the north rail thereof, and thereby received serious personal injuries, whereby her body was badly bruised, ligaments torn, and the surgical neck of her femur bone was thereby broken, whereby she became permanently injured, and suffered great physical pain, to her great injury and damage, all of which was caused solely by reason of the carelessness and negligence on the part of the defendant in the construction of said approach and crossing as aforesaid and in maintaining the same, and the failure to construct and maintain on the sides thereof railings and barriers for the protection of travelers thereon and thereover. That the said place where the said Annie Anderson met with her said accident and for which she recovered the said judgment against plaintiff, as hereinbefore alleged, was on the said approach and crossing on the said line of railway of the defendant herein, which the said defendant was by law and said ordinance No. 2,026 required to keep and maintain in a reasonably safe condition, and it was the duty of the defendant to have constructed, on and along the outer sides of said apron, barriers or railings for the protection of travelers thereover, and said accident was caused solely on account of the carelessness and negligence of said defendant in the construction and maintenance of said crossing and its failure to maintain such barriers and railings thereat. This plaintiff further alleges that this plaintiff defended said action brought by said Annie Anderson against the plaintiff aforesaid for the sole use and benefit of the said defendant, for that the said defendant was liable for all damages caused to or suffered by said Annie Anderson accordingly as aforesaid, and this plaintiff expended in defending said action for attorney's fees and witness fees for witnesses on its behalf necessary to defend said action, together with court costs and officers' fees, the full sum of \$1,063.80, all of which were laid out and expended for the sole use and benefit of said defendant, and said defendant derived the benefits thereof, for had

not said action been defended a judgment would have been obtained against this plaintiff for the sum of \$20,000 and costs of said action. That all of said sums were expended during the month of July, 1909, and prior to the 8th day of July, 1909, and plaintiff is entitled to interest on said sums so expended at the rate of 6 per cent. per annum from said 8th day of July, 1909, until paid."

Defendant, after denying each and every allegation in the complaint, alleged as a separate defense: "That if the said Miss Annie Anderson described in the complaint herein was injured in any manner whatsoever, she was not injured on Eleventh street in the city of Astoria, or upon any street, alley, or highway over which the city of Astoria had any jurisdiction, authority, or control."

The issues were concluded by a reply containing a general denial. The jury rendered a verdict in favor of plaintiff for a sum equal to that which the city was compelled to pay Annie Anderson, plus attorney's fees and costs expended in defending the action.

Counsel for the respective parties litigant announced, at the time of making their excellent oral arguments, that but four points were controversial: (1) Was the notice given the railroad company of the institution of the action by Annie Anderson legally sufficient? (2) Can plaintiff recover from the defendant necessary costs and attorney's fees in defending the action brought by Miss Anderson? (3) Did the trial court give the proper legal effect to the judgment obtained by Annie Anderson against the city of Astoria? (4) Did the city and the railroad company stand in *pari delicto* with respect to the injury suffered by Miss Anderson, and, if so, will the law support the action for indemnity? These questions will be considered in an order inverse to their introduction.

[1] The paramount question here involved is whether plaintiff and defendant stand as tort-feasors in an equal decree with respect to the wrong which caused the injury to Annie Anderson. If so, confessedly, plaintiff cannot maintain this action, as the rule is almost universal that joint wrongdoers standing in *pari delicto* cannot compel contribution. However, to work an inhibition, the parties must stand in *pari delicto*, and the fact that the parties stand in *delicto* each to the other will not foreclose contribution. This distinction, which rests in sound reason, was well stated many decades ago by Justice Wilde of Massachusetts, in *Lowell v. Boston & Lowell Railroad Corporation*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33: "Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is in *pari delicto potior est conditio defendantis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses, in

involved any moral delinquency or, all parties are deemed equally and courts will not inquire into their guilt. But where the offense is merely a prohibition, and is in no respect it is not against the policy of the courts to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-

In order accurately to determine the plaintiff and defendant are joint wrongdoers standing in pari delicto in the commission of the act which produced the injury to Miss Annie Anderson, recourse must be had to the complaint filed by Miss Anderson, and the action against plaintiff herein. The complaint recites that the city of Astoria had, prior to the accident, granted to the railroad company a right of way 50 feet wide on Eleventh street; that in conformity with the track the company laid its rails on the grade of the street about 18 inches above the grade of the street to a point about the top of the rails of the railroad track; that this apron only covered a portion of the street on the north side, leaving a perpendicular descent of about 18 inches from the top of the rails to the street; that no railing was placed along the street on the apron to protect travelers from falling therefrom; and that the city was liable for the reason that the apron was a permanent structure, and that there was no railing to prevent plaintiff from

A résumé of the salient features of the case, it plainly appears that the negligence charged is against the railroad company, while passive negligence only is charged against the city. All that is charged against the city is its failure to take care for the safety of the travelers, by not providing barriers along the street where the accident occurred. The city failed to perform its full duty in requiring the company to construct and maintain aprons sufficient to protect the street from harm, and in not seeing that barriers were placed along the track where injury was possible, and, for that, the city is liable to Annie Anderson, yet that does not render the parties equally liable. The efficient and primary cause of the accident was the negligence of the company in the subsequent negligence of the city in not enforcing obedience to the terms of the ordinance was constructive rather than actual. If, however, the city and the railroad company had, as a joint undertaking, constructed the railroad track above the grade and left the thoroughfare in the same condition which produced the injury to Annie Anderson, there could be no recovery against the company, because it would be concurring and mutual negligence on the part of the city and the railroad. According to the ordinance grant-

ing to the company the use of the street in question, it was the duty of the company to lay its track rails even with the grade of the elevated street and to keep the street crossing in good condition and repair. A nonobservance of these provisions was the proximate cause of the accident, and by rule of law defendant is liable over the plaintiff for the damages sustained by Miss Anderson.

[4] The next question to be considered concerns the legal effect to be given to the judgment obtained by Annie Anderson against the city of Astoria in the United States Circuit Court for Oregon. The lower court advised the jury that the judgment was conclusive evidence of the following facts: (1) That the street at the point where Miss Annie Anderson met with the accident in question was defective; (2) that Miss Annie Anderson was injured at a point about one foot north of the north rail of the railroad track crossing on Eleventh street, and that she was injured there while exercising due care; (3) that the amount of the judgment recovered by Miss Annie Anderson against the city, namely, \$5,000, was the amount of the damage that Miss Annie Anderson there sustained; and (4) that the point where Miss Annie Anderson met with the injury was a street within the city of Astoria. An examination of the pleadings in the original case reveals that the issues which the court told the jury were conclusive on defendant were all subjects of controversy therein. Consequently the judgment in that action is conclusive of the facts thereby established and could not again be the subject of litigation between plaintiff and defendant, if the latter was notified of the former action. The scope of the estoppel created by the judgment in the primary case embraces all of the issues determined by it. In *Oceanic Steam-Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663, 39 N. E. 360, the rule is thus stated: "It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of the claim and that the action is pending with full opportunity to defend or to participate in the defense. If he then neglects or refuses to make any defense he may have, the judgment will bind him in the same way and to the same extent as if he had been made a party to the record." This doctrine was approved by the Supreme Court of the United States in *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.

[5] Can plaintiff recover from defendant judgment for the necessary costs and attorney's fees expended in defending the action brought by Miss Anderson? We think it can. No question is raised as to the legitimacy of the costs incurred by the city in defending the action brought by Miss Annie Anderson, nor of the value and efficiency of the legal services rendered the city. We think these constituents are appropriate items of damage for which plaintiff may

claim indemnity. Plaintiff in its litigation with Miss Anderson was compelled to defend the negligent acts of defendant which gave birth to the accident, and for that reason plaintiff is entitled to recover over from defendant the reasonable and necessary costs incurred in such defense including attorney's fees. *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Sutherland on Damages*, vol. 1 (3d Ed.) § 83; *Town of Waterbury v. Waterbury Terminal Co.*, 74 Conn. 152, 50 Atl. 3.

[8] Lastly, was the defendant given such notice of the pendency of the Annie Anderson action as renders the judgment recovered therein conclusive against defendant? The notices served upon defendant contained the information that an action had been instituted against the city of Astoria by Miss Anderson to recover the sum of \$20,000 alleged to have been caused by a fall on the right of way owned by defendant, and that defendant would be expected to make a proper defense thereto. This court stated, in *Carroll v. Nodine*, 41 Or. 417, 69 Pac. 53, 93 Am. St. Rep. 743: "Before an indemnitor can be expected to defend, he must have reasonable notice of the pendency of the suit or action by which he is to be bound, and afforded an opportunity to participate in or interpose such defense as he may desire; and it is only by complying with such conditions that the party to be indemnified can estop the indemnitor to controvert the matter anew upon an action against him upon the indemnity contract or obligation." We think a full opportunity was afforded defendant to defend the first action, and that the judgment is conclusive.

Believing no errors were committed, the judgment is affirmed.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

WEST v. McDONALD.

(Supreme Court of Oregon. Nov. 25, 1913.)

1. EXCEPTIONS, BILL OF (§ 13*)—ADMISSION OF EVIDENCE—SUFFICIENCY OF BILL.

Under L. O. L. § 171, as amended by Laws 1913, p. 650, providing that no particular form of exceptions shall be required, and the objection shall be stated with as much evidence or other matter as is necessary to explain it, but no more, provided that the bill of exceptions may consist of a transcript of the whole testimony and all of the proceedings at trial including the exhibits, instructions, and any other matter material to the decision of the appeal, a bill of exceptions to the admission of evidence should only contain so much of the evidence as is necessary to explain the nature of the objection, and should not be a practical transcript of all of the proceedings, unless necessary to determine the correctness of a ruling on motion for a nonsuit or for directed verdict at the close of the case.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 13; Dec. Dig. § 13.*]

2. WORDS AND PHRASES—"WELL."

A "well" consists of a pit sunk in the earth until a water-bearing stratum is reached from which the water will flow into the pit from which a supply of water can be obtained.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7429, 7430.]

3. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF JURY.

The court instructed, in an action for services for digging a well, that "the plaintiff in this case has shown himself to be an expert well driller," and, if you find that he entered into a contract with defendant to drill a well for \$1.50 a foot, this agreement was not complied with unless he got a sufficient supply of water, "and, when he abandoned the work without having obtained such supply of water, the defendant had a right to rescind the contract and adopt other means for getting a supply of water," and plaintiff cannot recover. *Held*, that the instruction invaded the province of the jury in assuming that plaintiff abandoned the work without having obtained a water supply; and was also erroneous in charging that plaintiff had shown himself to be an expert driller.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

In banc. Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by R. A. West against Duncan McDonald. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

See, also, 128 Pac. 818.

George T. Cochran, of La Grande (C. H. Finn and Cochran, of Eberhard, all of La Grande, on the brief), for appellant. Turner Oliver, of La Grande (Crawford & Eakin, of La Grande, on the brief), for respondent.

BURNETT, J. This is a second appeal in this case, and for a particular statement of the issues involved it is sufficient to refer to 64 Or. 203, 127 Pac. 784. In brief, it is enough to say here that the plaintiff declares for labor and services furnished at the special instance and request of the defendant in boring a well to a depth of 350 feet at the reasonable value of \$1.50 per foot. The defendant denies this, and alleges that the parties contracted for a finished well supplying an adequate flow of water at a price of \$1.50 per foot, but not in any event to exceed the total of \$150.

[1] In the argument, sundry objections to rulings upon the reception of testimony are pressed upon our attention. We decline, however, to consider these on the ground that what is termed a bill of exceptions is nothing more than a literal statement of everything that was said by court, counsel, and witnesses at the trial. This has been so often held not to be a bill of exceptions that it is tautological to repeat the statement. In a manner Mr. Justice Slater began a new series of decisions on this subject in *Keady v. United Rys. Co.*, 57 Or. 325, 100 Pac. 658, 108 Pac. 197, and we have since added *Hahn v. Mackay*, 63 Or. 100, 126 Pac. 12, 991, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Public Market & Cold Storage Co. v. H, 135 Pac. 529.

not unmindful of the amendment 171, L. O. L., enacted by the legislature February 28, 1913, reading to particular form of exceptions required. The objection shall be such as much evidence, or other material necessary to explain it, but no evidence, however, that the bill of exceptions may consist of a transcript of the testimony and all of the proceedings at trial, including the exhibits offered and rejected, the instructions of the court to the jury, and any other matter material to the decision of the appeal." L. O. L. 170. It was pointed out in *Hahn v. Hahn*, 135 Pac. 529, supra, that the bill of exceptions must be in the meaning of the statute, an exemplification of only so much as is necessary to explain the point of the objection. It was further pointed out that qualifications of this rule in the inclusion of the whole testimony of the plaintiff on a motion for a non-suit or a motion for a directed verdict, or a ruling on these questions was an error, but that such bills of exceptions are not to be considered for any other purpose. The legislation adverted to had been for anything more than a statutory codification of the doctrine thus announced. It was pointed out that the original terms of the bill of exceptions, 171, L. O. L. But it has retained the same language, and the words emanate from the same as they have often been used in the decisions of this court. It was added that the bill of exceptions must be construed to conform to the exceptions established by our decisions, and mean nothing more than that in cases where the same is necessary to show the correctness of the ruling upon a non-suit or a motion to direct verdict at the close of the whole case, the exceptions may consist of a transcript of all the proceedings. Containing as they do the very words of the former statute, they do not depart from the construction placed upon them by so many decisions, amounting to a rule stare decisis. Hence the court declines to consider the objections to the bill of exceptions on the ground of the inadmissibility of testimony in various instances occurring during the trial.

There are, however, sundry exceptions to the instructions of the court to which may be tested by the standard of the pleadings appearing in the above cases. We can properly consider, for the purpose of this case, the facts that the plaintiff says for his cause of action that he was employed to serve the defendant in the latter's quest for water by drilling a well into the earth, and that his services were worth \$1.50 per foot, amounting to an aggregate of \$525, which has not been paid. Opposing this, the defendant de-

nies the allegations of the complaint and says that he employed the plaintiff to produce a finished well yielding an adequate supply of water, and that without fault of the defendant the plaintiff abandoned this entire undertaking before its completion. The question turns upon the definition of the term "well," as applied to the contention of each party. If the plaintiff was not responsible for the results of the excavation, it can be said properly that a well meant nothing more than a mere hole in the ground, for the services in digging which the plaintiff would be entitled to recover on the quantum meruit, in the absence of an express agreement. The question left to the jury the question of determining what the parties meant by digging a well. This presented plaintiff's theory of the case. On the other hand, the court said, in the course of its charge, that, "In using the word 'well' in these instructions, I mean a hole sunk or drilled into the earth to such a depth as to reach a supply of water." This is a permissible definition of the term. "A well consists of a pit sunk in the earth until a water-bearing stratum of the earth is reached, from which the water therein will flow into the pit, and a supply of water be thus obtained." *Andrews v. Carman*, 1 Fed. Cas. No. 371, p. 868. Again it is said in *Magoon v. Harris*, 46 Vt. 264: "The places where the defendant reached water by orifices in the ground, and where the water did not flow to the surface, are wells, and not springs." To avoid the circumlocution of repeating the definition in terms, wherever the word was used in his subsequent instructions, the judge defined it once and for all in his instruction relative to the defendant's side of the case. It was not intended to be conclusive upon the plaintiff, and a fair construction of the charge will not justify such a construction. Properly considered on that point, the court said in substance to the jury: If you find that the contract contemplated a finished well yielding an adequate supply of water, and that the compensation should not, in any event, exceed a specified sum, the plaintiff cannot recover until he has fully performed his contract and produced such a well.

[3] The court, however, was in error in giving the following instruction: "I instruct you further that the plaintiff in this case has shown himself to be an expert well driller, of many years' experience, and has drilled a large number of wells in the Grande Ronde Valley, and if you find from a preponderance of the testimony that he entered into a contract with McDonald either as an individual, or as the representative of the farmers subscribing to a fund for drilling a well, that he would drill a well for \$1.50 per foot, using 4 1/4-inch casing, himself furnishing all of the materials and machinery for such purposes, that this agreement was not complied with, unless he got a sufficient supply of water; and, when he abandoned the work without having obtained such supply of water, the

defendant had a right to rescind the contract, and adopt other means for getting a supply of water, and the plaintiff cannot recover anything from the defendant in this case." This instruction was erroneous in that it assumed as a proven fact that the plaintiff abandoned the work without having obtained a supply of water. This was a clear invasion of the province of the jury upon a vital point of the case. It took for granted the verity of the traversed allegations of the answer. It is objectionable, also, in that it says to the jury "that the plaintiff in this case has shown himself to be an expert well driller of many years' experience," etc. This might have been a legitimate deduction to be used by counsel in discussing the case to the jury, but it has no proper place in the charge of the court. That the assumption of a disputed fact is erroneous when coming from the court is taught by the following authorities: *Salomon v. Cress*, 22 Or. 177, 29 Pac. 439; *State v. Bock*, 49 Or. 25, 88 Pac. 318; *Keen v. Keen*, 49 Or. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504, 14 Ann. Cas. 45.

This conclusion leads to a reversal of the case for a new trial.

BEAN, J., concurs in the result.

DYER et al. v. CITY OF BANDON et al.
(Supreme Court of Oregon. Nov. 25, 1913.)

1. MUNICIPAL CORPORATIONS (§ 294*)—STREET IMPROVEMENTS—SUFFICIENCY OF NOTICE.

Under charter provisions that improvements should not be undertaken without ten days' notice thereof by publication in some city newspaper, specifying with convenient certainty the street or part thereof proposed to be improved and the kind of improvement proposed, a published notice that the city council had ordered Sixth street improved from the west line of Broadway, thence west, including therein Randolph avenue, to the east line of West Bandon, such improvement to consist of grading, sidewalks, and flumes, was invalid for want of a certain description of the proposed improvement and gave the council no jurisdiction to complete it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 776-783, 791; Dec. Dig. § 294.*]

2. MUNICIPAL CORPORATIONS (§§ 488, 489*)—IMPROVEMENTS—INVALIDITY—ESTOPPEL TO ASSERT.

Where there is an entire lack of jurisdiction to order the improvement, a property holder is not estopped from asserting the invalidity of the proceedings by reason of having failed to assert their invalidity before the work is completed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.*]

3. MUNICIPAL CORPORATIONS (§ 538*)—ASSESSMENTS FOR IMPROVEMENT—INJUNCTION—PARTIES.

Where all the plaintiffs, in an action to enjoin the collection of an assessment for improvements, had the same common ground for relief, that being lack of jurisdiction in the

council to order the improvements, there was no improper joinder of parties plaintiff.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1194, 1253; Dec. Dig. § 538.*]

Department 2. Appeal from Circuit Court, Coos County; J. S. Coke, Judge.

Injunction by Euphemia Dyer and others against the City of Bandon and others. Decree for defendants, and plaintiffs appeal. Reversed, and decree entered for plaintiffs.

This is a suit to restrain the collection of a street assessment. That portion of the charter of Bandon bearing upon the matter in hand is as follows: "No grade or improvement mentioned in the preceding section can be undertaken or made without ten days' notice thereof being given by publication in some newspaper published in the city of Bandon, or by posting such notice thereof in three public places in said city, except as herein otherwise provided; also mailing a copy of such notice to property owners within the corporate limits, where known to the recorder. * * * Such notice must be given by the recorder by order of the council, and must specify with convenient certainty the street or part thereof proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made."

On February 1, 1911, the council passed a resolution directing the recorder to advertise notice of the street improvement in question; the nature of the proposed improvement to be stated as follows: "Said improvement to consist of grading the street and avenue and building sidewalk on both sides of said street and avenue, sidewalk to be six feet wide, also that wood flumes be built in the three small creeks in the Woolen Mill and Woodland additions, a concrete flume to be built on Gross creek, retaining walls to be of wood and Gross creek to be filled over the culvert." Thereafter the recorder published such notice, which, so far as affects the matter at bar, is as follows: "Notice is hereby given that on February 1, 1911, the common council of the city of Bandon, Coos county, Oregon, at a regular meeting thereof, by resolution, ordered that Sixth street be improved from the west line of Broadway thence running west, including therein Randolph avenue, to the east line of West Bandon. Said improvements to consist of grading the street and building sidewalks on both sides of street, said sidewalks to be six (6) feet wide; that a concrete flume be built on Gross creek, where creek crosses Sixth street, the retaining walls to be of wood; and that a fill be made over culvert or flume, also that a wooden flume be built in the three (3) small creeks in the Woolen and Woodland additions which creeks also cross Sixth street." Later the council passed an ordinance authorizing the improvement, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 6, 1914

the street was improved. The plaintiffs refused to pay the assessment levied against their property for their share of said improvements and brought this suit to enjoin the collection of the assessment. The defendants had a decree in the court below, and plaintiffs appeal.

G. T. Treadgold and Geo. P. Topping, both of Bandon (L. A. Liljeqvist, of Coquille, on the brief), for appellants. F. J. Feeney, of Bandon, for respondents.

McBRIDE, C. J. (after stating the facts as above). [1] We are not compelled to go beyond the decisions of our own court for authority decisive of the questions raised on this appeal. The case of *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474, is exactly in point. The provisions of the charter of East Portland quoted in the opinion in that case are practically identical with sections 57 and 58 of the Bandon charter. The notice in that case described the nature of the improvement as follows: "From the center line of Seventh street to a point at the west line of Ninth street, by building to the established grade an elevated roadway thirty-six feet wide and elevated sidewalks twelve feet wide." It will be noticed that the description above given was quite as definite as that given in the case at bar; yet the court held the proceeding void; Mr. Justice Moore using the following language: "Respondent claims that the first notice was insufficient and void because it did not describe with any certainty the kind of improvements required, and that the second notice was issued and published without authority and therefore void. Do the words, 'by building to the established grade an elevated roadway 36 feet wide and elevated sidewalks 12 feet wide,' give with convenient certainty the kind of improvement required for that part of said street lying between the center line of Seventh and the west line of Ninth street? It cannot be ascertained with convenient or any certainty from an inspection of the published notice, nor from an examination of said petition, the description of which is copied in the said notice, what kind of material, nor the size, quality, or character thereof, was required for this elevated roadway. The owner of each lot abutting upon this street whose property might be benefited or injured by the proposed improvement was entitled to know just what kind of improvements were contemplated. The legal issue of the notice and its proper publication were for his benefit and protection and were the means by which the council acquired jurisdiction to subject his property to the burden necessary to defray the expense of making the improvement. This was not such a notice as the charter prescribed nor such as the owner of property adjoining said street was entitled to, since

it did not inform him of the character, nor could he from it estimate the probable cost, of the proposed improvement. No jurisdiction to levy a special assessment could possibly be claimed by the publication of such a notice, and any proceedings had thereupon were void." This holding has been approved in *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407; *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112; *Rubin v. City of Salem*, 58 Or. 91, 112 Pac. 713; *Jones v. City of Salem*, 63 Or. 126, 123 Pac. 1096. It follows from the reasoning of these decisions that the notice published was invalid and that the council never obtained jurisdiction to make the proposed improvement, unless plaintiffs in standing by and making no protest against the work are estopped from asserting the invalidity of the proceedings by which it was initiated.

[2] Where there is an entire lack of jurisdiction to order the improvement, as is the case here, it has been invariably held in this state that a property holder is not estopped from asserting the invalidity of the proceedings by reason of his having failed to assert their invalidity before the work is completed. *Strout v. City of Portland*, 26 Or. 294, 38 Pac. 126, and cases there cited; *Jones v. City of Salem*, supra.

[3] It is also contended that there is an improper joinder of parties plaintiff. The plaintiffs all have one common ground for relief, namely, the lack of jurisdiction in the council to order the improvement. In this the case differs from *Hendry v. City of Salem*, 64 Or. 152, 129 Pac. 531, cited by counsel for defendants.

It follows that the decree of the circuit court must be reversed, and a decree entered here for plaintiffs.

BEAN, EAKIN, and McNARY, JJ., concur.

SCOTT v. HUBBARD et al.

(Supreme Court of Oregon. Nov. 20, 1913.)

1. APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTIONS OF FACT.

Though an equity case is tried anew on appeal, and, when a question of fact is involved, all the evidence brought up is examined independent of the trial court's findings, such findings, where the testimony is conflicting, are entitled to great weight, and where the testimony was seemingly balanced, it would be taken to preponderate in favor of the party for whom the trial court found.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

2. ESTOPPEL (§ 85*)—REPRESENTATIONS—FUTURE EVENTS.

The doctrine of estoppel in pais applies only to representations as to past or present transactions, and not to promises as to the future which, if valid at all, must be binding as contracts.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 220, 221; Dec. Dig. § 85.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. CONTRACTS (§ 303*)—EXCUSES FOR NONPERFORMANCE — PERFORMANCE PREVENTED BY OTHER PARTY.

A party to a contract, who prevents another party from strictly performing its terms, may not avail himself of the default thereby occasioned.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.*]

4. FRAUDS, STATUTE OF (§ 131*)—MODIFICATION OF CONTRACT—TIME OF PERFORMANCE.

As a general rule, where the time for a sale of real property has been postponed by a parol agreement upon which the vendee has relied, the statute of frauds cannot be invoked to perpetrate a fraud.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.*]

5. FRAUDS, STATUTE OF (§ 131*)—MODIFICATION OF CONTRACT—TIME OF PERFORMANCE.

Where a party to a written contract orally agrees to extend the time for performance, he is estopped from taking advantage of the noncompliance with the terms of the writing, and the other party has the extended time within which to perform.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.*]

6. CONTRACTS (§ 237*)—MODIFICATION—CONSIDERATION—NECESSITY.

A parol agreement, extending or enlarging the time for performance of a written contract, must ordinarily be supported by a sufficient consideration, but need not be if mutual acts are to be performed by the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1119-1122; Dec. Dig. § 237.*]

7. EVIDENCE (§ 445*) — PAROL EVIDENCE TO VARY WRITING.

Evidence is admissible to show that the time of performance of a written contract within the statute of frauds has been enlarged by a subsequent oral agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.*]

8. VENDOR AND PURCHASER (§ 18*)—TIME OF PAYMENT—EXCUSES FOR DELAY.

Where, under an option to purchase land, providing that it would be effective only so long as the holder of the option paid \$50 a month in advance, and that time was of the essence of the agreement, the owner refused to accept three monthly installments, which were thereupon left for him at a bank, from which he withdrew them some time after they were due, he created the impression that time was not of the essence, and, without giving any notice of change in his intention, he could not forfeit the agreement because of a delay of one day in paying a subsequent installment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

9. VENDOR AND PURCHASER (§ 18*) — CONTRACTS—MODIFICATION—CONSIDERATION.

Where an owner of land who had given an option to purchase, providing that it should be effective only so long as the holders paid \$50 a month in advance, and that time was of the essence of the agreement, on May 25th requested the holders to advance \$600 for a year's option, and induced them to believe that by advancing this sum the installment due on or before May 31st might be paid during the first week of June, the holders' promise to pay such sum was a sufficient consideration for the extension, and the owner was therefore estopped from asserting a forfeiture because of the

failure to tender such installment during the month of May.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Suit by William Scott against L. P. Hubbard and others. From a decree dismissing the suit, plaintiff appeals. Affirmed.

This is a suit by William Scott against L. P. Hubbard, Mabel Zimmer, and Mendon F. Schutt to rescind a contract. The plaintiff, on December 31, 1908, entered into a written agreement with A. B. Saling, whereby he stipulated to sell and convey to the latter, his heirs or assigns, 1,365.82 acres of land in Jackson county, Or., particularly describing the premises, at \$22.50 an acre, amounting to \$30,730.95, of which sum \$10,000 was to be paid when the election to take the property was exercised, and the remainder in three equal, annual installments, with interest at 6 per cent. Clauses of the contract are as follows: "It is expressly understood and agreed that William Scott reserves all coal, oil or gas, also minerals and stone of whatever kind in and under above described lands, with the right to go on the premises and explore and mine for same not nearer than 300 feet from any building, and this option will be effective as long as A. B. Saling continues to pay William Scott the sum of \$50 per month in advance, and no longer, provided, however, this option shall terminate and all sums paid hereunder be forfeited absolutely unless the same is exercised before five years from this date. No part of the \$50 monthly payments shall be applied on the purchase price of the land. It is also agreed that any improvements put upon the land at any time since December 31, 1908, or at any time thereafter, including care of fruit trees, are to be added to the purchase price and that time is of the essence of this agreement." The terms of the contract were made binding upon the parties thereto, their heirs and assigns. Saling transferred all his interest in the agreement to the defendant L. P. Hubbard, who sold and assigned an undivided two-thirds of his interest in the real property to the defendants Mabel Zimmer and Mendon F. Schutt. The sum of \$50 for the option maturing the succeeding month was regularly tendered on or before the last day of the preceding month, including the payment for May, 1911. When so offered, the installments for January, February, and March, 1911, were refused by the plaintiff, who asserted that the contract was at an end, because the option was not exercised by the payment of \$10,000 on or before December 31, 1910. The sums so tendered in the early part of the year 1911 were left at a bank for the plaintiff, who in March of that year withdrew that money. No payment was made in May, 1911, for the next

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on June 1st of that year the sum was tendered to the plaintiff, who re-accept it. The complaint alleges the facts, in substance, as heretofore stated and avers that in consequence of the failure to pay the installment for June, following the preceding month, all rights of the defendants on or to the real property became forfeited. The material averments in the answer are to the effect that the defendants were able, and willing to pay in advance the sum of \$600, for the option during June, 1911, on May 25th of that year the plaintiff offered them to alter the terms of the contract to advance to him \$600 on account of the sums thereafter monthly maturing, and the privileges granted were sooner exhausted when the unearned part of the option beforehand was to be credited toward purchase price; that the defendants were thereby induced to believe, and did believe, that the time for making such payment was extended until June 1, 1911, on which day the witness secured the \$600, they offered it to the plaintiff, who declined the advance, and when they tendered as the installment for the month of June, \$50, which sum he also re-accepted; that by rejecting the installment when tendered for the month of June, February, and March, 1911, and by withdrawing such money from the plaintiff thereby waived the clause in the contract making time the essence of the contract and he could not thereafter revive the contract without giving written notice of rescission in this respect; that by reason of, and in consequence of the plaintiff's faith, he is and ought to be estopped to assert that any default has occurred in the payment of the installment for June, and that the successive portion for that month and all other partial payments substantially maturing were and will be left to the clerk of the court until the decree is rendered. The reply having put in issue the allegations of new matter in the complaint the cause was tried, and from the evidence received findings of fact were made, and thereon the court deduced the law that the contract was in effect rescinded and that the rights of the defendants therein remained intact. The suit was dismissed, and the plaintiff ap-

pealed, Mulkey, of Medford (Geo. W. Cherrill, of Medford, on the brief), for appellant. Neff, of Medford (Neff & Mealey), and Reames, all of Medford, on the brief for respondents.

W. J. (after stating the facts as above) testified that the plaintiff sought to obtain the money from the defendants, who secured that the money was paid to him, there is no doubt. The only question is as to when that money was paid. L. W. Zimmer, the hus-

band of the defendant Mabel Zimmer, testified that the plaintiff, on Thursday, May 25, 1911, requested the witness to advance \$600 on account of the option. "Q. What did you say to him with reference to that? A. I told him that I was expecting some money from the East, and that as soon as that arrived I would be glad to make the payment. Q. Of \$600? A. Of \$600. That he said he would like to have it by the following Saturday. I told him that I didn't know just how soon I would have it, but questioned whether it would be there by Saturday. He said then: 'Well, if I could have half Saturday and the other half next week it would help me out.' I told him when it came I would just as well pay it all at one time, and he said, substantially, that would be all right, to get it as soon as possible; next week would do." That on Thursday, June 1, 1911, the witness, having secured the money, offered \$600 to the plaintiff, who declined it, saying that he had borrowed that sum, whereupon the witness tendered him \$50 on account of the option, which sum he also refused. In referring to the plaintiff and the \$600 which he desired, Zimmer was asked on redirect examination: "What did he finally say with reference to getting that money next week?" The witness answered: "Well, he finally agreed that next week would do, and then he asked me about it Monday and again Tuesday; whether I had gotten the money." This testimony is corroborated by that of G. E. Maxwell, the father-in-law of the defendant Schutt, who was present and heard the conversation between Zimmer and the plaintiff in reference to the \$600 which the latter desired to secure.

The plaintiff testified: That on Friday May 26, 1911, wishing to obtain \$600 for M. G. Womack, who needed one-half thereof on that day or the next and the remainder a few days later, he requested an advance of the money from Zimmer, who informed the witness that he could give no assurance of furnishing it by Monday following, Scott saying: "So the conversation about the money ended right there." That on Saturday, May 27, 1911, the witness borrowed from a bank \$600, and thereupon sent a check for \$10 to Womack, to whom he also sent another check on the following Monday for \$290, and soon thereafter checks for the remainder. The written orders on a bank were identified and received in evidence. Scott denies the sworn declarations, made by Zimmer, that the money would be accepted at any time after Saturday, May 27, 1911. The testimony given by the plaintiff is corroborated by that of J. W. Lindquist, who was present when the request to advance \$600 was made, and who stated upon oath: "I know that Mr. Scott asked for that money; that is all I do know. And I know this: That he made it plain that he had to have the money at a certain time, Saturday or Monday as I have stated. He was very

emphatic, and said it would do him no good if he didn't get it just then."

Based on the conflicting testimony the findings of fact made by the trial court are to the effect that Scott led the defendants to believe that if the \$600 were paid within a week or 10 days from the time the application therefor was made, it would be satisfactory to the plaintiff, and that the defendants were able, willing, and ready to pay in advance the installment and request of the plaintiff to advance the sum so desired, and were led to believe that it would not be necessary to tender the June installment on or before May 31, 1911.

[1] These findings practically determine that the testimony given by Scott and Lindquist in respect to when the \$600 could be paid is not equal to that produced by the defendants' witnesses. Though an equity case is tried anew on appeal, which review when a question of fact is involved, requires an examination of all the evidence that has been brought up, independent of any findings thereon that have been made, such decision of the trial court, as a result of the investigation of testimony when it is as conflicting, as in the case at bar, is entitled to much weight, since that court had the advantage of seeing the witnesses, hearing them testify, and observing their expressions and demeanor when on the stand, which attention to the details of a trial are circumstances for the ascertainment of truth not possessed by an appellate court from a mere inspection of the transcript of the testimony. In view of the seemingly balanced disagreement in the testimony, it must be taken as true that it preponderates in favor of the defendants, as found by the trial court, and, such being the case, the remaining question is whether or not the plaintiff's representations and conduct were such as to estop him from asserting a forfeiture of the contract by reason of the defendants' failure to pay the installment for June, 1911, during the preceding month.

[2] The doctrine of estoppel in pais applies only to representations with respect to past or present transactions, and not to promises as to the future, which assurances, if valid at all, must be binding as contracts. 16 Cyc. 752. "The only case in which a representation as to the future," says a text-writer, "can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right; and is made to influence others who have been induced to act by it." 11 Am. & Eng. Ency. Law (2d Ed.) 425.

[3, 4] Where a party to a contract which is in force causes or prevents another party thereto from strictly performing the terms of the agreement, the former will not be permitted to avail himself of the default which he has thereby occasioned. Neppach v. O. & C. R. R. Co., 46 Or. 374, 80 Pac. 482, 7 Ann. Cas. 1035; Missouri, K. & T. Ry. Co. v. Pratt,

64 Kan. 118, 67 Pac. 464; Slotboom v. Simpson L. Co., 135 Pac. 889. Analogous to this legal principle the rule is quite general that where time for the sale of real property has been postponed by a parol agreement, and such extension has been relied upon by the vendee, the statute of frauds cannot be invoked to perpetrate a fraud.

[5] Thus where a party to a written contract orally agrees to extend the time for its performance, and puts the other party off his guard, he is estopped from taking advantage of the noncompliance with the terms of the writing, and the other party will have the extended time in which to discharge the modified agreement. Longfellow v. Moore, 102 Ill. 289; Scheerschmidt v. Smith, 74 Minn. 224, 77 N. W. 34; Thompson v. Poor, 147 N. Y. 402, 42 N. E. 13; and Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026.

[6] "The time for performance of a written contract," says an author, "may be extended or enlarged by parol, but a sufficient consideration of each parol contract must be shown, or the courts will not enforce it." Beach, Mod. Law Cont. § 781.

No new consideration is necessary, however, when mutual acts are to be performed by the parties. Izard v. Kimmel, 26 Neb. 51, 41 N. W. 1068.

[7] Evidence is admissible to show that the time of performance of a written contract, within the statute of frauds, has been enlarged by a subsequent oral agreement. Stearns v. Hall, 9 Cush. (Mass.) 31.

[8] By accepting in March, 1911, the money for the option for preceding months, the plaintiff thereby reasonably created the impression that time was not of the essence of the agreement; and, not having given the defendants a written notice of any alteration of his supposed intention prior to June 1, 1911, he ought not to be permitted to insist upon a forfeiture of the contract. Graham v. Merchant, 43 Or. 294, 72 Pac. 1088; Miles v. Hemenway, 59 Or. 318, 111 Pac. 696, 117 Pac. 273.

[9] In the case at bar the plaintiff's representations having induced the defendants to believe that the installment for June, 1911, could be paid during the first week of that month, by advancing \$600, for a year's option, their promise to pay that sum was a sufficient consideration for the extension of time, thereby estopping the plaintiff from asserting a forfeiture of the contract.

The decree should be affirmed; and it is so ordered.

COBB et al. v. PETERS et al.

(Supreme Court of Oregon. Dec. 2, 1913.)

1. APPEAL AND ERROR (§ 171*)—REVIEW—THEORY OF CAUSE.

Where the attorneys for both parties and the court have tried the case on the theory that it was an action for false representations, the

court will not consider any other the-

e.—For other cases, see Appeal and
t. Dig. §§ 1063-1063, 1066, 1067,
Dec. Dig. § 171.*]

§§ 45, 46*)—PLEADING—COMPLAINT.
plaint for false representations must
the representations were false, that
ant knew them to be false, that they
with intent to defraud, and that the
king relief believed and relied upon
their damage.

e.—For other cases, see Fraud, Cent.
41; Dec. Dig. §§ 45, 46.*]

(§ 49*)—ISSUES AND PROOF—THE-
CAUSE.

the case was tried by the attorneys
rties and the court as an action for
entations, a recovery cannot be sus-
the theory of want of consideration

e.—For other cases, see Fraud, Cent.
45; Dec. Dig. § 49.*]

NT (§ 712*) — CONCLUSIVENESS —
CONCLUDED.

action for false representations as
veyed by a third party to plaintiffs,
nt roll, in an action against the
in which it was adjudged that such
e papers were forgeries, is com-
ence that the third party had not
vey to plaintiffs, though the present
were not parties to the former suit.

e.—For other cases, see Judgment,
§ 1233; Dec. Dig. § 712.*]

ent 2. Appeal from Circuit Court,
a County; Henry E. McGinn,

oy James A. Cobb and another
Peters and another. From a judg-
plaintiffs, defendants appeal. Re-
l remanded.

an action to recover from the de-
t, \$100, the alleged value of certain
by plaintiffs to defendant. It is

at on or about the 9th day of Feb-
l, the defendants conspired with
F. Roth to defraud the plaintiffs
stock of groceries, fixtures, team,
y wagon, owned by said plaintiffs
y falsely and fraudulently repre-
said plaintiff that James F. Roth
owner in fee simple of a certain
m situate in Douglas county, Ore-
ffering to trade said timber claim
ntiffs for their stock of groceries,
am, and delivery wagon * * *
\$2,100.

that J. Peters, one of the above-
endants herein, offered an unfin-
e at Hood River, Oregon, or the
ribed timber claim to the plaintiff,
trade for the said stock of grocer-
ies, team, and delivery wagon; that
tiffs decided to take the timber
the deal was consummated, plain-
g said above-described timber
their stock of groceries, fixtures,
delivery wagon. * * *

at on the — day of April,

1911, it developed that James F. Roth never
had title to the timber claim above described
and set forth that had been traded to these
plaintiffs for their stock of groceries, fix-
tures, team, and delivery wagon; that all
the deeds and papers passing title to said
James F. Roth had been rank forgeries, and
that said title was in Mr. Geo. E. Dunn and
Mrs. M. H. Lott, of the state of Kansas;
that the plaintiffs had been swindled and de-
frauded out of their stock of groceries, fix-
tures, team, and delivery wagon."

The answer denies generally each and ev-
ery allegation of the complaint, except those
expressly admitted, and affirmatively pleads
the facts of the transaction as claimed by
defendants. There was judgment for plain-
tiffs, and defendants appeal.

Walter G. Hayes and A. M. Dibble, of
Portland (Malarkey, Seabrook & Dibble, of
Portland, on the brief), for appellants. E.
R. Ringo, of Salem (E. C. Geeslin, of Port-
land, on the brief), for respondent.

EAKIN, J. (after stating the facts as
above). [1-3] Both plaintiffs and defendants
have treated the action as one to recover
damages for false representations. The at-
torneys and court tried the case on that the-
ory, and we cannot consider any other on
this appeal. The complaint fails to state
facts sufficient to establish a liability against
the defendants for false representations. In
such a case it is necessary to plead that the
representations were false, that the defend-
ant knew them to be false, that they were
made with intent to defraud, and that the
parties seeking relief therefrom believed and
relied upon such representations, and were
misled, to their damage. *Bailey v. Frazier*,
62 Or. 142, 124 Pac. 643; *Anderson v. Adams*,
43 Or. 621, 74 Pac. 215; *Martin v. Eagle*
Development Co., 41 Or. 448, 69 Pac. 216;
Britt v. Marks, 20 Or. 223, 25 Pac. 636.
There was no allegation that defendants
knew the representations were false, nor
that plaintiffs believed them to be true, or
acted upon them, to their damage, which is
fatal to plaintiffs' cause of action based up-
on false representations. Plaintiffs have
failed, both in the pleadings and in the
proof, to make a case upon that theory.
While there is testimony to show a want of
consideration for the sale, yet that is not
the cause of the action relied upon by plain-
tiffs. They must recover, if at all, upon the
cause of action made by the pleadings, and
therefore the judgment must be reversed.

[4] One other question should be consid-
ered, as the case will be remanded for further
proceedings: Defendants contend that the
court committed error in admitting in evi-
dence the transcript of the judgment roll in
the case of *Dunn & Lott v. Roth et al.*, for
the reason that the defendant J. Peters was
not a party to the suit, and therefore not

bound by the decree. Of course, he was not bound by it as to any interest he might have had in the land; but, as he had none, he could not have been a proper party to the suit. The complaint in that suit charged that there was a deed on record purporting to be executed by Dunn & Lott to Roth, but that Dunn & Lott did not sign a deed, and that their names were forged thereto. Roth was a party to the suit, and made default, thereby confessing the complaint. The decree to that effect is conclusive of the facts decreed as to Roth and his grantees, if parties to the suit, and therefore Roth's deed to plaintiffs conveyed no title. The decree was competent evidence of the fact that Roth had no title to the land when he conveyed it to plaintiff, and it is conclusive against the plaintiffs. There was no question of estoppel involved, and therefore no necessity to plead one. The decree was simply evidence of the failure of the title in the plaintiff.

The judgment of the lower court is reversed, and the cause remanded for further proceedings.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

MURPHY v. DEAL et al.

(Supreme Court of Oregon. Dec. 2, 1913.)

1. FRAUD (§ 64*) — QUESTIONS OF LAW OR FACT—SUFFICIENCY OF EVIDENCE.

Where there was some evidence from which fraud could be deduced, the question was properly submitted to the jury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 65½, 67-71; Dec. Dig. § 64.*]

2. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in permitting a plaintiff to testify as to the cost of personalty two years previous to the transaction in question was harmless, where, after the court's admonition to state the reasonable value and not what it cost, plaintiff stated that it was worth at least a given sum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Floyd Murphy against William K. Deal and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. E. Collier, of Portland (Collier & Collier, of Portland, on the brief), for appellants. Claude Strahan, of Portland (Walde-mar Seton, of Portland, on the brief), for respondent.

McNARY, J. Over the month of February, 1912, plaintiff was the owner of a quantity of furniture used in the conduct of a rooming house in Portland. During the same time defendant Deal was the owner of a 15-acre tract of land near the town of

Estacada, Clackamas county. On February 27, 1912, plaintiff asserts, the defendants conspired to defraud him of his personal property by means of certain false representations, whereby he was induced to and did exchange his personal property for the real property of defendant Deal; that upon the discovery of the falsity of the representations, plaintiff tendered a deed of the premises to the defendant Deal, and concurrently demanded a return of the personal property, but that the proffer was refused, whereupon, this action was instituted, to recover judgment in the sum of \$800. Defendants, after admitting plaintiff's ownership of the personal property, deny stoutly the gravamen of plaintiff's complaint, and allege as an affirmative defense that defendant W. A. Rihorn was engaged by plaintiff to dispose of his personal property, and that, agreeably to the contract of employment, Rihorn on February 28, 1912, introduced the defendant Deal to the plaintiff, with the result that an exchange of properties was had; that Rihorn received from plaintiff \$25 in payment for services rendered in connection with the transaction. In a rejoinder plaintiff admits the engagement of and payment to Rihorn of \$25, but alleges that he violated his trust as agent, and confederated with Deal to defraud plaintiff. Judgment for \$500 was awarded plaintiff.

[1] Error is buttressed upon three assignments; the principal one being the court's refusal to grant an order of nonsuit, particularly with respect to the defendant John Keller. A patient reading of the evidence contained in the record on appeal confirms us that the trial court had no other alternative than to pass to the jury the determination of the question whether the defendants were guilty of the fraud charged in the complaint, as there was some evidence from which that deduction could properly have been made.

[2] Next it is contended that error was committed in admitting evidence as to what the personal property cost plaintiff. In response to a question propounded by his counsel as to the value of the property, plaintiff stated, "The furniture cost me \$900, three years ago." After a perspiring effort on the part of counsel for plaintiff and the court, the witness finally, in answer to the following question asked by the court, namely: "What was the reasonable market value of the furniture at the time you made the exchange?"—said: "The furniture was worth at least \$700." This latter statement, in reply to the court's query, rendered harmless any error that might have been urged against plaintiff's testimony regarding the cost price of the property in view of the court's admonition to plaintiff "to state the reasonable value of the property and not what it cost."

last assignment of error bears upon omission in evidence of a certain statement made from a witness by the name of

An exact application of the rules of evidence to the testimony in question preclude its admission to the jury, and the statement of the witness was so immaterial that we feel substantial justice would be overthrown if the judgment be sustained on account thereof, and therefore we do affirm the same.

BRIDE, C. J., and BEAN and EAKIN, concur.

McCANN v. BURNS et al.

Supreme Court of Oregon. Dec. 2, 1913.)

REAL AND ERROR (§ 349*) — TIME FOR TAKING APPEAL—DEATH OF PARTY.

O. L. § 38, provides that no action shall be taken by the death of a party if the cause be one which survives, and in case of death the party within a year allow the action to be taken by or against the personal representatives.

Section 550, subd. 5, as amended by 1913, p. 618, limits the time for appeal to the Supreme Court to 60 days, but extends the time where the right of appeal existed at the time of the act (June 3, 1913) 60 days from that date. A plaintiff obtained judgment January 29, 1913, and died February 12, 1913. On September 22, 1913, the court made an order substituting the executor as plaintiff. The defendant had 60 days from the order of substitution within which to appeal.

Note.—For other cases, see Appeal and Cent. Dig. §§ 1903-1912; Dec. Dig. §

REAL AND ERROR (§ 338*)—"RIGHT."

O. L. § 550, subd. 5, as amended by 1913, p. 618, limiting the time for appeal to the Supreme Court to 60 days, but extends the time where the right of appeal existed at the time of the act to 60 days from such taking effect, the word "right" is a privilege, that is, a prerogative to take appeal, and such right does not exist because of the death of a party and an order for the substitution of personal representatives as parties.

Note.—For other cases, see Appeal and Cent. Dig. §§ 1879-1882, 3057; Dec. Dig. § 338.*

For other definitions, see Words and Phrases, 7, pp. 6220-6223; vol. 8, p. 7790.]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

On by Margaret Burns against H. C. Burns and another. On the death of plaintiff's executor, D. R. McCann, was substituted as plaintiff. From a judgment for plaintiff, defendant appeals. Motion to discontinue denied.

Defendants: E. J. Seefeld & Smith, of Portland, and McVinton & Burdett, of McMinnville, for plaintiff. Moser & McCue, Wm. A. Wilcox and M. B. Meacham, all of Portland, and A. Klika, of McMinnville, for respondent.

MR. JUSTICE ARY, J. [1] This is a motion to discontinue appeal for the reason the same was

not taken within 60 days from June 3, 1913. The facts giving force to the motion are these: On January 29, 1913, Margaret Burns obtained a judgment against appellants in the circuit court for Multnomah county, Or. On February 12, 1913, she died. On September 22, 1913, upon the application of D. R. McCann, executor of the last will of decedent, the circuit court made an order substituting McCann as plaintiff. On September 25, 1913, appellants caused a notice of and undertaking on appeal to be served on the substituted plaintiff.

Section 88, L. O. L., reads: "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successors in interest." In considering that statutory provision, this court has held that a suit or action is held in abeyance during the time intervening between the death of the party and the order allowing his representatives to continue the proceedings, and that this period is not to be deemed any part of the time limited for taking an appeal. *Dick v. Kendall*, 6 Or. 166; *McBride v. N. Pac. Ry. Co.*, 19 Or. 65, 23 Pac. 814; *Stivers v. Byrket*, 56 Or. 565, 108 Pac. 1014, 109 Pac. 386.

Subdivision 5 of section 550, L. O. L., as amended by chapter 319, General Laws of Oregon for 1913, provides: "An appeal to the Supreme Court, if not taken at the time of the rendition of the judgment or decree appealed from, or at the time of making the interlocutory order appealed from, shall be taken by serving and filing the notice of appeal, within sixty (60) days from the entry of the judgment, order or decree appealed from or to the circuit court within thirty (30) days after such entry and not otherwise; provided, that in all cases where the right to an appeal to the Supreme Court shall exist at the time this act shall come into force, the time for taking such appeal is hereby extended for the period of sixty (60) days thereafter." This legislative enactment became effective June 3, 1913, and 60 days thereafter ended at midnight August 2, 1913.

Counsel for respondent's position is that appellants, not having perfected their appeal until September 25, 1913, are without the statute, for the reason the amendatory act states expressly that in all cases where the right to appeal existed at the time the act became operative, it shall expire 60 days thereafter or at midnight August 2, 1913. Doubtlessly, that construction of the statute would be correct, if it were not for section 38, supra, which suspended the action for that quantity of time between the death of

Margaret Burns and the order allowing the substitution of McCann as executor, and during which period there was no one in esse upon whom service could have been made, and consequently no right of appeal existed.

[2] The word "right" in this connection means a privilege, that is, a prerogative to take an appeal; therefore appellants' right of appeal did not inure until the day the circuit court made the order of substitution, and continued by force of the statute until 60 days thereafter.

Counsel for respondent intimate that there is another appeal pending in this court from the same judgment. The record shows that an ineffectual attempt was made to appeal prior to the order of substitution; but, on account thereof, the attempt was void, and this court did not acquire jurisdiction.

Motion to dismiss is overruled.

ANDERSON v. MEIER & FRANK CO.

(Supreme Court of Oregon. Dec. 2, 1913.)

1. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in the exclusion of a photograph of a pile of boxes was harmless where the jury was afterwards taken to the place and shown the boxes piled as shown as in the photograph.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

2. MASTER AND SERVANT (§ 270*)—ADMISSIBILITY.

Under L. O. L. § 727, subd. 12, providing that evidence may be given of usage to explain the true character of an act where it is not otherwise plain, but never except as a means of interpretation, in an action for injuries from the falling of a pile of boxes the testimony of witnesses of considerable experience in the storing of merchandise in boxes and bags as to the usual method of piling such merchandise was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

3. APPEAL AND ERROR (§ 237*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—MOTION TO STRIKE TESTIMONY.

That witnesses testifying as to the usual method of piling boxes allowed their opinions to creep into their testimony cannot be considered on appeal where no motion was made to strike out the opinions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. § 237.*]

4. PLEADING (§ 376*)—ISSUES—ADMISSIONS.

An employer which pleads that it had piled boxes which fell and injured a servant is charged with notice of a defect in the piling, and evidence of such notice is unnecessary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.*]

5. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—PLACE TO WORK.

In matters affecting the safety of the place for a servant to work, the master cannot escape liability by delegating the duty to another.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

Department 1. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Sigvald Anderson against the Meier & Frank Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff, a janitor in the employ of the defendant in its department store in Portland, Or., brings this action to recover damages for injuries which he alleges he received from a pile of boxes containing merchandise having fallen upon him in the basement of the defendant's establishment where he was at work. The substance of his allegations on that subject is that the defendant had piled boxes and bags of groceries about eight feet high in a passageway through which he was compelled to go in the prosecution of his labor; and that owing to the extreme height to which it had been erected, and not being braced or secured in any way, the pile suddenly and without warning fell upon the plaintiff, causing the injuries mentioned. The corporate character of the defendant and the employment and nature of the duties of the plaintiff are admitted by the answer. That pleading contains this affirmative allegation: "That in said store, in the basement thereof, the said defendant had piled up certain boxes of merchandise along certain passages where it was necessary for the said plaintiff and other persons in the basement of the said store to pass, and on said November 22, 1911, while the said plaintiff was passing along said passageway, certain merchandise owned by the defendant, and piled along beside said passageway, for some reason fell, striking the plaintiff, which is the accident mentioned in the complaint herein." It is said also by the defendant in substance that the merchandise stacked up in the passageway had been recently piled there by the plaintiff and his fellow servants; that the manner of its storage was left to them as a detail of their work, but according to the unchallenged statement of the trial judge in his charge to the jury, there was no evidence on this point, and the jury were cautioned to disregard that defense. An allegation that the plaintiff was an experienced workman and understood and appreciated all the risks of the situation closes the answer, all the new matter of which is traversed by the reply. From a verdict and judgment in favor of the plaintiff, the defendant appeals.

A. L. Clark, of Portland (Joseph & Haney and Wilbur & Spencer, all of Portland, on the brief), for appellant. E. J. Brazell, of Portland (Giltner & Sewall, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] Some months after the accident occurred, the defendant caused a photograph to be made of what witnesses said were not the same but similar boxes piled up prac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

were those causing the injury and the picture in evidence at the trial. In exception of the defendant, the bill of exceptions discloses, the defendant was not an accurate reproduction of the picture at the time of the injury. After- however, during the progress of the trial, the bill of exceptions discloses, the defendant was escorted to the store of the defendant, viewed the premises, where they were piled up as shown in the photograph. The words, with their own eyes they saw the picture of the picture offered in evidence, in our opinion, rendered harmless error there may have been in the picture, for the actual view of the picture, for the actual view of the picture was certainly better testified to than the picture itself.

The plaintiff called two witnesses who testified that they had had considerable experience in storing groceries contained in bags and inquired of them what was the usual method and custom of piling merchandise, going into detail as to the manner of goods as described in the complaint. These witnesses testified about the ordinary way to stack up goods. The testimony was elicited by these questions asked by the defendant on the ground that it is not a matter of expert testimony but is in the common knowledge of every person. It is the duty of a master to take ordinary care to provide a safe place in which his employees make their labors. It is presumed that a master takes ordinary care of his own conduct and would be competent, therefore, to testify as to what was the ordinary custom in such cases. The bill of exceptions discloses that the defendant was not an accurate reproduction of the picture at the time of the injury. After- however, during the progress of the trial, the bill of exceptions discloses, the defendant was escorted to the store of the defendant, viewed the premises, where they were piled up as shown in the photograph. The words, with their own eyes they saw the picture of the picture offered in evidence, in our opinion, rendered harmless error there may have been in the picture, for the actual view of the picture, for the actual view of the picture was certainly better testified to than the picture itself.

[3] It is true that the witnesses in answer to these questions allowed their opinions to creep somewhat into their testimony, but no motion was made to strike out these opinions, and hence we cannot regard the assignment of error on this point. *Rush v. Oregon Power Co.*, 51 Or. 519, 95 Pac. 193; *Pointer v. Klamath Falls Land Co.*, 59 Or. 438, 117 Pac. 605, Ann. Cas. 1913C, 1076; *Richardson v. Klamath S. S. Co.*, 62 Or. 490, 126 Pac. 24.

[4] Four instructions were tendered to the court to be given to the jury on behalf of the defendant, all turning upon the contention of the defendant that it is not enough to show that the piling of the boxes was defective but that the plaintiff must go further and show that the defendant had notice of the defect, or by the exercise of ordinary care should have known of the same. From the excerpt already quoted from the answer, it appears that the defendant had piled up the boxes which fell upon the plaintiff. It thus avows a situation necessarily involving knowledge thereof. As affecting the safety of a place in which the plaintiff was required to work, if the defendant, as it says, had piled up the boxes, it must be held to have known of the defect in the structure, although it may have delegated the erection of the same to some other servant.

[5] However, it is a well-settled rule that, in matters affecting the safety of the place in which to work, the master cannot escape liability by delegating that duty to another. The analysis of this pleading leads us to the conclusion that knowledge of the original defective condition of the pile of boxes is necessarily imputed to the defendant by its own statement, so that it was not requisite to make proof of it by the testimony of any witness. The bill of exceptions discloses that there was no testimony tending to show that the plaintiff had piled up the boxes or disclosing who actually performed that service; but the allegation of the answer itself fixes the responsibility and knowledge thereof irrevocably upon the defendant.

The judgment of the circuit court is affirmed.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

RASMUSSEN v. WALKER WAREHOUSE CO. et al.†

(Supreme Court of Oregon. Dec. 2, 1913.)

1. NAVIGABLE WATERS (§ 37*)—RIPARIAN RIGHTS—SEPARATION OF OWNERSHIP.

The ownership of the upland and adjoining land under water, whether tidewater or fresh streams or rivers, may be separated.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.*]

2. NAVIGABLE WATERS (§ 37*)—RIPARIAN RIGHTS—SEPARATION OF OWNERSHIP.

The separation of ownership of land under water from that of the adjoining upland confers ownership of the water, so far as that can rest in an individual, on the owner of the bed of the stream.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.*]

3. NAVIGABLE WATERS (§ 37*)—RIPARIAN RIGHTS—SEPARATION OF OWNERSHIP.

To separate the ownership of the upland and the adjoining land under water, the intention to do so must distinctly appear, and if the grant is in ordinary form, bounded by water, the land below as well as that above the water will pass.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.*]

4. NAVIGABLE WATERS (§ 37*)—RIPARIAN RIGHTS—SEPARATION OF OWNERSHIP.

Land under water may be reserved in a grant by the reservation of a strip along the shore.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.*]

5. NAVIGABLE WATERS (§ 39*)—"RIPARIAN RIGHT."

"Riparian right" is defined to be "a form of enjoyment of the land and of the river in connection with the land."

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.*]

6. NAVIGABLE WATERS (§ 46*)—RIPARIAN RIGHTS—LAND BOUNDED BY WATER.

Under L. O. L. § 5201, authorizing riparian owners in incorporated towns to build wharves, where a party conveys land bounded by water, though it is shallow and is intended to be reclaimed by filling, it will never be presumed that he reserves rights in front of the land conveyed, and the mere fact that the boundary is indicated by a line on the plat will not limit the grant.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 283-291, 293; Dec. Dig. § 46.*]

7. NAVIGABLE WATERS (§ 46*)—RIPARIAN RIGHTS—LAND BOUNDED BY WATER.

By the platting and dedication of a tract of land bordering on navigable water, and by conveyances of lots with reference to the map, the riparian or wharf rights are severed from the inside lots and attached to the outmost ones.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 283-291, 293; Dec. Dig. § 46.*]

8. NAVIGABLE WATERS (§ 46*)—RIPARIAN RIGHTS—LAND BOUNDED BY WATER.

A trust agreement, describing a tract of land as extending to low-water mark, and reciting that the parties were desirous of having the legal title in certain persons so that such persons could cause the tract to be surveyed into lots and blocks and properly dedicated, indicated an intention to plat and sell all the land to low-water mark.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 283-291, 293; Dec. Dig. § 46.*]

9. NAVIGABLE WATERS (§ 36*)—TIDELANDS—TITLE OF STATE.

The title of tidelands which became vested in the state upon its admission to the Union is subject to the paramount right of naviga-

tion existing in the public, and of Congress to regulate commerce between the states.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

10. QUIETING TITLE (§ 4*)—NATURE OF REMEDY—ADEQUATE REMEDY AT LAW.

The remedy at law by ejectment is not adequate to determine the rights of a riparian owner to land under water adjoining his upland, and equity has jurisdiction.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 5-13; Dec. Dig. § 4.*]

Department 2. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Suit by Chris Rasmussen against the Walker Warehouse Company and another. From a decree for plaintiff, defendants appeal. Affirmed.

This is a suit to quiet title to certain real estate. From a decree in favor of plaintiff, defendants appeal.

The pleadings, in so far as is necessary to refer to them, show as follows: Plaintiff alleges that he is the owner and in possession of the following described premises: "Commencing at the southwest corner of lot 2, block 3, in Woodland addition to the town of Bandon, in Coos county, Or., as laid out, platted, and recorded by Robert Walker, his wife, Mary E. Walker, R. H. Rosa, and others, running thence northerly along said west line of said lot 115 feet and to the northwest corner of said lot as platted; thence northerly on said west line of said lot extended to navigable water of the Coquille river, to wit, to ship's channel of said stream; thence easterly along said ship's channel to the east line of said lot 2 extended northerly in a straight line; thence southerly on said line to the northeast corner of said lot 2; thence southerly and along the east boundary line of said lot 2, 127.5 feet, and to the southeast corner of said lot; thence west to the southwest corner of said lot and to the place of beginning. That plaintiff is likewise the owner and in possession of all the water and wharfage rights, easements, privileges, hereditaments, and appurtenances thereunto belonging and in front of and between said lot 2 and ship's channel of the Coquille river. That said Coquille river is a navigable stream."

The defendants answered separately, Mary E. Walker claiming a right of dower in the disputed tract not yet assigned or set off to her. They deny the title of plaintiff to that portion of the real estate lying between lot 2, as platted, and the navigable water of the Coquille river. They allege: That Robert Walker, now deceased, was during his lifetime the owner in fee simple of the lots mentioned in the complaint and of other adjacent lots, all of which property he, by the dedication, plat and survey filed and recorded in the office of the county clerk of Coos county, Or., as Woodland addition to Bandon, divided into streets, blocks, lots, and al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

leys, in which plat and addition Robert Walker was joined by R. H. Rosa and other plat-ers, owners of other property lying back of and away from the river. That said Walker was the owner and the holder of the legal title of that part of the addition affected in any way by this suit and bordering on the Coquille river, including lot 2, block 3; and all of said lands, rights, title, interest, and riparian and other rights in front of such lot. That the said plat, as duly filed and recorded, indicates lot 2 as a piece of clear and well-defined limits. That it clearly and definitely shows a tract of land lying in front of said numbered lot of substantially the following description, which is the tract in dispute, to wit: "Commencing at the northwest corner of said numbered lot, running thence north 50 feet to the navigable channel of the Coquille river; thence east 50 feet; thence south to the northeast corner said numbered lot; thence westerly along the northern boundary said numbered lot to the place of beginning." That it was the intention of Robert Walker and all parties to the plat and dedication to sever the riparian and wharf rights from all land lying back of the latter tract, and to attach the riparian rights to the last-mentioned tract of land. That by such act of dedication the land so dedicated on the plat as lying between lot 2 aforesaid and the navigable channel of the river was the property of the deceased. That plaintiff acquired title from Robert Walker to lot 2, block 3, according to the plat thereof, relying upon such for the description of the land, and not otherwise. That plaintiff should be estopped from alleging that he is the owner of the land fronting on lot 2 or of any rights outside the boundaries thereof as shown by the plat. Plaintiff filed a reply putting in issue the new matter contained in the answer, and alleging in effect that lot 2 was contained in a parcel of land (which was particularly described) containing 39.89 acres, which was platted and dedicated as a part of Woodland addition into lots, blocks, and streets embracing all that portion of the parcel of land lying above low-water line of the Coquille river. That the northerly row of blocks numbered respectively 1, 2, 3, and 4, and the streets dedicated between such blocks extended and still extend to low-water line of the Coquille river as shown by the plat. That defendant should be estopped from alleging that Robert Walker, now deceased, platted and dedicated said lots so that the same cannot be reached or touched by any street, alley, or highway.

Plaintiff testified that he was the owner of lot 2, in block 3, and of the rights and privileges between such lot and the navigable channel of the Coquille river; that that space between the north line of the lot and the river is covered by water about two feet deep at ordinary low tide, and that various persons had used such space for several years, with his permission; that the driving of pil-

ing or the erection of a building of any kind or a structure between the north end of lot 2 and the navigable channel interfered with his ingress to and egress from said channel and would cut off all access, unless he crossed the private property of others; that there was no road or street touching said land, and the only ingress and egress was by the way of the Coquille river, a navigable stream in which the tide ebbs and flows; that he had been in possession of this lot, wharfage rights, and privileges, rights of ingress and egress, for about $3\frac{1}{2}$ years.

Mr. S. B. Cathcart, county surveyor, testified in substance that he surveyed Woodland addition for R. H. Rosa and Robert Walker; that in such survey he marked a small street along the water front between the low-water line and the line of the lots; that Walker objected to the same, stating that he did not want any street there. The surveyor does not remember all the details, but the plat filed for record shows no such street.

R. H. Rosa testified in effect that he owned an interest in Woodland addition with A. M. Crawford and Robert Walker, who, for convenience, held title to the tract as trustee for himself and the two others, they having bought the land together; that afterwards this addition was laid off to low tide line; that there is water on the north end of the Rasmussen lot at ordinary low tide; that he was in possession of the lot before Rasmussen owned it, and permitted various boats to use this space; that the ground in front of the lots is exposed for about 60 feet at the very lowest of the tides, which occur about once or twice a month; that Walker rubbed off the street that they had placed upon the plat, as he thought one Dwyer would have a monopoly of the water front in case a street was laid there. Rosa further testified that he and Walker wanted the lots in the north end of the addition to be water front lots; that Walker never represented during his lifetime that there was any strip of land in front of the lots, except that in front of the woolen mill; that the lots would not have been of any value to anybody unless there had been some means of ingress or egress. He stated: "We dedicated those lots so as to get in to them from the river; sure, there was no other street to them, no other way to get out of there."

Harry Walker testified on behalf of defendants to the effect that he could not see any change in the formation now and when he first saw it; that he was 26 years old; that when the tide is at zero on the government gauge there is probably 50 feet of land bare in front of the Rasmussen land and 60 or 75 feet on the lower tides; that the Walker Warehouse Company is in possession of the land in front of the Rasmussen lot and have been using it for coal; that a stream about 200 yards above goes through this mud flat, flowing into the river; that the Trow-

bridge tide table is commonly used; that when the tide is at zero there are 40 feet exposed; that the land is a very gradual slope; that a foot above zero mark would cover the low-tide flat in front of the Rasmussen lot; that in order to expose this land in front of the latter lot it is almost necessary for the tide to go to zero on the government gauge; that the Walker Warehouse Company's wharf was built for the purpose of holding possession.

On the 20th day of October, 1890, Robert Walker, R. H. Rosa, and A. M. Crawford entered into a trust agreement, in which they recite that "the parties to this indenture were desirous of having the legal title in and to all of the said premises hereinafter described in the name of the parties of the first part (the Walkers) for convenience so that the parties of the first part could cause said premises to be surveyed into town lots and blocks, and properly dedicate the same and make conveyances of the same for the use and benefit of all parties interested in said premises according to their respective rights therein," and describe the 39.89-acre tract as extending to low-water line. Walker and wife accepted the trust and platted the tract, conveying the lots in accordance therewith.

G. T. Treadgold, of Bandon, for appellants. F. J. Feeney, of Bandon, and A. J. Sherwood, of Coquille (L. A. Liljeqvist, of Coquille, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It appears from the record that the plat of Woodland addition was filed December 15, 1890. There are 17 lots in the four blocks bordering on the Coquille river. These lots do not extend to any highway on the north except the river, and 9 of them have no means of ingress or egress except by way of the river. Little street, Salmon street, Lower Main street, and Lumber street, running north and south adjacent to these blocks, are not indicated as terminating with the north line of said blocks by any line across the north end thereof; but the appearance of the plat leaves such streets open at the north end as though extending to the river. Coquille river is navigable at this point, and the land in dispute is tideland title to which was obtained from the state. The east line of Woodland addition extends about 500 feet farther north than the west line, making the distance from the navigable channel at these points about the same, as the river flows southwesterly. The north lots extend north and south as though facing on the river, while the other lots in these blocks extend east and west facing on the streets. The north part of lot 2 is covered by about 2 feet of water at low tide, by 6 or 7 feet of water at high tide, and the land is uncovered for 50 or 60 feet north of the lot at extreme low tide. There is a difference of 2 feet between the water gauge, established by the

United States engineer at work on the river, and the local gauge, causing some confusion in the evidence as to the mean low tide line. It is approximately 150 feet from lot 2 to the wharf line as established by the city of Bandon. There is a reef of low rocks next to the navigable channel. At zero or low tide about 15 feet square of this rock is about a foot above water. It appears that during the lifetime of Robert Walker the strip of land in front of the blocks in Woodland addition was never assessed nor taxed to him. Robert Walker died March 31, 1909. His heirs executed a quitclaim deed of the strip of unplatted land north of these blocks, 40 feet wide at the easterly end and 105 feet in width at the westerly end, to the defendant Walker Warehouse Company. This strip is called a "mud flat." This defendant company obtained a permit from the Secretary of War of the United States on November 16, 1911, to construct a wharf in front of blocks 1, 2, and 3. Plaintiff resists an attempt by said defendant so to do.

It also appears that during the lifetime of Robert Walker there was a building used as a creamery erected in front of lot 3, block 3, and a woolen mill in front of lot 1, block 4, and a large warehouse in front of lot 2, block 4 A; that wharves have been extended to the channel; that none of the original owners made any objections to the erection of these structures, or to the use of such property, although Walker lived near the same for 19 years after the plat was filed.

The question is to be determined by ascertaining what was the intention of the dedicators of Woodland addition. Did they intend to leave a space between the north end of the addition and the Coquille river, or did they intend that the lots in the north row of blocks of the addition should be water front lots and entitled to the usual water front privileges? We have stated the allegations of the pleadings somewhat at length, not so much to show the issues in the case as to indicate the claims of the respective parties or their conclusions and deductions from the facts in the case, which are disputed only as to the minor details, having a slight bearing upon the main points. For these reasons we have not referred to all the testimony, but to a sufficient amount to indicate the trend thereof.

The main contention of the defendants is that the riparian rights were severed from the lot by the plat and dedication; that the ownership of plaintiff, shown to be dependent upon the common grantor, Robert Walker, is by the terms of the plaintiff's deed clearly limited to the platted lot described in his chain of title; that he bought in reliance upon the plat, which gives him a certain tract of land and clearly expresses an intention to divest the riparian rights from the platted lot; that, under the authorities, such riparian rights are attached to the tract indicated on the plat as lying between the platted

the lot and the river. Plaintiff's right of ingress and egress from the river, and the right to wharf the navigable water of the Coquille appurtenant to his lot.

As a general proposition it may be said that the upland and the land under water forming, as they do, different parts of one entire estate, there is nothing to prevent the separation of the estate at the water so as to permit the bed of the water to be owned by one person and the upland by another.

When a separation results in conferring ownership of the water, so far as it can be owned by an individual, upon the one who owns the bed of the stream, and such ownership carries certain of the rights which are riparian rights. It gives the right to use of the bed of a stream and of the water furnished by the flow of the water. It applies to land bordering on tidewater that bordering on fresh streams.

In order to accomplish a separation, the effect it must be made distinct. If the grant is in the ordinary way, bounded only by the water, the land below as well as that above the water, will

the land under the water may be reserved by the reservation of a strip along the water, so as to prevent the grant from extending to the water's edge and making the owner a riparian owner. 3 Farnham on Water Rights, § 724. Where a grant is made on a navigable lake or river to lots, blocks, and streets, and the title to lots situated so as to be fronted by the lake or river by a street, it is held that the owner of such lots did not acquire any riparian rights at the street was a barrier separating the lots from the river. P. S. Co. v. U. S., 109 U. S. 672, 3 Sup. Ct. 445, 4 Ed. 1070; Oliver v. Klappan Nav. Co., 54 Or. 95, 102 Pac. 786. In the case at bar differ from those mentioned cases, in that the controversy, namely, the intervening question, wanting in the case under consideration.

Riparian right is defined to be "a right of enjoyment of the land and of the water in connection with the land." Lord Lyon v. Fishmonger's Co., 1 App. Cas. 672, quoted in P. S. Co. v. U. S. P. S. Co., 109 U. S. 683, 3 Sup. Ct. 445, 4 Sup. Ct. Ed. 1070. In many states lands to be partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Fowler v. Wood, 73 Kan. 511, 549, 85 Pac. L. R. A. (N. S.) 162, 117 Am. St. Rep. 102. Taylor Sands Fishing Co. v. State of Oregon, 56 Or. 157, 161, 108 Pac. 128. Grant v. Oregon Nav. Co., 49 Or. 324,

at page 328, 90 Pac. 178, at page 179, Mr. Justice Eakin said: "By the legislative acts of 1872 (Laws 1872, pp. 129, 130) and 1874 (Laws 1874, pp. 76, 77), the upland owner was given the preference right to purchase the tideland, and upon such purchase, if not already vested in another under section 4042, B. & C. Comp., he thereby acquired also the exclusive wharfage right to deep water, and also all accretions to his tideland and the right to fill up the shallows or flats, so long as he does not impede navigation nor interfere with commerce over the same—citing *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219." Section 5201, L. O. L., provides that "the owner of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water." Where a party conveys a parcel of land bounded by water, although it lies in shallow water and is intended to be reclaimed by filling, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance, and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the lines on the plat or operate to reserve to the grantor proprietary rights in front of the lots. *Gilbert v. Emerson*, 55 Minn. 254, 56 N. W. 818, 43 Am. St. Rep. 502.

[7] In the latter case, R., being the owner of the land fronting on the waters of the bay of Duluth known as "Rice's Point," platted it into blocks and streets, extending the plat a distance of several blocks beyond the actual shore line out into the shallow water, but not out to the line of navigability. He then conveyed, according to the plat, the original shore block to A., and all the water blocks in front of it to B. It was held: (1) That A.'s rights were limited to the lines of the original shore block as indicated on the plat, and that he acquired no appurtenant riparian rights in the unplatted space between the outermost platted blocks and the line of navigability; (2) that the plat, on its face, showed an intention that the outermost platted blocks should be deemed the shore blocks, with all the riparian rights in the water, and land under the water, in front of them, usually incident to a riparian estate, and that, after conveying these blocks, R. had no proprietary interest in the unplatted space in front of them. The same rule as to the outermost platted blocks was applied in the case of *Northern Pac. R. R. Co. v. Scott, etc., Lbr. Co.*, 73 Minn. 25, 75 N. W. 737. This

rule, if adopted in the case at bar, as we think it should be, is decisive in favor of plaintiff's claim.

By the platting and dedication of Woodland addition to Bandon by the former owners, thereby laying out the property in blocks and lots constituting definite metes and bounds as shown on the map, and by conveyances of lots with reference to the map, the riparian or wharf rights were severed and disassociated from all the inside lots and attached to the outermost ones, of which plaintiff's lot 2, block 3, is a part. *Grant v. Oregon Nav. Co.*, 49 Or. 324, 90 Pac. 178, 1099; *Pac. Milling Co. v. City of Portland*, 133 Pac. 72. The plat of Woodland addition contained in the record, taken in connection with the circumstances surrounding and following the dedication thereof, fairly implies that it was the intention of the dedicators that the outermost platted lots should be deemed the shore lots, with all the riparian rights in the water and the land under the water in front of them, usually incident to a riparian estate, and that the owner of such a lot should permanently enjoy direct access to the water. All parties buying or selling lots by reference to the plat should be presumed to have acted with that understanding. After conveying these lots, neither Walker nor his representatives or their grantee had any proprietary interest in the unplatted space between the front lots and navigable water. *Gilbert v. Emerson*, supra; *Watson v. Peters*, 26 Mich. 508; *Richardson v. Prentiss*, 48 Mich. 88, 11 N. W. 819.

[8] From the trust agreement referred to, as well as from the plat and the conduct of the parties in regard thereto, it would seem that it was the intention of the dedicators of this addition to plat and sell all the available land to low-water mark. It is very significant that the map shows that the northerly lines of the lots are not parallel with the south lines, but run at an angle corresponding approximately with the direction of the river. If it had been the intention of the dedicators to reserve a strip of land north of the addition adjacent to the river, it would seem that they would have platted the blocks in a regular or rectangular form so that there would have been but one irregular shaped tract next to the river. They platted submerged land. By thus indicating the line of the addition along the river they practically established the same as the low-water line. There is at times considerable water upon this tract, and it was very appropriate, in dividing the same into city lots and blocks, for a line to be definitely fixed as the mean or ordinary low tide line and marked on the map. This we think the plat shows was done. Woodland addition was surveyed and the plat prepared by a civil engineer. It certainly should have been the intention of the parties platting the addition to make the lines definite. It also appears from the map

that the lot in question and the other lots similarly situated are water front lots. Persons purchasing these lots on a navigable river with reference to the plat would be presumed to purchase the same as such water front lots with the rights and privileges usually appurtenant to such lots.

[9] The title to tidelands which became vested in the state of Oregon by virtue of its sovereignty, upon its admission to the Union, is subject to the paramount right of navigation existing in the public, and the right of Congress to regulate commerce between the states. *Pac. Milling Co. v. City of Portland*, supra, and cases there cited.

[10] There is involved in this case more than the mere possession of the land. The right of access to and to wharf out to the harbor line is here in question. Plaintiff's remedy at law by an action of ejectment, if such there be, would not be adequate. The cases in this state heretofore cited are authority for the exercise of equitable jurisdiction in the case at bar. The contention earnestly made by counsel for defendants that a court of equity has no jurisdiction of this cause must therefore be denied. We are of opinion that the findings of the lower court are correct. The form of the decree there entered differs somewhat from the findings.

The decree, except in this respect, is affirmed; plaintiff to recover costs.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

KRONENBERG v. WALKER WAREHOUSE CO.†

(Supreme Court of Oregon. Dec. 2, 1913.)

Department No. 2. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Suit by J. L. Kronenberg against the Walker Warehouse Company. From a decree for plaintiff, defendant appeals. Affirmed.

G. T. Treadgold, of Bandon, for appellant. F. J. Feeney, of Bandon, and A. J. Sherwood, of Coquille (L. A. Liljeqvist, of Coquille, on the brief), for respondent.

BEAN, J. This is a suit to enjoin the defendant from constructing a building in front of lot 1, block 3, in Woodland addition to the city of Bandon, Coos county, Or., between that lot and the established wharf line of the city. The trial court rendered a decree in favor of plaintiff, and defendant appeals.

The facts in this suit, and the rights of the parties, are substantially the same as in the case of *Rasmussen v. Walker Warehouse Co. et al.*, 136 Pac. 661, in which an opinion has this day been rendered. The form of the suit corresponds with that of *Oliver v. Klamath Lake Nav. Co.*, 54 Or. 95, 102 Pac. 786. It is unnecessary, therefore, to say anything in addition to that which was said in the *Rasmussen Case*. The same decree will be entered in this suit as in that one, affirming the decree of the lower court.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

† Rehearing denied December 30, 1913.

HUBNER v. HUBNER.

me Court of Oregon. Nov. 25, 1913.)
 ORCE (§ 62*) — JURISDICTION — RESI-
 DENCE — "MAY."

O. L. § 396, providing that suits for
 tion of marriage may be commenced and
 in any county of the state in which either
 resides, is mandatory, the word "may"
 equivalent to "shall"; and hence, where
 parties resided in M. county, a suit for
 commenced in C. county, where neither
 ever resided, gave the court no jurisdic-

Note.—For other cases, see Divorce,
 Dig. §§ 200-202, 208-216, 220, 282; Dec.
 62.*

Other definitions, see Words and Phras-
 es, 5, pp. 4418-4447; vol. 8, p. 7719.]

CESS (§ 158*)—MOTION TO QUASH.

The objection that the suit for divorce was
 brought in the wrong county may be raised by
 motion to quash based on affidavits.

Note.—For other cases, see Process,
 Dig. §§ 218-220; Dec. Dig. § 158.*]

ORCE (§ 139½*)—DISMISSAL—WANT OF
 JURISDICTION.

Where it was shown by affidavit in the trial
 that neither of the parties to a divorce
 resided in the county where the action was
 brought, so as to give the court jurisdiction, serv-
 ice in another county should be quashed and
 the suit dismissed; as the defect of ju-
 risdiction could not be cured by any amendment
 defendant objected thereto.

Note.—For other cases, see Divorce,
 Dig. §§ 469, 489; Dec. Dig. § 139½.*]

ORCE (§ 109*)—PRESUMPTION — RESI-
 DENCE.

Without a showing by affidavit that nei-
 ther of the parties to a divorce suit resided in
 the county in which the suit was brought, so
 as to give the court jurisdiction, service of
 summons in another county would be valid,
 it would be presumed that one of the
 parties resided in the county of suit.

Note.—For other cases, see Divorce,
 Dig. §§ 354-364; Dec. Dig. § 109.*]

Department 1. Appeal from Circuit Court,
 Clackamas county; J. W. Campbell, Judge.

For divorce by Gerhardt R. Hubner
 against Charity M. Hubner. Decree for
 divorce, and defendant appeals. Reversed,
 suit dismissed for want of jurisdiction.

For C. Nelson, of Portland (Beach, Si-
 mon Nelson, of Portland, on the brief), for
 appellant. James E. Craib and Claude Stra-
 toth of Portland, for respondent.

MSEY, J. The plaintiff commenced
 suit for divorce in the circuit court of
 Clackamas county. The cause for which the
 plaintiff asks a divorce is alleged cruel and
 abusive treatment. The plaintiff and the
 defendant intermarried in Illinois on October
 1903. The complaint alleges that the
 plaintiff and the defendant are residents and
 citizens of the state of Oregon, and that
 they had been such residents and inhabitants
 more than a year immediately prior to
 commencement of this suit. The com-
 plaint alleges facts sufficient to constitute a
 cause of suit. The complaint shows that the
 plaintiff and the defendant removed from

California to Portland, Or., and that they re-
 sided at the latter point. There is nothing
 in the complaint to indicate that either of
 the parties ceased to reside in Portland.
 The plaintiff in his evidence testified that
 both he and the defendant resided in Port-
 land when the evidence was taken. The de-
 fendant was served with the summons in
 Portland, Multnomah county, Or., August 20,
 1912. On September 9, 1912, the defendant by
 her counsel appeared specially in the court be-
 low to object to the jurisdiction of said court
 to hear or determine said suit, and filed there-
 in a motion, based on an affidavit of the de-
 fendant, for the dismissal of said suit, for the
 reason that the summons and the complaint
 were served on the defendant in Multnomah
 county, Or., and not in Clackamas county,
 and because neither the plaintiff nor the de-
 fendant resided in said Clackamas county.
 The affidavit of the defendant upon which
 said motion was based showed that both the
 plaintiff and the defendant, at the time that
 said suit was commenced, resided in said
 Multnomah county, and that neither of them
 had ever resided in Clackamas county, Or.
 On October 25, 1912, the defendant by her at-
 torneys again appeared specially in said
 cause and filed a motion based on the affida-
 vit of the defendant for an order of the
 court below quashing the return of the serv-
 ice of summons and complaint on the defend-
 ant in said suit, for the reason that neither
 the plaintiff nor the defendant was at the
 time of the filing of the complaint or of the
 service of summons on the defendant, in
 said cause, or at any time before or since
 said service, a resident of Clackamas county,
 and because it appears from the return of
 service of said summons that it was served
 outside of said Clackamas county. The affi-
 davit upon which said last-named motion
 was founded showed that neither the plain-
 tiff nor the defendant at the time said suit
 was commenced, or at any other time, was a
 resident of Clackamas county. The facts
 stated in said affidavit were not denied.

[1] Hence we find that, when this suit was
 commenced, both parties were residents of
 Multnomah county, and not of Clackamas
 county, and that the summons was served
 on the defendant in Multnomah county, and
 not in Clackamas county. These facts are
 not disputed.

Section 396 of our Equity Code (L. O. L.) is
 as follows: "Suits in equity in the following
 cases shall be commenced and tried in the
 county where the subject of the suit, or some
 part thereof, is situate: (1) For the partition
 of real property; (2) for the foreclosure of
 a lien upon real property; (3) for the deter-
 mination of an adverse claim, estate, or in-
 terest in real property, or the specific per-
 formance of an agreement in relation thereto.
 In all other cases, the suit shall be com-
 menced and tried in the county in which the

defendants, or either of them, reside, or may be found at the commencement of the suit; provided, that if none of the defendants reside in this state, the suit may be tried in any county in the state which the plaintiff may designate in his or her complaint; and provided, further, that in any suit for the dissolution of the marriage contract the same may be commenced and tried in any county of this state in which either party to the suit resides." This section provides, first, that what are called local suits shall be commenced and tried in the county in which the subject of the suit or some portion thereof is situated. It then provides that what are usually called transitory suits shall be commenced and tried in the county in which the defendants, or either of them, reside or may be found at the commencement of the suit, with a proviso that, if none of the defendants reside in the state, the suit may be tried in any county in the state which the plaintiff may designate in his or her complaint, and with a further proviso that in any suit for the dissolution of the marriage contract the same may be commenced and tried in any county of this state in which either party to the suit resides. The said section requires transitory suits, as a general rule, to be commenced and tried in the county in which the defendant resides or may be found at the time of the commencement of the suit. If there are two or more defendants, the suit may be begun and tried in the county in which either of them resides or may be found. If neither of the defendants resides in this state, the plaintiff has the right to bring the suit in any county in the state. But, in suits for divorce, the plaintiff has the right to commence the suit in the county in which either party resides. But a person has no right to commence a suit for divorce in a county in which neither party resides. This is the plain meaning of this statute. "May," in this statute concerning divorce suits, means "shall."

The statute of Tennessee concerning suits for divorce provides as follows: "The bill may be filed in the proper person and name of the complainant in the circuit or chancery court of the county or district where the parties resided at the time of their separation, or in which the defendant resides, or is found, if a resident; but, if a nonresident or convict, then in the county where the applicant resides." Commenting on this statute, the Supreme Court of Tennessee, in *Walton v. Walton*, 96 Tenn. 27, 33 S. W. 561, says: "This provision is mandatory, and not merely directory; the word 'may,' used in the first line, having the same force and meaning as 'shall.' All the jurisdictional facts or conditions therein named are wanting in this case. The defendant being a resident of the state, and not a convict, and not being found in any other county, the bill should have been filed in Giles or Marshall county." The defendant resided in Marshall county, when

the suit was commenced, and the parties resided in Giles county, at the time of the separation. The court dismissed the bill for want of jurisdiction. In *Majors v. Majors*, 1 Tenn. Ch. 265, Chancellor Cooper, speaking of jurisdiction in a suit for divorce, said, *inter alia*: "I think, too, that the nonresidence of the defendant has not been made satisfactorily to appear. * * * If the defendant is still a resident of the state, this court would have no jurisdiction. The bill ought to have been filed in the county of the defendant's residence under the Code, * * * or in Wilson county, where the separation took place."

In 1 *Nelson on Divorce & Separation*, § 20, the author says: "The divorce suit is a proceeding to establish or change a status, and not a proceeding to punish a crime. Therefore the suit need not be commenced in the county where the delictum occurred. The venue is generally prescribed by statute, and must be complied with to render the divorce valid. A common provision of the statute is that the action may be tried by the court of the county where the parties or one of them resides. This language recognizes the probability that the parties have separate domiciles, and permits the wife to bring suit where she resides."

In *Bannister v. Bannister*, 150 Mass. 291, 22 N. E. 901, the court says: "Pub. Ste. c. 146, § 6, provides that, 'when the libellant has left the county in which the parties have lived together, the adverse party still living therein, the libel shall be heard and determined in the court held for that county.' This obviously means, when the libellant has left the county in which the parties have last lived together. These parties last lived together in Norfolk county, the place where * * * the libelee had his domicile, and at the time when this libel was brought, as well as when it was heard, he still lived there. By the plain meaning of the statute, the libel must be heard and determined in that county." The lower court dismissed the bill on the ground that it was filed in the wrong county, and its action was sustained by the Supreme Court.

In *Way v. Way*, 64 Ill. 406, the court says: "All suits for divorce must be commenced in the county where the complainant resides."

In *Lewis v. Lewis*, 9 Ind. 108, the court says: "The statute says that 'Divorces may be decreed by the circuit courts of this state, on petition filed by any person at the time a bona fide resident of the county in which the same is filed; of which bona fide residence, the affidavit of the petitioner shall be prima facie evidence.' * * * In the petition before us, there is no averment of residence. On that account it was objectionable, but such objection could not be properly raised after the trial commenced."

14 Cyc. p. 592, says: "The residence which will determine the venue must be actual residence in the county where the suit is brought."

The residence need not, however, have continued for any particular length of time, in the absence of a statute to the contrary."

In 9 Am. & Eng. Ency. Law (2d Ed.) pp. 740, 741, the author says: "As already stated, the domicile of the parties is the test of jurisdiction of the subject-matter, and the place where the marriage was celebrated or the cause of divorce occurred is immaterial. A divorce suit is a proceeding to alter the status of married persons, and not a proceeding to punish a crime, and it is therefore immaterial that the cause for divorce occurred in another county. The divorce suit must be commenced in the county designated by the statute, and this (is) generally where the parties reside, or where one of them resides."

It is shown by the affidavit of the defendant, and not denied, that both parties to this suit were residents of Multnomah county when this suit was commenced, and that neither of them had resided in Clackamas county. Hence this suit was, without doubt, brought in the wrong county.

[2] 2. The respondent contends that the objection that this suit was brought in the wrong county could be properly raised only by a plea in abatement. However, we hold that it could be raised by motion based on affidavit. Most of the cases referred to by learned counsel for the plaintiff are law cases.

Courts differ on this point as they differ on many other questions of practice. The question as to the place of residence of the parties to a divorce suit is not a complicated one, and it can be easily determined by affidavits. The parties to the suit know the facts and can produce the affidavits of themselves and of other persons showing where they resided.

In *Grady v. Gosline & Barbour*, 48 Ohio St. 687, 29 N. E. 768, the court says, concerning the quashing the service of summons by motion on an affidavit: "It is contended in behalf of the plaintiff that the court erred in admitting in evidence the affidavit of the defendants. When there has been an irregularity in the service of the original summons, through which the court failed to get jurisdiction over the party defendant, it is competent, on motion, before answering to the merits of the action, to have the service of summons set aside, and in support of the motion affidavits may be used. It is said by Mr. Nash (1 Pl. & Pr. 75) that 'the service of the original summons will be set aside on motion, if served on a wrong person, or the copy is not left at the right place.' The existence of any fact showing that the service is not correct may be set up to vacate it. The motion should state the grounds on which the party relies as showing the service had."

In *Grand Island & W. C. R. Co. v. Sweeney*, 95 Fed. 404, 37 C. C. A. 135, the United States Circuit Court of Appeals, passing on a motion to quash a sheriff's return, says: "In the state courts of this country, while

some question has been made as to the conclusiveness of the sheriff's return, it has generally been held that it is only prima facie true, and that the truth or falsity of the return may be determined upon motion supported by affidavit. * * * Upon examination of a great many American cases, we believe the general rule in this country, with some dissenting cases like those in Illinois, to be this: The sheriff's return stands in the first instance as the affidavit of the sheriff, but is subject to be disputed by affidavits on the part of the defendant showing to the satisfaction of the court, upon motion to quash, that the return is not true in point of fact, or, as in the case at bar, is insufficient."

See, also, the following cases holding that a sheriff's return can be quashed on motion supported by affidavits: *Carr v. Bank*, 16 Wis. 50; *Bond v. Wilson*, 8 Kan. 228, 12 Am. Rep. 466; *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71; *Walker v. Lutz*, 14 Neb. 274, 15 N. W. 352; *Wallis v. Lot*, 15 How. Prac. (N. Y.) 507.

In this case, the affidavit on which the motion to quash is based does not contradict the statements made in the return of the sheriff, but it shows want of jurisdiction in the court below to try this cause, by showing that neither the plaintiff nor the defendant resided in Clackamas county, and hence that the service on the defendant in Multnomah county was invalid. That service being invalid, because the suit was commenced in the wrong county, the court below acquired no jurisdiction of the suit, and this defect of jurisdiction is one that cannot be remedied in this cause.

[3] When it was shown by affidavit in the court below that neither the plaintiff nor the defendant resided in Clackamas county, it was thereby made known to the court that the suit had been wrongfully commenced in that county, and that court should have quashed the service, and then have dismissed the suit, as the want of jurisdiction to try the case was clear, and the defect of jurisdiction was of such a nature that it could not be cured by any amendment that could be made while the defendant objected to the jurisdiction.

[4] Without a showing by affidavit that neither of the parties resided in the county in which the suit was commenced, it might be contended, in support of the jurisdiction of a superior court, that it should be presumed prima facie that one of the parties resided in that county. The showing by affidavit was necessary to overcome that presumption and thus prove that the service of the summons was invalid. If either of the parties had resided in Clackamas county, the service could have been made in this case in Multnomah county.

The objection that a party is sued in the wrong county in a divorce suit is probably waived where the defendant does not object

thereto, but it is not necessary to decide that point in this case.

The court below erred in not quashing the service and in not dismissing the suit.

The motion to quash the service is sustained, and the decree of the court below is reversed, and this suit is dismissed for want of jurisdiction.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

GOODEVE v. THOMPSON.

(Supreme Court of Oregon. Dec. 2, 1913.)

1. BREACH OF MARRIAGE PROMISE (§ 34*) — ADMISSIONS—DETERMINATION AS TO ADMISSIBILITY.

A witness, in an action for breach of promise to marry, testified that defendant said he had been after a girl for approximately 10 years, and he had finally landed her. Witness could not say that the remark related to plaintiff, but that the girl had come from Tacoma or Vancouver; he did not remember which. The statement was communicated to plaintiff as having reference to her, and she talked it over with defendant in the presence of a third person. Plaintiff had returned from Vancouver about that time, and defendant was associating with her. *Held*, that the circumstances were sufficient to permit the testimony to go to the jury as to whether defendant had reference to plaintiff.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 50; Dec. Dig. § 34.*]

2. TRIAL (§ 29*)—CONDUCT IN GENERAL—REPROVING WITNESSES.

The reproof of a witness by the judge for including argument in his testimony, and for nodding his head and making demonstrations constantly in the courtroom, is not error in itself.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-83, 508; Dec. Dig. § 29.*]

3. NEW TRIAL (§ 102*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A motion by defendant for new trial on the ground of newly discovered evidence is properly denied, where the proposed new witnesses were residents of the city where the trial was held, and one or both were present at the trial to the knowledge of defendant, and their testimony, if material, could have been procured by reasonable diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.*]

4. APPEAL AND ERROR (§ 1069*)—REVIEW—HARMLESS ERROR—MISCONDUCT OF JUROR.

The misconduct of plaintiff and a juror in meeting and conversing will not be held harmless, where the jury rendered a verdict for \$50,000 for breach of promise of marriage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4136, 4138, 4139; Dec. Dig. § 1069.*]

5. NEW TRIAL (§ 47*)—GROUNDS—MISCONDUCT OF OR AFFECTING JUROR.

A surmise of the judge, unsupported by direct evidence, that misconduct of a juror and plaintiff in meeting and conversing was procured by defendant will not prevent a new trial for such misconduct.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 88-95; Dec. Dig. § 47.*]

Department No. 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Helen M. Goodeve against Robert H. Thompson, Jr. From a judgment for plaintiff, defendant appeals. Reversed and remanded for further proceedings.

This is an action for a breach of promise of marriage; the complaint alleging a promise of marriage by the defendant and acceptance by plaintiff, and that on September 30, 1911, the defendant repudiated the said promise and refused to marry the plaintiff, and praying for a judgment for \$50,000. The answer denies that defendant promised to marry the plaintiff, and alleges that she was incapable of contracting marriage at that time, having a husband living. The case was tried before a jury, and a verdict rendered for the plaintiff, assessing her damages at \$50,000, and from a judgment thereon the defendant appeals.

Samuel White, of Portland (Sheldon & Huntington and John Manning, all of Portland, on the brief), for appellant. Hall S. Lusk, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). [1] There are five assignments of error. The first two relate to the admission in evidence of testimony of the witness MacLean to the effect that in September or October, 1911, the defendant said to him that he had been after a girl for approximately 10 years, and that he had finally succeeded in landing her. The witness could not say that the remark related to the plaintiff, but that the girl referred to had come from Tacoma or Vancouver; he did not remember which. This statement was communicated to plaintiff as having reference to her, and she talked it over with the defendant in the presence of Gaut. Plaintiff had returned from Vancouver about that time and was in Portland, and defendant was associating with her. The circumstances were sufficient to permit the testimony to go to the jury as to whether or not the defendant had reference to the plaintiff.

[2] The third and fourth assignments of error relate to the action of the court in reproofing the witness Terry in the presence of the jury, to which the defendant now excepts. In the absence of proof of what did take place, or of what was the misconduct of the witness, we must accept the statement of the judge as to the circumstances calling for the reproof. The witness was reproofed by the judge at least twice, once for including argument in his testimony, and, again, for nodding his head and making demonstrations constantly in the courtroom. Evidently the judge thought he was attempting to exert an influence on the jury or the witnesses,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and, if so, it was the court's duty to reprove him and prevent such conduct. There is nothing in the record that discloses error in that regard.

[3] The only other assignment of error relates to the denial of the defendant's motion to set aside the judgment and to grant a new trial. Three grounds are assigned: (1) Newly discovered evidence material to the defense, and which he could not with reasonable diligence have discovered and produced at the trial; (2) improper conduct of a juror; and (3) excessive damages given under the influence of passion and prejudice. The motion was supported by several affidavits, that of Mrs. W. R. Works and Lucille Ayers as to their knowledge of facts alleged to be material, and others relating to the misconduct of the juror. These affidavits were met by affidavits on the part of the plaintiff, and those followed by counter affidavits especially relating to the misconduct of the juror. Whereupon the court proceeded to hear the oral evidence of many witnesses for and against the motion, all of which is reduced to writing and reported to this court, consisting of 150 pages, and upon consideration of the proofs by the court the motion was denied. It appears in the affidavits of Mrs. Works and Mrs. Ayers that they had certain conversations with the plaintiff with reference to her relations with the defendant. There is testimony tending to show that Mrs. Works and Mrs. Ayers were, at the time of the trial, residents of Portland, with whom defendant was acquainted, and that one or both of them were in the courtroom during the trial within the knowledge of the defendant, and that by the exercise of diligence the testimony, if material, could have been ascertained by the defendant for the trial.

[4] The court tried out the question of the misconduct of the juror at great length. A perusal of the evidence taken on the hearing on the motion to set aside the judgment is convincing that the conduct of the juror Walls in meeting and conversing with the plaintiff under the circumstances disclosed was misconduct on the part of both the plaintiff and the juror; and, in view of the extravagant amount of damages awarded to the plaintiff, we cannot ignore this circumstance, nor say that the misconduct was not prejudicial to the defendant's rights.

[5] The trial court found that there was misconduct by both the juror and the plaintiff, but says he was constrained to think it was by procurement of the defendant. There is no doubt but that the misconduct complained of was sufficient ground to set aside the judgment, unless the misconduct was procured by the defendant; but such a conclusion can only be a surmise. There is no direct evidence of fact to that effect, and it is not sufficient to justify the court in

ignoring the facts. It is said in *Davidson v. Manlove*, 2 Cold. (Tenn.) 346: "Such conduct on the part of a suitor is highly improper and reprehensible, and should call forth the severe censure of the court. Men must not be permitted to tamper with jurors before whom their suits are being tried; and, being seen in close conversation with them during the trial, or while they are considering of their verdict, the circumstance, unexplained, is sufficient to authorize the circuit judge to grant a new trial, and to subject the party to punishment by the court for contempt. The fountains of justice must be kept pure and free from suspicion, or the citizen will lose all respect for the laws, and the rights of person and property will become insecure. Suitors and jurors must not place themselves in a position where their conduct creates suspicion."

The judgment is reversed, and the cause remanded for further proceedings.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

WEST SHORE LUMBER CO. v. HOLLENBECK et al.†

(Supreme Court of Oregon. Dec. 2, 1913.)

1. LOGS AND LOGGING (§ 84*)—LIENS—Loss OR WAIVER.

A contract that payment shall be made for logs, poles, and piling when they shall be scaled and measured by purchasers and sold by defendant, and before any raft shall leave the water front of plaintiff, except the first raft, which shall be paid for before the second raft shall leave the water front and as soon as defendant shall have received his money from the purchaser, provided that the payment shall never be more than 30 days after the logs have been delivered at the water front, contemplates payments as fast as the logs are rafted, and requires payment within 30 days whether defendant sells the logs or not, and does not contemplate sales to third parties on credit, and does not defeat a lien on the property.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 104-111; Dec. Dig. § 34.*]

2. LOGS AND LOGGING (§ 84*)—LIENS—Loss OR WAIVER.

Under L. O. L. § 7463, giving a lien to the owner of timber land for the price of timber cut, when the landowner permits several rafts to be taken away without payment he loses his lien thereon.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 104-111; Dec. Dig. § 34.*]

Department 1. Appeal from Circuit Court, Columbia County; J. U. Campbell, Judge.

Suit by the West Shore Lumber Company against G. W. Hollenbeck and another. From a decree for defendants, plaintiff appeals. Affirmed.

This is a suit brought to foreclose a landowner's lien on some sawlogs cut upon such premises. The defendant Hollenbeck cut the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes bearing dated December 30, 1913.

logs under a contract for their sale between him and the plaintiff, and the defendant Stennick claims as a purchaser from Hollenbeck.

W. H. Powell, of Portland, for appellant.
J. M. Long, of Portland, for respondents.

BURNETT, J. [1] The admitted contract under which the parties operated contains this provision: "It is expressly understood and agreed that payments shall be made for such logs, poles, and piling whenever and at such times when the same shall be scaled and measured by purchasers thereof and sold by said party of the second part, and before any raft so unpaid for shall leave the water front where the same are rafted on the premises of the said party of the first part, excepting, however, the first raft which shall not exceed 250,000 feet, but the said stumpage on said first raft shall be paid for before the second raft shall leave such water front aforesaid in any event, and as soon as said party of the second part shall have received his money from the purchaser thereof: Provided that the payment for the stumpage aforesaid shall never in any event exceed thirty days after such logs, poles, and piling has been delivered into the water at said water front."

It is plain from the excerpt quoted that the parties contemplated that payments should be made on the logs as fast as the same were put into the water and rafted. The condition that the payments should never go by 30 days evidently meant that the defendant Hollenbeck could not postpone payment beyond that date whether he contracted the logs for sale to other parties or not. The plain import of the provision is that payments should be made before the logs were taken away from the stream adjacent to the plaintiff's premises. It did not contemplate that sales to third parties should be made on credit nor operate to defeat the right to perfect a lien on the property.

[2] The record discloses that the plaintiff had allowed a number of rafts to be taken away without collecting payment in full, and that, before the last two rafts constructed during the life of the contract had left its water front, the plaintiff filed notices of liens covering not only what it claimed to be due upon those particular rafts but also the balances due on the former rafts which it had allowed to be sold and delivered to strangers to the contract. The statute under which the plaintiff here claims is section 7463, L. O. L., which is as follows: "Any person who shall permit another to go upon his timber land and cut thereon sawlogs, spars, piles, or other timber has a lien upon such logs, spars, piles, and timber for the price agreed to be paid for such privilege, or for the price such privilege or the stumpage thereon would be rea-

sonably worth, in case there was no express agreement fixing the price." The lien contemplated by this section is a claim upon the identical logs in question, and it is not admissible to permit a number of rafts to go without collecting the full amount due and expect to carry the balance on to rafts constructed in the future. When the plaintiff allowed the earlier rafts to go without collection, of the amounts due or filing its notice of lien, as in ordinary cases, the balances due on those rafts at once became nonlienable.

The contract also contains another condition, as follows: "It is also expressly understood and agreed that the twelve hundred dollars paid at the execution of this agreement aforesaid is received and held by the said party of the first part and is to be applied as follows: First. If the said party of the second part shall cut and remove all the timber hereinbefore mentioned to be so cut and removed within the time hereinafter provided, and shall well and truly do and perform all the other conditions, agreements, and covenants herein specified and agreed to be done and performed on his part, then the same shall be applied upon and be the last payment and for the last timber so cut, removed, measured, scaled, and sold as logs, poles, and piling, and as the stumpage therefor, in accordance with the stumpage price for the same hereinbefore stipulated and specified." It was also stipulated concerning the \$1,200 in substance that, if the defendant here should fail to comply with its agreement, the amount should be retained as stipulated and liquidated damages.

It is charged in the reply that the defendant Hollenbeck committed a breach of the contract in that he did not cut all the timber on the premises; the writing having stipulated that he should remove all, which may be styled for convenience "scattering timber." The plaintiff relies upon this as a breach authorizing it to retain the \$1,200 as liquidated damages and refusing to credit it as a payment on the last timber. On this point we think the clear weight of the testimony is against the plaintiff, so that it has not shown any valid reason for declining to credit the \$1,200. Excluding, therefore, the amounts claimed as balances on the former rafts, and applying the \$1,200 in payment of the balance due, plaintiff has not shown a case authorizing the filing of a lien such as he relies upon in this suit. Without reference, therefore, to the actual state of the account between the parties, and deciding only on the case before us that no right to a lien properly existed, it follows that the circuit court was right in dismissing the suit.

The decree is therefore affirmed.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

LOEWI v. LONG et ux.

(Supreme Court of Washington. Dec. 1, 1913.)

1. SALES (§ 32*)—REQUISITES—ORAL CONTRACT.

Defendant, by letter, offered hops, which plaintiff accepted, at 30 cents per pound, with an agreement to advance 5 cents a pound for the whole amount, and on immediate answer to call the trade closed, and defendant wired his acceptance on condition that plaintiff advanced a certain amount, and stated that plaintiff might have all the crop except a lot sold to another buyer, whereupon plaintiff made the advances required, and forwarded a formal written contract which defendant refused to sign on the ground that the hops had been previously sold. *Held*, that such informal writings established a contract between the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 59; Dec. Dig. § 32.*]

2. SALES (§ 82*)—PAYMENT—TIME.

Where the time of payment is not mentioned, the delivery of the goods and the payment of the purchase price are to be concurrent acts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229-233; Dec. Dig. § 82.*]

3. CONTRACTS (§ 32*)—OFFER AND ACCEPTANCE—FORMAL CONTRACT.

A contractual relation may exist prior to the execution of the subsequent formal contract contemplated by the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 113-115; Dec. Dig. § 32.*]

4. SALES (§ 418*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

On breach of a contract to sell and deliver 25,000 pounds of hops at 30 cents, where it was found that the fair market value of hops at the place and time of delivery was 40 cents, the buyer was entitled to damages in the sum of \$2,500.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Hugo V. Loewi against Charles W. Long and wife. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with direction to enter judgment in favor of plaintiff.

E. P. Whiting, of Seattle, for appellant. Bevington & Redden and C. B. Egan, all of Seattle, for respondents.

MAIN, J. The purpose of this action was to recover damages for the breach of a contract for the sale of hops.

On or about August 5, 1911, one Robert M. Livesley, residing at North Yakima, Wash., and engaged in the business of buying and selling hops as the plaintiff's agent, received an unsigned letter sent from Brooks, Alberta, Can., dated July 31, 1911. This letter Livesley understood to be from Charles W. Long, one of the defendants. The letter was in fact written by one of Mr. Long's sons, but had the father's indorsement. No question is raised as to the authenticity of the letter. This letter, among other things, stated: "We are holding our hops for 28 cents, and, if you can do anything at that price, I would

like for you to handle them; let me know how the market is."

This letter Livesley, on August 5, 1911, replied to by wire as follows: "North Yakima, Aug. 5, 1911. Charles Long, Brooks, Alberta, Canada: Letter received; like your crop at twenty-eight but won't take advantage; thirty is talked and some bought; will give thirty and advance you five cents Sept. first for what you wish to sell and if you answer at once will call the trade closed. Robert Livesley."

Thereafter, and on August 9th, Long wired as follows: "Brooks, Alberta, Aug. 9, via North Yakima, Wn., Aug. 10, 1911. Mr. Robert Livesley, Caré Frye Hotel, Seattle, Wn.: Will accept your offer providing you wire me one thousand dollars down and two thousand five hundred the first of September. You can have all the crop except twelve thousand five hundred pounds which McNeff gets there. Will be twenty or twenty-five tons. Answer. C. W. Long."

This telegram was received by Livesley in Seattle, and on August 11th he sent the following: "Seattle, Aug. 11—11. Chas. Long, Brooks, Alberta, Canada: Accept your hop crop for nineteen eleven at thirty cents as per your offer by wire. Will I send contract and one thousand dollars to you at Brooks? Answer. Robert Livesley."

On August 14th Livesley caused the Bank of California located at Seattle to wire the Union Bank at Brooks \$1,000 for the credit of C. W. Long. After this had been done, and later during the same day, Livesley received from Long the following telegram: "Brooks, Alberta, via North Yakima, Wn., Aug. 14, 1911. Robert Livesley, Hotel Frye, Seattle, Wn.: Send contract. Wire one thousand to Merchants bank, Brooks, Alta. C. W. Long."

In reply to this, Livesley wired as follows: "Seattle, Aug. 14, 1911. C. W. Long, Brooks, Alberta, Canada: Have wired you one thousand bank at Brooks. Will send you contract to-morrow for your signature. Robert Livesley."

On August 15th Long received from his son Otis the following telegram: "Chehalis, Wn., Aug. 15. C. W. Long, Brooks, Alta.: Sold to Klaber for forty cents. Otis Long."

Livesley prepared a contract, using the usual form of "Hop Contract," signed the same, and on August 16th forwarded it to Long at Brooks for signature. The contract was never signed by Long or returned.

On August 17th Long sent to Livesley a telegram as follows: "Brooks, Alb., 17, via North Yakima, Wn., Aug. 17, 1911. Robert Livesley, Caré Frye Hotel, Seattle, Wn.: Received wire late. Otis sold hops; will wire money back. C. W. Long."

On August 23d Livesley wired Long as follows: "North Yakima, Aug. 23, 1911. Chas. W. Long, Brooks, Alberta, Canada: Have you sent contract. If not, do so at once other-

wise will have to take action per Loewi's instructions. Wire me at once. Robert Livesley."

On August 31st \$2,500 was sent to the Union Bank of Brooks to be placed to the credit of O. W. Long; the same being the amount of the second advancement called for by the telegram of Long under date of August 9th. The Union Bank of Brooks promptly notified Long of the receipt of each advancement, which was placed to his credit. Long, however, refused to accept the money.

The hops in question were grown in Lewis county, this state, during the season of 1911, upon a farm formerly owned by Charles Long, but during the season leased by the then owner to Otis Long. The defendants having failed and refused to deliver the hops to the plaintiff or his agent, on December 18, 1911, the present action was instituted, claiming damages in the sum of \$4,817.50 for breach of contract. The cause was tried to the court without a jury. The court found that the hop crop raised on the farm leased to Otis Long during the year 1911 amounted to about 25,000 pounds in excess of the 12,500 pounds sold to one McNeff, and that the value of these hops delivered at the railway station f. o. b. on the 31st day of October, 1911, was 40 cents per pound. In his telegram of August 9th to Livesley, a copy of which appears above, Charles W. Long stated: "You can have all the crop except twelve thousand five hundred pounds which McNeff gets."

Judgment was entered for the defendants. The plaintiff appeals.

[1] The question is whether or not the correspondence above set out establishes a contractual relation between the parties. To determine whether or not a contractual relation has been established by informal writings, such as letters and telegram, where the parties have in mind the subsequent signing of a formal written contract, it is necessary to inquire (a) whether the subject-matter has been agreed upon (b) whether the terms are all stated in the informal writings, and (c) whether the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. If the subject-matter is not in dispute, the terms are agreed upon, and the intention of the parties plain, then a contract exists between them by virtue of the informal writings, even though they may contemplate that a more formal contract shall be subsequently executed and delivered. *Sanders v. P. B. F. Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757; *Blaney v. Hoke*, 14 Ohio St. 292; 1 Beach, *Modern Law of Contracts*, § 3; *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Green v. Cole*, 103 Mo. 70, 15 S. W. 317.

In the case last cited, the law is stated in this language: "It is a well-settled principle of law that to constitute a contract the minds of the parties must assent to the same thing

in the same sense. There must be a mutual assent to all of the propositions, for so long as any matter forming an element of the contract is left open the contract is not complete. Though the terms of the contract may all be agreed upon, still, if the parties make it a condition to the existence of a contract that the terms agreed upon be reduced to writing, and signed by them, there is no contract until this is done. 1 Addison on Contracts (Morgan's Ed.) p. 37. On the other hand, it is well-settled law that, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing does not negative the existence of a present contract. In other words, if the parties make an agreement which they intend shall be binding from the time it is made, effect will be given to it from that time, though they intend it shall be superseded by a more formal written agreement."

[2] Applying this rule of law to the facts in the present case, and considering first the matter of the intention of the parties as evidenced by the letter and telegrams, it would appear obvious that they intended by the correspondence to establish a contractual relation, for, had not Mr. Long intended this to be the effect, why did he wire requesting that \$1,000 be sent him prior to the time that the written contract could be signed? This would seem to make it plain that he then thought the contract existed, and intended to be bound thereby. As a rule, in business transactions men do not expect or demand that a part of the purchase price of an article shall be paid when no contract for its sale and purchase exists. That it was the intention of Livesley that the informal writings should constitute a contract is made evident by the fact that the \$1,000 was forwarded prior to the preparation of the formal written contract. There appears to be no dispute as to the subject-matter. But it is claimed that the formal written contract contained terms not found in the informal writings. Conceding for the present that this is the case, it would seem to be immaterial in view of the fact that Long refused to comply prior to the time he had seen or knew the contents of the formal written contract. The reason which he gave in his telegram of August 15th for refusing to proceed further was that his son Otis had sold the hops. The fact that the time and place of delivery was specified in the formal contract, but not mentioned in the telegrams, would not constitute additional terms, since the trial court made a finding, which was not excepted to, "that by the custom of the trade, when no specific agreement therefor is made, hops are to be delivered at the railway station nearest to the place where raised on or before the 31st day of October." Neither does the fact that the informal writings do not fix the time when the balance of the purchase price shall be paid, while the formal contract does, constitute the adding of an additional term. It

s the rule that, where the time of payment is not mentioned, then the law provides that the delivery of the article and the payment of the purchase price shall be concurrent acts. 2 Mechem on Sales, § 1407.

[3] The respondent contends further that the law is that, where a formal written contract is to be subsequently signed, then no contractual relation can exist prior to its execution. In support of this position, two decisions from this court are cited, viz., *McDonnell v. Cœur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135, and *Stanton v. Dennis*, 64 Wash. 85, 116 Pac. 650. In the *McDonnell* case oral negotiations had taken place between the parties relative to a logging contract. The court there held that the details of the contract had not been arranged, and that the contract itself was to be reduced to writing, and the details stated therein, which was never done. That case may be distinguished from the present in this, that here all the essential terms of the contract were agreed upon, and the parties intended that a contractual relation should exist prior to the time of the signing of the formal written contract, while there, as already stated, the details of the contract had not been arranged. In the *Stanton* case the plaintiff's assignor by letter had submitted to the defendant a proposition relative to the furnishing of labor for the setting of millwork and doing the carpentry on an addition to a certain building. The letter provided: "Formal contract to follow." After the word "accepted" which appeared below, the defendant had signed his name. In that case it was held that it was the duty of the plaintiff's assignor to prepare and forward a formal written contract, which was never done. He being in default in this regard, the action could not be maintained. In the case cited it does not appear that it was the intention of the parties that a contractual relation should exist prior to the subsequent execution of the contract. In the present case that intention is unequivocal. We think the court did not intend to hold in either of those cases that under no circumstances could a contractual relation exist by virtue of informal writings when it was provided that a subsequent formal contract was to be executed. To so hold would be not only to go counter to the views expressed by text-writers and courts generally, but would place an unreasonable barrier in the way of the facility of business transactions.

Evidence was introduced for the purpose of showing that the hops in question were not the property of the defendant Charles W. Long, but were owned by his son Otis. The ownership of the hops does not seem to us material. Even though they were owned by the son, if the father contracted for their sale, and failed to deliver them, he would subject himself to liability in damages.

[4] On the question of the amount of damages, it appears that the amount of hops sold and not delivered was 25,000 pounds. The contract price with Livesley was 30 cents. The hops were sold to other parties for 40 cents. The court found that the fair market value of hops in Lewis county on the 31st day of October was 40 cents. Upon this showing, we think the plaintiff is entitled to a judgment in the sum of \$2,500.

The cause will be reversed and remanded, with directions to the superior court to enter a judgment in favor of the plaintiff in the sum of \$2,500.

CROW, C. J., and ELLIS and MORRIS, JJ., concur.

COVERT et ux. v. BURGER et al.

(Supreme Court of Washington. Nov. 29, 1913.)

HOMESTEAD (§ 45*)—DECLARATION—STATUTES—CONSTRUCTION—LIBERAL CONSTRUCTION.

Under Rem. & Bal. Code, § 558, providing that a selection of a homestead be acknowledged in the same manner as a grant of real property and filed for record, a declaration not acknowledged is invalid.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 62; Dec. Dig. § 45.*]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge. Action by Jason Covert and wife against Robert Burger and wife and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

H. J. Hibschanman, of Spokane, for appellants. S. Edelstein, of Spokane, for respondents.

MORRIS, J. This appeal presents a question of law, simple of statement; whether or not a declaration of homestead, without the statutory acknowledgment, is valid as against an execution. The lower court held it was not.

Our statute relating to the mode of selecting homesteads (section 558, Rem. & Bal. Code) provides as follows: "In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." The two following sections contain provisions for the contents of the declaration and its recording. Section 558, however, seems to us controlling. The contents and record of the instrument avail nothing, unless it has been executed with the formality required by the statute. Appellant contends that acts of this character should be liberally construed in order to carry out the humane public policy involved in their enact-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment. This is doubtless true. But while courts may, and should, construe these statutes liberally in order to preserve the rights they guarantee, it does not follow that such statutes should be construed so as to abrogate or repeal them. To liberally construe a statute is to expand its meaning to meet cases which are clearly within the spirit or reason of the law, or within the evil it is sought to remedy, provided such interpretation does not do away with, or is not inconsistent with, the language used. Black on Interpretation of Laws, 282. To so read this statute in such a way as to omit the provision for an acknowledgment is to do away entirely with the language used, and say that, when the Legislature says a thing shall be done, the court may, because it has in mind the purpose of the act, say the requirement may be omitted; and, since in this case this requirement is the only purpose of the statute, and the only thing with which it treats, it would mean an absolute repeal. This is something the courts cannot do. They may interpret the law and declare its meaning, but they can neither add to nor take from.

This identical question has never been submitted to us before, although in two cases (Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046, and Donaldson v. Winningham, 48 Wash. 374, 93 Pac. 534, 125 Am. St. Rep. 937) we have said that, since the passage of the act of 1895 (Laws 1895, c. 64), of which this statute is a part, no homestead right can be acquired without the execution, acknowledgment, and record required in the act. This language, while not addressed to the point now submitted, is decisive of the principle involved, that the statutory requirement must be fulfilled in order to obtain the rights the statute protects. All other states having like statutory provisions, so far as our investigation goes, have held that the declaration must be acknowledged in substantial conformity to the statute, or else it will not constitute a homestead. Beck v. Soward, 76 Cal. 527, 18 Pac. 650; Kennedy v. Gloster, 98 Cal. 143, 32 Pac. 941; Richardson v. Woodstock Iron Co., 90 Ala. 266, 8 South. 7, 9 L. R. A. 348; s. c., 94 Ala. 629, 10 South. 144; Burbank v. Kirby, 6 Idaho, 210, 55 Pac. 295, 36 Am. St. Rep. 260. In the last citation, after stating the rule here adhered to and adopting the reasoning of the California cases, supra, the court adds: "It is the act of the owner of the property, whereby such owner secures a right or privilege given him by the statute, and which is in derogation of the common law and common right, and which can only be secured by a substantial compliance with the provisions of the statute, conditions precedent to the investiture of the property with the exceptional character contemplated."

The question submitted is therefore an-

swered in the negative, and the judgment is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

STATE v. FATEH-MOHAMED.

(Supreme Court of Washington. Nov. 29, 1913.)

1. ROBBERY (§ 24*)—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction for robbery.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. § 24.*]

2. CRIMINAL LAW (§ 438*)—EVIDENCE—PHOTOGRAPHS.

There was no abuse of discretion in admitting in evidence in a robbery case the photograph of the prosecuting witness showing the injured condition of his neck, where the evidence showed that the photograph correctly showed its condition when taken and that its condition was the same immediately after the assault, allowing for the ordinary change in condition within five or six days.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. § 438.*]

3. CRIMINAL LAW (§ 938*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A new trial for newly discovered evidence was properly refused, where the evidence was largely cumulative and it was not shown that it could not have been discovered with reasonable diligence before the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.*]

Department 2. Appeal from Superior Court, Chehalis County; Ben Sheeka, Judge.

Fateh-Mohamed was convicted of robbery, and appeals. Affirmed.

Hogan & Graham, of Aberdeen, for appellant. J. E. Stewart and A. Emerson Cross, both of Aberdeen, and O. M. Nelson, of Montesano, for the State.

PARKER, J. The defendant, Fateh-Mohamed, and two others, were jointly charged by information filed in the superior court for Chehalis county with the crime of robbery. All three were tried jointly, resulting in the conviction of Fateh-Mohamed and the acquittal of his codefendants. From such conviction he has appealed to this court.

[1] The principal contention made by counsel for appellant is that the evidence does not justify the verdict and judgment rendered against him, and that he is entitled to an acquittal as a matter of law, or, in any event, to a new trial. We have carefully read the entire evidence and find ourselves unable to agree with this contention. The evidence is in serious conflict, especially on the question of the identity of appellant's two codefendants as participants in the alleged robbery. Counsel's contention is principally that, since the identity of appellant's codefendants as participants in the crime rested entirely upon the positive testimony of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prosecuting witness, and that, since the jury must have disbelieved his testimony upon that subject, he was thereby so discredited as a witness as to warrant the court in interfering with the verdict of "guilty" against the appellant. It is true that the prosecuting witness did testify positively that appellant's two codefendants were present and assisted in robbing him, and that there was no corroborating testimony upon that subject, while there was positive testimony of their being elsewhere at the time, which testimony the jury must have believed, and disbelieved that of the prosecuting witness. If there were no other evidence tending to show that the prosecuting witness was robbed at the time, and that appellant participated therein, there would be some merit in this contention. The prosecuting witness testified, in substance, among other things, that he was attacked by all of these defendants while crossing a bridge over a slough near Aberdeen, when he was cut upon the head, beaten, and thrown over the railing of the bridge into the water, and at the same time was robbed of his watch and purse by his assailants. This occurred, according to his story, about 10 o'clock on the night of July 27, 1912. A short time thereafter, probably within an hour, he was met upon the road leading from the bridge towards Aberdeen by witnesses who then saw that he had been seriously injured and that he was bleeding from injuries on his head. Soon thereafter, he went to the police station, where he told of being robbed by the defendants, and where his injuries were also noticed by the officers who also noticed that his clothes were very wet as though he had fallen into the water, all of which they testified to upon the trial. He was there furnished with dry clothing and taken by the officers in a conveyance back over the bridge and some distance beyond, to the homes of the three defendants, who lived in shacks near the West Lumber Company's mill, where they were working. Upon searching the shack of appellant, the officers found the purse which the prosecuting witness claimed had been taken from him at the time of the robbery, under the mattress of the bed in which appellant was sleeping alone; he being in the bed at the time of the arrival of the officers. Appellant did not claim the purse as belonging to him, and said he did not know how it came there. The prosecuting witness described the contents of the purse before it was opened; that is, the quantity and denominations of the money contained therein, and also a receipt issued to him for money deposited by him with the Grays Harbor Commercial Company. Upon opening the purse, his description of the contents was found to be correct by the officers. The finding of the purse in appellant's bed occurred only three or four hours after the assault made upon the prosecuting witness at the bridge. Some pools of blood were found upon

the floor of the bridge the following morning at the place where the prosecuting witness claimed to have been assaulted. He claimed to have been choked and also cut upon the head, and, when examined at the hospital, there were found incisions upon his head as though cut by a sharp instrument, and also bruises upon his neck as if made by the fingers of a person. There was also introduced in evidence a photograph of the prosecuting witness, showing his neck in its injured condition, taken some five or six days following the alleged robbery. In view of these corroborating circumstances, we cannot see our way clear to disturb the verdict of the jury, notwithstanding the manifest untruth of the prosecuting witness' testimony going to the identification of the two defendants who were acquitted. The jury were not obliged to disbelieve all of the prosecuting witness' testimony, in the light of these corroborating circumstances.

[2] It is contended that the introduction of the photograph of the prosecuting witness, showing the injured condition of his neck, was erroneous. There was oral testimony tending to show that this photograph correctly showed the condition of his neck at the time it was taken, and that such condition was not different from its condition immediately following the alleged assault, except such changes as five or six days' time would ordinarily show. The introduction of photographs under such circumstances is a matter of sound discretion in the trial court. It seems clear to us that such discretion was not abused in this case. 17 Cyc. 416. The following decisions deal with the question of the admissibility of photographs in evidence, and the court's discretion relative thereto, and are in harmony with the conclusion that we here reach: *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748; *State v. Powell*, 5 Pennewill (Del.) 61 Atl. 966; *Harris v. City of Ansonia*, 73 Conn. 859, 47 Atl. 672; *State v. Matheson*, 130 Iowa, 440, 103 N. W. 137, 114 Am. St. Rep. 427, 8 Ann. Cas. 430; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100; *Baustian v. Young*, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462, and note on page 473.

[3] Some contention is made that appellant is entitled to a new trial because of newly discovered evidence. The answer to this contention is that the claimed newly discovered evidence, as shown by the record, is little else than cumulative of that which was given upon the trial, and there is no showing that it could not have been discovered, with reasonable diligence, before the trial. Some contention is also made that the court erroneously restricted cross-examination of witnesses and erroneously instructed the jury. These contentions, however, we regard as so entirely without merit that they do not require discussion.

The judgment is affirmed.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

STATE ex rel. BEELER v. SMITH, Judge.
(Supreme Court of Washington. Nov. 29, 1913.)

1. JUDGES (§ 51*)—CHANGE OF JUDGE.

Under Laws 1911, c. 121, authorizing a change of judge in any action upon affidavit of prejudice, a motion for such change must be granted if timely made.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.*]

2. JUDGES (§ 51*)—CHANGE OF JUDGE—TIME—TIME OF MAKING APPLICATION.

Rem. & Bal. Code, § 38, empowers the judges of the superior court to establish rules, and thereunder a rule of that court required applications for a change of judge to be made prior to the setting of the cause for trial. In the absence of counsel, and without notice, relator's case was on June 28th assigned for trial on September 15th, and relator on September 10th duly filed his application for a change of judge. Held that, as relator could not know which of the nine judges of the court had been assigned to try the case until it was actually set for trial, he was not required to file an affidavit of prejudice until he did know such judge, and the rule in such case was unreasonable, and the application was filed in time.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.*]

Department 1. Original prohibition by the State of Washington on relation of Adam Beeler, as receiver of the Kupreanof Copper Mining & Smelting Company, against Everett Smith, as Judge of the Superior Court for King County. Writ made permanent.

Lyter & Folsom, of Seattle, for plaintiff.
Brightman, Halverstadt & Tennant, of Seattle, for respondent.

GOSE, J. This case is before us on an alternative writ of prohibition. The facts shown by the record are these: On the 26th day of March, 1913, the relator commenced an action in the superior court of King county against Annette Loder for the recovery of a money judgment. She appeared and answered on the 28th day of April. The relator served and filed a reply on the 8th day of May. On the 26th day of June the cause "was assigned for trial in department No. 9" of the superior court of King county before the respondent judge, who then set the case for trial on September 15th. These orders were made in the absence of counsel for the respective parties, and without notice to them. Between the 28th day of June and the 6th day of September, the motion calendar was not called or heard in department 9 on account of the summer vacation of the judges. On the 10th day of September the relator duly served and filed his motion and affidavit for a change of judges, in harmony with Laws 1911, p. 617. The motion was noticed for hearing on the 13th day of September, the regular motion day of the court. The motion was denied on the 16th day of September "on the ground that said motion was not timely made." On the 15th day of September the cause was continued for trial on the application of the defendant in the orig-

inal cause, and reset for trial in department 9 for the 8th day of October. Prior to the commencement of this action the judges of the superior court of King county, being nine in number, adopted a rule, which has since been in force, requiring all applications for a change of judges under the law of 1911 to be made prior to the setting of the cause for trial. The motion was denied because of the failure of the relator to comply with this rule of the court.

[1] We have held that motions of this character must be granted if they are timely made. State ex rel. v. Clifford, 65 Wash. 313, 118 Pac. 40; State ex rel. Jones v. Gay, 65 Wash. 629, 118 Pac. 830; Garvey v. Skamser, 69 Wash. 259, 124 Pac. 668; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594.

[2] We think, upon the facts stated, the motion was timely and should have been granted. We do not hold that the rules of the superior court to which reference has been made would in all cases be unreasonable. Court rules are necessary for orderly procedure in the administration of justice. Rem. & Bal. Code, § 38. The record, however, shows that there are nine superior judges in King county, and there is nothing in the record which tends to show that the relator knew to which judge the case would be assigned until it was actually assigned and set for trial. The allegation in the petition is that the case was assigned for trial in department 9 on the 26th day of June, and that it was set for trial upon the same day, and that these orders were made in the absence of counsel. It is manifest, therefore, that relator was not required to file an affidavit of prejudice until he knew the judge to whom the case had been assigned, or by some rule of court or statute he was charged with such knowledge. It follows that the rule as applied to the facts of the case at bar is unreasonable and in contravention of both the letter and the spirit of the statute. If the record showed that the relator had had notice of the judge who was to try his case for a reasonable time before the case was set for trial, his application under the rule would not be timely. Limiting the case to the facts shown in the record, the application was timely.

The writ will be made permanent.

CROW, C. J., and CHADWICK, ELLIS, and MAIN, JJ., concur.

HANSEN v. ABRAMS et ux.

SAME v. QVIKSTAD et al.

(Supreme Court of Washington. Nov. 29, 1913.)

1. MORTGAGES (§ 38*)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

The rule that one who attempts to have a deed absolute in form decreed a mortgage is required to make strict proof of the fact by evidence that is clear, unequivocal, and convincing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is one of substance and should be applied in such an action where the evidence does not preponderate in favor of the party seeking to have the instrument declared a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

A finding by the trial court based on conflicting evidence will not be disturbed on appeal, unless the evidence so preponderates against the finding that the appellate court can say that the trial court was not justified.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. MORTGAGES (§ 38*)—A DEED ABSOLUTE AS MORTGAGE—EVIDENCE.

In a suit to declare both a deed and bill of sale absolute on their face mortgages, held that the finding against plaintiff was not contrary to the preponderance of the evidence.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. § 38.*]

Department 2. Appeals from Superior Court, King County; R. B. Albertson, Judge.

Actions by John Hansen against N. B. Abrams and wife, and against Harry Qvikstad and others, consolidated by agreement. From a judgment for defendants, plaintiff appeals. Affirmed.

Jas. R. Chambers, of Seattle, for appellant. Frank S. Griffith, Ralph A. Horr, and Wm. Totten, all of Seattle, for respondents.

MORRIS, J. It was sought in these two cases, consolidated below, to have instruments which upon their face were absolute conveyances declared to be mortgages. In the first action in the instrument was a deed conveying two lots in the city of Seattle; in the second, it was a bill of sale to an undivided one-half interest in the furniture and fixtures of a rooming house located at 716 Dearborn street, Seattle, known as the Hotel Norway. The appellant and his then wife executed each of these instruments to the respondent Abrams on August 15, 1910, and commenced these actions in March, 1912. The lower court entered its decree in favor of the respondents, and this appeal followed.

[1-3] It is impossible to make any definite statement of the facts in these cases, as the evidence is so irreconcilably in conflict that any attempted statement of facts could be no more than a recital of the respective contentions; and, as the question submitted to the court is to be answered as the court finds the facts to be, no conclusion under such circumstances can be reached which leaves the mind free from doubt. It would be useless to refer to the rules of law applicable to cases of this character. They are too well settled, and have been too long adhered to, to attempt to add anything new. It is conceded that one who attempts to have a deed absolute in form decreed to be a mortgage only is required to make strict proof of the fact by evidence that is clear, unequivocal, and

convincing. Counsel for appellant refers to this rule as a technical rule, and argues that the trial court gave entirely too much strength to the deed and bill of sale. It is not technical, when in cases of this character the evidence on material points is inconsistent and irreconcilable, for the trial court to credit material and competent evidence which clearly tended to show that there was no loan of money, but a positive and express refusal to make a loan, and that the deed and bill of sale were not accepted as security, but were intended by the parties to be conveyances in pursuance of absolute sales. After hearing such testimony, it is rare that any trial judge, recognizing the rules of law applicable to cases of this character, would hold otherwise than did the court below; and the fact that the testimony in behalf of plaintiff would, if it had been believed by the trial court, demand a different finding will not lead to a reversal of the lower court's decree unless the evidence so preponderates in favor of the plaintiff's contention that the appellate court can say the lower court was not justified in accepting the contention of the defendants as the true facts of the situation. We cannot say there is such a preponderance in these cases.

The trial judge's conclusion, after hearing the evidence in this case, is best expressed in his own language: "I have reached the very deliberate conclusion that the presumption of veracity which the law gives to a deed absolute on its face ought not to be overthrown by the testimony offered by the plaintiff in these suits. His own testimony is so full of glaring inconsistencies and equivocations that it is not entitled to such credit as should overthrow the deed which he executed with full knowledge of its contents. The testimony of the defendants is not entirely satisfactory to the court, but I have no hesitation in granting judgment for the defendants upon the whole testimony in the case."

The decree of the lower court is strengthened by the fact that, subsequent to the commencement of the actions, the appellant sought a small loan from Abrams. This, according to Abrams and a corroborating witness, was refused. Abrams then gave appellant \$15, and appellant then executed the following receipt: "Seattle, Feb. 10, 1912. Received from Norman B. Abrams, fifteen dollars (15.00) in full settlement and in satisfaction of all claims and demands of any nature both legal and equitable heretofore existing or claimed to be existing in my favor against said, Norman B. Abrams, and he is hereby released and exonerated from all such claims and demands. This receipt shall be taken in all courts and places as evidence that all claims as aforesaid have been fully paid, satisfied and discharged and shall forever operate as a receipt in full

*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of all demands. [Signed] John Hansen. Witness: [Signed] Fred I. Christ." Appellant contends that the only writing upon this receipt when he signed it was: "Seattle, Feb. 10, 1912. Received from Norman B. Abrams, fifteen dollars (15.00)"—and the remainder of the receipt is a forgery. But his evidence upon this charge is not sufficient to warrant such a finding.

Like the trial court, upon the whole record we are of the opinion that appellant has not sustained his complaints, and the judgments are affirmed.

CROW, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

JONES v. MAES.

(Supreme Court of Washington. Dec. 4, 1913.)

1. CONTRACTS (§ 50*)—CONSIDERATION—SUFFICIENCY.

Where, since under the law three of the thirteen existing saloons in a town would be compelled to go out of business, the saloonkeepers agreed that three of the present license holders, including plaintiff, should be given \$500 each to retire, there was a valuable consideration for the promise to pay the retiring saloonkeepers \$500, so that plaintiff could recover such sum from defendant, who collected the money from the saloonkeepers pursuant to the agreement; the transaction being a contract and not an incomplete gift.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 222; Dec. Dig. § 50.*]

2. MONEY RECEIVED (§ 6*)—RIGHT OF ACTION.

Where, in view of the fact that there could legally be only ten liquor licenses granted, the thirteen holders of licenses in a town agreed to pay \$500 to each of three saloonkeepers who should not reapply for a license, and defendant collected the money for payment to plaintiff and two others under their agreement to retire from business, plaintiff could recover such money from defendant as money received for plaintiff's benefit.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 15, 21-27; Dec. Dig. § 6.*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by R. E. Jones against Jules Maes. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. A. Greene and C. L. Henry, both of Seattle, for appellant. Wingate & Dolby, of Seattle, for respondent.

CROW, C. J. Action by R. E. Jones against Jules Maes to recover \$500, money had and received by defendant for the use and benefit of plaintiff's assignor. From a judgment in plaintiff's favor, the defendant has appealed.

The evidence shows, and the trial court in substance found, that on February 6, 1912, and for a long time prior thereto, two broth-

ers, Umberto Conella and Christopher Conella, were the owners and proprietors of a certain saloon in the city of Georgetown; that while they were conducting their saloon business, Georgetown was annexed to, and became a part of, the city of Seattle; that, under the charter and ordinances of Seattle, it became necessary to decrease the number of saloons from thirteen to ten in the former territory of Georgetown, and refuse license renewals to at least three saloons then existing; that at a meeting of the Georgetown saloonkeepers, or their representatives, it was orally agreed that three of their saloons, including that of Conella Bros., should be closed without applying for renewals of licenses; that, in consideration thereof, a fund would be raised by the remaining saloonists sufficient to pay \$500 to the proprietors of each of the retiring saloons; that the defendant Maes was appointed to collect the fund; that he did collect \$1,500; that he paid \$500 to the proprietors of each of the two other retiring saloons, but refused to make any payment to Conella Bros.; and that, prior to the commencement of this action, Conella Bros. assigned their claim to respondent. Appellant contends that the money agreed to be paid Conella Bros. was an uncompleted gift *inter vivos*; that no consideration existed for any promise to pay them \$500; that he had been ordered by the donors not to make the payment; and that for these reasons respondent cannot recover.

[1] It is apparent that the fund was not a gift, and we find no merit to the contention that the promise to pay \$500 to Conella Bros. was made without consideration. Notwithstanding appellant's contention, Conella Bros. were not compelled to go out of business, but, had they seen fit to do so, could have applied for a renewal of their license. It clearly appears from the record now before us that three out of thirteen saloons would be compelled to retire from business; that an agreement was made among the entire number of saloonists to the effect that three designated saloons, including that of Conella Bros., should cease business and not interfere or compete with the remaining ten in their application for renewals of licenses; and that the designated saloons did quit. Under such circumstances, there was a valuable consideration for the promise to pay \$500 to the proprietors of each of the retiring saloons.

[2] But without regard to the question of consideration, the record shows that appellant received \$500 for the use and benefit of Conella Bros., and that he had the money and refused to pay it to them. Appellant testified as follows: "Q. You understood between yourselves three saloons were going out of business; that the rest of the saloonmen were going to raise \$500 apiece for them? A. Yes, sir. Q. And you were the man appoint-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed to collect this \$500 apiece? A. Yes. Q. And you went around and collected it from the different people? A. Yes. Q. Five hundred dollars for each one of these saloonmen? A. Yes. Q. Every one paid their share to you? A. Yes. Q. In fact, paid over to two saloons their \$500? A. Yes. Q. But you haven't paid these people their \$500 yet? A. No." There is no reason why the payment should not have been made by appellant.

The judgment is affirmed.

MAIN, CHADWICK, ELLIS, and GOSE, JJ., concur.

WASHINGTON-OREGON CORPORATION et al. v. CITY OF CHEHALIS et al.

(Supreme Court of Washington. Nov. 28, 1913.)

1. MUNICIPAL CORPORATIONS (§ 887*)—BONDS —SINKING FUNDS—VALIDITY.

Under Rem. & Bal. Code, § 8008, authorizing the common council of any city or town, the voters of which have adopted a proposition for any public utility, to create a special fund for the sole purpose of defraying the cost of such utility in which it may obligate the city to set aside and pay a fixed proportion of the gross revenues of the utility, or any fixed amount out of and not exceeding a fixed proportion thereof, or a fixed amount without regard to any fixed proportion, and to issue bonds or warrants payable out of such fund, where an ordinance submitted to a vote of the people of a city providing for the construction of a water plant provided for two funds, into the first of which the proceeds of all bonds sold and the entire gross revenues of the water system, including a fair charge for water used for municipal purposes, together with such other funds as the city might see fit to transfer thereto, should be paid, and the second of which was to be created by transferring from the first fund each month a fixed sum out of the revenues of the plant to take care of the interest and principal of special water fund bonds, the second fund was not invalid, as it would not be assumed that the municipal authorities at some future time would pay the special fund bonds with money not wholly derived from the revenue of the water system, and no difficulty in determining the amount in the first fund derived from such revenues and in segregating therefrom the amount to be transferred to the second fund was apparent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1869; Dec. Dig. § 887.*]

2. MUNICIPAL CORPORATIONS (§ 921*)—BONDS —“SALE.”

Under Rem. & Bal. Code, § 8007, providing that, when the qualified voters of a city or town shall adopt a proposition for any public utility and authorize a general indebtedness therefore, general city or town bonds may be issued, and that such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the city or town, the city could deliver such bonds to a contractor in payment for the construction of a water plant at their face value; this being a “sale” within the meaning of the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1932-1935; Dec. Dig. § 921.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

3. MUNICIPAL CORPORATIONS (§ 870*)—WARRANTS AND CERTIFICATES OF INDEBTEDNESS —VALIDITY.

The issuance of warrants by a city to a contractor during the progress of the work, which he had contracted to do under an agreement that they would later be exchanged for bonds when issued, did not violate the constitutional provision prohibiting a municipality from loaning its credit to a private individual, since the issuance of certificates of indebtedness acknowledging a pre-existing debt is not a loan of credit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1817; Dec. Dig. § 870.*]

Department 2. Appeal from Superior Court, Lewis County; Edward H. Wright, Judge.

Action by the Washington-Oregon Corporation and another against the City of Chehalis and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

W. A. Reynolds, of Chehalis, and F. D. Oakley and J. A. Shackleford, both of Tacoma, for appellants. Forney & Ponder, of Chehalis, and Chas. A. Johns, of Portland, Or., for respondents.

MORRIS, J. The lower court in this action enjoined the city of Chehalis from entering into a contract with W. H. Mitchell providing for the construction of a municipal water system, and from any delivery of general bonds of the city authorized by ordinance and an election in payment for the construction of such system. From this judgment the city appeals.

The facts out of which the controversy between appellants and respondents arose are these: The city on March 25, 1912, passed an ordinance providing for the submission to the qualified voters of the city of a plan for the construction of a municipal water plant. The plans upon which the system was to be constructed were set forth in detail. The cost of the system was estimated at \$185,000, and it was provided that this cost should be met by an issue of \$70,000 in general bonds of the city, bearing interest at not exceeding 6 per cent. and payable after the expiration of 10 years, and a further issue of \$115,000 in special water fund bonds, bearing the same rate of interest, payable out of revenues of the water system, at different dates ranging from 5 to 17 years. The ordinance, with its proposed features of construction and payment, was submitted to a vote of the people, and was ratified by more than the requisite three-fifths vote. The city thereupon advertised the sale of both bond issues and called for bids for the construction of the plant, providing in the call that the contractor would be paid by the issuance to him of \$70,000 general fund bonds and so much of the \$115,000 issue of special fund bonds as should be necessary to complete payment. No bids were obtained for the special water fund bonds, and no bid acceptable to the city was obtained for the general fund

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bonds. A bid of W. H. Mitchell for the construction of the plant for \$161,750, being satisfactory to the city, was accepted, and the city was about to contract with him for the construction of the plant and for the delivery to him of the \$70,000 general fund bonds and so much of the special water fund bonds as would be required to meet the balance of his bid, when this action was brought, with its resulting injunction.

[1] The judgment of the court below was based upon a holding that portions of the ordinance are invalid. Under section 8 of the ordinance, which is the portion referred to by the lower court, it is proposed to create two funds. The first of these funds is known as the "Newaukum River Gravity Water System of Chehalis Fund." The second fund is known as the "Newaukum River Gravity Water System of Chehalis Bond Fund." The ordinance provides that into the first-named fund are to be paid the proceeds of all bonds sold and the entire gross revenues of the water system, including a fair charge for water used by the city for all municipal purposes, together with such other funds as the city may see fit to transfer thereto. Out of this fund is to be paid the entire cost of constructing and maintaining the water system, together with the special fund bonds with the interest thereon. The second fund is one created out of the first-named fund by transferring from it into the second-named fund, on the 20th of each month after the issuance of the water fund bonds, a fixed sum out of the revenues of the plant in order to take care of the interest and principal of the special water fund bonds as the same matured. The first of these funds was held valid by the court; the second was held to be invalid. No further reference, therefore, need be made to the first fund. The second fund is held to be invalid upon the ground that the money, out of which it is created and which is to be used for payment of special bonds, is derived from transfers from the first fund which may have other moneys in it than those derived from the revenues of the water system. The mere fact that the gross revenues of the water system are paid into the first fund, together with moneys derived from other sources, and that the second fund is created out of the first fund by setting aside from the first fund a fixed sum derived from the revenues of the plant to take care of the principal and interest of the special fund bonds, does not suggest to us any reason for holding the second fund invalid. The creation of funds of this character is provided for in section 8008, Rem. & Bal. Code, providing that the common council shall have power to create a special fund for the sole purpose of defraying the cost of any public utility, in which special fund the common council or other authorities of the municipality may obligate the city to set aside and pay a fixed proportion of the gross

revenues of the utility, or any fixed amount out of and not exceeding a fixed proportion of such revenues, or a fixed amount without regard to any fixed proportion, and to issue and sell bonds or warrants bearing interest not to exceed 6 per cent.; such bonds to be payable only out of such special fund. In creating such special fund the corporate authorities shall have regard to the cost of operation of the plant or system, and to any proportion or part of the revenues previously pledged as a fund for the payment of bonds, warrants, or other indebtedness, and shall not set aside into such special fund a greater amount or proportion of the revenues than in their judgment will be available over and above the cost of maintenance and operation and the amount or proportion, if any, of the revenues so previously pledged; such bonds or warrants issued against such fund being a valid claim only against said fund, and not a general indebtedness of the municipality, such bonds to be sold in such manner as the corporate authorities shall deem for the best interests of the city or town, and the corporate authorities may provide in any contract for the construction and acquirement of the proposed improvement that payment therefor shall be made only in such bonds or warrants at par value thereof.

The provisions of the ordinance with reference to this second fund follow these requirements of the statute, and the issue submitted to the people for their acceptance or rejection specially provided that the special bonds should be payable solely from the fund created out of the revenues of the water system. Inasmuch, therefore, as the scheme proposed and adopted is within the provisions of the statute, we shall not assume that the municipal authorities will at some indefinite future time do an illegal act by paying these special fund bonds with money not wholly derived from the revenues of the water system. Nor is there, so far as we can observe, any difficulty in determining the amount of money in the first fund derived from the revenues of the plant that should be segregated from this fund and transferred to the second fund. The first fund is merely a collection fund. It will not be a difficult matter to segregate the money that should be transferred into the second fund, and when so segregated and transferred a fund is created out of which the special bonds are payable as provided by law. We therefore cannot concur in the conclusion of the court below that the portion of the ordinance creating this second fund is invalid.

[2] The main attack made by respondents upon the validity of the ordinance and the proposed Mitchell contract is that the city cannot in law exchange its general fund bonds in payment of the amounts to become due for material and construction under the Mitchell contract, upon the ground that the statute requires the bonds to be sold for cash, and out

of the fund derived from such sale the contractor shall be paid his due; and, second, that the provision of the Mitchell contract providing for the delivery to him of warrants to be later exchanged for bonds, when the latter are printed and ready for delivery, is a lending of the city's credit in violation of the constitutional provision. That part of the contract attacked by these contentions is, first, a provision in the specifications for the proposed water system that all bids should be submitted with the understanding that the contractor would receive in payment for the material and work the \$70,000 in general bonds and so much of the special bond issue as would be required to meet the balance of his bid; the bonds of each class to be taken at their face value. It was further provided that, if for any reason the city should be unable to issue and deliver bonds as payments became due, the city would issue warrants for the amount due, to be exchanged for bonds as soon as the bonds were prepared and ready for delivery, and not later than 50 days after the completion and acceptance of the work. Section 8007, Rem. & Bal. Code, referring to general fund bonds issued by any municipality, provides that "such bonds shall be sold in such manner as the corporate authorities shall deem for the best interest of the city." We find in this language no limitation upon the power of the city to deliver the bonds to the contractor in payment for the construction of the water plant. If the statute required the bonds to be sold in any particular manner, no sale, unless in the manner provided in the statute, would be valid. But our statute contains no requirement of this character. It provides only for the sale of the bonds in such manner as the corporate authorities shall deem best, thus vesting in them a discretion as to the method of sale or disposal. Because the statute uses the word "sale" does not necessarily imply that the bonds can only be disposed of for cash and the cash thus obtained paid to the contractor. Tiedeman, in his work on Sales (section 12), says: "Although it has been sometimes held that the sale must be a transfer for money, and that every other transfer is an exchange or barter, the better opinion is that the transaction is still a sale, although the transfer is made for something else than money, provided each article is transferred at an agreed or the market value, so that the one thing is received in payment of the price of the other."

In so far as this definition would make the contract between the city and the contractor a sale of the bonds because the bonds and the construction were exchanged at an agreed valuation, the bonds at their face value, and the construction at the price bid and accepted, it is supported by the authorities. A statute of New Jersey authorized township commissioners to issue and dispose of bonds

in aid of railway construction at not less than par, and that the money so raised by any loan or sale of the bonds should be invested in bonds of the railway company. The commissioners, instead of selling the bonds and investing their proceeds in bonds of the railway company, exchanged them for a like amount of the railway company bonds, and it was held to be a compliance with the statute. *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431. A like ruling was made in *Cady v. Watertown*, 18 Wis. 322, construing a statute authorizing the commissioners to negotiate the sale of bonds and use the proceeds in purchasing sites for school-houses and other purposes. The commissioners accepted a deed from Cady and delivered to him bonds in payment. It was contended that the commissioners under the act had no power to dispose of the bonds except by sale for cash. This contention was overruled; the court saying in its holding that there was nothing in the act which required the sale of the bonds for cash, that the exchange of them for school sites was a sale of them within the meaning of the law, and that it was not a departure from the power to negotiate a sale to pay for the property purchased in these securities without resorting to the idle ceremony of first selling the bonds for cash and then paying the money so received to the owner of the site. A third case in point is *O'Neill v. Yellowstone Irrigation District*, 44 Mont. 492, 121 Pac. 283, where a statute providing for the issuance of bonds for an irrigation district declared that the bonds so issued should be sold. The court held that this imposed no restriction upon the district commissioners in exchanging the bonds for water rights, rights of way, etc.; the court saying: " * * * And exchange of the bonds of the district for the property of the company at its cash value was a sale of them, the same as if they had been sold for cash. * * * " Other supporting authorities are *Germania Savings Bank v. Darlington*, 50 S. E. 337, 27 S. E. 846; *Myer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Wiley v. Board of Education*, 11 Minn. 371 (Gil. 268); *Harris on Municipal Bonds*, n. 342; *McQuillin, Municipal Corporations*, § 2303.

Although not cited nor referred to by either counsel, we think our ruling in *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399, may be regarded as authority for the principle involved in our present holding. An irrigation district was there in debt to a contractor for work on its canal, and in payment of his claim delivered to him its bonds. The statute, authorizing the organization of irrigation districts and the issuance of bonds as amended in Laws of 1895, p. 432, authorized commissioners of the district to sell the bonds and raise money for necessary construction. These bonds so delivered to the contractor were attacked on several grounds, one of which was that they were not paid for

in cash. Upon this point the court said: "If the statute contemplated or required a sale for cash, we think the transaction between the parties amounted to that."

As to special fund bonds, no question is raised, but that under section 8008, above quoted, the city was authorized to deliver these bonds to the contractor in payment of the work. The court below based its conclusion as to the general fund bonds, and the conclusion is sought to be upheld here, upon the authority of *Hansard v. Green*, 54 Wash. 161, 103 Pac. 40, 24 L. R. A. (N. S.) 1273, 132 Am. St. Rep. 1107. From the facts in that case it appears that the town of Harrington borrowed \$22,000 from a local bank and purchased a water system, agreeing with the bank that the town would thereafter execute and deliver to the bank its bonds in a like amount in payment of the loan. An injunction was sought to enjoin the commissioners from executing and delivering the bonds. The town made no appearance, and its default was entered. The bank then intervened alleging its contract with the town. The court below denied the injunction and rendered judgment in favor of the intervener. This judgment was on appeal reversed by us upon the ground that the right to issue bonds and dispose of them was a legislative function which the courts could not usurp by directing their issuance and delivery to any person. In discussing this ruling, it is said: "We know of no rule of law which permits a municipal corporation to contract a debt upon an agreement to issue bonds to cover it. To so hold in this case would be equivalent to holding that the court had the right and power to say that the contract should be executed—the bonds sold to interveners—when the right is reserved to and the duty put upon the corporate authorities to sell them in such manner as they should deem for the best interests of the town (Bal. Code, § 1077), and thus by judicial decree usurp and exercise a legislative function. It is within the power of the city or town to purchase a waterworks system and to issue its bonds to raise money to pay therefor, but it cannot contract a bond issue in advance of its authorization, and deliver them, over the challenge of a taxpayer. The bond must be in existence before it can be delivered or become an object of barter and sale. * * * To hold that a party advancing money at the request of the officers of a municipal corporation, upon their promise to reimburse the creditor by an issue of its negotiable bonds, can acquire a right of action, would defeat both the purpose and spirit of the law." It will thus be seen that no point here involved was there discussed.

We are, for these reasons, of the opinion

that the arrangement between the city and the contractor is a "sale" of the bonds within the meaning of the statute, and that the lower court was in error in holding this arrangement vitiated the contract.

[3] The next contention is that the agreement in the contract, whereby warrants are to be issued to the contractor during the progress of the work, to be exchanged for bonds when issued, infringes upon the constitutional provision prohibiting a municipality from loaning its credit to a private individual. We cannot perceive how, under this arrangement, the city is loaning its credit. The contractor obtains nothing upon the credit of the city. The city, recognizing an indebtedness to him which it has contracted to pay by the delivery of bonds, agrees that, in case the bonds are not ready for delivery as the money is earned, it will recognize the claim by issuing its warrants, to be exchanged for bonds when the bonds are ready for delivery. The bonds have already been authorized, and the only thing remaining is the ministerial act of their preparation. If for any reason this is not done, the contractor is not to go empty-handed, but is to receive a recognition of the indebtedness in the form of a promise to pay, to be later exchanged for the payment agreed upon. A city warrant is nothing more than a device for liquidating an existing municipal indebtedness or a certificate of indebtedness, which is neither intended to nor does create any new debt. *Dillon, Mun. Corp. § 851; McQuillin, Mun. Corp. 2241*. To issue a certificate of indebtedness acknowledging a pre-existing debt is in no sense to loan credit. In *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29, cited by respondents, it was held that a contract providing for the issuance of city warrants in payment of certain contract work, bearing interest from date, the contractor agreeing to refund to the city all such sums it had paid or incurred liability to pay as interest between the date of the issuance of the warrants and the final completion of the work, together with 5 per cent. interest upon all sums paid as interest, was nothing more than a loan of credit and a violation of the constitutional provision. It will be readily seen that, under the contract there involved, the city was advancing money to be thereafter returned to it with interest—a loan under any definition. No agreement of that character is involved in this case, and, without further discussion of the point, it is our opinion it should be overruled.

Believing for these reasons the lower court was in error, the judgment is reversed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

PEET v. MILLS.

(Supreme Court of Washington. Nov. 28, 1913.)

1. MASTER AND SERVANT (§ 250¾, New, vol. 16 Key-No. Series)—INJURIES—REMEDIES—WORKMEN'S COMPENSATION LAW.

Workmen's Compensation Act (Laws 1911, c. 74) § 1, recites that the common-law system of dealing with actions by employees against employers for personal injuries is inconsistent with modern industrial conditions, and that the state declares its policy to withdraw all phases of the premises from private controversy regardless of questions of fault "and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished." Section 5 provides that each workman injured shall receive certain compensation, payment of which "shall be in lieu of any and all rights of action whatsoever against any person whomsoever." *Held*, that since the enactment of the compensation act an employee could not sue for damages for injuries against the president of the employer corporation individually; all rights of action against every person being abolished by the statute.

2. STATUTES (§ 236*)—CONSTRUCTION—REMEDIAL STATUTES.

Remedial statutes enacted to cure recognized evils should be construed with regard to the former law and the evils to be remedied.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. § 236.*]

3. STATUTES (§ 236*)—CONSTRUCTION—REMEDIAL STATUTES—LIBERAL CONSTRUCTION.

Remedial statutes should be liberally construed to cure the evil sought to be remedied and advance the remedy even by including therein cases without the letter, but within the reason, of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 317, 324, 325; Dec. Dig. § 236.*]

4. STATUTES (§ 114*)—TITLES AND SUBJECTS.

The Workmen's Compensation Act (Laws 1911, c. 74), which was entitled an act relating to the compensation of injured workmen, "abolishing the doctrine of negligence as a ground for recovery of damages against employers," would include within its title a provision abolishing the right of the employee to recover for negligence against all persons, including negligent officers of the employer corporation as well as against employers.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145, 147-149; Dec. Dig. § 114.*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Horace E. Peet against E. M. Mills. From a judgment for defendant, plaintiff appeals. Affirmed.

Chas. P. Spooner and George R. Biddle, both of Seattle, for appellant. Kerr & McCord and J. N. Hamill, both of Seattle, for respondent.

MORRIS, J. By this appeal we are again called upon to review the Workmen's Compensation Act of 1911 (Laws 1911, c. 74), under appellant's contention that the act is applicable only where recovery is sought upon the ground of negligence of the employer. The facts upon which appellant predicates

his right of action are these: On January 22, 1912, while in the employ of the Seattle, Renton & Southern Railway Company as motorman, he was injured in a collision between two of the railway company's trains. Respondent was then the president of the railway company, and it is sought to hold him personally responsible for the injuries because of the allegations that, when he assumed the control and management of the railway company, it was equipped with a block signal system for use in foggy weather, which respondent negligently failed to operate; and that, when complaint was made by the train operators of the great danger of operating the trains without the aid of the block signals, a promise was made by respondent to have the block signals working during foggy weather, which promise respondent failed to keep, and as a consequence of his negligence in so failing appellant was injured. The court below sustained a demurrer to the complaint, and, appellant electing to stand upon his complaint, the action was dismissed, and this appeal taken.

[1] It is the contention of appellant, conceding he was at the time of his injury a "workman" within the meaning of the act, and that as such he has no right of action against the railway company, his employer, that the act in no way infringes upon his right of action against respondent, because: (1) The act itself is in derogation of the common law, and, since it does not expressly abolish the doctrine of negligence as a ground of recovery except as against employers, it should be strictly construed; (2) even though it be admitted that the body of the act is in itself sufficient to abolish negligence as a ground of recovery of damages against all persons within the scope of the act, the title to the act is not broad enough to include such abolition as against any one except employers. Our recent discussion of the Workmen's Compensation Act of 1911, as found in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 460, and *State v. Mountain Timber Co.*, 135 Pac. 645, renders unnecessary any further review of the act except in so far as may be necessary to notice the contentions here raised. The act contains its own declaration of legislative policy, in reciting in section 1 that the common-law system in dealing with actions by employees against employers for injuries received in hazardous employments is inconsistent with the modern industrial conditions, uneconomic, unwise, and unfair, and that as the welfare of the state depends upon its industries, and even more upon the welfare of its working men, the state of Washington in the exercise of its police and sovereign power declares its policy to withdraw all phases of the premises from private controversy, regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation except as pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vided in the act, "and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

[2, 3] It is a well-accepted rule that remedial statutes, seeking the correction of recognized errors and abuses in introducing some new regulation for the advancement of the public welfare, should be construed with regard to the former law and the defects or evils sought to be cured and the remedy provided; that in so construing such statutes they should be interpreted liberally, to the end that the purpose of the Legislature in suppressing the mischief and advancing the remedy be promoted, even to the inclusion of cases within the reason, although outside the letter, of the statute (36 Cyc. 1173); and that in construing the statute courts will look to the old law, the mischief sought to be abolished, and the remedy proposed. *State v. Stewart*, 52 Wash. 61, 100 Pac. 153, 17 Ann. Cas. 411. Starting with these basic principles, the conclusion is evident that, in the enactment of this new law, the Legislature declared it to be the policy of this state that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employes; and that it was the further policy of the state to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full, and complete, reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed. We can conceive of no language the Legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the first section of the act. To say with appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystalized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens. The employer and employe as distinctive producing causes are lost sight of in the greater vision, that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enter into that production, recognizing no distinction between the injury and destruction of machinery and the injury and destruction of men in so far as each is a proper charge against the cost of production. The Legislature in this act was dealing, not

so much with causes of action and remedies, as with this great economic principle that has obtained recognition in these later years, and it sought in the use of language it deemed apt to embody this principle into law. That in so doing the legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of section 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and "such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Referring again to section 1 of the act and the declaration of its exercise of police power by the state, to the end that it may advance the welfare of its citizens injured in any hazardous undertaking, we find this expression of intention: " * * * All phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished." For these reasons we are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing, except as they are saved by the provisos of the act, are done away with.

[4] Upon the second point we think there is no room for argument. The first clause of the title indicates that it is an act relating to the compensation of injured workmen in any industry of the state, and the employment of the language further on in the title, "abolishing the doctrine of negligence as a ground for recovery of damages against employers," is indicative of the evil the act seeks to overcome rather than the new remedy created. The title is plainly broad enough to indicate that the act is intended to furnish the only compensation to be allowed workmen subsequent to its becoming law, and as such clearly includes any and all rights of action theretofore existing in which such compensation might have been obtained.

The second point is therefore overruled, and the judgment affirmed.

CROW, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

LANTZ v. MOELLER et al.

(Supreme Court of Washington. Nov. 28, 1913.)

1. CORPORATIONS (§ 157*)—STOCK—PAYMENT.

Where the stockholders in a corporation with one outsider agreed to convey their separate property to the corporation in return for an increased issue of capital stock, the assets of the original corporation, above its capital stock and debts, can be applied on the subscription contract for the increased stock; such transaction being in the nature of a stock dividend.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 584-586; Dec. Dig. § 157.*]

2. CORPORATIONS (§ 232*)—STOCK—LIABILITY OF STOCKHOLDERS.

Where the rights of creditors intervene, property transferred to a corporation in payment of shares must be equal in value to the amount of the subscription regardless of the subscribers' good faith; the capital stock of a corporation being a trust fund for the benefit of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

A finding of fact by the trial court based on disputed oral testimony will be given weight on appeal but is not controlling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. APPEAL AND ERROR (§ 882*)—PERSONS ENTITLED TO COMPLAIN—INVITED ERROR.

An appellant cannot complain of the exclusion of evidence which was excluded on his own objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

En Banc. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Edwin F. Lantz, as receiver, against Christ F. Moeller and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Raymond J. McMillan, of Tacoma, for appellant. Stallcup & Keyes, of Tacoma, for respondents.

MAIN, J. This is an action brought by the appellant, Edwin F. Lantz, as receiver for the West End Manufacturing Company, a corporation, for the purpose of recovering from the respondents, Christ F. Moeller, William Scheer, Richard Rinne, and Anton Anderson, the sum which is alleged to be due from each of them upon their subscription contract. On May 5, 1906, the West End Manufacturing Company, a corporation, was organized under the laws of the state of Washington with a capital stock of \$8,200, which was divided into 82 shares of the par value of \$100 per share. Of these 82 shares Moeller owned 44, Anderson 24, and Rinne 14. On April 1, 1909, the capital stock of this corporation was increased from \$8,200 to \$41,400, which increase in the capital stock was represented by 332 shares of the par value of

\$100 per share. Of these 332 shares representing the increase in the capital stock Moeller subscribed for 74, Anderson for 54, Rinne for 84, and Scheer for 120. The contract of subscription was in terms as follows:

"We, the undersigned, being the owners of the entire stock of the West End Manufacturing Company, to wit, 82 shares of one hundred dollars each, and having this day duly increased the capital stock of said corporation from \$8,200 divided into 82 shares of \$100 each to \$41,400 divided into 414 shares of \$100 each. Now the increased number of shares, to wit, 332, are hereby subscribed and paid for and taken as follows, to wit: By transferring to and vesting in said corporation the following described property: Lots one (1) to six (6) block 1130, Alliance addition to the city of Tacoma; block fifteen (15) Prescott's second addition to the city of Tacoma; that tract of land bounded on the east by the west line of block fourteen (14) of Prescott's second addition, extended north, on the north by a line 200 feet northerly from the Northern Pacific Ry. Co. right of way, measured at right angles and parallel to said right of way, on the west by the west line of the northeast quarter of the southeast quarter of section seven (7), township twenty (20) north, range three (3) east, W. M., and on the south by a line fifty (50) feet northerly from the Northern Pacific Ry. Co. right of way measured at right angles and parallel to said right of way, and certain building contracts and bills receivable. All of which have been vested in the said corporation by the undersigned subscribers to the said increased stock in the following proportions, to wit:

| | New Stock. | Old Stock. | Total Stock. | Value. |
|--------------------|---------------|---------------|-----------------|-----------------|
| C. F. Moeller..... | 74 | 44 | 118 | \$11,800 |
| Wm. Scheer..... | 120 | 00 | 120 | 12,000 |
| Anton Anderson... | 54 | 24 | 78 | 7,800 |
| Richard Rinne..... | 84 | 14 | 98 | 9,800 |
| | <u>332</u> | <u>82</u> | <u>414</u> | <u>\$41,400</u> |

"C. F. Moeller.

"Anton Anderson.

"Richard Rinne.

"William Scheer."

An examination of this subscription contract discloses that the increased capital stock was paid for by transferring to the corporation: (1) Lots 1 to 6, inclusive, in block 1130, Alliance addition to the city of Tacoma; (2) block 15, Prescott's addition to the city of Tacoma; (3) an irregular tract of ground in Prescott's second addition; and (4) certain building contracts and bills receivable. The evidence shows: (1) That lots 1 to 6 in Alliance addition were held under contract of purchase by Moeller, Rinne, and Anderson, and that their interest therein was of the reasonable value of \$4,500; (2) that block 14 in Prescott's addition was owned by Scheer and was worth approximately \$6.

000; (3) that the irregular tract of ground was owned by the corporation itself prior to the 1st day of April, 1909, the date of the increase of the capital stock; and (4) that the building contracts and bills receivable were the property of the corporation. It will be seen, therefore: (1) That Moeller, for his 74 shares of the increased capital stock of the par value of \$7,400, paid \$1,500, that being the amount of his interest in the Alliance addition property, and in addition to this whatever interest he had in the assets of the old corporation after deducting the amount of its capital stock and debts; (2) that Anderson, for his 54 shares of the increased capital stock of the par value of \$5,400, paid \$1,500 in property and his interest in the net assets of the old corporation; (3) that Rinne, in payment of his 84 shares of the increased capital stock of the par value of \$8,400, paid \$1,500 in property and \$2,000 in cash, and in addition to this his proportionate interest in the net assets of the original corporation; and (4) that Scheer, for his 120 shares of the increased capital stock of the par value of \$12,000, paid in property of the reasonable value of \$6,000. On July 17, 1911, the corporation being then indebted in the sum of \$33,837.03 and being in an insolvent condition, in an action then pending in the superior court, Edwin F. Lantz was appointed receiver. The assets of the corporation being insufficient to meet its obligations, the receiver, upon due notice to each of the respondents, applied to the superior court for leave to make an assessment and call for the amounts alleged to be due upon the subscription contract. A hearing being had, the court found that an assessment and call was necessary. Thereupon due notice was given to each of the respondents and demand for payment made, which was refused. Suit was brought against the respondents for the amount alleged to be due from each of them. The cause was tried to the court without a jury.

From the evidence introduced upon the trial it appears that the method adopted for the payment of the increased capital stock was this: Moeller, Anderson, and Rinne, being the owners and holders of the entire capital stock of the original corporation, and Scheer, not a stockholder in the old company, attempted to group into a common fund the individual property of each, together with the net assets of the original corporation, and the whole was to operate as a payment for the increased stock. At the conclusion of the trial the court dismissed the action and made a finding that the stock subscribed for by each of the respondents had been fully paid. From which judgment the appeal was taken.

[1] The first question that must be determined is whether or not the assets of the original corporation, after deducting the amount of its capital stock and debts, can be

applied on the subscription contract to the increased capital stock. The appellant argues that the assets of the original corporation, over and above the amount of its capital stock and debts, if any, cannot be applied in payment of the increased capital stock, and that the only question in the case is: Was the value of the property turned over by the individual subscribers equal to the par value of the stock subscribed for? This position is not tenable. If the assets of the original corporation on April 1, 1909, exceeded its debts and the amount of the capital stock, the excess might be applied in payment of the increased capital stock which had been subscribed for by the stockholders of the original corporation. This would be in the nature of a stock dividend. 2 Clark & Marshall, Private Corporations, p. 1603; 1 Cook on Corporations (6th Ed.) § 287. The latter citation states the rule thus: "A frequent method of issuing an increase to the capital stock is by stock dividend; * * * but, in all cases of a stock dividend as a method of issuing an increase of the capital stock, there must be in possession of the corporation an amount of property over and above its corporate debts equal to the whole capital stock, including the increase, and this amount cannot afterwards be used for any kind of a dividend."

It is true that Scheer owned no stock in the old corporation and would therefore have no interest in its assets, but if all of the stockholders, by agreement, grouped their interest in the assets, together with the individual property of themselves and an outsider, and intended that the total should be considered as one fund to liquidate the subscription, it would appear that, if the total was equivalent to the par value of the stock as increased, less the capital stock and debts of the original corporation, it would operate as payment of the subscription.

[2] The respondents contend that, when the stock is paid for by the transfer of property, the liquidation of the liability on the subscription contract is complete, even though there may be a material discrepancy between the par value of the stock and the value of the property transferred in payment thereof, unless there is fraud in the transaction either actual or constructive. According to this contention, it would be immaterial whether or not the value of the property transferred to the corporation in payment of the subscription was substantially equivalent to the par value of the stock. It must be admitted that the expressions of this court from time to time have not been harmonious upon this question. The rule contended for by the respondents appears to be supported in the cases of *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115, *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605, and possibly some others. The opposite doctrine, that the stock of a corporation is a trust fund for the benefit of its creditors and that when the

rights of creditors are involved the stock subscribed for must be paid in money or money's worth, is upheld in the following cases: *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

In the *Adamant Case*, supra, this court, in an opinion written by the late Chief Justice Dunbar, said: "The doctrine that the stock of a corporation is a trust fund for the benefit of creditors is one which is founded in equity and fair dealing and in any event has become so well established in this country that it can no longer be gainsaid. This doctrine was announced by Chancellor Kent, as early as 1824, in *Wood v. Dummer*, 3 Mason, 309, and since that time has become the established law of this country and is termed the 'American doctrine,' although, as shown in the case above referred to, the same doctrine had long been established in England; and so universally has this doctrine been accepted, in America especially, that the citation of authorities seems a work of supererogation. We will, however, quote from 2 *Morawetz on Private Corporations*, § 820, the rule which is announced as follows: 'Debts due a corporation are equitable assets and may be reached by creditors through the aid of a court of chancery, if the legal assets which can be reached by execution prove insufficient. The liability of the shareholders to contribute the amount of their shares as capital is treated in equity as assets, like other legal claims belonging to the corporation. This liability, together with the capital actually contributed, constitutes the trust fund which in equity is deemed pledged for the payment of the corporate debts.' This being true, then it must necessarily follow, for the protection of creditors who dealt with these corporations, that the stock subscribed for must be paid in cash or in property of an equivalent value. In other words, the corporation must be in the actual condition which it represents itself to be in financially. If it were allowed to hold itself out as having a capital stock of \$100,000, when in reality the capital stock, which is and must be, under the theory of the law, assets in the hands of the corporation, is worth only one-half that amount, the corporation is to that extent doing business under false colors and is obtaining credit upon the faith of an asserted estate which is purely fictitious."

We think the rule as laid down in the *Adamant Case* is not only legally but ethically sound, and all the decisions of this court which are not in harmony with the views therein expressed are overruled.

[3] It is also contended by the respondents that, since the trial court made a finding that the stock was fully paid for, this court should not review such finding; but we

think the rule contended for is stated too broadly. If the trial court makes a finding of fact based upon disputed oral testimony, such finding of fact will be given weight but is not controlling, as has frequently been expressed. The court, however, in the present case did not find the facts which would show that the stock was fully paid for but merely found as a conclusion that such was the result. This does not bring it within the rule which is applicable when the trial court has expressly made a finding of fact upon disputed testimony.

[4] From the record in this case it cannot be determined to what extent, if at all, the assets of the original corporation exceeded the amount of its capital stock and debts at the time of the increase. The appellant introduced no evidence tending to show this fact but only showed the value of the property turned over by the individual subscribers and that this was materially less than the par value of the stock subscribed for. During the trial the respondent attempted to show the value of the assets of the original corporation at the time in question, but this evidence was objected to by the appellant and sustained by the court. The record, therefore, is silent upon a material fact. The appellant, however, is not in a position to predicate error upon the ruling of the trial court in excluding this evidence; he having invited the ruling by objecting to the testimony when it was offered by the respondent.

The judgment will therefore be affirmed.

CROW, C. J., and ELLIS, FULLERTON, MOUNT, GOSE, CHADWICK. PARKER, and MORRIS, JJ., concur.

ARMOUR & CO. v. JESMER et al.

(Supreme Court of Washington. Nov. 29, 1913.)

1. SALES (§ 339*)—ACTION BY SELLER—SUFFICIENCY OF EVIDENCE.

Evidence, in a seller's action to recover the difference between the contract price and the resale price of certain butter which the buyer refused to receive, *held* to sustain a judgment for the seller.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 924, 926; Dec. Dig. § 839.*]

2. CONTRACTS (§ 103*)—ILLEGALITY.

A contract, lawful in itself and not required or contemplating the doing of an unlawful act, is not necessarily illegal because it is carried out in an illegal way.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 468-476; Dec. Dig. § 103.*]

3. SALES (§ 180*)—ACCEPTANCE AND DELIVERY—OBLIGATION OF PARTIES.

Rem. & Bal. Code, § 5447e, forbids the manufacture or sale of butter known as "process" butter unless the package is marked with the words "renovated butter," and makes a violation thereof a misdemeanor. The seller of renovated storage butter made a number of deliveries of that kind marked "process" instead of "renovated," which were accepted by the buyer without objection that it was not properly marked. *Held*, that there was a mutual obligation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—44

upon the parties to deal fairly; that, as on objection the seller might have met the requirement by substituting the word "renovated" for the word "process," the buyer could not refuse to accept delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 469-472; Dec. Dig. § 180.*]

4. SALES (§ 48*)—LEGALITY—VIOLATION OF STATUTE.

In such case, even if the buyer was not bound to object on account of the seller's failure to mark as required, he could not repudiate the contract on that ground, since it was within his power to demand and receive literal compliance therewith, and the alleged illegal acts entered neither into the promise nor into the consideration, but the contract might have been performed without violating any law, and since it could not be assumed that the seller would continue to violate the law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 101-107; Dec. Dig. § 48.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Armour & Company against Mrs. H. B. Jesmer and husband. Verdict for plaintiff with judgment for defendants non obstante, and plaintiff appeals. Remanded, with instruction to enter a judgment on the verdict.

Peters & Powell, of Seattle, for appellant. John E. Ryan and Grover E. Desmond, both of Seattle, for respondents.

CHADWICK, J. [1] This action is brought to recover the difference between the contract price and the price on resale of certain butter which plaintiff had agreed to deliver and defendants had agreed to receive from plaintiff. The contract called for delivery of a gross amount in lots, at prices varying from month to month. A part of the butter was delivered; but, the price having fallen, defendants became dissatisfied, and a new contract was entered into, in all respects the same as the first, except that the price was reduced. The butter was packed in cubes marked "81#," and defendants took delivery of ten of these after the execution of the second contract. Butter continued to decline, and defendants finally refused to accept delivery of any more butter under the contract; no reason being assigned other than that they could buy butter in the market at a lower price than the contract called for. Defendants answered denying damages and affirmatively pleaded that the butter was under weight and that it was not marked or branded as required by law. The case went to a jury, and a verdict was returned in favor of the plaintiff. A judgment was entered, however, non obstante in favor of the defendants.

There is some testimony tending to show that some of the cubes were slightly under weight, and that butter is subject to some shrinkage. The butter was packed in the state of Minnesota, and the weight was stamped upon it at the time in compliance with the

act of Congress known as the Oleomargarine Law. No complaint of under weight was made at the time of delivery or credit claimed upon the account sales or contract by the defendants. Upon this state of facts, we think the jury was warranted in finding for the plaintiff upon this issue, and we will accept the verdict as final.

The only question remaining is whether the butter was misbranded. The contract called for the delivery of "renovated storage" butter. The butter delivered was what is called "renovated" or "process" butter. These adjectives are used in the federal act to describe the same article. Act May 9, 1902, c. 784, U. S. Statute at Large, vol. 32, p. 193 (U. S. Comp. St. Supp. 1911, p. 1339), and Regulation No. 1, Dept. of Internal Revenue. Plaintiff had complied strictly with the federal statute. The defense of misbranding is based on the local law (section 5447e, Rem. & Bal. Code), which provides that: "No person, firm or corporation shall manufacture, sell or offer for sale or have in his possession with intent to sell butter known as process butter, unless the package in which the butter is sold has marked on the side of it the words 'renovated butter' in capital letters one inch high and one-half inch wide with ink which is not easily removed. * * * All process butter shipped from other states shall be subject to the same regulations as provided in this section." An offense against the law is made a misdemeanor, and the offender is subjected to certain penalties provided in the act.

It is the contention of the defendants, and it was no doubt the opinion of the trial judge when he entered the judgment non obstante, that the law is that, when the doing of an act is prohibited by statute, any contract or transaction in contravention thereof is void, and that no recovery can be had thereunder. Apt authority is cited to sustain this premise; the principal cases being: *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; *Pinney v. First Nat'l Bank*, 68 Kan. 223, 75 Pac. 119, 1 Ann. Cas. 331; *Church v. Proctor*, 66 Fed. 240, 13 C. C. A. 426. Other cases relied on will be found in 35 Cyc. 88. Plaintiff relies upon our own cases, *Horrell v. Cal.*, etc., 40 Wash. 531, 82 Pac. 889. To which may be added, *Way v. Pacific Lum. & Timber Co.*, 133 Pac. 595; *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827.

Not being of one accord when in consultation, and it being possible to rest our judgment upon firm legal ground, it was decided that the writer of the opinion should not go into the questions raised under the authorities cited nor discuss the question that occurred to some of us, whether the names "process" and "renovated" should not be held to be synonymous (see statute) in a civil action based upon a partly executed contract.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

Whether a party, having contracted for a certain kind of butter and having accepted a part under a different trade-name, can repudiate the contract, no question being raised as to quality, and no objection being made on account of misbranding, without giving the vendor an opportunity to relabel the goods in order to comply with the local statute or to make delivery in form required by statute, is the question confronting us.

[2] The contract in this case is lawful. It does not require or contemplate the doing of an unlawful act. "There is no policy of the law against the plaintiff's recovery unless his contract of sale was illegal, and a contract is not necessarily illegal because it is carried out in an illegal way." *Fox v. Rogers*, 171 Mass. 546, 50 N. E. 1041; *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808. See, also, *Dowley v. Schiffer* (Com. Pl.) 13 N. Y. Supp. 552.

[3] The contract calls for the delivery of renovated butter, and renovated butter was delivered. The only objection is that the article called for by the contract was labeled "process" instead of "renovated." To sustain the judgment of the lower court, assuming that the statute applies in this case, we must hold that plaintiff could not and would not have finished performance of the contract without doing an illegal act; that is, deliver butter that was marked with the word "process," instead of the word "renovated." No such conclusion follows. A mutual duty rests upon parties to a contract. There is an obligation to deal fairly. After partial performance, a vendee cannot refuse to accept delivery for some undisclosed reason that does not go to the substance of the contract. If defendants had disclosed the reason now set up, plaintiff might have met the objection without appreciable cost or effort. The word "process" could have been marked out and the word "renovated" substituted therefor. Defendants would have then received the contracted goods under the name demanded in their answer.

[4] But if we assume that there was no duty resting upon defendants to object on account of the name and that the prior deliveries were in fact illegal, the judgment cannot be sustained. The contract being lawful and calling for partial deliveries, courts will not presume, in the absence of a tender of a proscribed article or other convincing evidence, that a party will violate or continue to violate the law. One who has received without objection a part of that which he has contracted for should not be heard to say in court for the first time that he will reject future deliveries; no other reason appearing than that which he has received and paid for was not marked as the statute requires. The reason for this holding is that, if the name of the article to be delivered is material (the

butter being the same whether it is called process or renovated), it is within the power of the vendee to demand and receive literal compliance. Having failed to make his present objection known and being in a sense himself in default, he cannot assume that the vendor will do that which is unlawful. The contract was good as a whole. The alleged illegal acts entered neither into the promise nor into the consideration. It might have been performed without violating any law. "Then it is only a natural and legal presumption that it will be so performed, or at least there is no legal presumption that it will not be so performed." *Sheffield v. Balmer*, 52 Mo. 474, 14 Am. Rep. 430. The test is laid down in *Dunham v. Hastings Pavement Co.*, 57 App. Div. 426, 428, 68 N. Y. Supp. 221-223: "It is quite evident to our minds that the mere performance of one or several illegal acts would not necessarily render this contract invalid. Mere misconduct in the performance of the contract does not have the effect of vitiating it. On the other hand, if the parties contemplated that illegal acts condemned by law were essential or necessary in its performance, the court would not stop to measure the gravity of the act, but would declare, as a matter of law, that the contract was void."

The case will be remanded, with instructions to enter a judgment on the verdict.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

WISCONSIN LUMBER CO. v. PACIFIC TANK & SILO CO.

(Supreme Court of Washington. Nov. 29, 1913.)

1. APPEAL AND ERROR (§ 882*)—PERSONS ENTITLED TO ALLEGE ERROR.

Where a finding was in accordance with the allegations of plaintiff's pleading and its evidence, plaintiff cannot attack the finding on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

A finding on conflicting testimony will not be disturbed on appeal where it was not so contrary to the clear preponderance of the evidence as to justify the court in determining that it was erroneous as a matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. SALES (§ 180*)—DELIVERY—DAMAGES FOR DELAY.

Where plaintiff delayed the delivery of lumber, that defendant, after time fixed for delivery, accepted a portion of the lumber is not a waiver of its right to recover damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 469-472; Dec. Dig. § 180.*]

Department 2. Appeal from Superior Court, Lewis County; E. H. Wright, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Wisconsin Lumber Company against the Pacific Tank & Silo Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Gus Thacker, of Chehalis, and Hayden & Langhorne, of Tacoma, for appellant. Tucker & Bowe, of Portland, Or., A. A. Hull, of Chehalis, and Abel & Burnett, of Montesano, for respondent.

MORRIS, J. Appellant commenced this action to recover an amount claimed to be due on account of lumber sold respondent. Respondent answered, admitting the delivery of lumber of the value of \$2,172.46, of which amount \$1,201.71 was upon a contract for the delivery of silo stock, and the balance upon an open account. Counterclaim was then pleaded, setting forth a contract for the delivery of silo stock, quantity, grade, size, and price of the stock, with time of delivery, and alleging a breach of the contract in the failure to deliver within the time called for, and the resulting damage. Appellant by way of reply admitted the making of the contract, denied it had breached its terms, and alleged a breach by respondent in refusing to pay for deliveries of stock as provided for in the contract. The breach being admitted by both parties, the question for the court to decide, a jury having been waived, was, Which of the parties breached the contract, and the damages, if any? This issue was found in favor of respondent. Appellant, attacking the findings as unwarranted by the evidence, appealed.

[1] The first complaint is made of a finding that respondent was given 60 days' credit for certain trade discounts. The order as prepared by respondent was silent as to the time of payment. Appellant, however, in its acknowledgment of the order stated the terms under which payment should be made, and in its reply further alleged the terms as found by the court. Its general manager likewise testified that these were the terms of the sale. This, it seems to us, is sufficient to justify the finding. Appellant, having alleged and proved the terms of payment, can hardly now say the court was in error in so finding.

[2] The next contention is error in charging appellant with the breach of the contract and in the award of damages. Without a more specific reference, there is ample evidence to justify the conclusion reached by the court in these particulars. It is probably true that the evidence would sustain a different finding; but, the court below having reached its conclusion upon contested facts with ample supporting evidence, and the evidence to the contrary not so preponderating as to justify us in saying the court was in error, we refuse to say such findings are not supported by the evidence.

[3] We find no question of law in the case, unless it be appellant's contention that re-

spondent waived the default of appellant in failing to deliver the silo stock within the time and in the quantities called for by the contract. We find no facts upon which such a waiver can be predicated. The mere fact that subsequent to the time fixed for the delivery the respondent received a portion of the stock does not of itself destroy its right to recover damages for delay. *Dignan v. Spurr*, 3 Wash. 309, 28 Pac. 529. There might be circumstances under which such a receipt might be held a waiver; but we find none of them present here. On the contrary, it clearly appears that respondent on different occasions called appellant's attention to the damages sustained by reason of the failure to deliver promptly.

Finding nothing to call for a reversal of the judgment, it is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

STATE v. KLINKENBERG.

(Supreme Court of Washington. Nov. 29, 1913.)

FALSE PRETENSES (§ 11*)—NATURE OF OFFENSE—LARCENY OF LAND—"TITLE"—"PROPERTY."

Rem. & Bal. Code, § 2601, declaring that every person, who, with intent to deprive or defraud the owner, shall obtain the possession or title to any property, money, or any check, by any false or fraudulent representation or pretense, shall be guilty of larceny, does not apply to the procurement of a conveyance of land by fraudulent representations; the crime of larceny being so essentially one relating to personal property that the word "property" must be construed as meaning personal property despite section 2303, which, in defining the terms in the Criminal Code, declares that the word "property" shall include both real and personal property, and though the word "title" used in section 2601 in connection with property is a term used more frequently to denote the ownership of real property than personality.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 15; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6978-6982, 7816; vol. 6, pp. 5893-5728; vol. 8, pp. 7768-7770.]

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

John M. Klinkenberg was convicted of obtaining a conveyance of land by false and fraudulent representations, and he appeals. Reversed, with directions to dismiss.

Marquis & Shields, of Stevenson, and H. F. Norris and T. W. Hammond, both of Tacoma, for appellant. Lorenzo Dow and W. D. Askren, both of Tacoma, for the State.

PARKER, J. The defendant, John M. Klinkenberg, was charged by information filed in the superior court for Pierce county with having, by false and fraudulent representations, obtained from Michael Meier and wife a conveyance and transfer of certain land owned by them situated in Pierce coun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ty. Demurrer was interposed on behalf of the defendant upon the ground, among others, "that said information does not set forth any crime under the laws of the state of Washington." The demurrer was by the trial court overruled, and a trial followed, resulting in verdict and judgment of conviction against the defendant, from which he has appealed to this court. The only question we find it necessary to notice, is whether land is such property as may become the subject of the offense sought to be charged against the appellant.

The prosecuting attorney proceeds upon the theory that appellant has been properly charged with and convicted of the crime of larceny as defined by section 2601, Rem. & Bal. Code, reading, so far as we need here notice its provisions, as follows: "Every person who, with intent to deprive or defraud the owner thereof (1) shall take, lead or drive away the property of another; or (2) shall obtain from the owner or another the possession of or title to any property by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling, * * * steals such property and shall be guilty of larceny."

The crimes of false pretenses and larceny have always been considered as largely analogous and having reference to the wrongful obtaining of personal property only of another. This analogy obtains even where the crimes are defined by statute, using the word "property" in a seemingly very broad sense, if the word be viewed apart from the history of the law of those crimes. The statute above quoted declares that, where a person obtains the property of another by any unlawful means therein specified, he thereby "steals such property and shall be guilty of larceny." This suggests the thought that the word "property," as there used in defining the offense, means such property as has always been understood to be the subject of larceny and false pretenses, the latter of which we have noticed is analogous to larceny. The unqualified use of the word "property" in describing what may be stolen or obtained by false pretenses from another, so as to incur criminal liability, viewed in the light of the history of those crimes both common and statutory, it seems to us, falls short of conveying the idea that land may be so obtained and criminal liability flow therefrom. Clearly, under the common law, land was not subject to larceny. 25 Cyc. pp. 12, 15. Nor has there come to our notice the holding of any court to the effect that the crime of false pretenses, which is apparently little else than

a statutory expansion of the crime of larceny, renders criminally liable one who, by false pretenses, procures a conveyance of land from its owner.

In *People v. Cummings*, 114 Cal. 437, 439, 46 Pac. 284, substantially the same question as here presented was learnedly discussed by Justice Van Fleet, speaking for the court as follows: "In their origin both the common law and statutory offenses were undoubtedly designed and aimed solely at protecting personal property and in aid of the laws against larceny and theft. Indeed, they appear to have sprung into being largely by reason of certain defects in the application of the laws against larceny. Among the reasons stated in the statute (33 Henry VIII) for enlarging the offense of cheating are that 'many light and evil-disposed persons, not minding to get their living by truth, etc., but compassing and devising daily how they may unlawfully obtain and get into their hands and possession goods, chattels, and jewels of other persons for the maintenance of their unthrifty living, and also knowing that, if they came to any of the same goods, chattels, and jewels by stealth, then they, being thereof lawfully convicted, etc., shall die therefor, have now of late falsely and deceitfully contrived, devised, and imagined privy tokens and counterfeit letters in other men's names, unto divers persons, their special friends and acquaintances, for the obtaining of money, goods, chattels, and jewels of the same persons, their friends and acquaintances, by color whereof the said light and evil-disposed persons have deceitfully and unlawfully obtained and gotten great substance of money, goods, chattels, and jewels into their hands and possession, contrary to right and conscience,' etc.; and in one of the early statutes relating to false pretenses it is recited that, whereas, 'a failure of justice frequently arises from the subtle distinction between larceny and fraud,' etc., one of which distinctions being that when property was obtained by consent of the owner intending to part with the title, although by the grossest fraud, it would not constitute larceny. And the offense of false pretenses under the English statutes has always been construed as largely analogous to and closely bordering upon that of larceny and as applying only to personal property which was capable of manual delivery and the subject of the latter offense, and has always been punishable in much the same manner as larceny. Real property under the English law was never the subject of the offense, either of cheating or of false pretenses. Being incapable of larcenous asportation, it was not regarded as requiring at the hands of the criminal law the same protection as personalty. Since it could not be carried away and dissipated like chattels, although a man might be deprived of his landed estate by means of fraudulent practices and devices, yet the property was bound to remain stationary

and accessible to the reach of the law, and he was relegated for the civil courts for his redress of the wrong. Our American statutes upon the subject have all followed more or less closely those of England. As indicated, there are slight differences in language, but in substantive purpose and effect they are the same. Some, instead of employing the specific terminology of the English statutes in designating the character of the property made the subject of the offense, have used more general and perhaps more comprehensive terms, such, for instance, as those found in the provision of our Code above quoted. In their interpretation, however, of the purpose and effect of these statutes, the American courts, by reason, no doubt, of the origin of the offense, and in obedience to a well-established rule of statutory construction, have closely followed in a general way that of the English courts, and the statutes of the various states, however general their terms, have been uniformly held to apply only to personal property of a larcenous nature.

* * * In no case, so far as an extended research discloses, has the offense ever been held to include transactions in land or real estate."

The property specified in the statute there involved was "money or property," and the statute provided that the punishment should be "as for larceny." These views find support in *State v. Eno*, 131 Iowa, 619, 109 N. W. 119, 9 Ann. Cas. 856, *Commonwealth v. Woodruff*, 4 Pa. Law J. (4 Clark) 362, and *State v. Burrows*, 33 N. C. 477. There has come to our notice the case of *Morse v. State*, 9 Ga. App. 424, 71 S. E. 699, wherein the transfer of a leasehold interest, together with a manufacturing plant situated thereon, evidently including personal property used in connection therewith, was obtained by false pretenses, and it was held by the court that criminal liability flowed therefrom. A critical reading of the decision will show that the holding rested upon the theory that the property so obtained was personal property; particular reliance apparently being placed upon the fact that there was personal property aside from the leasehold interest, although that was also regarded as personal property. This decision is not in conflict with the conclusion we have here reached, though it comes the nearest to sustaining the prosecution's contention of any authority coming to our notice. Indeed, its reasoning supports the views we here express.

Our attention is called to section 2303, Rem. & Bal. Code, defining various terms used in the Criminal Code of 1909, in which is found the definition of the crime as above quoted. That section, among other things, provides: "In construing the provisions of this act, save when otherwise plainly declared or clearly apparent from the context, the following rule shall be observed: * * *

(9) The word 'property' shall include both real and personal property." We think enough has already been said by us to show that it is clearly apparent from the context of section 2601, above quoted, defining the crime here involved, that the word "property" as there used does not include land or real property. Our attention is also called to the word "title" used in connection with the word "property" in the definition of the crime in section 2601, from which it is argued that this suggests the thought of real property. The word "title" is a term indicating the foundation of ownership of personal as well as real property, though probably used somewhat more frequently in connection with real property. 32 Cyc. 678. The idea of larceny of land being so foreign to all previous conceptions of that crime or the analogous crime of false pretenses, we are constrained to hold that the Legislature did not intend by this statute to bring land within its provisions.

The judgment is reversed, with directions to dismiss the action.

CROW, C. J., and FULLERTON, MORRIS, and MOUNT, JJ., concur.

STATE v. NORDSKOG.

(Supreme Court of Washington. Nov. 29, 1913.)

TELEGRAPHS AND TELEPHONES (§ 25*)—OFFENSES—DAMAGING TELEPHONE APPARATUS.

Rem. & Bal. Code, § 2656, subd. 6, provides that every person who willfully or maliciously damages or destroys a telephone transmission line or any apparatus connected with its operation shall be guilty of a misdemeanor. Accused "tapped" a private telephone wire, but the operation did not interfere with the use of the telephone or injure the property in any respect. Held, that accused's acts did not constitute an offense; it being necessary that there be a physical invasion of the property which injures it so as to prevent or impair its ordinary use to constitute an offense under the statute.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 25.*]

Department 1. Appeal from Superior Court, King County; John E. Humphries, Judge.

A. A. Nordskog was convicted of maliciously damaging the property of a telephone company, and appeals. Reversed and remanded, with directions to dismiss.

J. M. Hammond and Frank E. Hammond, both of Seattle, for appellant. John F. Murphy, Crawford E. White, and Reah M. Whitehead, all of Seattle, for the State.

CHADWICK, J. Defendant was tried and convicted of the crime of willfully and maliciously damaging the property of the Pacific Telephone & Telegraph Company. The information was filed under section 2656, subd. 6, Rem. & Bal. Code, which reads as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

follows: "Every person who shall willfully or maliciously remove, damage or destroy: A telegraph, telephone or electric transmission line or any part thereof, or any appurtenance thereto, or apparatus connected with the operation thereof—shall be guilty of a misdemeanor." The charging part of the information is as follows: "He, said A. A. Nordskog, in the county of King, state of Washington, on the 5th day of November, 1912, did then and there willfully, unlawfully, and maliciously damage the electric telephone transmission wire of the Pacific Telephone & Telegraph Company, a corporation duly organized and existing under and by virtue of the laws of the state of California, and doing business in the state of Washington, by then and there tapping and connecting a wire thereto, and willfully, unlawfully, and maliciously intercepting and reading a message then and there being sent and transmitted on said electric telephone transmission wire, said wire being number Elliott 2538, the property of said Pacific Telephone & Telegraph Company, and a public utility." H. P. Murphy is an electrician and an experienced telephone man. He is described by the trial judge as a professional wire tapper, having previously performed such services for the Burns Detective Agency, the manager of which is the prosecuting witness in this case. He testifies that in July, being at the time not employed by the Burns people, he was employed, together with the defendant, to do certain detective service for the Seattle Times. He says that he, in company with defendant, tapped the wire leading into the office of the Burns Detective Agency. That the wire was tapped is proven and is not denied, although defendant says that it was done over his objection; that he advised Murphy not to do it. Afterwards, conceiving that defendant was "double crossing" him, Murphy voluntarily told the manager of the detective agency that he and defendant had tapped its wire. He was then taken into the employ of the detective agency, and, after a lapse of about one month, defendant was arrested. The manner of tapping, as described by Murphy, is accomplished by first getting the location of the cable wire in the cable box, and then running a pair of fine wires through the box out through its outer edge, and then running a heavy duplex from that point to the top of the building, and from thence to the room where the wire tapper has his apparatus. The wire used is what is known as magneto wire, being a very small wire a little larger than a thread. It is ordinarily used for making coils. It would require a minute inspection of the cable box to determine whether the wire was tapped. Conversations over the phone would not be in any way interrupted, nor would any one

using the telephone know that the tap was on.

Upon some theory not entirely clear to us, the court held that the act complained of was a "damaging" within the meaning of the statute. It is our judgment that the law will bear no such interpretation. It is a cardinal principle of statutory construction that the first consideration in the interpretation of questioned statutes is to inquire as to the object of the law. The statute here involved is a part of the Criminal Code and is found under the subtitle "Injuring Public Utilities," and its purpose, standing alone and compared with other subsections, is unquestionably to preserve the efficiency of the public utilities of the state. To offend against it there must be such physical invasion of the quasi public property as to destroy the property or so injure it that it will not meet the ordinary tests of efficiency. In the instant case the property of the telephone company was not "removed" or "destroyed." Its use was in no way impaired; its business was in no way interrupted. It is not complaining. To hold under this state of facts that the mere attachment of two thread-like wires is a damage would be to overrule the legislative intent by the most strained sort of judicial construction.

The state seeks to sustain its case by calling our attention to the fact that the information is broad enough to cover subsection 18 of section 2856, which reads as follows: "Who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line." Inasmuch as there is no evidence to sustain this part of the charge, it is unnecessary to follow counsel's argument.

We do not want to be understood as condoning in any way the offense of wire tapping. The record before us warrants the assertion that there has been altogether too much of this form of pilfering going on in this state, and the omission of the law now disclosed calls aloud for legislative action. In the event that the Legislature is disposed to meet our suggestion, the law should be so framed that the privacy of all citizens, as well as the detective agencies, may be protected, and that any tampering or interference, however slight, that is not done under the rules of the company and by its agents, or under some regulation of the public service commission, may be prohibited. The record shows that the citizen has suffered from this manner of invasion in greater degree and more often than has the detective agency.

Reversed and remanded, with instructions to dismiss.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

NOYES v. ADAMS.

(Supreme Court of Washington. Nov. 25, 1913.)

1. GUARANTY (§ 43*)—PERFORMANCE OF CONTRACT.

To constitute a substantial compliance with defendant's guaranty that notes and attached securities, which were obligations of mining companies in which plaintiff and her son were interested, should be placed in plaintiff's hands after she had taken them up under an agreement that they be assigned to her with collaterals, all of the notes correctly described in the guaranty, with their collaterals, should be turned over to plaintiff, and not merely all but one.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 53; Dec. Dig. § 43.*]

2. GUARANTY (§ 16*)—CONSIDERATION.

A detriment to the promisee is as much a consideration for a guaranty as is a benefit to the promisor, so that money paid by plaintiff to a trust company to take up certain notes and attached securities of mining companies in which plaintiff was interested was a sufficient consideration for the personal guaranty of defendant, an officer of the trust company, that the notes and collateral should be placed in her hands after she had taken them up.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

3. GUARANTY (§§ 36, 75*)—BREACH—MEASURE OF DAMAGES.

Plaintiff's remedy for partial breach of defendant's guaranty that notes and attached securities, which were obligations of companies in which plaintiff and her son were interested, should be placed in her hands after she had taken them up under an agreement that they be assigned to her with collaterals, and immediate payment of the balance of the corporate indebtedness be not enforced, was an action for damages; her measure of damages being her actual losses, and not the amount advanced for the obligations.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45, 85; Dec. Dig. §§ 36, 75.*]

4. GUARANTY (§ 36*)—SUBSTANTIAL DAMAGES—BREACH OF CONTRACT.

In an action to recover damages only, such as for breach of a contract of guaranty, failure to prove substantial damages entitles defendant to a judgment, notwithstanding that a technical breach of the contract is shown.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45; Dec. Dig. § 36.*]

Department 2. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Elmira Noyes against Robert D. Adams. From a judgment for defendant, plaintiff appeals. Affirmed.

Ralph R. Duniway and James G. Raley, both of Seattle, for appellant. Hughes, McMicken, Dovell & Ramsey, of Seattle, for respondent.

FULLERTON, J. The appellant, plaintiff below, brought this action against the respondent to recover damages in the sum of \$15,000, alleged in the complaint to have been suffered by her because of the failure of the respondent to comply with the terms of a written guaranty. Issue was taken on the complaint, and a trial had before the court sitting without a jury, which resulted

in findings and a judgment in favor of the respondent.

The principal facts giving rise to the controversy are not seriously in dispute. From the record it appears that in the year 1909, and for some years prior thereto, the Candle Alaska Hydraulic Gold Mining Company, a corporation, owned and controlled extensive placer mining properties situated near Candle, Alaska, in the development of which it had expended large sums of money, and incurred a large indebtedness. Its principal stockholder was T. C. Noyes, a son of the appellant, who, it seems, had furnished the corporation with the principal part of the money with which its properties were acquired. The appellant was also a stockholder in the concern in a limited amount, and was also its creditor in a considerable sum; the precise amount not appearing in the record. During the course of its operations the corporation became largely indebted to the Nome Bank & Trust Company, a banking corporation, doing business at Nome, Alaska. In the fall of the year 1908 this indebtedness was represented by promissory notes as follows: A note for \$25,000, secured by a mortgage upon the real and personal property of the corporation; a note for \$5,000, secured by 10,000 shares of the stock of the corporation; a note for \$2,924.60, secured by 6,000 shares of such stock; and a note for \$1,000, secured by 5,000 shares of such stock. The bank also held at the same time the individual note of T. C. Noyes for \$2,000, secured by 25 shares of the corporation's capital stock, the note of T. C. Noyes and Frances Noyes for \$3,000, secured by 12,000 shares of such stock, and a note of the T. C. Noyes Banking Company, a banking concern managed by T. C. Noyes, for \$2,994, secured by 12,000 shares of such capital stock. These notes were then all overdue, and the bank seemingly was not easy concerning them, especially the notes secured by pledges of the corporation's capital stock; but Noyes was either unwilling or unable to meet them, and left Nome before the close of navigation in 1908, without arranging for their payment. The respondent, Adams, was vice president of the Nome Bank & Trust Company in the years 1908 and 1909, although he testifies he had nothing to do with its immediate management. He left Nome also before navigation closed in 1908, going to the state of California. In the early part of the year 1909 a representative of the Nome bank cabled him at San Francisco to take up the matter of the Noyes' indebtedness to the bank with Noyes, and endeavor to procure its settlement, directing him to notify Noyes that, if the indebtedness was not taken care of, the bank would attempt to realize on its collaterals. Noyes was also in San Francisco, and Adams communicated with him concerning the matter. The record does not make clear

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

what Noyes had done in that behalf; but it appears that he had been endeavoring to raise money for his mining adventures, and some days after Adams had communicated with him he showed Adams the following telegram, received from his mother, the appellant, who was then in New York City: "Possibility of making arrangement here. Prepare to come East. Will telegraph Monday. Think it wise to have Adams come with you."

Shortly thereafter Noyes and Adams left for New York, reaching there in the early part of May, 1909. The matter of the indebtedness to the Nome bank was at once broached between Adams, T. C. Noyes, and the appellant, and pending the negotiations a cablegram was sent to Noyes by the Nome bank purporting to describe the obligations due to the bank from Noyes personally and from the different concerns which he represented. This cablegram was sent in cipher, and was translated by Noyes with the aid of one Meyer, and a copy of the translation given to Adams. After some negotiation the appellant agreed to take up these obligations to the amount of \$15,000, provided they were assigned to her with their collaterals, and the immediate payment of the balance not enforced. Adams agreed to these conditions on the part of the bank. It was understood by Adams at that time that these notes and collaterals were in the possession of the Nome bank's correspondent bank at Seattle, and he so informed the appellant. She thereupon wired her bank at Seattle to turn over to the correspondent bank \$15,000, and take over certain described notes with their collaterals. The Seattle bank informed her shortly thereafter that no such notes and collaterals as she described were with the correspondent bank, and she so informed Adams. Adams thereupon agreed with her that, if she would let the \$15,000 go to the credit of the Nome bank, he would undertake personally to see that the notes and collaterals described would be turned over to her as soon as navigation opened with Nome during the coming summer. She agreed to this and directed her bank to turn the money over unconditionally. Adams thereupon gave her the following writing:

"May 21st, 1909. To Mrs. Elmira Noyes: In consideration of the fact that certain notes and securities which were believed to be in the hands of Scandinavian-American Bank, and which are now found to be in possession of Nome Bank & Trust Co., I hereby guarantee personally that the following notes and attached securities will be placed in Mrs. Noyes' hand on demand. These notes and securities are as follows, viz.: Note of \$2,500, with Ditch Stock as security; note of T. C. & Frances Noyes of \$3,000, with securities; note of T. C. Noyes Banking Co. for \$2,900, with securities; note of T. C. Noyes personal for \$2,000, with attached securities; and note of Candle A. H. G. M.

Co. for \$4,400, with attached securities. R. D. Adams, Vice Pres. Nome Bank & Trust Co."

On receipt of information that the money had been paid to its use, the Nome bank credited it as follows:

| | |
|---|-------------|
| Note of the Candle Alaska Hydraulic Gold Mining Co. to the Nome bank..... | \$ 5,000 00 |
| Interest on same..... | 463 33 |
| Note of Candle Alaska Hydraulic Gold Mining Company | \$ 1,000 00 |
| Interest on same..... | 73 00 |
| Note of T. C. Noyes Banking Company..... | \$ 2,994 40 |
| Interest on same..... | 222 18 |
| Note of T. C. Noyes and Frances Noyes.... | \$ 3,000 00 |
| Interest on same..... | 508 65 |
| Overdraft Candle Alaska Hydraulic Gold Mining Company | 408 95 |
| Overdraft of the T. C. Noyes Banking Company | \$ 1,335 49 |
| Total | \$15,000 00 |

This application of the fund was made on May 20, 1909, and later the Nome bank on behalf of Adams proffered the appellant the notes above mentioned with their collaterals; the latter consisting of 27,000 shares of the capital stock of the Candle Alaska Hydraulic Gold Mining Company. The appellant refused to accept the same as a compliance with the written guaranty above set forth, and brought the present action as before stated.

By a comparison of the notes described in the written guaranty and the notes tendered the appellant as a compliance therewith, it will be observed there is no exact correspondence between them except in the instances of the note of T. C. and Frances Noyes. It was abundantly shown, however, that the bank did not hold the notes described in the guaranty, or any other or different notes against T. C. Noyes and the interests he represented than the notes tendered, except the note for \$25,000, and the personal note of T. C. Noyes for \$2,000 before mentioned. Of these notes it was clearly not the intention of the parties to the agreement that the note owing by the mining company itself to the Nome bank should be taken up, and the collaterals by which it was secured assigned to the appellant. But it is clear that the note of T. C. Noyes for \$2,000 was to be so taken up; in fact it is one of the two notes that were correctly described in the guaranty. Why it was not tendered to the appellant the evidence fails to make clear; but apparently the reason was that the Nome bank at the time it made the application of the money paid it by the appellant had no very definite knowledge of the terms of the guaranty.

[1, 2] The trial judge, in a memorandum filed shortly after the close of the trial, rested his judgment on the ground that there had been a substantial compliance with the terms of the guaranty. In his formal findings made later he added the additional reason that the guaranty was inval-

id for want of consideration. It has seemed to us, however, that the judgment cannot rest on either of these grounds. To constitute a substantial compliance with the guaranty, all of the notes that were correctly described therein with their collaterals should at least have been turned over, and, as we have shown, one of such notes was not so turned over. The second reason is untenable, as plainly the guaranty was founded on a sufficient consideration. The appellant parted with the sum of \$15,000 on the faith of the promise contained in the guaranty, and a detriment to the promisee is as much a consideration as is a benefit to the promisor.

But we think nevertheless that the judgment was right. The contract was not indivisible. It contains no promise to return the money advanced in the case the notes and securities are not delivered in their entirety. In this respect it does not differ from an ordinary contract. The promise implied by the agreement is that the promisor will make good any losses suffered by the promisee by reason of a failure to perform the contract. It is plain from the recitals we have made that the appellant had two objects in making the advancements. The first and perhaps the principal one was to stay the hand of the Nome Bank & Trust Company with reference to the collaterals held by it. It was desired that no sale of these might be made by the bank, as it might put the control of the mining company in the hands of strangers, and thus cause a loss of not only the interests the appellant and her son had therein but the very considerable sums they had advanced in its promotion. The second reason was to secure individual control of these notes and collaterals that she might better secure a return of the money advanced. The major part of these purposes was fulfilled.

[3] The appellant not only succeeded in stopping a sale of the collaterals, but secured, or could have secured, the greater part of the notes and collaterals agreed to be turned over to her. Her remedy was therefore, as she correctly conceived, an action in damages for a breach of the contract; but her measure of damages was not, as she seems to have incorrectly conceived, a return of the entire sum advanced. She was entitled to recover her actual losses and no more. What these were the record is silent. True, it was shown that the mining adventure failed, and that the collaterals which consisted of its capital stock lost their value. But this was not the fault of the respondent. He did not guarantee the success of the mining adventure, and, in so far as losses were caused by this fact, they must be borne by the appellant, who assumed the risk. The only tangible asset described in the guaranty capable of being measured, and which was not tendered, was the note

of T. C. Noyes for \$2,000. But there was evidence to the effect that Noyes was insolvent, and this, we think, overcomes the presumption that perhaps arises from the execution and delivery of the note, namely, that the maker of the note is able to make good the promise contained therein.

[4] The record, therefore, shows nothing more than the execution of a contract and its partial breach. While this in some instances would show a right to nominal damages, it is not so in this character of action. The rule in this jurisdiction is that, in an action for damages, the object of which is to recover damages only, a failure to prove substantial damages is a failure to prove the substance of the issue, entitling the defendant to a judgment.

The record is long, and in the foregoing we have given only its most salient features. Without, however, pursuing the subject further, we conclude that the judgment is in accord with the evidence, and should be affirmed.

It is so ordered.

MOUNT, ELLIS, and MAIN, JJ., concur.

JENSEN v. SHAW SHOW CASE CO.

(Supreme Court of Washington. Nov. 25, 1913.)

1. JURY (§ 34*) — QUESTIONS OF LAW AND FACT—DETERMINATION BY COURT.

Under Const. art. 1, § 21, providing that the right of trial by jury shall remain inviolate, the courts have no right to trench on the province of the jury in determining questions of fact; it being only where there is no evidence, either direct or circumstantial, which warrants the jury's verdict that the courts may interfere.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 233-235; Dec. Dig. § 34.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—RIPSAW—GUARDS.

Decedent was injured by being struck by a board which kicked back as he was passing it through a rip saw in defendant's factory. Defendant had provided the machine with a hood, but this was cumbersome and inadequate and could not be used on polished wood on which decedent was working at the time. The saw was not equipped with a spreader, which would have prevented the injury. Held that, whether the guard provided under such circumstances constituted a compliance with factory act (Rem. & Bal. Code, § 6587), requiring the employer to provide and maintain in use reasonable safeguards, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—FACTORY ACT—COMPLIANCE—QUESTION FOR JURY.

Except in unusual cases, where the minds of reasonable men could not differ, whether an employer has complied with factory act (Rem. & Bal. Code, § 6587), requiring the employer to provide and maintain in use reasonable safeguards where it is practicable to guard the ma-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

chinery with which an employé is liable to come in contact, is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Decedent, while working in defendant's factory, was injured by a board being kicked back from a rip saw as he was passing it through the saw. No one saw the accident, but men of large experience testified that if the board had not been pinched, but had merely fallen on the saw, it would not have been thrown with sufficient force to cause a serious injury, and that the pinching would have been avoided by providing a spreader back of the saw. *Held*, that it sufficiently appeared that the board pinched against the saw, that this was the proximate cause of the injury, and that the cause of the accident was not mere matter of speculation or conjecture in that it might have been as well caused by decedent negligently allowing the board to catch the saw.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

Mount, J., dissenting.

En Banc. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Kirstine Jensen, as administratrix of the estate of Martin Jensen, deceased, against the Shaw Show Case Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Martin J. Lund, of Seattle, for appellant. John P. Hartman, of Seattle, for respondent.

GOSE, J. This action is brought to recover damages under the factory act (Rem. & Bal. Code, § 6587 et seq.). The husband of the plaintiff administratrix sustained an injury, from which he died two days later, while operating a circular rip saw in the factory of the defendant company. He was a cabinet maker and accustomed to the use of saws. There were two saws in the factory, one a trimmer or cut-off saw and the other a rip saw. He was engaged in cutting panels to an exact size, and while thus engaged, and when the saw had passed through the panel or just as it was about to do so, the board kicked back and struck him in the abdomen. At the close of the plaintiff's testimony the defendant moved for a nonsuit, which was denied, and at the close of all the testimony defendant moved for a directed verdict, which was also denied. There was a verdict for the plaintiff. Following the return of the verdict the defendant moved for a judgment non obstante and in the alternative for a new trial. The motion for new trial was denied, and the motion for a judgment non obstante was granted, whereupon a judgment was entered in the defendant's favor. Plaintiff has appealed.

The testimony submitted by the appellant tends to prove that the respondent failed to provide a practicable or efficient safeguard for the protection of its workmen while

operating the rip saw; that the only practicable guard is a spreader or splitter, an upright piece of steel fastened to the saw table a few inches back of the saw. The purpose of this appliance is to spread the board so that it will not pinch the saw. The testimony is to the effect that kickbacks come from pinching; that is, that the saw picks up the material and throws it toward the workman. Several witnesses testified that with a spreader the injury could not have happened. The respondent had installed a guard over its saws, which had been approved by the commissioner of labor whose certificate it produced and filed as an exhibit. The guard provided is a hood made of woven wire, hung upon gas pipe suspended from the ceiling, to be lowered and adjusted by the workmen. The jury inspected the factory during the trial and watched an operator put a panel through the saw with and without the use of the hood.

The first proposition advanced by the respondent to sustain the judgment is: "(a) If a good and sufficient guard is furnished for a machine and a workman skilled in the business of using the machine is instructed to use the guard by the employer, but does not use it, then is the workman injured on the machine guilty of contributory negligence when said injury could not have happened had the guard been used?"

[1] The crucial question is: Who shall determine the sufficiency of the guard? The Constitution, art. 1, § 21, provides that the right of trial by jury "shall remain inviolate." This provision is pregnant with meaning. The courts have no right to trench upon the province of the jury upon questions of fact. It is only where there is no evidence, either direct or circumstantial, which warrants the verdict of the jury that the courts may interfere. In proper cases the jury is an arm of the court; its province is to find the facts; and the province of the court is to declare the law.

[2] A number of witnesses testified that the guard provided was cumbersome and inadequate; that it could not be used upon polished wood such as the deceased was working upon at the time he sustained the injury. The reason assigned is that it would scratch the wood. Witnesses also testified that the hood was never used, and that the respondent's foreman admitted its impracticability. They further testified that, had a spreader or splitter been used, there could have been no pinch; hence no kickback and no injury. Upon these facts it was clearly a question for the jury whether the guard provided complied with the factory act. The Legislature could have provided that the certificate of the labor commissioner as to the sufficiency of the guard would be conclusive, but it did not do so. It made it simply *prima facie*. Rem. & Bal. Code, §

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6593. In other words, it left the question of the sufficiency of the guard to be determined by the jury, like other questions in the case. The factory act (Rem. & Bal. Code, § 6587) requires the employer who operates a factory to "provide and maintain in use" reasonable safeguards where it is practicable to guard the machinery with which an employé is "liable to come in contact" while in the performance of his duty.

[3] Except in unusual cases, such as where the minds of reasonable men could not differ, it is for the jury to determine whether the employer has complied with the provisions of this act. *Benner v. Wallace Lumber & Mfg. Co.*, 55 Wash. 679, 105 Pac. 145; *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4; *Vosberg v. Michigan Lumber Co.*, 45 Wash. 670, 89 Pac. 168; *Noren v. Larsen Lumber Co.*, 46 Wash. 241, 89 Pac. 563; *Boyle v. A. & M. Lumber Co.*, 46 Wash. 431, 90 Pac. 433; *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 93 Pac. 428. The respondent relies on *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089, *Johnston v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627, and *Burns v. Leudinghaus*, 65 Wash. 448, 118 Pac. 305. In the *Daffron* Case the court said: "The law is well settled that, where an employer places a guard sufficient to protect against all dangers reasonably to be anticipated, he is not guilty of negligence because the guard fails to protect against an unforeseen danger against which it was not intended as a protection." The same view is announced in the *Johnston* Case. In the *Burns* Case the majority of the court were of the opinion that the saw had been guarded in the only way in which it could have been guarded. An examination of these cases will show that they are *sui generis* upon the facts, and that they do not impinge upon the general rule as we have announced it; i. e., that except in unusual cases the question of the sufficiency of the guard must be determined by the jury. This view is made prominent in the *Young* Case, where the court said: "The court seems also to have held that appellant assumed all the risks of working at the saw, because he had been properly instructed and knew something of machinery. This was not ground for a nonsuit, if in fact the guard in use was not a reasonably safe one and a reasonably safe guard was practicable, and if in fact the appellant would not have been injured had a reasonably safeguard been used. These were questions for the jury."

[4] The next proposition suggested by counsel for the respondent is: "(b) When an injury to a workman occurs which might have happened in one of several ways, but there is no evidence as to how it occurred, then is negligence imputable to the employer because of such accident when a saw was being used without the knowledge of the employer and without the workman adjusting a guard for his own protection, which guard would have fully protected him; the workman

knowing all the dangers and the risks of the employment?"

The suggestion that the guard was sufficient has been sufficiently met. No one saw the accident; and hence it is argued by the respondent that it is a matter of speculation and conjecture as to whether the panel was pinched and thrown back by the saw or whether the deceased picked it up and negligently allowed it to catch the saw. The vice of this argument lies in this: That men of large experience in such work testified that, if the board had not been pinched but had merely fallen upon the saw, it would not have been thrown with sufficient force to cause a serious injury. The suggestion is subject to another criticism. There was abundant evidence to warrant the jury in finding that the death of the deceased was caused by the panel pinching, and that the pinch was due to the failure of the respondent to furnish a suitable guard. Again, negligence is never presumed but must be proven. It would be going altogether too far to say that a verdict is based upon speculation or conjecture where the negligence of the employer is shown, and that negligence is of such a character as to produce the injury in controversy, and where to overthrow the verdict the court would be required to presume that the workman was himself guilty of negligence. There was ample evidence to justify the inference that the board pinched as it passed through the outer edge of the saw and was thrown against the deceased with such violence as to cause his death.

The respondent, to sustain this contention, relies upon the case of *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077. In that case a piece of board was found after the accident near where the operator would ordinarily stand in the discharge of his duty. The board had some marks upon it, indicating that it might have been caught by the teeth of the saw and hurled against the deceased. The court said that these were the only facts or circumstances tending even remotely to show the cause of the accident or how it happened. In this case, as we have already said, men of large experience testified that the marks upon the board indicated to an experienced man that the panel pinched and was thrown upon the saw, and that the marks excluded the inference that the workman himself brought the panel in contact with the top of the saw. In the *Young* Case, *supra*, in answer to a similar contention, this court said: "When, from all the circumstances developed by the evidence, it becomes reasonably apparent that the injury occurred because of an insufficient guard, then, in the absence of contradictory evidence, a nonsuit should not be granted for lack of direct evidence showing just how it occurred. There is no valid reason why the same rule should not apply in such a case as in cases where the master has failed to in-

struct the operator and warn him of the danger. 'Where the contact is involuntary or accidental, the (in)ability of the party to fully explain how the accident happened should not be deemed conclusive against him.' *Von Postel v. Lake Sammamish Shingle Co.*, 51 Wash. 261, 98 Pac. 665."

Without encroaching upon the constitutional guaranty of trial by jury, this court cannot say either that the guard furnished by the respondent was adequate or that there is neither evidence nor justifiable inference of sufficient value to sustain the verdict.

The judgment is reversed, with directions to enter a judgment upon the verdict.

CROW, C. J., and ELLIS, MAIN, PARKER, and FULLERTON, JJ., concur. MOUNT, J., dissents.

SCHNEIDER v. BIBERGER.

(Supreme Court of Washington. Dec. 3, 1913.)

1. HUSBAND AND WIFE (§ 221*)—ACTION—PARTIES.

Under Rem. & Bal. Code, § 181, providing that, when a married woman is the party to an action, her husband must be joined, except in actions concerning her separate property, when the action is between husband and wife, and when the wife is living separate and apart from her husband, in a married woman's action for damages for an indecent assault, resulting in a miscarriage, the husband was a necessary party, and, where the complaint showed that she was a married woman, a demurrer because of the husband's nonjoinder should have been sustained.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 707, 802-806, 968, 973, 976½; Dec. Dig. § 221.*]

2. HUSBAND AND WIFE (§ 221*)—ACTION—PARTIES—"LIVING SEPARATE AND APART."

Under Rem. & Bal. Code, § 181, providing that, when a married woman is a party to an action, her husband must be joined with her, except in the case, among others, when she is living separate and apart from the husband, a wife was not "living separate and apart" from her husband at the time of an assault upon her, though she was at the time residing with her parents and had been for about two weeks, where a week subsequent thereto she returned to her husband's home, where she remained, excepting for a temporary absence while in a hospital, until she commenced an action for divorce, since her absence from the husband was of a temporary nature, and to constitute a living separate and apart within the meaning of the statute there must be an abandonment or desertion by one of the parties, or a separation which is intended to be final.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 707, 802-806, 968, 973, 976½; Dec. Dig. § 221.*]

3. HUSBAND AND WIFE (§ 260*)—COMMUNITY PROPERTY—WHAT CONSTITUTES.

A cause of action for an indecent assault upon a married woman, resulting in a miscarriage, arising during the existence of the marriage was community property, since it was not acquired by the wife by gift, devise, or inheritance, and the community status of

property is determined and fixed at the time the property is acquired.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 912; Dec. Dig. § 260.*]

4. HUSBAND AND WIFE (§ 270*)—COMMUNITY PROPERTY—DISSOLUTION OF COMMUNITY—EFFECT.

Where a cause of action for an assault on a married woman which constituted community property was not awarded to the wife by a subsequent divorce decree, it became the common property of the husband and wife, and an action thereon could not be maintained by the wife alone.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 968-971, 973-984, 988; Dec. Dig. § 270.*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, Chehalis County; Ben Sheeks, Judge.

Action by Mary Schneider against John Biberger. Judgment for plaintiff, and defendant appeals. Reversed.

W. H. Abel and Geo. D. Abel, both of Hoquiam, for appellant. Conway & Snider and Taggart & Phillips, all of Aberdeen, for respondent.

MORRIS, J. [1] The amended complaint in this action sought to set up a cause of action based upon an indecent assault by appellant upon respondent, resulting in a miscarriage. The first paragraph of the amended complaint alleged "that on or about June 15, 1911, plaintiff was a married woman residing at the home of her parents. * * *" To this complaint a demurrer was interposed, pleading a defect of parties plaintiff and insufficiency of facts to constitute a cause of action. The demurrer was overruled, to which ruling exception was taken. The trial resulted in verdict and judgment for respondent, from which this appeal was taken.

The error upon which appellant most strongly relies is the ruling of the court below upon the demurrer. It seems clear to us that this ruling was erroneous. The amended complaint alleging that plaintiff was a married woman at the time of the assault, the cause of action arising therefrom, and the damages recoverable therefor were clearly such as to make the husband a necessary party to the action. *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72; *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784; *Matthews v. Spokane*, 50 Wash. 107, 96 Pac. 827; *Maynard v. Jefferson County*, 54 Wash. 351, 103 Pac. 418; *Magnusson v. O'Dea*, 135 Pac. 640.

[2] Section 181, Rem. & Bal. Code, provides that, when a married woman is a party, her husband must be joined with her, except (1) in actions concerning her separate property, (2) when the action is between husband and wife, and (3) when the wife is living separate and apart from the husband. No allegation of the amended complaint brought the cause of action within these exceptions. Respondent contends that the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaint should be regarded as amended to comply with the proof, and that the proof shows that at the time the cause of action arose respondent was living separate and apart from her husband, and hence could maintain the action in her own name. It might be answered, first, that this is not a suit in equity, and hence equitable rules should not obtain. Seeking, however, to avoid rather than to assert any technical ruling, we have read the evidence, and hold that respondent there fails to show that she was living separate and apart from her husband. She testifies that on June 15, 1911, the time of the alleged assault, she had been residing with her parents for about two weeks, and that a week subsequent to the assault she returned to her husband's home, where she remained until she went to a hospital for an operation; that she returned to her husband's home from the hospital, and remained with him until she commenced an action for divorce, the complaint in which was verified August 19, 1911. These facts do not establish a living "separate and apart" within the meaning of the statute. How can it be said that on June 15th the wife was living separate and apart from her husband, when, within a few days thereafter, she returns to him and resumes marital relations? The return within a few days shows that the absence from the husband was of a temporary nature. Such an absence does not constitute a "living separate and apart." Such a situation can only arise where there is an abandonment or desertion by the husband or wife, or a separation which was intended to be final. *Tobin v. Galvin*, 49 Cal. 34; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847. The return to the husband's home and remaining there until the commencement of the divorce proceedings negatives the requirement of the statute, and clearly establishes that on June 15th there had been no abandonment by either husband or wife, and no intention on the part of the wife to permanently live apart from the husband.

[3] It is suggested by respondent that, as the community had been dissolved by the divorce decree prior to the commencement of this action, the respondent had no husband to join in the action. The divorce did not change the situation so far as property rights were concerned. The cause of action having arisen during the existence of the community, the damages would be community property, as the community status of property is determined and fixed at the time the property is acquired. *Katterhagen v. Nelster*, 134 Pac. 673. Respondent did not possess this right of action at the time of her marriage; neither did she acquire it by gift, devise, or inheritance, and, as all other property acquired by a married woman, except the issues and profits of separate property, is community property, it follows that the

right of action and the damages recoverable were community property. *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176.

[4] The respondent could have had this cause of action awarded to her in the divorce decree had she submitted it to the court; but, not having done so, its character is not disturbed by the decree. The community having been dissolved, there can now, of course, be no community property strictly speaking; but such property as was community property prior to the decree and not disposed of thereby would become common property, in which husband and wife would retain all the interest vested in them prior to the decree. *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103; *Barkley v. American Sav. Bank*, 61 Wash. 415, 112 Pac. 495. So that, whether the cause of action and the damages recoverable be now regarded as community or common property, the necessity for joining the husband in the action would be the same.

For these reasons, we hold the complaint cannot sustain the judgment, and the judgment is reversed.

CROW, C. J., and MOUNT and PARKER, JJ., concur.

FULLERTON, J. The wrong here committed, if any, was an "unjust usurpation of the wife's natural rights," and, in my opinion, she may maintain an action therefor in her individual name under section 5926 of the Code (Rem. & Bal.).

McDONALD v. NEW WORLD LIFE INS. CO.
(Supreme Court of Washington. Dec. 2, 1913.)

1. EVIDENCE (§ 370*)—ACTION AGAINST PRINCIPAL—ADMISSION OF EVIDENCE.

In an action against an insurance company for commission for selling capital stock, printed matter purporting to have been issued by defendant was not admissible against it in the absence of proof that defendant authorized the issuance of the printed matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1538, 1559, 1560, 1562-1578, 1592; Dec. Dig. § 370.*]

2. EVIDENCE (§ 317*)—HEARSAY.

Evidence that another, who was not connected with defendant corporation, told plaintiff that certain printed matter exploiting the business of defendant insurance company was issued by defendant, was hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

3. PRINCIPAL AND AGENT (§ 184*)—LIABILITY OF PRINCIPAL—WAIVER—ACTION AGAINST AGENT.

One who, with full knowledge of the material facts, including the existence of the agency, elected to hold the agent liable, thereby discharged the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 701-703; Dec. Dig. § 184.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

If there was evidence making the requested instruction applicable, the Supreme Court cannot say that it was error to give the instruction on the ground that the jury might have found the facts otherwise.

[Ed. Note.—For other case, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by D. P. McDonald against the New World Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

T. A. E. Lally, John D. Carmody, and Pat. M. Tammany, all of Seattle, for appellant. James T. Lawler and William H. Burns, both of Seattle, for respondent.

MORRIS, J. Appeal from a judgment based upon a verdict in an action where it is sought to recover commissions claimed to be due from appellant upon a sale of its capital stock. The action was brought against the appellant and the Columbia Finance Company. The finance company, however, was not served. The theory of the respondent is that the finance company was the authorized agent of the insurance company for the sale of the stock, and that as such employed him, and that, acting under such employment, he sold the stock on which the commission is claimed. The appellant contends that respondent was not its agent in the sale of the stock, but represented the finance company and it alone, and that the latter company is responsible to him for his commission. Having reached the conclusion that the judgment must be reversed, we will make only such reference to the facts as is necessary to a proper understanding of our views on the point submitted.

[1] Error is claimed in the admission of certain exhibits, consisting of printed matter giving an outline of the intention of the insurance company, which was a new organization just embarking in the writing of life insurance, as to its plan of operation, the value of its stock as an investment, a personal reference to each of its officials, and copies of letters purporting to have been written by various well-known gentlemen, commending the insurance company as an investment feature. These exhibits were introduced as binding upon appellant, without any preliminary proof of their authorization or issuance by appellant. The respondent testified that some of these exhibits were handed him by a Mr. Gorman, who is not claimed to have any connection with appellant. Others were sent him by mail from Spokane. It is admitted that Spokane is the home office of appellant. It is also the home office of the finance company and of a Mr. Harding, who was the person through whom respondent first became interested in the sale of the

stock and whose connection with the insurance company was one of the issues in the case; respondent claiming he was acting for the appellant, while appellant claims Harding was acting solely for the finance company. We therefore think that, if deemed material, in order to make these exhibits admissible as against appellant there should have been some proof from which the jury could find that they were authorized or issued by appellant, or that in some way appellant had become responsible for their existence. *Atchison, T. & S. F. R. Co. v. Cruzon*, 31 Kan. 718, 8 Pac. 520; *Berry v. Mathewes*, 7 Ga. 457; *Brayley v. Kelly*, 25 Minn. 160.

[2] Respondent seeks to bind appellant by testifying that Mr. Harding told him that the exhibits came from appellant. It seems to us something more than this hearsay evidence and the mailing of the exhibits from Spokane was necessary, and that it would be a comparatively easy matter to show, if such were the fact, that appellant either authorized or issued the exhibits. The ruling here made is not intended to apply to all the exhibits, as some of them were admissible upon the proof subsequently made from which authorization might be inferred. Others, however, were admitted without any preliminary proof or any fact from which authorization could be inferred. Our ruling is intended to apply to those exhibits only which fall within the latter class.

[3] Appellant contended that, knowing that the finance company was the selling agent of the insurance company, respondent had elected, prior to the commencement of this action, to hold the finance company, and in support of this contention requested the court to instruct the jury that: "If you find from the evidence in this case that the plaintiff, with full knowledge of the facts, had elected at some time prior to hold Columbia Finance Company, a corporation, liable for his commission, you shall return a verdict for defendant, New World Life Insurance Company." The request was denied. This we think was error. If respondent, with full knowledge of the facts material to his rights, elected to hold the agent, he thereby discharged the principal. *Landers v. Foster*, 34 Wash. 674, 76 Pac. 274.

[4] Respondent contends that these two companies were one and the same, and that there could be no election. We are, however, dealing with facts, and cannot say how the jury might have determined this question. It is enough to find testimony making the requested instruction applicable to the facts in the case, and as such it should have been given.

Complaint is also made of instruction No. 3. We are not satisfied with the correctness of this instruction, as it eliminated appellant's theory of election and that respondent was in the employ of the finance company

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

under contract with it alone. But, inasmuch as for the errors previously treated we have determined to reverse the judgment, it probably will not be necessary to go into the matter further.

For these reasons the judgment is reversed, and a new trial ordered.

CROW, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

ADAMS v. SIMPSON.

(Supreme Court of Washington. Dec. 4, 1913.)

APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTION OF FACT.

Where a verdict is returned on conflicting evidence, and the trial court denies a motion for a new trial, the verdict cannot be disturbed on appeal, even though the Supreme Court may believe it to be against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Department 1. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Frank Adams against Robert Simpson. Judgment for plaintiff, and defendant appeals. Affirmed.

Leo & Flaskett, of Tacoma, for appellant.

MAIN, J. This action was brought for the purpose of recovering money alleged to be due upon a contract. The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff in the sum of \$927.89. Motion for new trial being made and overruled, judgment was entered upon the verdict. The defendant appeals.

For the purpose of considering the only question presented upon this appeal, a detailed statement of the facts is unnecessary.

The only point contended for by the appellant is that the verdict is against the weight of the evidence.

The evidence was conflicting. There is substantial evidence to support the verdict. By repeated decisions it has become the settled doctrine of this court that, where a verdict is returned upon conflicting evidence, and the trial court denies a motion for new trial, the verdict cannot here be disturbed, even though we may believe the verdict was against the weight of the evidence. *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825; *Kincaid v. Walla Walla Valley Tr. Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982; *Meador v. Northwestern Gas & Elec. Co.*, 55 Wash. 47, 103 Pac. 1107.

The judgment will be affirmed.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

RADOVICH v. FRENCH, District Judge. (No. 2,069.)

(Supreme Court of Nevada. Oct. 1, 1913.
Rehearing Denied Dec. 3, 1913.)

APPEAL AND ERROR (§ 758*)—REVIEW—SCOPE.

The Supreme Court may determine questions involved in a case before it though not discussed by counsel in their briefs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8093; Dec. Dig. § 758.*]

On petition for rehearing. Former decision modified, and rehearing denied.

For former opinion, see 135 Pac. 920.

NORCROSS, J. Counsel for respondent, in his petition for rehearing, expresses the conviction that the decision in this case "fore-shadows the breaking down of rules that have long been a part of our law." Coming from one whose standing at the bar entitles his expressions to great respect, we have carefully reviewed the opinion with the view of ascertaining whether therein is expressed any new, dangerous, or revolutionary rule.

The opinion comports with the recent decision in *Floyd v. Sixth Judicial District Court*, 135 Pac. 922, No. 2070, in which, in effect, we held that, when a cause or matter is properly before a court for determination upon the merits, an order to dismiss or to strike is an act in excess of jurisdiction. It is true in so holding we ceased to longer follow some precedents in this and other courts; but we were not without illustrious precedent in making the change which we are convinced is abundantly supported both in reason and justice.

Before determining the questions involved in the case as affected by the doctrine of waiver, it would doubtless have been the better practice to have asked respective counsel to have considered that question; but it would, we think, be unfortunate if it were an inflexible rule that a court of last resort in all cases could only consider questions actually discussed in the briefs.

There can be no question, we think, but that the filing of the motion to retax, without reservation, was a waiver of any question of the regularity of service. Unless the waiver itself was waived, the cost bill and the motion to retax were regularly before the court. Under these circumstances an order striking the cost bill was in excess of jurisdiction. It may be, as contended by counsel for respondent, that the plaintiff in the court below waived the waiver, and that the case is within the rule laid down by this court in *Iowa M. Co. v. Bonanza M. Co.*, 16 Nev. 64. The record brought to this court, however, is silent upon the facts that would be controlling upon that point. If the court below had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

simply entered the order to strike, without stating any reason therefor, there might be ground for contention that all presumptions are in favor of the order, including a presumption that the waiver was waived. The court, however, expressly put its order upon the ground that there was no proper service of the cost bill, while the record before us discloses that defendant had waived service by the filing of a motion to retax.

The court below correctly decided that there had not been a proper service; but that question became immaterial when counsel filed his motion to retax, and could only again become material in the event that the plaintiff waived his right to assert a waiver upon the part of defendant upon consideration of the motion to strike. *Iowa M. Co. v. Bonanza M. Co.*, supra.

The order heretofore made annulling the order to strike will stand; but it is conditioned upon the power of the court below to reconsider the question submitted upon the motion to strike with reference to the questions of waiver.

Rehearing denied

TALBOT, C. J., and McCARRAN, J., concur.

FORRESTER v. SOUTHERN PAC. CO.
(No. 1,860.)

(Supreme Court of Nevada. Dec. 2, 1913.)

On petition for rehearing. Denied.

For former opinion, see 134 Pac. 753.

TALBOT, C. J. After examination of the extended petition for rehearing and the answer thereto, which cover the points previously presented by briefs and argument, we see no reason for changing the decision, which was reached only after mature deliberation.

It is urged that the importance of the questions involved justifies a rehearing before the full court; but as the present members of the court who heard the argument and approved the opinion are satisfied with the conclusion reached, after a careful consideration of the petition for rehearing, it seems to be unnecessary to further delay the case and put counsel to the trouble incident to a rehearing.

The writer of the opinion frankly confesses error in referring to Montello as being a place which is little more than a side track. This was true when he passed there at different times years ago, but it seems the place is now considerably more than a side track, and is a small town. This error is not

regarded as being of such consequence as to justify a change in the judgment.

The petition for rehearing is denied.

NORCROSS, J., concurs.

SHEARER v. CITY OF RENO. (No. 2,041.)

(Supreme Court of Nevada. Nov. 24, 1913.)

1. DEDICATION (§ 19*)—ACTS CONSTITUTING—FILING MAP.

By filing a plat as an addition to a town, and advertising and selling lots, the land shown on the map as streets, avenues, and public parks became dedicated for those purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

2. DEDICATION (§ 63*)—RIGHT OF INTRUDER.

Notwithstanding the city council might be bound by its order on petition of the property owners, changing the northerly boundary line of an avenue, such order in no way added anything to the alleged title of an intruder upon the land formerly included within and dedicated as the avenue.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

3. DEDICATION (§ 1*)—WHAT CONSTITUTES.

A dedication of land for public purposes is simply a devotion of it, or an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 8, 10-12; Dec. Dig. § 1.*]

4. DEDICATION (§ 29*)—ACCEPTANCE—REVOCATION.

An acceptance completes the transfer of the property or the easement in it from the owner to the public, and, where there is nothing beyond the owner's declaration without acceptance by the public, the dedication may be revoked at the owner's pleasure.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.*]

5. DEDICATION (§ 29*)—ESTOPPEL TO DENY DEDICATION—INTERVENING RIGHTS.

If nothing beyond a declaration is made, and no interest in the property is acquired by third persons a dedication of property may be recalled at the pleasure of the owner; but, where contracts for a valuable consideration are made upon the supposed appropriation of the property to the uses indicated, the dedication becomes irrevocable, such contract estopping the owner from asserting any interest except in common with purchasers from him.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.*]

6. DEDICATION (§ 31*)—NECESSITY OF ACCEPTANCE.

No formal acceptance of a dedication by the public authorities is necessary to complete the dedication and preclude the original owner from revoking it, although the formal acceptance by the public authorities may be necessary to impose upon them the duty of protecting the property, and keeping it in a condition to meet the uses intended.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. § 31.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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7. DEDICATION (§ 29*)—REVOCATION—FAILURE TO SUBJECT TO IMMEDIATE USE.

The irrevocable character of a dedication, after sales made with reference thereto and induced thereby, is not affected because the property is not at once subjected to the uses designed.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.*]

8. PROPERTY (§ 9*) — POSSESSION AS INDICATION OF OWNERSHIP.

In the absence of any showing of a better title or right, the bare possession of property is sufficient to indicate ownership, and to warrant a recovery by the occupant against a mere intruder.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9; Evidence, Cent. Dig. § 2457.]

9. DEDICATION (§ 63*)—RIGHTS AS BETWEEN PUBLIC AND INTRUDER.

Where the owner of land dedicated part of it as an avenue by filing a map as an addition to a town, and by selling lots with reference thereto, a mere intruder upon land originally within the boundaries of an avenue who fenced and built thereon acquired no rights as against the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103–106; Dec. Dig. § 63.*]

10. DEDICATION (§ 65*)—CESSATION OF USE—REVERTER.

Where city authorities close an avenue dedicated as such, or release it from the public easement, the right to it reverts to the dedicator's estate, and not to an intruder thereon.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 103; Dec. Dig. § 65.*]

Appeal from District Court, Washoe County; John S. Orr, Judge.

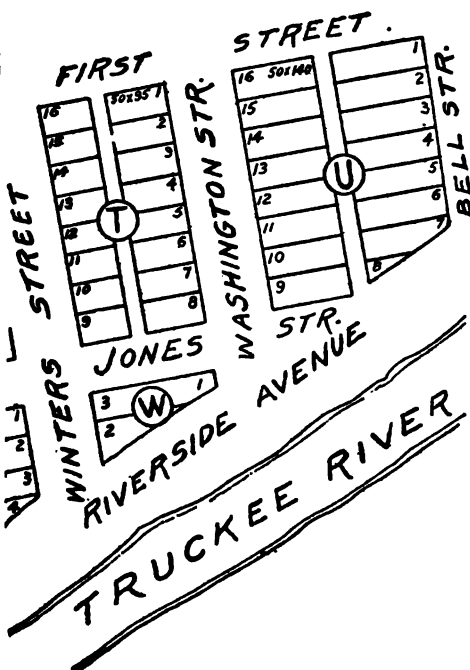
Action by Ralph W. Shearer against the City of Reno and others. Judgment for plaintiff, and defendant City of Reno appeals. Reversed, with direction to enter a judgment in favor of City of Reno.

E. F. Lunsford, City Atty., of Reno, for appellant. Thomas E. Kepner, of Reno, for respondent.

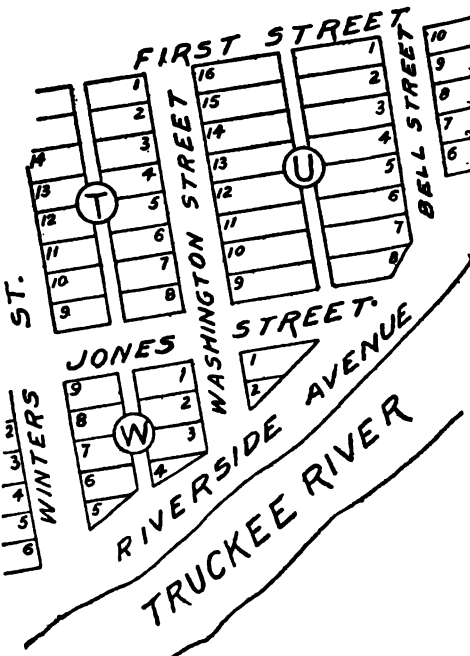
TALBOT, C. J. Plaintiff brought this action to quiet title to a triangular piece of ground in the city of Reno, bordering 109 feet on the south line of Jones street, 73.42 feet on the east line of Washington street, and 133.35 feet on the northerly line of Riverside avenue, as shown on the "Amended Map of Powning's Addition to the Town of Reno." The case was tried upon an agreed statement of facts, and, from a judgment in favor of the plaintiff, and an order denying a motion for a new trial, the city of Reno, which was incorporated by acts of the Legislature passed in 1903 and 1905, has appealed.

On the original map of Powning's addition to the town of Reno, filed March 17, 1887, which covered over 20 blocks and adjacent streets, laid out on land belonging to C. C. Powning, which adjoined the blocks and streets of the town of Reno, the ground in controversy stands open, without lines or lot

designation, as a part of Riverside avenue, at the junction of Jones and Washington streets, thus:



On the amended map of Powning's addition to the town of Reno, filed on April 10, 1891, four years later, this piece of ground is platted as fractional lots 1 and 2, without block designation, in this manner:



*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This was accomplished by reducing the width of Riverside avenue as it appeared on the original map.

On the day the original map was filed Powning sold lots in his addition to six different purchasers, and later sold other lots, and for a period of some weeks, beginning prior to the filing of this map and continuing after such filing, published an advertisement in his paper, the Nevada State Journal, extolling the lots, and offering them for sale, and stating that it was intended to have Riverside avenue 100 feet in width, and that it was certain to become the fashionable driveway of the country. After the filing of the amended map, in a bond or agreement for the sale of lots directly across the street, he expressly agreed that he would not sell or improve the two gore lots constituting the ground in controversy, and that they should be left and thrown open to the public for all time as a part of Jones and Washington streets and Riverside avenue. After making this agreement he sold to other persons lots in the adjoining blocks, from which the view of the river might be partly obscured if buildings were erected on the ground in dispute.

In November, 1900, S. O. Hatfield entered upon the ground in controversy, built a fence around it and a small house on the premises, and lived there about ten months, and until the house burned. Within a period of several months thereafter the fence was gradually carried away by Indians. Through quitclaim deeds executed since Hatfield left the premises the plaintiff has acquired any right which Hatfield obtained to the ground by reason of his improvement or possession, and since his occupancy the taxes have been paid by his grantees.

The controlling questions presented are whether it is necessary to show acceptance by the town or city authorities in order to make the dedication by Powning of land for streets, avenues, or other public uses binding, and whether the plaintiff has such a title or right to the land as will enable him to recover.

[1] By filing the plat, and advertising and selling lots, the land shown on the map to be streets, avenues, and public parks became dedicated for those purposes. Powning's intention to so dedicate it is confirmed by his express agreement, made after the filing of the amended map, that the land in controversy should forever remain open as a part of the streets and avenue, and by the fact that he kept this agreement and never sold nor improved this land.

One of the inducements and considerations offered by Powning to purchasers of lots was the width and beauty of Riverside avenue. He and intending purchasers naturally considered the advantage of having good streets and parks for enhancing or constituting a part of the value of lots, and few, if any, town lots could be sold for satisfactory prices, if the owner or dedicator offering the lots for sale could with-

draw or inclose the streets and avenues, regardless of whether the city formally accepted, or graded, or improved the streets dedicated.

[2] If, after the dedication by filing the original map and selling lots, Powning could withdraw a part of Riverside avenue, he could withdraw all of the land covered by that avenue and other streets, render the lots he had sold of little or no value, and work great inconvenience to the public. The filing of the original plat and the selling of lots was with the representation and assurance that purchasers would have the benefit of streets and avenues as represented on the map. After such filing and sales of lots he became estopped from reclaiming the ground which he had dedicated for streets, avenues, or public uses, and could not withdraw it from the purpose for which it was so dedicated without the consent of the town or city authorities. Notwithstanding the city council may change streets, and may be bound by the order it made on April 26, 1909, on petition of the property owners on Riverside avenue, changing the northerly boundary line of the avenue, that order in no way adds anything to plaintiff's alleged title.

Among the cases holding that an acceptance is not necessary to make the dedication binding, one of the most clearly written opinions is by Justice Field in *Grogan v. Town of Hayward* (C. C.) 4 Fed. 161. The case was very similar to the present one, except that there the plaintiff was better fortified by reason of being the grantee of any right which remained in the dedicator after he had made the dedication. In that case a second map was filed, and the plaintiff claiming under conveyances from Castro, the original dedicator, and through the holder of mortgages which had been foreclosed, constructed warehouses on part of a block marked "Plaza," and occupied them from 1864 to 1877. In the latter year these warehouses were burned, and the town authorities claimed possession of the ground as a part of its public plaza. It was held that the dedication was irrevocable, and that the plaintiff could not recover, notwithstanding his possession with the warehouses, and the fact that he had acquired any right to the land which belonged to the dedicator after the dedication. In the opinion it is said that under this statement of the case there ought to be no doubt as to the judgment of the court. In the light of adjudications, almost without number, in the courts of the several states, and in those of the United States, the law as to what constitutes a dedication of private property to public purposes, so as to be beyond the recall of the original owner, would seem to be settled.

[3-5] A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact. If nothing beyond the declaration be done—if there be no acceptance by the pub-

lic of the dedication, and no interest in the property be acquired by third parties—the dedication may be recalled at the pleasure of the owner. But, if the dedication be accepted by the public authorities of the place where the property is situated, or contracts for a valuable consideration be made by others founded upon a supposed appropriation of the property to the uses indicated, the dedication becomes irrevocable. In the one case, the acceptance completes the transfer of the property, or easement in it, from the owner to the public; in the other case, the contract with the owner estops him from asserting any interest except in common with the purchasers from him.

The filing in the office of the county recorder of the map containing a designation of the streets and blocks, as set apart for public uses, was a public declaration of the fact. Whether, if nothing further had been done by him, there would have been any such interest acquired by the public as to forbid a subsequent assertion of ownership may be questioned. But when, by the sale of the property by reference to the map filed or bounded by streets marked upon it, other parties had become interested in the property set apart for public uses, the owner was precluded from asserting his original rights. The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in the deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an implied covenant that subsequent purchasers should be entitled to the same rights. The grantor could no more recall this easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased.

[6] No formal acceptance by the public authorities of the dedication, upon which the counsel for the plaintiff so much insist, was essential. A formal acceptance by the public authorities of a dedication may be necessary to impose upon them the duty of protecting the property, and keeping it in a condition to meet the uses designed—as, for instance, to open and repair a street—but it is in no respect essential to complete the dedication and preclude the original owner from revoking it. The dedication is irrevocable when third parties have been induced to act upon it and part with value in consideration of it.

[7] Nor is this irrevocable character of the dedication affected because the property is not at once subjected to the uses designed. In many instances, perhaps the greater number, there may be no present need of the land for the purposes contemplated, as in the case

of streets and parks laid out upon a tract added to an existing city to meet its supposed future growth, as in the present case, or upon a tract selected as a site for a new town. In such cases it is understood that the property will only be subjected to the uses intended as it may be from time to time needed to meet the growth of the place. If an immediate subjection were required in such cases, the object of the dedication would be defeated.

In *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145, it was held that a dedication to the public is effected by the owner of land if he makes and records a map by which the tract is subdivided into blocks and lots which are bounded by streets connecting with streets already laid out, marks a space thereon "Park," and sells lots facing the park, holding it out as an inducement to purchasers. It was also the conclusion of the court that delay on the part of the town in using the land which had been dedicated to it for a park did not impair its right thereto, and that, although acceptance is necessary in case of an offer to dedicate, actual dedication will vest title in the public without acceptance.

The decision in *Abbott v. Mills*, 3 Vt. 521, 23 Am. Dec. 222, holds that it is not necessary in order to show dedication of land to the use of the public to prove that it has been appropriated to such use, and that it is sufficient if the owner thereof, by some unequivocal act, manifested his intention of dedicating it to public use, and in consequence of such intention individuals have purchased from him property which would be materially affected if such intention be changed; that the proprietors, after setting apart lands as a public square or common, cannot resume the lands so dedicated or appropriate them to any other use when individuals have been induced by reason of the dedication to purchase lots bordering on such square in expectation that it will so remain.

In *Bartlett v. City of Bangor*, 67 Me. 460, it was held that, when the owner of land near a growing city or village divides it into streets and lots, makes a plat of the land showing the streets and lots, and then sells one or more of the lots by reference to the plan, he thereby annexes to each lot sold a right of way in the streets which neither he nor his successors can interrupt or destroy. It was further held that, although the location and platting of streets by the owner of land and the sale of lots constitute an incipient dedication of the streets to the public, neither the owner nor his successors in title can afterwards revoke such dedication, notwithstanding it does not impose upon the municipality the burden of keeping the streets in repair until they have been accepted by competent authority.

Northport Ass'n v. Andrews, 104 Me. 342, 71 Atl. 1027, 20 L. R. A. (N. S.) 976, holds that the dedication of land for a park is ef-

lected by the exhibition of a plat on which the space is designated as a park when selling lots bordering thereon, followed by permitting the public to use the tract.

In *Wood v. Seely*, 32 N. Y. 116, it is said: "Cases of dedication often rest upon the principle of estoppels in pais; it being considered fraudulent on the part of one dedicating his land to public uses to retract, to the prejudice of parties who have purchased on the faith of such dedication."

In *Wiggins v. McCleary*, 49 N. Y. 346, it was held that, where the owner of a tract of land lays it out into lots, and intersects it with a street or alley for the convenience of the lots, and sells a lot, bounding it upon the street or alley, the purchase being made in reference to such convenience, the purchaser acquires an easement in the street or alley which cannot be recalled, and that such easement is not lost by mere nonuser.

In *Rowan v. Town of Portland*, 8 B. Mon. (Ky.) 232, the land between the blocks and the river was left open, with no line separating it from the town, and it was held that the designation by the proprietor of particular parts or spaces as intended for public use, though appearing on the map alone, would be regarded as conclusive dedications of such parts or spaces to the uses designated. It is said, in the opinion: "We are satisfied, therefore, that whatever ground within the limits of the town of Portland, as presented by the plat and plan of said town, appears to have been designated as for public use must be taken to have been irrevocably dedicated to that use by the recorded plan and indorsement thereon, and by the recorded deeds conveying the lots according to said plan. * * * The foregoing principles are fully sustained by the cases already referred to in this court, and by the case of *Buckner v. Trustees of Augusta*, 1 A. K. Marsh. [Ky.] 8; *Augusta v. Perkins*, 3 B. Mon. [Ky.] 437; *Town of Bowling Green v. Hobson*, 3 B. Mon. [Ky.] 478; *Cincinnati v. White's Lessee*, 6 Pet. 431 [8 L. Ed. 452]; *Barclay v. Howell's Lessee*, 6 Pet. 498 [8 L. Ed. 477]; *New Orleans v. United States*, 10 Pet. 662 [9 L. Ed. 573]; *Livingston v. Mayor of New York*, 8 Wend. [N. Y.] 87 [22 Am. Dec. 622]; *Wyman v. Mayor of New York*, 11 Wend. [N. Y.] 486; *Trustees of Watertown v. Cowen*, 4 Paige [N. Y.] 513 [27 Am. Dec. 80]; *Hills v. Miller*, 3 Paige [N. Y.] 260 [24 Am. Dec. 218]. To these might be added many other cases, both in England and America, tending to give efficacy to a sale according to the plan or map of a town, as a dedication of the spaces left apparently and appropriately open for the public use, as streets, public squares, commons, landing places. * * * The efficacy of a dedication to public use, arising from the clear indications of the map or plan of a town by which lots have been sold or conveyed, is so well established by the adjudications of the highest tribunals in our own and other coun-

tries, and flows so directly from the principles of honesty and good faith, which must be applied to the transactions and the rights of individuals, and is so absolutely essential to preserve, from oppression and outrage, privileges well understood, fully paid for, and necessary to the reasonable enjoyment of that which is expressly granted, that it cannot be shaken by any metaphysical inquiry into the capacity of the public at large to take the benefit of such dedication as a grantee."

In *Kimball v. City of Chicago*, 253 Ill. 105, 97 N. E. 257, it was held that, in order to show an intent to dedicate a strip of land as a street or alley it is not essential that it be designated in terms on the plat, provided such intention is manifested by the consideration of the entire plat.

The decision in *Barclay v. Howell's Lessee*, 31 U. S. (6 Pet.) 505, 8 L. Ed. 477, in effect holds that, if it was intended at the time the survey was made to have the streets extend though to the river, the land was dedicated accordingly, notwithstanding the ground claimed for the streets was not in a situation to be used, and had not been used.

In *Church v. City of Portland*, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259, it was held that the general dedication of land for public squares implies that they are to be enjoyed by the public. In the L. R. A. note to that case, and over the citation of numerous decisions, it is said that, where the owner has laid out village lots intersected with roads and public squares, such roads and public squares are dedicated to public use; that the same rules of law are applicable to the dedication of public squares as for the dedication of highways; that commons are dedicated to public uses, and the original proprietor can never appropriate them exclusively to any private use; that the word "Park" written upon a block or upon a map indicates a public use, and operates conclusively as a dedication of the block; that cases of dedication rest upon the principle of estoppel in pais; that it is not competent for the party making a dedication to assert any right over the land so long as it remains in the public use; and that where the owner of a tract of land lays it out into lots, and intersects it with streets, obviously for the convenience of the lots, and purchases of lots are made, there is created in the owners an easement in the streets which cannot be recalled.

In 3 *Dillon on Municipal Corporations* (5th Ed.) § 1073, that eminent author states: "As to common-law dedications, the right to make which is not usually taken away or abridged by statutory regulations respecting town plats, the subject may be advantageously presented by referring to the leading case of the *City of Cincinnati v. White*, decided by the Supreme Court of the United States, which has been extensively followed by the state tribunals, and is everywhere recogniz-

ed as a sound exposition of the peculiar doctrines of the law respecting the rights which may be parted with by the owner and acquired by the public under the doctrine of dedication. In that case it appeared that in 1789 the original proprietors of Cincinnati designated on the plan of the town the land between Front street and the Ohio river as a common, for the use and benefit of the town forever. A few years afterwards a claim was set up to this common by a person who had procured a deed from the trustee in whom the fee of the land was vested, and who had entered upon the common, and claimed the right of possession. The proof of the dedication (marking on the plat, accompanied by public use) being made out to the satisfaction of the court, it sustained the rights claimed by the city."

Over the citation of scores of decisions in numerous states, it is said, in 13 Cyc. 455: "Where the owner of real property lays out a town upon it, and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, or where he sells with reference to the map of a town or city, in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public, unless it appears either by express statement in the conveyance or otherwise that the mention of the street was solely for purposes of description, and not as a dedication thereof. On the same principle the owner will be held to have dedicated to the public use such pieces of land as are marked on the plat or map as squares, courts, or parks. The reason is that the grantor by making such a conveyance is estopped, as well in reference to the public as to his grantees, from denying the existence of the easement. Nevertheless the mere laying out of a town and making a plat of it without selling any of the lots will not, in the absence of a statute, constitute a dedication of the streets, and it has also been held essential that the sales be shown to have been rendered effectual by conveyances. According to the great weight of authority a dedication made as hereinbefore described is irrevocable, and the dedicator is forever concluded from exercising any authority or setting up any title to the same, and that, too, although there has been no formal acceptance by the public authorities. Nor is the irrevocable character of the dedication affected by the fact that the property is not at once subjected to the uses designed."

There are cases holding that a formal acceptance or the keeping in repair or making of improvements, constituting an implied acceptance, are necessary in order to make a road, street, or alley a public highway, more usually in cases for damages for failure to keep in repair, where they have been opened by some owner who has not dedicated them by filing a map and selling lots, and where

the public or owners of property generally in the vicinity are not interested in having them maintained as highways. These cases are distinguishable from the present one because not involving similar considerations pertaining to the purchasers and owners of lots and the public.

[8, 9] If it could be held that Powning had not dedicated the land in controversy as a part of the streets and avenue, or that he could or did recall it after making the dedication, the title would, in the absence of any conveyance by him, still remain in his estate, and not in the plaintiff. Hatfield traces no title from him, and the same is true of the plaintiff, who claims no right except through Hatfield. In the absence of any showing of a better title or right, the bare prior possession of property is sufficient to indicate ownership and warrant a recovery by the occupant. If no other right to the ground prior to the possession by Hatfield were shown, the plaintiff would prevail. If Hatfield had been in possession of the ground prior to any ownership or title held by Powning, the presumption would arise that Hatfield owned the property, and consequently that the dedication of it by Powning when he was not the owner was ineffective, and plaintiff would be entitled to recover as grantee under the quitclaim deeds carrying Hatfield's right by reason of being first in possession. But, as it is conceded that Powning was the prior owner of the property, and did not convey it to Hatfield, and, as we have held, dedicated it for a public use, the later possession by Hatfield, and any right or claim acquired through it by the plaintiff, is shown to be subordinate to the right of the public. As Powning, by filing the original map, and selling lots, became precluded from asserting ownership against the easement or right of the public to the use of the streets, Hatfield, a mere intruder, and his grantees are quite as much precluded. If he could acquire a right by fencing and building upon land which had been dedicated as an avenue by another, it might follow that any person could build upon the streets or highway, and successfully maintain an action for the ground taken in possession.

[10] In *New Orleans v. United States*, 35 U. S. (10 Pet.) 662, 9 L. Ed. 573, it was held that a grant from the dedicator of land dedicated to public use and the erection of buildings could not be considered as disproving a dedication nor affecting the vested rights of the public. This would be authority for holding that, if Hatfield had obtained a deed from Powning for the land in dispute after the dedication made by filing the map and selling lots, and any title so obtained by Hatfield, with any right he acquired by his improvements or possession, had been conveyed to the plaintiff, he could not recover against the dedication and the vested right of the public. If the city authorities closed the avenue covering the land in dispute, or au-

thorized it to be freed from the public easement and recalled, the right to it would revert to Powning's estate, and not to the plaintiff, because he holds no title from Powning. *Harris v. Elliott*, 35 U. S. (10 Pet.) 25, 9 L. Ed. 333.

The judgment and order are reversed, and the district court is directed to enter a judgment in favor of the city of Reno.

NORCROSS and McCARRAN, JJ., concur.

DE SANDRO v. MISSOULA LIGHT & WATER CO. et al.

(Supreme Court of Montana. Nov. 20, 1913.)

1. MASTER AND SERVANT (§ 277*)—ACTION—SUFFICIENCY OF EVIDENCE—EMPLOYMENT.

Evidence, in an action against a water company for injuries by the caving of a ditch, held to sustain a finding that all of the men engaged in the work, including plaintiff, were employes of the defendant company, and not of any independent contractor.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 953; Dec. Dig. § 277.*]

2. MASTER AND SERVANT (§ 277*)—INJURIES—CONTRACT OF EMPLOYMENT.

Plaintiff, to recover for personal injuries sustained while in defendant's employment, must show prima facie that the relation of master and servant existed between him and defendant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 953; Dec. Dig. § 277.*]

3. MASTER AND SERVANT (§ 285*)—INJURIES—BURDEN OF PROOF—EMPLOYMENT.

The burden was upon one suing for alleged negligent injuries incurred in defendant's employment to prove that the relation of master and servant existed, and this burden remained upon him throughout the trial, under Rev. Codes, § 7972, requiring the party holding the affirmative of an issue to prove it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

4. MASTER AND SERVANT (§ 189*)—LIABILITY OF MASTER.

An employer is responsible for injuries caused by the negligence of his superintendent, etc., upon the principle of the maxim, "qui facit per alium facit per se."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

5. MASTER AND SERVANT (§ 329*)—INJURIES—DEFENSE—BURDEN OF PROOF—INDEPENDENT CONTRACTOR.

The defense of independent contractor by an employer is not an affirmative defense which must be established by him by a preponderance of the evidence, and hence is available, under the Code, under a general denial.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 329.*]

6. MASTER AND SERVANT (§ 276*)—INJURIES—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

Evidence, in an action by an employe of a water company for injuries by the caving in of a ditch, held not to show that the cave-in was caused by failure to crib or support the walls of the completed part of the ditch as al-

leged, but merely to show that plaintiff was injured by the caving of the walls.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

7. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S DUTY—SAFE PLACE OF WORK.

A master must exercise ordinary diligence to furnish the servant with a reasonably safe place of work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 182; Dec. Dig. §§ 101, 102.*]

8. MASTER AND SERVANT (§ 103*)—MASTER'S DUTY—DELEGATION.

The master cannot delegate to another his duty to furnish employes with a reasonably safe place of work, so as to avoid responsibility for failure to discharge such duty.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 175; Dec. Dig. § 103.*]

9. MASTER AND SERVANT (§ 107*)—SAFE PLACE OF WORK—EXCEPTIONS TO RULE.

The rule requiring the employer to furnish a safe place of work does not apply where the employe is engaged in making a dangerous place safe, or where the place of work is made by the employe as he proceeds in the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

10. MASTER AND SERVANT (§ 206*)—ASSUMED RISK—INCIDENTAL DANGERS.

An employe assumes the risk of such dangers as are incident to his work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 550; Dec. Dig. § 206.*]

11. MASTER AND SERVANT (§ 276*)—INJURIES—PROXIMATE CAUSE.

An injured servant must show, by substantial evidence, that the employer's alleged negligence proximately caused the injury; the master not being liable if his negligence was a mere condition and not the efficient cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

12. MASTER AND SERVANT (§ 276*)—PROXIMATE CAUSE—PROOF.

The proximate cause of a servant's injuries may be shown by indirect evidence which affirmatively shows that the negligent act caused the injury, and excludes the idea that it resulted from any other cause.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

13. MASTER AND SERVANT (§ 284*)—PROVINCE OF JURY—CONSTRUCTION OF WRITINGS.

When a contract of employment is in writing and clearly expresses all the terms of the agreement, whether it creates the relation of independent contractor or of employer and employe between the parties is for the court to determine.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.*]

14. MASTER AND SERVANT (§ 284*)—PROVINCE OF JURY.

Where a contract of employment is verbal and it is not entirely clear as to what relation it creates between the parties, the construction of the contract as to the relation created is for the jury under proper instructions, though it would be a question for the court if the evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence clearly showed its terms without controversy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.*]

15. MASTER AND SERVANT (§ 288*)—INJURIES—JURY—ASSUMED RISK.

In an action against a water company for injuries claimed to have been caused by the caving in of a ditch which plaintiff had already completed, whether plaintiff assumed the risk of injury therefrom held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1008-1088; Dec. Dig. § 288.*]

16. APPEAL AND ERROR (§ 1051*)—AUTHENTICATION—ORDINANCES.

Admission of an ordinance, granting a franchise which defendant water company acquired by assignment from the original grantee, without proof that it was an ordinance of the city, is harmless, where the answer admitted that the franchise was granted by the ordinance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

17. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a water company for personal injuries by the caving in of a ditch which plaintiff was digging, the admission in evidence of an ordinance granting the franchise, which defendant had acquired by assignment from the original grantee, was not prejudicial to defendant, though irrelevant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

18. MASTER AND SERVANT (§ 88*)—INJURIES—ADMISSION OF EVIDENCE.

It was immaterial, in an action for injuries claimed to have been sustained while working in defendant's employment, whether plaintiff knew for whom he was working, so that a question as to whether he knew was improper; the material question being who was in fact his employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. § 88.*]

19. MASTER AND SERVANT (§ 267*)—INJURIES—ADMISSION OF EVIDENCE.

In an action against a water company for injuries by the caving in of a ditch which plaintiff claimed to have been digging while in defendant's employ, evidence that he saw defendant's foreman on the ditch line the day before the accident, and that such foreman had ordered the foreman in charge to keep the crew at work there, was admissible as tending to show how far defendant retained control of the work; defendant claiming that it was being done by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 909, 911; Dec. Dig. § 267.*]

20. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMED FACTS—UNCONTESTED FACTS.

Where the evidence in a servant's injury action as to the propriety and safety of the method of work was not contradicted, and accorded with common observation and experience, the court could assume in instructions that such method was reasonable and proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

21. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICE.

The modification of a requested instruction in a servant's injury action that the shearing of a ditch, by the caving of which plaintiff was injured, was a proper method of protecting workmen, by submitting the propriety of such method to the jury, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

22. APPEAL AND ERROR (§ 1033*)—ESTOPPEL TO ALLEGE ERROR.

Appellant cannot complain of a decision in its favor as to the validity of a contract involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

23. APPEAL AND ERROR (§ 263*)—PRESENTATION BELOW.

Plaintiff cannot complain on appeal of a ruling that a certain contract was valid, where it did not object to an instruction submitting the existence of such contract and reserve an exception to an adverse ruling, as required by Rev. Codes, § 7118.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.*]

24. TRIAL (§ 328*)—GROUNDS.

That the jury, in an action against an employer and his agent, arbitrarily renders a verdict in favor of the agent from whose negligence the actionable wrong resulted does not require that the verdict against the employer, the principal, be set aside, but it will be allowed to stand if otherwise supported.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 771-773; Dec. Dig. § 328.*]

25. MASTER AND SERVANT (§ 311*)—INJURIES—LIABILITY OF ASSISTANT SERVANT.

If it was the particular duty of one of two employees who had the superintendence of certain work to take precaution to protect the workmen, that superintendent who was not under that particular duty would not be responsible for the negligent failure of the other employee to take such precaution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 311.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Angelo De Sandro against the Missoula Light & Water Company and another. From a judgment for plaintiff, and from an order denying a new trial, the defendant named appeals. Reversed and remanded.

W. M. Bickford, Wm. L. Murphy and H. H. Parsons, all of Missoula, for appellant. John H. Tolan and R. F. Gaines, both of Missoula, for respondent.

BRANTLY, C. J. The plaintiff recovered a judgment for damages for personal injuries alleged to have been suffered by him during the course of his employment as a servant, by the defendant Missoula Light & Water Company. Adam Hadalin was also made a defendant, but the jury found in his favor. Plaintiff has not appealed, nor did he reserve and incorporate in the record exceptions to

any rulings adverse to him during the course of the trial. The Missoula Light & Water Company has appealed from the judgment and an order denying its motion for a new trial. This defendant, hereinafter referred to as "the company," is the owner of a franchise granted by the city of Missoula, whereby it is authorized to lay the mains and pipe lines in the streets of the city necessary to enable it to distribute water to the inhabitants. The franchise in express terms grants the privilege of making such excavations in the streets and alleys as are required to install the system of mains and pipe lines and to keep it in repair. It provides that the company shall repair or pay for any damage done by it to property or persons by reason of the construction or maintenance of the system. Under an arrangement between the company and the defendant Hadalin, the latter had undertaken to do, at a stipulated price per foot, all the digging and refilling of trenches required by the company for the laying of pipe lines, for the year 1910. Under this arrangement Hadalin employed his own men, including a foreman, and furnished all the tools and implements necessary to do the work, and agreed to hold the company harmless as against any claim for damages by reason of the doing of the work or any part of it. At the time of the accident the plaintiff, with others, in all about 15 men, was engaged, under the direction of one Odenwald, Hadalin's ostensible foreman, in excavating a trench on South Seventh street, in what is designated in the record as No. 2 Daly addition to the city of Missoula. The addition had not, at the time, been incorporated in the city, because the owner of it had not complied with the requirements of the statute relating to additions to cities and towns. Rev. Codes, §§ 3212, 3213, 3465, et seq. The pipe line theretofore laid on this street was, by the work in hand, being extended from the city limits into the addition at the expense of the owner. The place where the accident occurred was therefore not within the city limits, though the street mentioned is an extension of the street of the city having the same designation. The manner of doing the work was as follows: Each employé was allotted a section of $12\frac{1}{2}$ or 13 feet, which he was expected to complete during the forenoon. A like amount was allotted to him for the afternoon. In case any one of them had not fully completed his allotment within the time allowed, the others would assist him. The trench was $5\frac{1}{2}$ feet deep and 2 feet in width. The débris was shoveled out upon the surface to the sides of the trench. At noon on the day of the accident the plaintiff had finished the task allotted to him up to that time. As soon as he had taken his lunch he went to the assistance of another who had not completed his task. At that point the ditch had been completed to

the depth of about four feet. While the plaintiff was engaged in lowering it to the required depth, the walls for a distance of from 15 to 30 feet caved in and partially covered him, breaking his left leg below the knee. From causes which supervened thereafter, it became necessary for the limb to be amputated above the knee.

It is alleged that the defendants were engaged in excavating ditches in certain streets of the city of Missoula; that they well knew, or in the exercise of ordinary care ought to have known, that the nature of the soil in which the excavation was being made required the walls of the completed portions thereof to be supported by some sort of cribbing or other appropriate means in order to prevent them from crumbling or caving; that the lack of such cribbing or support rendered it unsafe to work in the incomplete portions; that with knowledge of these conditions the defendants wholly failed and neglected to provide any cribbing or support for the walls of the completed portions; that plaintiff did not know of the conditions; and that while he was engaged in his work, the walls of the completed portions crumbled and caved in, causing the walls of the incomplete portion, where the plaintiff was at work, also to crumble and fall upon him, whereby he suffered the injuries complained of.

The defendants filed separate answers; the company admitting its corporate capacity and plaintiff's injury, denied all the other material allegations of the complaint. Among other matters designated as affirmative defenses, it alleged that at the time the plaintiff was injured he was not in the employment of the company, but was in the employ of its codefendant Hadalin, under an independent contract, by the terms of which the latter had exclusive control of the construction of the trenches required by the company, at a stipulated price per foot for excavation and refilling, and that neither the company nor any of its officers or agents had any right to control, or was responsible for, any act or omission of said Hadalin. The defendants also relied upon the special defenses of contributory negligence and assumption of risk. There was issue by reply.

The brief of counsel for the company contains 35 assignments of error, to most of which they have devoted attention in their argument. Many of them are wholly without merit. We shall give special notice to such of them only as will serve to guide the court on another trial, which must be ordered on the ground of insufficiency of the evidence to sustain the verdict.

1. The sufficiency of the evidence to make a case for the jury was challenged during the trial, both by motion for nonsuit and by request for a directed verdict. The principal contention now made is that the evidence introduced by the plaintiff fails to show *prima facie* that, at the time of his injury, he was in the employment of the company,

and that, if it be conceded that he was employed by the company, and that the latter was guilty of negligence in failing to support the walls of the completed portions of the trench by any suitable means, the evidence wholly fails to show a causal connection between this dereliction of duty and the plaintiff's injury.

[1] The plaintiff was the only witness who testified in his behalf as to the character of the work, the purpose for which it was being done, the surrounding circumstances, and how and by whom he was paid his wages. When his case was closed no contract had been shown between Hadalin and the company. On the other hand, it appeared that the trench was being excavated for the company for the laying of a pipe line which was to be part of its system, and that it was engaged, with another crew of men, in laying pipe therein as fast as it was completed. It was shown that the plaintiff's wages were being paid by Hadalin, but Hadalin's relations to the company were not shown, except that he was directing the work as it progressed. One seeing how and for what purposes the operations were being conducted, and knowing, as he must, that corporations can act only through agents, would naturally infer that the whole enterprise was that of the defendant company. These circumstances, we think, furnish a sufficient basis for an inference, in the absence of countervailing evidence, or circumstances in themselves explanatory of the situation, that all the men engaged were the employees of the company.

It was said by Chief Justice Cockburn, in *Welfare v. London & Brighton Ry. Co.*, L. R. 4 Q. B. 693: "I agree that where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done."

To the same effect are the remarks of Justice Clopton, in *Rome & Decatur R. R. Co. v. Chasteen*, 88 Ala. 591, 7 South. 94: "As no contract was produced or proved, which was in the power of the defendant, evidence that the engine and cars belonged to the company, and that the road was being constructed for its benefit, if believed, prima facie shows that those employed in the work of construction were the agents and servants of the company, and devolves on it the burden to prove that the road, engine, and cars were in the possession, and under the control of Callahan as a contractor, and that those employed were exclusively his agents and servants. As an inference may be reasonably drawn that the company retained the right to direct what should be done, and how—the general mode of performance—though Callahan may have employed and paid the workmen, the sufficiency of the undisputed facts mentioned to overcome the presumption

arising from ownership was a question for the jury, on consideration of all the circumstances proved."

The decisions recognizing the doctrine stated above are not numerous, but the following are more or less directly in point: *McCamus v. Citizens' Gaslight Co.*, 40 Barb. (N. Y.) 380; *Redstrake v. Swayze*, 52 N. J. Law, 129, 18 Atl. 697; *Dillon v. Hunt*, 82 Mo. 150; *Perry v. Ford*, 17 Mo. App. 212. See, also, *Moll on Independent Contractors*, etc., § 32, and note to *Richmond v. Sitterding* (Va.) 65 L. R. A. 445, at page 459.

[2, 3] Of course it was indispensable for the plaintiff to show his employment in the first instance. Without a prima facie showing of the relation established by it, he could not recover. Having the affirmative of the issue, the burden was upon him to produce evidence to support it, and as to this issue the burden was upon him throughout. Rev. Codes, § 7972. But under the doctrine of the cases cited supra, the circumstances disclosed by plaintiff's own testimony were sufficient to call for the production of evidence to rebut the presumption thus raised against the company. In a given case the circumstances developed by plaintiff's witnesses may be such as to furnish no basis for an inference in his favor. As was pointed out by Chief Justice Cockburn, in *Welfare v. London & Brighton Ry. Co.*, supra, the character of the work done may be such as to rebut any presumption that the person doing it is in the employ of the defendant or is its agent. Under this condition of the evidence the plaintiff has not made a prima facie case calling for the opinion of the jury, but must produce other evidence to avoid a nonsuit.

[4] The defendant is responsible upon the principle of the maxim "*Qui facit per alium facit per se*"; and, if at the end of plaintiff's case there has not been made out a prima facie case of employment by the defendant, or at the end of the whole case it has not been disclosed by a preponderance of the evidence that the defendant is the master—the responsible principal—the plaintiff cannot recover.

[5] The defense that the person responsible for the work is an independent contractor is not affirmative in its nature. At common law it was available under a plea of not guilty. *Greenwalt v. Horner*, 6 Serg. & R. (Pa.) 71; *Hall v. Snowhill*, 14 N. J. L. 551; *Plowman v. Foster*, 6 Cold. (Tenn.) 54; *Bibb's Adm'r v. N. & W. R. R. Co.*, 87 Va. 711, 14 S. E. 163. Under the Code it is equally available under a general denial, because evidence tending to show that a person other than the defendant is the responsible principal—the master—not only tends to negative the fact of employment by the defendant, but also that the negligence causing the injury was his. So far as we know, no court has announced the rule that the defense must be established by a preponder-

ance of the evidence. If the plaintiff's case as made at the close of his evidence calls for the opinion of the jury, the defendant must thereupon proceed with his evidence in rebuttal, but he is never required to assume any greater burden; and if at the close of the whole case it appears that the work was being done by an independent contractor, or the evidence on this point stands at an equipoise, he is entitled to a verdict. Just here it may be remarked that the trial court adopted the view that the burden was upon the company to establish this defense by a preponderance of the evidence. This was clearly error.

[6-10] While we think the evidence sufficient to show prima facie an employment by the company and a dereliction of duty in the failure to provide against the caving of the walls of the completed portion of the trench, we also think it wholly fails to show, directly or inferentially, any causal connection between this dereliction and the injury suffered by the plaintiff. Under the allegations of the complaint the failure to crib or support the walls of the completed portion caused the walls of the incomplete portion to crumble and cave. It is the duty of the master to exercise ordinary diligence to furnish his servant with a reasonably safe place in which to work. He cannot delegate this duty to another so as to avoid being held responsible for any negligence in that behalf. This rule, however, does not apply when the servant is employed in making a dangerous place safe, or when the making of the place is an incident of the work in which he is engaged and the danger arises from the work as it progresses. This is true particularly of mining and other industries which from their nature require service in dangerous places, as well as in the making of them. The master, if a corporation, must necessarily employ some one to do this work. The necessities of the case, therefore, require the servant, when he enters upon such an employment, to assume the risk of such dangers as are incident to it. *Thurman v. Pittsburg & Mont. C. Co.*, 41 Mont. 141, 108 Pac. 588; *Labatt on Master and Servant* (2d Ed.) § 1177.

The plaintiff is a foreigner. He speaks broken English, and some of his statements are somewhat quaint. The following excerpts from his evidence will be sufficient to show that it wholly fails to support the allegations in the complaint: "I came back this end and helped this man here; and my bank started to cave in and reached me and buried me up. While I was working in this ditch in the afternoon, I was turned east and the cave-in came from the west. I was digging and shoveling both in the afternoon; digging I believe and shoveling is the same thing. I was working on the west side when I was through there, and went to help another man when I was hurt. The dirt came on me just about here. After the dirt buried me I did

not lose consciousness; I started to yell, another man came and dug me out. I said something a while ago about the ditch caving starting at the west. I saw that afterwards; after they dug me up. The time they took me up they left me there; then I turned back and saw it was caven on the west side of me; it was about from 30 to 35 feet west.

* * * The first man west of me was about 30 or 35 feet. When the dirt covered me up it did not cover my head and the upper part of my body; I looked back west at the same time the cave struck me. They dug me up, and I could not myself, and I turned back, and they helped me, took me out while I was looking back, too. I turned round and looked back and saw the ditch just as the cave struck me and saw the cave-in. It was caving in, sliding, falling. Back of me at the time I turned around I saw the ditch falling in. At that time the ditch was falling in about 30 or 35 feet. I did not see, could not see, it fall; it was fallen already. I did not see it fall; I just saw what buried me. I did not see the cave fall at all. I felt that it was falling. I do not know where that cave started back of me. It started with a piece of work I was through in the morning. I know that because I saw it after; saw it after it was caved in. Q. It was all fallen down when you saw it? A. That end of it faced me; I didn't was looking around. As to whether or not it caved both ways, I did not see it. I saw when it reached me; it buried me up. All I know is when I looked at it the ground was caved in there for 30 or 35 feet. I know it started back of me. I was not looking back at the time it was caving. I do not know where it started." This evidence was not aided by the testimony of any other witness.

The witness Hadalin said: "When I went there in the afternoon about 12 or 15 feet in length of the bank had fallen into the ditch on the north side of the ditch. * * * When I got back there in the afternoon I found that 12 or 13 feet had caved in. Mr. Odenwald and I measured it; I do not exactly remember the number of feet, but it was only a short distance, 12 or 15 feet to the best of my knowledge." Odenwald testified: "The cave-in of the ditch on the north bank was about 12 or 15 feet, and on the south bank not quite that much, I don't think."

Marino Scandello, a fellow workman of plaintiff, testified: "I noticed how far along the ditch the cave-in extended; it was about 15 feet. De Sandro was in the center of this cave, and the ground was caved on both sides of where De Sandro was. I was there before De Sandro was liberated and taken out of the ditch."

The utmost that this evidence tends to show is that the plaintiff was caught and injured by the caving of the walls at the place in which he was working. Whether he himself caused the fall of the material by a

stroke of his pick at that place, or whether because of the nature of the ground, disturbed as it was by his work, it began to cave there and extended to the completed portion, or whether it began in the completed portion, and the fall there carried with it the walls at the point where the plaintiff was at work are questions left entirely to speculation. If the nature of the soil at that place was such that the plaintiff's operations were likely to cause it to fall, this was a catastrophe which he was bound to foresee and guard against; for it is conceded that cribbing could not have been put in at that place until that portion of the trench had been completed.

[11] It is not sufficient that the plaintiff prove the injury. It is necessary that he go further and show by some substantial evidence the causal connection between the negligence of the defendant and the injury; for the master cannot be held liable if his negligence was merely a condition, as opposed to the efficient cause of the injury. *Labatt on Master and Servant* (2d Ed.) § 1570; *Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549.

[12] The efficient cause may be shown by indirect evidence, but it cannot be said to be established by such evidence unless the circumstances are such that they not only tend affirmatively to show it, but also tend to exclude any other. *Monson v. La France Copper Co.*, supra; *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.

The further contention is made that the evidence as a whole demonstrates that the plaintiff was employed by Hadalin as an independent contractor, and hence that the court should have directed a verdict for the company. During the years 1909 and 1910 the company was apparently engaged in reconstructing and extending its system. It had entered into a written contract for the year 1909 with Hadalin & Campbell, as co-partners, under the terms of which the latter agreed to dig and refill all trenches required for the work during the year, at a stipulated price per foot. The contract had been executed to the satisfaction of the company. For the year 1910 it contracted exclusively with Hadalin. This contract the evidence tended to show was to be reduced to writing, but that this was not done because Mr. Brown, the manager of the company, was too busy to attend to it. In September, after the accident had happened, this was done. Except the price per foot stipulated for, the writing expressed substantially the stipulations and conditions contained in the one entered into the year before, though there was some discrepancy in the statements of Brown and Hadalin on the subject. Both testified, however, that it contained the terms and stipulations which had been agreed upon by them at the time. The writing was dated back to April 1st, the time at which Hadalin actually began work. Under its terms Hada-

lin agreed to do all the excavation and refilling of trenches required by the company during the year 1910, to supply his own tools and other means of doing the work, to complete the work from time to time, and at points indicated by the company, in a workmanlike manner, subject to the approval of the foreman of the company, and to save the company harmless against any claim for damages caused by him. The company on its part was to pay Hadalin from time to time on estimates of the amount of work done. This evidence tends further to show that from April until the contract was reduced to writing, periodical settlements were made between Hadalin and the company, based upon estimates at the price per foot named in the contract, the company paying a lump sum for the amount due, and that Hadalin employed and paid all the men who did the excavation work.

It is insisted by counsel that this evidence stands uncontroverted by any evidence in the record, and hence that the court erred in submitting to the jury the question whether Hadalin was an independent contractor. With this contention we do not agree. But for the fact that the parties prepared and signed the writing in September, the question whether there was or was not a contract would have been left entirely to rest upon parol evidence. The preparation of the writing at that time did not change the situation so far as it covered the time prior to the accident. In the absence of the writing it would have been the exclusive province of the jury to say whether there was or was not a contract; for whether there was or not depended upon the truth of the statements of Brown and Hadalin in that behalf, in the light of the surrounding circumstances. There was some evidence that Wright, the general foreman of the company, was present and gave some orders to Odenwald touching the completion of the particular work on which Hadalin was engaged on the day before the accident. This was a circumstance to be considered by the jury in connection with the other evidence as to how far the company retained control of the work. The mode pursued for periodical settlements between Hadalin and the company tended to corroborate Hadalin and Brown as to the terms of the contract, but this did not so conclusively establish the fact of its existence that the court was warranted in taking the case from the jury. The production of the writing did not aid the defendant's case; on the contrary, the fact that it was executed after the accident, and dated back to cover the time of its occurrence, might be suggestive of fabrication in order to save the company from liability. This was also a circumstance to be considered by the jury; for the question of good or bad faith of the transaction thus was made a matter of inquiry to be determined by the jury.

[13] When such a contract is in writing

and clearly expresses all the undertakings of the parties, the relation it creates between them is to be determined exclusively by the court. *Good v. Johnson*, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896; *Moll on Independent Contractors, etc.*, § 32; *Lannehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Mayhew v. Sullivan Mfg. Co.*, 76 Me. 100.

[14] So, too, when, though verbal, there is no controversy or uncertainty in the evidence as to the terms of the contract and there is room for only one inference, it is to be construed by the court. *Drennan v. Smith*, 115 Ala. 396, 22 South. 442; *Moll on Independent Contractors, etc.*, § 29. When, however, as in this case, the contract is not in writing, and the evidence is not entirely clear as to its terms, and different deductions may be drawn from it, especially so when a question of good faith is at issue, the relations of the parties are to be determined by the jury under proper instructions. *Rome & D. R. R. Co. v. Chasteen*, 88 Ala. 591, 7 South. 94; *Carlson v. Stocking*, 91 Wis. 432, 65 N. W. 58; *Daley v. Boston, etc., R. R. Co.*, 147 Mass. 107, 16 N. E. 690. See, also, note to *Richmond v. Sitterding*, cited supra, 65 L. R. A. 508.

[15] The contention is also made that the court should have directed a verdict on the ground that the danger incident to the employment was shown by the evidence to have been obvious and fully understood by the plaintiff. On the theory that the injury was caused by a cave-in in the completed portion of the trench, which would not have occurred if precaution had been taken to make safe the completed portion, we think the question whether plaintiff assumed the risk of danger from this source was properly submitted to the jury.

[16, 17] 2. We have examined the several assignments upon the rulings of the court in admitting and excluding evidence. Some of them were objectionable from a technical point of view, yet we do not think the company suffered prejudice by reason of any of them. Others of which complaint is made were correct. To illustrate: The ordinance granting the franchise which the company acquired by assignment from the original grantee was admitted in evidence without preliminary proof that it is one of the ordinances of the city. That the franchise was granted by this ordinance is admitted in the answer. While it was not relevant to any issue involved, its admission could not have wrought any prejudice.

[18] It appeared from the testimony of plaintiff that he had been paid his wages by Hadalin by check, and that he had signed the pay roll kept by Hadalin. On cross-examination he was asked whether after he received the checks signed by Hadalin, he knew for whom he was working. An objection to the question was sustained on the ground that it was not proper cross-examination, and

that it called for the conclusion of the witness. We think it was wholly immaterial whether the plaintiff knew for whom he was working, the real inquiry being who in fact was his employer. Though he knew that Hadalin paid him, he could not be expected to know the relations of Hadalin to the company.

[19] Again, this witness was permitted, over objection, to state that he saw Mr. Wright, the foreman of the company, on the line of trench the day prior to that on which the accident occurred, and that the latter had ordered Odenwald, the foreman in charge, to keep the crew at work at that place the following day. The evidence was competent as reflecting upon the relations of the parties, and as tending to show how far the company retained control of the work being superintended by Odenwald.

3. The instructions submitted to the jury are criticised in many particulars, the chief complaint being made of those wherein the court declared that the company must, in order to avoid liability, show by a preponderance of the evidence that the plaintiff was employed by Hadalin as an independent contractor. Though the contract was pleaded as a special defense, counsel by specific objection and exceptions to the instructions on the subject sufficiently reserved the question as to who should sustain the burden of proof. What has already been said in discussing the evidence is sufficient to dispose of these assignments. It is sufficient also to dispose of the assignments upon the question whether the court should have instructed the jury to find for the defendants. There was evidence tending to show that the nature of the soil in which the excavation was being made was such that cribbing or other suitable support was necessary to prevent the walls of the completed portions from caving.

[20, 21] There was also evidence tending to show that caving could have been prevented as well by "shearing" off the lips of the trench or digging it wider at the top, thus removing a portion of the superincumbent weight, and that a short time prior to the accident special instructions had been given by Hadalin to all the men working on the trench to do this. These instructions, the witnesses stated, were given because on a preceding day a cave-in had occurred, slightly injuring one of the men. The plaintiff denied that he had been so instructed. Counsel requested the court to instruct the jury that shearing was a reasonable and proper method to protect the workmen, and that if they found that special instructions had been given to the plaintiff to pursue this method, but that he had failed to do so, and that the accident was the result, they should find for the defendants. The court modified this instruction so as to submit also the question whether or not the method was reasonable and proper. Contention is made that the court erred in modifying the request. The

evidence tending to show that the method called "shearing" was proper and safe was not contradicted or impeached in any way; indeed, that it would have furnished ample protection to any one working in the trench is manifest. Of course, it was a question for the jury whether Hadalin had given instructions to the men, as he and other witnesses stated. Since the evidence as to the propriety and safety of the method was not contradicted, but was entirely in accord with the experience and common observation of men, the court might well have assumed it true and given the instructions as framed by counsel. We do not think, however, that prejudice was wrought by the modification.

[22] The question whether the company, operating as it does under a franchise from the city, could let a contract to Hadalin for the digging and refilling of the trenches, so as to relieve itself from liability to Hadalin's employés for damages for injuries caused by his negligence, was raised during the course of the trial. The court held that such a contract is valid, as is manifest from the fact that it permitted the jury to find whether there was a contract or not. Counsel for plaintiff, so far as the record shows, did not make objection to any instruction and reserve exception, under the provisions of the Code (Rev. Codes, § 7118), to the action of the court in that behalf, so as to require this court to review it. In their briefs counsel have devoted a great deal of space to a discussion of the validity of such a contract, and also to the question whether it was invalid so far as any of the work to be done under it was without the city limits. Since the court held in favor of the company as to the validity of the contract, it has no right to complain.

[23] Plaintiff cannot complain because counsel did not reserve the question, as required by the statute. Under these circumstances we must accept the opinion of the trial court as to the law of the case for the purpose of these appeals, and decline to undertake a determination of the question involved. A discussion of it at this time would be purely academic, and any conclusion arrived at with reference to it would be obiter. The same would be true as to a discussion and decision of the question whether, though the contract so far as it included work done within the city was invalid, it was valid as to work done without the city limits; for if the contract was valid, it applied to any work which might be done under it within or without the city.

4. It is insisted that since the jury found in favor of Hadalin, who had general charge of the work, thus acquitting him of negligence, the company was entitled to a judgment notwithstanding the verdict against it. The question presented by this contention has practically been foreclosed by this court by the decisions in *Verlinda v. Stone & Webster Eng. Corp.*, 44 Mont. 223, 119 Pac. 573,

and *Melzner v. Raven Copper Co.*, 47 Mont. 351, 132 Pac. 553. It is true that the verdict in each of these cases was silent as to the servant who was made codefendant with the master, while here it is in favor of the servant. But we think the formal acquittal of the servant or agent through whose wrong the injury was done should not deprive the plaintiff of what the jury has given him, if the evidence shows that he has suffered wrong.

As was said in *Verlinda v. Stone & Webster Eng. Corp.*, supra: "The conclusions reached by jurors are sometimes inexplicable. Often they arbitrarily find against one party and in favor of another without any apparent reason; but, if the evidence justifies the verdict as to the party held, there is no reason why it should not be deemed good as to him, notwithstanding there is no finding as to the other. It seems to us that the better rule is that, if the evidence is such that the jury might have found against both the master and the servant, the plaintiff should not be denied his recovery against the master because the jury were unable to agree upon a verdict against the servant, or arbitrarily disregarded the evidence tending to show negligence on the part of the servant." There are cases which adhere to the rule which counsel invoke. *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, *Morris v. Northwestern Improvement Co.*, 53 Wash. 451, 102 Pac. 402, and *Hayes v. Chicago Telephone Co.*, 218 Ill. 414, 75 N. E. 1003, 2 L. R. A. (N. S.) 764, are in point.

[24] We prefer, however, as indicated by the decision in *Verlinda v. Stone & Webster Eng. Corp.*, supra, to follow the doctrine announced by other courts: That where the jury arbitrarily acquits the servant or agent through whose negligence the wrong was done, the verdict against the principal ought to be allowed to stand; the reason being that the plaintiff should not be concluded by the capricious conduct of the jury. *Illinois Central Ry. Co. v. Murphy*, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352; *Railway Co. v. James*, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; *Texas & P. R. Co. v. Huber* (Tex. Civ. App.) 95 S. W. 568. This doctrine may not be strictly logical, but it is equally as logical as that announced in the cases cited; for under the rule followed by them, the plaintiff is deprived of his right of recovery on purely technical grounds.

[25] But aside from this consideration, for aught that we can gather from the record, the jury in this case did not arbitrarily or capriciously acquit Hadalin. Upon the theory that the work was being done by the company through Odenwald and Hadalin, both being its servants, the jury may have concluded that since Odenwald had direct, personal supervision, it was his duty, and not that of Hadalin, to take precautions for the safety of the employés, and that the company should be held because of his failure to per-

form the duty delegated to him. From this point of view, Hadalin was an intermediate agent, and ought not to have been held liable for Odenwald's dereliction.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

KNAPP v. KNAPP. (Civ. 1,189.)

(District Court of Appeal, Third District, California. Oct. 8, 1913.)

1. DIVORCE (§ 27*)—GROUNDS—CRUELTY.

Under Civ. Code, § 94, providing that extreme cruelty as a ground for divorce is the wrongful infliction of grievous bodily injury and mental suffering, a husband's acts in slapping his wife in the face and injuring her person, and his breaking of the furniture, so as to inflict grievous bodily injury and mental suffering and make it dangerous to the wife's health and well-being to live with him, constituted extreme cruelty.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-83; Dec. Dig. § 27.*]

2. DIVORCE (§ 286*)—PRESUMPTION—DISPOSITION OF PROPERTY—APPEAL.

Where the trial court, in an action for divorce, found certain property to be community property, and set aside two-thirds to defendant and one-third to plaintiff, it must be assumed, in the absence of evidence, that the facts warranted such distribution.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.*]

3. DIVORCE (§ 249*)—DISPOSITION OF PROPERTY—STATUTE.

Civ. Code, § 146, expressly provides that where a divorce is rendered on the ground of extreme cruelty, the disposition of the community property rests in the discretion of the trial court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-705, 707, 709, 712; Dec. Dig. § 249.*]

4. DIVORCE (§ 286*)—APPEAL—PARTY ENTITLED TO COMPLAIN—DISPOSITION OF PROPERTY.

In an action for divorce for extreme cruelty, the trial court found that a certain lot was the separate property of the plaintiff, wife, but the decree was silent as to it. *Held*, in view of Civ. Code, § 146, which does not contemplate the disposition in the decree of the separate property, but only of the community property, defendant could not complain of the court's failure to accord to the wife her separate property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action for divorce by Rosa Knapp against William Knapp. From a judgment awarding certain community property to plaintiff, defendant appeals. Affirmed.

H. A. Luttrell, of Oakland, for appellant. George Samuels, of Oakland (Samuels & Magnes, of Oakland, of counsel), for respondent.

BURNETT, J. Plaintiff was granted an interlocutory decree of divorce on the ground of cruelty and she was awarded certain community property. The appeal is from that portion of the judgment "which attempts to and does set aside and award to the plaintiff herein the real property mentioned and described in said judgment; also that portion of said judgment which attempts to and does set aside and award to said plaintiff the household furniture mentioned and described in said judgment; also that portion of said judgment which sets aside and awards to plaintiff a one-third interest of, in, and to the sum of \$1,000 mentioned and described in said judgment"—and none of the evidence is brought up.

The points urged for reversal of the judgment are so destitute of merit as hardly to merit specific attention. However, they will be accorded brief consideration.

[1] 1. That the complaint states a cause of action for divorce on the ground of cruelty cannot admit of doubt. It is therein alleged: "That ever since the marriage of this plaintiff and said defendant, and continuously during said period of time, the defendant has wrongfully and willfully inflicted, and he still does wrongfully and willfully inflict upon this plaintiff a course of grievous mental suffering and grievous bodily injury, and more particularly as follows, to wit." This is followed by the specification that, in January, 1906, "the said defendant at the residence of the parties hereto, without any reasonable cause, excuse, or provocation willfully used force and violence on the person of this plaintiff"; that, in January, 1908, "the said defendant, at the residence of the parties hereto, without any reasonable cause, excuse, or provocation therefor, used force and violence on the person of this plaintiff, slapped this plaintiff in the face, and injured the plaintiff's person and body, thereby causing this plaintiff to have black and blue marks upon her person and black and blue eyes for several days thereafter; that upon said occasion the said defendant, without any reasonable cause, excuse, or provocation therefor, broke and smashed the furniture in the house of said parties." Other similar instances are pointed out, and the complaint proceeds: "That the foregoing acts and conduct on the part of the said defendant consist of but a few of the acts of cruelty and brutality inflicted upon this plaintiff by said defendant since and during the married life of said parties, and that by reason of the acts and conduct hereinabove specifically set forth and described, this plaintiff has been caused to suffer and she has suffered and does now suffer, great and grievous bodily injuries, and great and grievous mental anguish, and the said plaintiff further alleges that to longer live with said defendant would, as plaintiff is informed and believes, and therefore alleges, be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dangerous to the health and physical being of herself."

If the treatment by defendant of plaintiff as therein delineated does not constitute acts of cruelty, we confess our inability to understand the meaning of the expression. It appears that these acts were wrongful, and that they inflicted upon plaintiff "grievous bodily injury" and "grievous mental suffering." A case is thus presented that meets the requirement of the Code. Section 94, Civ. Code; *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; *Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566, 29 Am. St. Rep. 124; *MacDonald v. MacDonald*, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45. The objection that it does not appear that the said acts were wrongfully committed is hypercritical. The words "wrongfully and willfully," found in the first paragraph of the above quotation, are intended to modify the specific acts of violence that follow, the general allegation. But aside from that, it can hardly be contended that it is lawful for a man, "without any reasonable cause or without excuse or provocation," to slap his wife in the face so as to leave for several days thereafter black and blue marks and also to discolor her eyes and, in addition, "to break and smash the furniture in the house." The acts were sufficiently characterized to bring them under the condemnation of the law. Defendant may regret that a man is not permitted to whip his wife as in the olden days, but he should know that the customs and laws of mankind have changed with the progress of time. Though it may seem strange to defendant, neither the law nor enlightened public sentiment looks with favor even upon such acts as he confesses in the following allegation of his answer: "Defendant admits that on the 24th day of May, 1911, he slapped plaintiff, but not with force sufficient to cause plaintiff much suffering, nor did she suffer more than little pain thereby."

2. As to the motion to strike out portions of the complaint, it may be said that it is unintelligible from the transcript. But surmising what was intended, it follows from our interpretation of the complaint that the court did not err in denying the motion. Besides, it is perfectly apparent that if the court erred, we cannot say that defendant suffered any prejudice thereby.

3. The findings follow substantially the material allegations of the complaint, including a declaration that the plaintiff was without fault, and a specific statement that the allegations of defendant as to wrong conduct on the part of plaintiff are untrue; and an inspection of them is sufficient to show that they support the judgment.

[2] 4. In the absence of the evidence it is, of course, impossible for us to say that the court abused its discretion in awarding the community property. The homestead and

household furniture, and \$1,000 on deposit in the Citizens' Bank of Fruitvale, were found to be community property, and two-thirds of the money were set aside to defendant and the residue of said property to plaintiff. We must assume that the facts warranted such distribution. It is sufficient in this connection to refer to *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Eslinger v. Eslinger*, 47 Cal. 62; *Brown v. Brown*, 60 Cal. 579; and *Gorman v. Gorman*, 134 Cal. 378, 66 Pac. 313.

[3] In the *Gorman* Case it is said: "Where the divorce is granted on the ground of adultery or extreme cruelty, section 146 of the Civil Code leaves the disposition of the community property, in the first instance, to the discretion of the trial court, with, perhaps, the qualification, inferred from a reading of the entire section, that, as a general rule, more than one-half of such property must be decreed to the innocent spouse in such case."

[4] 5. In his closing brief, appellant complains that there was no adjudication of the fact that a certain lot, "No. 7 in Block D," is the separate property of plaintiff. There was no allusion to this lot in plaintiff's complaint, but in the answer it was alleged to be community property. The trial court found as a fact that this lot was the separate property of plaintiff, but the decree is silent as to the matter. It is sufficient to say that if any one could complain of the omission, it must be plaintiff and not defendant. If the court failed to accord to plaintiff what the findings of fact show she was entitled to, it is manifestly of no legal concern to defendant on this appeal.

Besides, the statute does not contemplate the disposition in the decree of the separate property, but of the community property only. Section 146, Civ. Code.

There is no merit in the appeal and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

NORMAN v. HALL. (Civ. 1,182.)
(District Court of Appeal, Third District, California. Oct. 3, 1913.)

CONTRACTS (§ 303*)—BUILDING CONTRACTS—BREACH BY OWNER.

The contractor cannot recover as for breach of a contract to build, he having put in a foundation not complying with the contract, and substantially defective, and being merely stopped from proceeding further till he should remedy the foundation, and failing to put in another, in place thereof, simply because the owner and architect would not in advance assure him that the second one would be accepted.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by S. A. Norman against C. P. Hall. Judgment for defendant, and plaintiff appeals. Affirmed.

Aldrich & Gentry, of Oakland, for appellant. Abe P. Leach, of Oakland, for respondent.

BURNETT, J. The action was brought to recover damages claimed for the violation of a written contract for the construction of two certain buildings. Plaintiff proceeded no further than the completion of the foundation, but the basis of his action is that "said defendant, without any cause or reason, requested and ordered plaintiff to stop said work and not to proceed further with said contract and to suspend work upon said contract; and said defendant did then and there stop said plaintiff from performing said conditions and said work, and refused to allow plaintiff to proceed further with said work." The appeal is from a judgment of nonsuit.

The "articles of agreement" under which the work was undertaken imposed upon plaintiff the duty to "perform and complete in a workmanlike manner all the work required to conform with the plans and specifications designated," and it was provided that the services were to be "under the direction and supervision and subject to the approval of" the architect. The contract price was \$15,842, to be paid in four installments; the first payment of \$3,900 to be made "when the frames are completed and the roofs are sheathed." It was further agreed "that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from said architect, stating that the payment or installment is due or work completed as the case may be, and the amount then due; and the said architect shall at said time deliver said certificates under his hand to the contractor, or in lieu of such certificate, shall deliver to the contractor, in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates, or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand made by him for the certificate, shall at the expiration of said three days, become due and payable, and the owner shall be liable and bound to pay the same on demand."

There can be no legal objection to said provisions, and it is apparent that they bear a reasonable relation to the rights both of the owner and the contractor. It is equally clear that, in order to recover, plaintiff must

show that he complied with said terms or offered a sufficient excuse for his failure to do so. *Copley v. Durand*, 153 Cal. 278, 95 Pac. 38, 16 L. R. A. (N. S.) 791, and cases therein cited.

There is neither evidence nor contention here that plaintiff obtained the architect's certificate to the effect that any part of the work had been completed in accordance with the contract, or that any demand was made therefor, or that sufficient work had been done to entitle plaintiff to the first payment designated in the agreement, or that plaintiff performed his work as required by the said plans and specifications. Indeed, as to this last consideration, all the evidence shows that the foundation constructed by plaintiff was defective and unfitted for the purpose intended. It was not built in a workmanlike manner and it did not measure up to the requirement of the contract. It was defective not in a trifling but in a substantial respect, and defendant was under no obligation, therefore, to accept or pay for it. The imperfect condition of the work was called to the attention of plaintiff and he did not gainsay it. In fact, there seems to have been no substantial difference of opinion as to the inadequacy of the work that had been completed.

This situation demands both legally and morally that plaintiff, in order to recover compensation or to place defendant in default so that an action for damages could be maintained, must remedy the defect and make the foundation conform to the specifications unless prevented from so doing by the act of defendant. But the evidence is that the defect was not cured, and there is no showing that the failure was through any fault of defendant.

Plaintiff contemplated putting in a new foundation as appears from the conversation which he relates as having occurred between him and the architect, Mr. McCall, as follows: "Mr. McCall says to me, 'Norman, what does it cost to take out that concrete out of there and haul it away and renew it, that it will be trap rock?' I said, 'It will cost me \$530.' He says, 'Sooner than have any trouble, I would prefer to pay one-third of it.' I said: 'All right, Mr. McCall, I will stand the other one. Are you satisfied, Mr. Whitmore (the subcontractor) to stand yours?' He said, 'Yes.'" However, nothing further was apparently done in pursuance of that agreement, and plaintiff assigns as his reason for not renewing the foundation that "they would not assure me whether they would accept the second one." It is perhaps needless to say that this afforded no legal excuse for his inaction. The written contract was the measure of the rights and obligations of the parties. Defendant was not required to give any additional assurance that he would comply with its terms, and plaintiff could not demand it as a prerequisite.

site to the fulfillment on his part of his covenants. He should have put the foundation in proper condition and gone on as required by the contract, and the law would have afforded him redress if defendant had refused him justice.

The case, of course, would be different if defendant had repudiated the contract or interfered with the efforts of plaintiff to comply with his agreement. But the only fair inference from the testimony is that plaintiff was not precluded from earning the compensation provided for in said contract. Defendant's attitude was shown by his testimony that he told the architect to stop the contractor "until he could go ahead and do it according to specifications and do it so it would stand. I was willing to do it, and I didn't care when it would be, but not if it was going to be any less, so I wanted a good substantial building."

We have not overlooked the familiar rule that applies in cases of nonsuit; but, as we view the matter, there is no substantial evidence here of the default of defendant.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

DOUGHERTY et ux. v. UNION TRACTION CO. (Civ. 1,173.)

(District Court of Appeal, Third District, California. Oct. 3, 1913.)

1. CARRIERS (§ 320*)—PASSENGER'S ACTION FOR INJURIES—QUESTION FOR JURY.

In a street car passenger's action for injuries, it was a question for the jury whether the car made a sudden lurch or jerk after its speed had been slackened; and, there being a conflict in the evidence, a verdict for the defendant must be construed as a finding that there was no such sudden movement.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

2. CARRIERS (§ 333*)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A street car passenger, handicapped to some extent by a basket which she was carrying, who, without signaling the conductor that she desired to alight, though she knew that the conductor was at the opposite end of the car and could not know of such desire, arose while the car was moving and went upon the step from which as claimed she was thrown by a sudden lurch, was wholly to blame for the accident.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.*]

3. CARRIERS (§ 333*)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A street car passenger, who had not notified the conductor of her desire to alight at the next street crossing, had no right to assume and act upon the assumption that the car would stop at such crossing merely because its speed for some reason had been diminished, especially

where such crossing was one where cars were required to stop only on signal.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.*]

4. CARRIERS (§ 333, 347*)—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

While it is not negligence per se for a street car passenger to arise from his seat preparatory to leaving the car while it is still in motion, if he does so, he must exercise a reasonable or proper degree of care to protect himself from falling off the car or from falling against any object properly in the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. §§ 333, 347.*]

5. CARRIERS (§ 295*)—LIABILITY FOR INJURIES TO PASSENGER.

A street car conductor was not negligent in going to the forward end of the car for the purpose of collecting a fare from a passenger who had just boarded the car and gone upon the forward platform, as was his duty to do, though he was thereby prevented from observing that a passenger was preparing to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1191-1197, 1199, 1213-1215, 1219, 1220; Dec. Dig. § 295.*]

6. CARRIERS (§ 333*)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A street car passenger is bound to exercise that degree of care which an ordinarily careful and prudent person having due regard for his safety would exercise and be expected and required to exercise under similar circumstances and does not do so by attempting or preparing to leave a moving car without notifying the conductor in some proper manner of his desire to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. § 333.*]

7. APPEAL AND ERROR (§ 1029*)—HARMLESS ERROR—ERRORS AFFECTING PARTY NOT ENTITLED TO SUCCEED IN ANY EVENT.

Where the court should have taken a case from the jury because the evidence showed no negligence on the part of defendant and showed that the injuries sued for were caused by plaintiff's negligence, errors in the instructions and in the rulings thereon, and alleged improper remarks of the trial judge were not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.*]

8. APPEAL AND ERROR (§ 1015*)—REVIEW—QUESTIONS OF FACT.

Where plaintiff's affidavits on a motion for a new trial setting forth alleged improper remarks of the trial judge were contradicted by affidavits of ten jurors who deposed that they heard no such remarks and the affidavit of the trial judge denying such remarks, the trial judge's decision upon the issue thus made was conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Hugh Dougherty and wife against the Union Traction Company. Verdict for defendant, and, from an order denying a new trial, plaintiffs appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

John H. Leonard, of Santa Cruz, for appellants. Netherton & Torchiana, of Santa Cruz, for respondent.

HART, J. The plaintiffs sued the defendant, a corporation, which maintains and operates an electric railway in the city of Santa Cruz, for damages in the sum of \$15,000 for personal injuries inflicted upon the plaintiff Catherine through the alleged negligence of the defendant. The cause was tried by jury, who returned a verdict for the defendant, and the plaintiffs prosecute this appeal from the order denying them a new trial.

The answer, among other things, sets up contributory negligence on the part of the plaintiff Catherine and avers that but for negligence on her part she would not have met with the accident and received the injuries sustained by her.

The points urged for a reversal of the order are that the evidence discloses negligence by the defendant and no negligence by said Catherine; that the court erred in its rulings respecting the evidence; that the trial judge prejudiced the rights of the plaintiffs by certain remarks alleged to have been made by him in the presence of the jury; and that error was committed in the matter of the giving and refusing to give certain instructions.

The accident in which Mrs. Dougherty received the injuries complained of occurred on the 12th day of May, 1909. Her version of how the accident happened is as follows: "I remember the journey on the street cars in this city on May 12, 1909. I took the car at the corner of Morrissey and Soquel avenues, transferred to the Mission street car, and gave my transfer. When we got to the Bedell, I turned to motion the conductor to stop. He had gone through the car—at that moment he started through the car, so I could not attract his attention, out on the front platform. The car slowed up. I supposed it was going to stop and stood up and took one step and the car jerked and threw me on the ground. I could not attract the conductor's attention, as I was on the back of the car, on the west side as the car was going southwesterly on Mission street. I was seated on the outside of the car, and the seats are lengthwise on the car. If there was a person seated in front of the car it would have been impossible for me to pass that person without going down on the steps of the car to get where the conductor was. When I arose from my seat, the car had almost stopped. It slackened slowly. It was going quite fast when we passed the Bedell. The Bedell is not quite a block this side of Otis street but I do not know the distance. I had a basket in one hand and took hold of the pole with the other, the up and down pole on the car. I took one step; this step took me down a step to the lower step. I do not remember whether there were two steps

on the car or not. I was thrown on the ground and stunned."

It appears that at about the point where Mrs. Dougherty was thrown to the ground the motorman slackened the speed of the car to allow two passengers, one Peakes and one Bibbins, who were sitting on the outside at the front part of the car, to alight. Peakes testified that it had always been his practice, when returning to his home on the street cars, to leave the car, upon reaching his residence, while it was still in motion; the motorman always reducing the speed of the car to enable him to alight. On the occasion of the accident he left the car under those circumstances.

The conductor, Lang, testified that the car made a stop at Walnut avenue, where a passenger boarded the car. Otis street on which the accident happened, was the next street to be reached after leaving Walnut avenue. The passenger just referred to stepped and stood on the front platform, and, immediately after the car started, the conductor went forward for the purpose of collecting the fare from said passenger. Lang proceeded: "I just went outside the front door, took his fare, and turned around to go back in the car; saw Mr. Peakes on the front end of the car. Of course, I expected Mr. Davis, the motorman, to slow down and let him off. Then I looked around. There was nobody to board the car. I was just inside the door. He then called for a signal that all was clear with two taps on the gong. I looked back through the car and saw that everything was all right, which I could see from the position I was in. All was clear and I gave him the signal, two bells, the signal that all was right. Then I walked back to the middle of the car and I saw Mrs. Dougherty, this lady, I did not know her at the time, stepping down on the steps. I hurried towards her and at the same time gave a bell to the motorman to stop, but before I could get to her and warn her about her danger she stepped off or apparently stepped off the car and fell to the ground. * * * I was at the rear end of the car, near where Mrs. Dougherty was seated, very close to her, and she never said anything to me at any time about desiring to alight at Otis street. She did not give me a signal, and I did not have any knowledge of the fact that she desired to alight at Otis street at all. After the car slowed down sufficiently for Mr. Peakes and Mr. Bibbins to alight, we just gradually increased our speed. There wasn't any jerking or sudden start that I noticed. I was standing up all the time and certainly would have noticed it if there had been. After collecting the fare from the passenger who boarded at Walnut avenue, I went right back, turned right around, and went right back to the rear end. The doors of the car were left open, but in going back I had to turn and pass through the inclosed part of the car. * * * I was in a position (when he gave

the motorman the signal) where I could see any one in the inside or in the rear of the car but did not notice Mrs. Dougherty in particular. There was no passenger standing at that time. * * * If there had been I could have seen them. * * * I did not notice her particularly from any other passenger. There were probably about 17 on the car at the time. There were also passengers inside of the body of the car."

The witness McCormack, an employé of the defendant and connected with its operating department for a number of years, said that the cars which were operated by the company at the time of the accident were equipped with a rope drum brake. "Air brakes and rope brakes," he continued, "are the two brakes generally used on the cars, but the car upon which the accident happened was equipped with a rope brake. The rope is operated around a drum. It is so constructed that, in stopping a car, it must stop gradually, and in starting up it will start gradually. It is impossible to start a car with a jerk when equipped with a rope brake. It is so constructed as to wrap around the drum and the weight of the rope on the drum makes it impossible to release the brakes instantly. While the air brakes can be released instantly, and of course the car can start with a jerk, it is quite different with a rope brake." McCormack further testified that on certain parts of the defendant's lines of railway there are certain places where the cars are required to stop whether or not there are passengers to leave or take the car thereat. At all other points, passengers desiring to leave or board the cars must signal the conductor or motorman. It is further made to appear that the point at which Mrs. Dougherty desired to leave the car and where she fell to the ground was not one of the regular stopping places.

A Mrs. Linstedt was sitting between Mrs. Dougherty and the main body of the car, and her testimony shows that it was not possible for the latter to have passed in front of Mrs. Linstedt without getting down on the steps. Mrs. Linstedt did not arise from her seat to let Mrs. Dougherty pass. She testified that she was not requested by Mrs. Dougherty to arise and that had such a request been made she would have certainly done so.

[1, 2] The question whether the car made a sudden lurch or jerk after its speed had been slackened to let two passengers swing to the ground while it was still in motion and which sudden lurch, it is claimed, caused the precipitation of Mrs. Dougherty to the ground from the step to which she had descended and upon which she was standing was entirely one for the jury's determination. And upon that question there is a distinct conflict in the evidence, and the verdict must therefore be construed as a finding by the jury that the car was caused to make no such sudden movement. But, even if it were

true that the car did make a sudden lurch at the time and that by reason thereof Mrs. Dougherty was thrown to the ground, still, according to her own testimony, she herself was wholly to blame for the accident. She did not notify or signal the conductor that she desired to alight but upon her own volition arose and placed herself in a position which, even under ordinary circumstances, was one which would be attended by more or less peril. The peril of her situation was increased in some measure by the fact that she was carrying and holding in one hand a basket, whereby she was necessarily handicapped to some extent in moving from the car to the step and, after reaching the step, in securing herself against falling. She knew that the conductor was at the opposite end of the car at the time, and of course knew that he could not then have known that she desired to leave the car.

[3] But Mrs. Dougherty said that, the speed of the car having been slackened, she supposed it was going to stop at the next crossing, where it was her desire and purpose to alight. What she supposed the car was going to do is no excuse for her carelessness. It is not for a passenger, desiring to alight from a street car at a particular place, and who has not notified the conductor of such desire, to assume, and to act upon such assumption, that, merely because the speed at which the car has been traveling has been diminished for some reason, it is to be stopped at the next street crossing toward which it is traveling, especially where, as was true in this case, the next crossing was not one where the cars are required to stop in any event but only on a signal to the conductor or motorman by any one desiring to leave or board the car at that point.

[4] No fault can be found with the cases, cited by the plaintiffs, in which it is held that the fact that a passenger arises from his seat, preparatory to leaving the car, while it is still in motion, raises no presumption of negligence on his part or, in other words, is not negligence per se. See *Capital Traction Co. v. Brown*, 29 App. D. C. 473, 12 L. R. A. (N. S.) 831, 10 Ann. Cas. 813; *Scott v. Bergen County Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060; *Alton R. Gas & Elec. Co. v. Webb*, 219 Ill. 563, 76 N. E. 687. There is obviously nothing in the mere act of a passenger arising from his seat in a street or any other kind of a car while it is in motion which of itself constitutes negligence, but it will not be doubted, and the cases referred to do not otherwise hold, that, when a passenger arises from his seat in a moving car for any purpose, he must exercise a reasonable or proper degree of care to protect himself from falling off the car or, if he is inside, from falling against any object properly in the car, otherwise any injuries he may thus sustain will legally be imputed directly to his own negligence. In this case, as has been shown,

the injured plaintiff did more than simply to arise from where she had been sitting; she, obstructed in the free use of both hands as a protection against possible accident by engaging one in the carrying of a basket, descended to that part of the platform where the conductor usually stands and thus remained until thrown to the street.

[5, 6] As to the claim that the defendant was negligent in that its conductor left the rear end of the car to go to the forward end for the purpose of collecting a fare from a passenger who had just boarded the car and taken a position on the forward platform, the reply is that the evidence clearly shows that that officer was then merely engaged in performing a duty which was required of him in the capacity in which he was acting for his employer. He was required as such employé to collect fares from the passengers, wherever they might be located on the car, and when he left the rear platform, where Mrs. Dougherty was then sitting, for that purpose, he was merely engaged in the doing of an act which Mrs. Dougherty well knew that his duties compelled him to do and which she, in common with all the other passengers, and indeed with the whole traveling public, expected and anticipated that he would do. When performing that duty, a street car conductor is not to be supposed or expected to perform the impossible act of watching or keeping his eyes on all the passengers in the car, and there is therefore some responsibility very justly cast upon the passengers themselves to look out for their own safety and before attempting to leave a moving car, or when preparing to do so, to notify the conductor in some proper manner of their desire to alight. A passenger who fails to do this does not exercise the care with which he is charged; viz., that degree of care which an ordinarily careful and prudent person, having due regard for his safety, would exercise and be expected and required to exercise under similar circumstances.

[7] Under the view we take of the evidence, as indicated by the foregoing, the defendant having been in no respect guilty of negligence and the damage sustained by Mrs. Dougherty directly the result of her own, the court below should have taken the case from the jury. It follows, therefore, that any errors committed by the court in the matter of the instructions or in its rulings or in the alleged prejudicial remarks of the judge in the presence of the jury are without prejudice. It may, however, be remarked that the court's charge, though it became, by reason of the fact that the evidence disclosed negligence in the injured plaintiff and none in the defendant, but little more than a mere abstract statement of the law covering the various elements entering into such a case, is not obnoxious to any of the criticisms directed against it by the plaintiffs. The in-

structions submitted by the plaintiffs and disallowed by the court involved the exposition of no principle not correctly laid down in the court's charge.

[8] It may further be remarked that the court made no error in its rulings upon the evidence which was prejudicial to the plaintiffs, and, as, to the alleged remarks of the court in the presence and hearing of the jury, it is to be observed that the affidavits filed and pressed by the plaintiffs on their motion for a new trial setting forth the alleged remarks and the charge that they were made within the hearing of the jury were contradicted by affidavits of ten of the jurors, who deposed that they heard no such remarks as were thus imputed to the judge, and by the affidavit of the latter, who therein denied that the remarks referred to were made in the presence or within the hearing of the jury. It results that, if the point were important here, the decision of the trial judge upon the issue thus made would, under the conflict so disclosed, be conclusive upon this court.

The order from which this appeal is prosecuted is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

SCHENCK et al. v. HIRSHFELD.
(Civ. 1,372.)

(District Court of Appeal, Second District, California. Sept. 19, 1913. Rehearing Denied by Supreme Court Nov. 18, 1913.)

1. GAMING (§ 23*)—WAGERS—RELIEF.

Contracts of wager, or betting, are generally void because they contravene the policy of the law, and the courts will ordinarily give no relief except to those who wish, before the happening of the condition of the wager, to withdraw their money from the stakeholder.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 49; Dec. Dig. § 23.*]

2. GAMING (§ 29*)—RIGHT TO WITHDRAW FROM STAKEHOLDER.

Where a gaming contract itself does not amount to a violation of a penal statute, either party may withdraw his money from the stakeholder at any time before it is paid over.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 68; Dec. Dig. § 29.*]

3. GAMING (§ 28*)—WAGERS—RIGHT TO RECOVER FROM STAKEHOLDER.

Where plaintiffs made a wager on an election and deposited their money with defendant, they cannot after the election recover it back, for Pen. Code, §§ 60, 659, declare that every person who makes any bet upon the result of an election shall be guilty of a misdemeanor, and that every person who aids another in the commission of a misdemeanor is also guilty with the principal offender; hence, all of the parties being in fault, the law will leave them where it finds them.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 62-67; Dec. Dig. § 28.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Sam Schenck and another against Dave Hirshfeld. From a judgment sustaining a demurrer without leave to amend, plaintiffs appeal. Affirmed.

E. L. Foster and Thomas Scott, both of Bakersfield, for appellants. T. M. McNamara and C. L. Claflin, both of Bakersfield, for respondent.

JAMES, J. Plaintiffs and one Coyne wagered \$500 each upon the event of an election. Defendant acted as the stakeholder. After the election had been held and the result declared, a proceeding in contest of the election was instituted, and, before the money had been paid over or the contest decided, plaintiffs in writing notified the stakeholder that they repudiated the wager and demanded the return of the \$500 deposited by them. Their demand was refused. The foregoing is a brief statement of the facts set out in the complaint of plaintiffs, to which complaint defendant interposed a demurrer. The trial court sustained the demurrer without leave to plaintiffs to amend, and from the judgment which followed plaintiffs appealed.

[1] Contracts of wager, or betting, fall generally within a class which are said to be void because they contravene the policy of the law. It will serve no useful purpose here to trace the course of judicial decisions in dealing with actions growing out of such disputes, further than to observe that betting contracts were in early English times allowed to be enforced in the courts, but that later it became the settled view of the judges that any person who indulged in that species of gambling should have no right to call upon the arm of the law to aid him in compelling the opposite party to fulfill his promise; that the only assurance upon which a wager could rest was the sometimes uncertain one of "the honor of a gambler." But while leaving the party without redress for a default by the other in his obligations, the courts did, and continue to, entertain a cause of action on behalf of the parties to wagering engagements where such persons seek to withdraw their money from the contest and so quit the unsavory relationship. This relief is granted upon the ground that he who repents of an act which is frowned upon by the law will be furnished aid in withdrawing the consideration ventured.

[2] Courts have differed as to whether a man should be allowed to "repent" after it has been determined that he has lost his money; some holding that money wagered may be withdrawn at any time before the stakeholder has paid it over to the winner. See Beach on Modern Law of Contracts, § 1490, and authorities there cited. Others, among them our own Supreme Court, stating the law to be that the withdrawal of the money may be made and enforced only up to the time of the happening of the

event upon which the wager was conditioned. See Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110. All of these decisions, however, consider situations where the engagement of the parties does not amount to the violation of a penal statute. In other words: A contract of wager as to some subjects may not be unlawful in the sense that it comes within the express definition of a statute creating a public offense; then the parties may carry out their agreement and they commit no crime by so doing; the wagers, when they deposit the money with the stakeholder, do so lawfully, and the act of the stakeholder receiving it is free from unlawful taint. In such cases the law will aid the parties in rescinding the agreement and in regaining the money or thing which they ventured upon the hazard of chance. Anson on Law of Contract, p. 257, par. 265. But not so where the act of wagering is made a penal offense under the law.

[3] Such was the condition that affected the transaction narrated in plaintiff's complaint. By section 60 of the Penal Code it is declared: "Every person who makes, offers, or accepts any bet or wager upon the result of any election, or upon the success or failure of any person or candidate, or upon the number of votes to be cast, either in the aggregate or for any particular candidate, or upon the vote to be cast by any person, is guilty of a misdemeanor." By section 659 of the same Code, every person who aids another in the commission of a misdemeanor is also guilty with the principal offender. So in this case, when plaintiffs deposited the \$500 with defendant, they committed a misdemeanor; defendant likewise committed a misdemeanor in accepting the money on the conditions stated. Shall the courts then lend their aid to enable persons who have committed a public offense to recover the property which was used in the perpetration thereof? It would seem that the plaintiffs, upon their own statement of the facts, have shown themselves not to be entitled to seek any aid in a court of justice. The demurrer to the complaint was, therefore, properly sustained.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

HENRY v. CASWELL et al. (Civ. 1106.)

(District Court of Appeal, Third District, California. Oct. 3, 1918.)

1. DEPOSITIONS (§ 39*) — COMMISSION — TO WHOM ISSUABLE.

Code Civ. Proc. § 2024, authorizes a commission to take testimony in another state to issue to any person agreed upon by the parties, or where they do not agree to any judge or justice of the peace or commission selected by the court. The parties stipulated that depositions should be taken before one F., "a notary public" in and for the city of Chicago. Held, that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

court was justified in construing the term "a notary public" as words of description and to issue the commission to F. not in his official capacity but as the person agreed upon by the parties.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 54-60; Dec. Dig. § 39.*]

2. DEPOSITIONS (§ 76*)—CERTIFICATE OF OFFICER.

Where a commission to take depositions was issued under Code Civ. Proc. § 2024, to one F. as an unofficial person, his seal as notary would have added nothing to the genuineness of his certificate; and hence the objection that a notary's seal was not attached to the certificate was without merit.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 166, 176, 190-196; Dec. Dig. § 76.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Jay Henry against W. H. Caswell and E. W. Caswell, as Caswell & Co. Judgment for defendants, and plaintiff appeals. Reversed.

Jay Henry, of Sacramento, pro se. Chas. M. Beckwith, of Sacramento, for respondents.

CHIPMAN, P. J. This is an appeal, within 60 days, from a judgment of nonsuit, on statement of the case, in favor of defendants dismissing the action "upon the grounds," as recited in the judgment, "that the plaintiff had failed to prove a sufficient case, inasmuch as the evidence introduced was in the form of depositions and that said depositions were and are incompetent." The only objection made to the admissibility of the depositions was that a notary's seal was not attached to the certificate of the commissioner. The depositions were taken under the following commission, appointing E. C. Ferguson, of Chicago, Ill., to perform that office:

"Commission to Take Depositions.

"[Title of Court and Cause.]

"The People of the State of California, to E. C. Ferguson, 1450 Otis Building, Chicago, Illinois:

"Know you that, trusting in your fidelity and circumspection we have appointed you special commissioner, and do hereby authorize you to administer the necessary oaths, and to take the depositions of Charles S. Hayes and Thomas F. Hanks, residing at 1508-1512 Tribune Building, city of Chicago, county of Cook, state of Illinois, in answer to the interrogatories, direct and cross, annexed hereto, in the matter of the above-entitled cause. All of which matter, together with this writ, you will return to this court, according to law, in a sealed envelope, directed to the clerk of said court, at the city of Sacramento, county of Sacramento, state of California, and forward the same, by mail or express, or other usual channel of conveyance.

"Witness the Honorable C. N. Post, judge

of Department 3 of said court, and the seal thereof, at the city of Sacramento, county of Sacramento, state of California, this 29th day of October, 1912. E. F. Pfund, Clerk. H. W. Hall, Deputy. [Seal.]"

This commission was issued pursuant to an order of the judge of said court, "that a commission issue out of and under the seal of this court, directed to E. C. Ferguson, 1450 Otis building, a person agreed upon by and between the parties, residing at the city of Chicago, Cook county, state of Illinois, to take the testimony of Charles S. Hayes and Thomas F. Hanks, residing at the same place, as witnesses on behalf of the plaintiff," etc. A stipulation was entered into by the parties that the depositions of the persons above named "be taken before E. C. Ferguson, 1450 Otis building, a notary public in and for the city of Chicago, county of Cook, state of Illinois. * * * The annexed are interrogatories proposed by the plaintiff on which such depositions are to be taken." The depositions were subsequently duly taken and returned under a full and formal certificate showing what was done by the special commissioner. The certificate is signed "Elbert C. Ferguson, Special Commissioner."

[1] It is quite apparent that the construction given the stipulation by the judge who made the order and issued the commission was that it was not to issue to Ferguson in his official capacity but to him as the person agreed upon by the parties. The order reads: "Upon reading and filing the stipulation of the parties to the above-entitled action, and upon the files, papers, and records in this action, on motion of Jay Henry, attorney for plaintiff, it is ordered," etc. The judge was justified in construing the terms "a notary public in and for the city of Chicago, county of Cook," as words of description. That there was authority for such appointment is expressly provided by section 2024 of the Code of Civil Procedure, and it was so held in *Alcorn v. Gleseke*, 158 Cal. 396, 111 Pac. 98.

In the case of *Temby v. Brunt Pottery Co.*, 229 Ill. 540, 82 N. E. 336, the commission was issued to George E. Davidson, in Ohio, a notary public. The depositions were returned signed by him as commissioner. The court said: "He derived his authority from the commission, and it is immaterial that he was also described as a notary public. It is not necessary that a commissioner hold any office, and a commission may be directed to any competent disinterested person. The person to whom a commission to take depositions is issued need only be designated by the office which he holds, and in either case he obtains his authority from the commission. *Brown v. Luehrs*, 79 Ill. 575. The addition of the description to the name of the commissioner did not add to or detract from

his authority, and no certificate was necessary. *Kendall v. Limberg*, 69 Ill. 355. The certificate showed that the witnesses were sworn and examined under oath, and the objections were properly overruled."

[2] In the present case, had the commission issued to Ferguson as notary and in his official capacity, he should have taken the deposition and certified it as notary. Code Civ. Proc. § 2024. But, as the commission issued to him as an unofficial person, his seal as notary would have added nothing to the genuineness of his certificate or its authenticity. The objection to the depositions was without merit, and they should have been admitted as evidence in the case. It was error to grant the nonsuit.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

HINES v. COPELAND. (Civ. 1,160.)

(District Court of Appeal, Third District, California. Oct. 8, 1913.)

1. SPECIFIC PERFORMANCE (§ 114*)—COMPLAINT—SUFFICIENCY.

Under Civ. Code, § 1624, providing that contracts for the sale of real property are invalid unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by his agent, a complaint, in a suit for specific performance, which fails to show that the agreement is in writing, is insufficient.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.*]

2. FRAUDS, STATUTE OF (§ 110*)—WRITING—SUFFICIENCY.

Under Civ. Code, § 1624, providing that a contract for the sale of real property is invalid, unless the contract or some note or memorandum thereof is in writing, a receipt for \$100, reciting that it was a deposit on 40 acres of land, at \$2,200, signed by a person owning 6 different and distinct lots of land, containing 120 acres, was not a sufficient memorandum in writing, since it could not be told therefrom what particular 40 acres was sold or even whether it was any part of the 6 lots referred to.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 225-236; Dec. Dig. § 110.*]

3. FRAUDS, STATUTE OF (§ 110*)—WRITING—SUFFICIENCY.

Under Civ. Code, § 1624, providing that a contract for the sale of real property is invalid unless the contract or some note or memorandum thereof is in writing, the writing must not only contain a description of the property, but the description must be such as to facilitate a ready identification of the property, without the necessity of resorting to extrinsic or parol evidence.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 225-236; Dec. Dig. § 110.*]

4. SPECIFIC PERFORMANCE (§ 29*)—CONTRACT ENFORCEABLE—DESCRIPTION OF PROPERTY.

Specific performance of a contract for the sale of land cannot be decreed unless the specific property, which defendant agreed to convey is so described in the agreement sought to be enforced

that it may readily be identified from such description.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.*]

5. FRAUDS, STATUTE OF (§ 129*)—PART PERFORMANCE—PAYMENT OF CONSIDERATION.

Under Code Civ. Proc. § 1972, providing that the preceding section, which provides that no estate or interest in real property, other than leases for not exceeding one year, can be created otherwise than by operation of law, or a conveyance or other instrument in writing, must not be construed to abridge the power of any court to compel the specific performance of an agreement in case of part performance thereof, payments on the purchase price of land do not constitute part performance sufficient to take an oral agreement out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. B. Hines against M. E. Copeland. Judgment for defendant, and plaintiff appeals. Affirmed.

Ernest Klette, of Fresno, for appellant.
Drew & Drew, of Fresno, for respondent.

HART, J. This is an action for the specific performance of an alleged contract for the sale of real property. The complaint alleges that, at the date of the execution of the alleged agreement, the defendant was the owner of 120 acres of land, situated in Fresno county, and described as "lots 21, 22, 23, 24, 25 and 26 of De Witt Colony, according to the map or plat of said colony on file and of record in the office of the county recorder of the county of Fresno, state of California"; that the defendant, on the 20th day of April, 1911, agreed to sell and convey to the plaintiff, by a good and sufficient deed, "any forty acres of land that plaintiff should or might select, elect or choose to purchase, for the sum of \$2,200.00," etc.; that thereafter, and on or about the same day, the plaintiff went to said land and "then and there chose, selected and elected" to purchase lots 23 and 24 of the land above described, and he at that time made known to the defendant the fact of his selection of said lots and his election to purchase the same according to the defendant's agreement; that, thereafter and on the same day, the plaintiff paid to the defendant the sum of \$100 on the purchase price of the lots so selected by him; and that the defendant "then and there made, executed, and delivered to said plaintiff a writing, signed by said defendant, in the words and figures following, to wit: 'Fresno, Cal., April 20, 1911. Received of S. B. Hines one hundred dollars, deposit on 40 acres of land at \$2,200.00. Mrs. M. E. Copeland.'" The complaint states that, after the execution of the foregoing receipt, the plaintiff, at various times, made payments in small amounts, so that the total amount paid by the plaintiff to the defendant on the purchase price of the land is \$393.30; that the defendant still

retains said sum and has refused and still refuses to furnish the plaintiff with an abstract or certificate of title or a deed to the premises, although before the commencement of this action he demanded the same and tendered to the defendant the sum of \$1,806.70, the balance due on the purchase price. To the complaint the defendant interposed a demurrer, both general and special, and the court sustained the same; leave to amend having been denied upon the statement of the plaintiff in open court that he had no other or further agreement in writing than the one set forth in his complaint. Judgment was thereupon entered in favor of the defendant, and this appeal is by the plaintiff from said judgment.

The complaint fails to state a cause of action for the specific performance of a contract for the sale of real property, and the demurrer was therefore properly sustained.

[1-3] Section 1624 of the Civil Code, among other things, provides: "The following contracts are invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * * (5) For the sale of real property, or an interest therein." See, also, section 1973, Code Civ. Proc.

The agreement referred to in the third paragraph of the complaint is not shown to be in writing, and it follows that that paragraph of the complaint wholly fails to state a cause of action for the relief demanded. And nothing could be clearer than that the writing set out in the complaint and upon which the plaintiff seems solely to rely for the support of his action does not satisfy the requirement of our statute of frauds, above quoted. It does not contain a description of the property to which it purports to relate, and thus it is wanting in one of the first essentials of an agreement for the sale of real property to render it valid or subject to recognition either at law or in equity. Not only must there be a description of the property which is the subject of the agreement, but the description must be such as to facilitate, without the necessity of resorting to extrinsic or parol evidence, a ready identification of the property. As seen, the complaint declares that the defendant is the owner of six different and distinct lots of land situated in De Witt Colony, Fresno county, and that the 40 acres to which the plaintiff claims to be entitled to a deed, by virtue of the alleged agreement of sale, is a part of said lots; but, even if this be true, the writing upon which the demand for the relief prayed for is founded does not so describe the 40 acres as to convey even the remotest notion as to which of the several lots mentioned embrace or constitute the 40 acres. In other words, it cannot be determined from the writing what particular 40 acres the defendant agreed to sell out of the several pieces of land which the complaint states she owns in De Witt Colony. And, taking the writing by itself,

unexplained or unaided by the allegations setting forth the oral negotiations of the parties, it cannot be told therefrom whether the land referred to therein is any part of the six lots referred to. Indeed, so far as the writing itself discloses any information as to its location, the land it refers to may be situated in some other part of Fresno county, or, for that matter, in some other county.

[4] An action based upon such an agreement, whether it be one at law for damages for its breach or one in equity for a specific enforcement of its terms, cannot, of course, be sustained. The remedy by specific performance, which is invoked in this case, obviously means that, where an agreement to sell property has been broken, the party seeking the remedy is entitled only to a decree compelling the other party to convey to him the identical or specific property which he agreed to convey, and, that this may be done, the land must, in the very nature of the case, be so described in the agreement whose terms are thus sought to be enforced as that it may readily be identified from such description. The court must, in other words, be definitely made to know the precise property as to which the terms of the agreement are asked to be enforced. And such knowledge can be acquired only by those means or through that instrumentality prescribed by the law for the acquisition of such knowledge; that is, by and through such a writing as embraces all the essential features of the contract.

As is said in *Breckinridge v. Crocker*, 78 Cal. 529, 534-5, 21 Pac. 179, 181: "In order to take a contract for the sale of land out of the statute of frauds, it is not necessary that there be a formal contract, drawn up with technical exactness. A memorandum of the agreement is sufficient, and it may be found in one or more papers, some or all of which may be telegrams. But the memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must so describe the land that it can be identified."

There are many California cases in which the essentials of an agreement to sell real property, to take it out of the statute of frauds, are clearly pointed out and, we think, show that the one here is wholly insufficient to satisfy the statute. *Craig v. Zeilan*, 137 Cal. 105, 69 Pac. 853, is instructive upon this proposition. There the writing pleaded and relied upon read, after the date: "Received of Wm. Craig and James Marlow the sum of \$20.00, twenty dollars, in part payment for a strip of land in front of Golden Rule Store and Stent Market. The purchase price of said lot to be \$150.00, one hundred and fifty dollars"—signed by the defendant. The action was for damages for the breach of the contract. The court, holding that the writing was insufficient to take the case out of the statute of frauds because the description of the land was too vague and indefinite,

said: "An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they have omitted from the writing. * * * The statute of frauds was originally enacted 'for the prevention of frauds and perjuries,' and an agreement for the sale of land is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence. A description of the land intended to be conveyed is one of the most essential parts of the agreement, and must be contained in the writing."

There are numerous cases from other jurisdictions which illustrate the application of the rule as it is stated and applied by the above California cases. See *Repetti v. Maisak*, 6 Mackey (D. C.) 366; *Rollin v. Pickett*, 2 Hill (N. Y.) 552; *Baldwin v. Kerlin*, 46 Ind. 426; *Miller v. Campbell*, 52 Ind. 125; *Taney v. Batchell*, 9 Gill (Md.) 205; *Coolley v. Lobdell*, 82 Hun, 98, 31 N. Y. Supp. 202; *Murdock v. Anderson*, 57 N. C. 77; *Ives v. Armstrong*, 5 R. I. 567; *Humbert v. Brisbane*, 25 S. C. 508; *Nippolt v. Kammon*, 39 Minn. 372, 40 N. W. 268.

[5] While there is no claim made in the brief by counsel for the plaintiff that he is in any event entitled to a specific enforcement of the agreement on the ground of part performance (section 1972, Code Civ. Proc.), yet, as we have shown, the complaint alleges payments made on the alleged purchase price of the specific parcel of land of which the plaintiff alleges that he became the purchaser under the alleged contract with the defendant, and the inference from those allegations is that such payments constitute part performance, and should be so regarded. That mere payments on the purchase price of the land are not sufficient to take an oral agreement for the sale of land out of the statute of frauds is well settled. *Forrester v. Flores*, 64 Cal. 24, 28 Pac. 107. In that case, the plaintiffs sought the specific enforcement of an oral agreement by the defendant to sell certain real property to the plaintiffs on the ground of part performance; the complaint alleging that the latter had fully performed the agreement on their part by paying the entire purchase money, but that the defendant, although he had taken and kept the money, refused to execute and deliver to the plaintiffs a deed to the property. The answer of the defendant made no denial of the

allegations of the complaint as to the payment of the purchase price, and, by reason of that fact, the plaintiff asked for a judgment on the pleadings, which motion was denied and judgment thereupon entered for the defendant. Upholding the judgment, the Supreme Court said: "And although there was no denial of the allegations as to the payment of the money, yet no inference could be drawn, from the fact of payment, that the moneys were paid to the defendant on account of and in the performance of the alleged agreement. Besides, if such an inference could be drawn from the fact, neither the fact, nor the inference, nor both together, would amount to such proof of part performance as would take the parol agreement out of the statute of frauds; for the mere payment of the purchase money of such agreement is not, according to the general practice in courts of equity, sufficient for that purpose. 'By an unbroken current of authorities running through many years, it is settled, too firmly for question, that payment, even to the whole amount of the purchase money, is not to be deemed part performance so as to justify a court of equity in enforcing the contract.' *Browne on Frauds*, § 461; *Fry on Specific Performance*, § 403; *Story's Equity Jurisprudence*, § 761. It is only where the payment is accompanied by a change of possession in the land, or the expenditure of money upon it, on the faith of the oral agreement, and where the failure to perform by the vendor would work a gross fraud upon the vendee, that a court of equity will decree specific performance by compelling the execution of a deed. *Story's Eq. Juris.* § 761. For money paid under an invalid contract, the party who pays has an adequate remedy at law."

The facts in the cases cited by the plaintiff distinguish them from this. For instance, in the case of *Preble v. Abrahams*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301, the agreement contained in the writing upon which the plaintiff relied was that the vendors would sell to "A. Abrahams, of Reno, for \$125.00 per acre, for forty acres of the eighty-acre tract at Biggs," etc. The writing was dated, "Biggs, January 13, 1888," from which it was readily to be inferred that there was a town or settlement known by that name and readily susceptible of identification. All that was required to locate or identify the land, as it was thus described in the writing, was to ascertain whether the vendors owned an 80-acre tract, distinct from any other tract, at or in the immediate neighborhood of the town or settlement of Biggs, and, as is suggested by counsel for the defendant here, this could easily be done by reference to the public county records. Besides, it is to be assumed that the use of the definite article "the" immediately preceding the words, "eighty-acre tract," was intentional and for the express purpose of describing a particular tract of land consisting of that number of acres, situated "at Biggs." More-

over, the use of the article "the" as it appears in the sentence referred to implies that the vendors were the owners of but one 80-acre tract at Biggs; so, as the Supreme Court in that case said: "If the vendors owned an 80-acre tract at Biggs, we assume that they intended to sell 40 acres of the 80-acre tract owned by them at Biggs." If therefore parol testimony was admitted to disclose the precise location of said tract, its purpose was not to correct an insufficient description, but merely to locate the land by the description as given of it in the writing. *Crozer v. White*, 9 Cal. App. 612, 616, 100 Pac. 130.

The other cases cited by the plaintiff need not be specially reviewed here. Many of them are from other jurisdictions and two are the following California cases: *Towle v. Carmelo L. & C. Co.*, 99 Cal. 397, 33 Pac. 1126, and *Carr v. Howell*, 154 Cal. 372, 97 Pac. 885. An examination of the California cases will disclose that they are very much different from this case as to the facts.

Our conclusion is, as must be apparent from the foregoing, that the alleged written agreement upon which the plaintiff declares, and upon which he must rely if he would succeed at all in sustaining his action, falls very far short of measuring up to the requirements of the statute of frauds, and that it cannot therefore be upheld either at law or in equity.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

CALDWELL v. REGENTS OF UNIVERSITY OF CALIFORNIA. (Civ. 1,175.)

(District Court of Appeal, Third District, California. Oct. 4, 1913. Rehearing Denied by Supreme Court Dec. 3, 1913.)

1. DISMISSAL AND NONSUIT (§ 60*)—DELAY IN PROSECUTION—DISCRETION.

Code Civ. Proc. § 581a, requiring dismissal of an action where, within three years after its commencement, summons has not been served and return thereon made, does not prevent the court, in its sound judicial discretion, dismissing, for unreasonable delay in prosecution, an action in which such service and return has not been made, though less than the three years has elapsed.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.*]

2. DISMISSAL AND NONSUIT (§ 60*)—DELAY IN PROSECUTION—SUFFICIENCY OF EXCUSE.

Plaintiff filing his complaint, and at the same time recording a lis pendens, ten years after his cause of action, if any, accrued, through an alleged void foreclosure sale, to quiet title to land, record title to which, under the sale, was in defendant, does not excuse his delay for 19 months after filing the complaint to serve the summons, so that dismissal of the action for unreasonable delay in prosecution can be said to have been an abuse of discretion, by a statement that during such time he was making efforts, resulting in success just be-

fore the motion to dismiss, to raise the entire amount, for which sale was made, to tender to defendant.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by R. A. Caldwell against the Regents of the University of California. From a judgment and order of dismissal, plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court; Beaty, C. J., dissenting.

F. W. Sawyer, of San Francisco, for appellant. Warren Olney, Jr., of San Francisco, for respondent.

HART, J. This is an appeal from a judgment entered upon an order dismissing the above-entitled action and from the order of dismissal. The ground upon which the order of dismissal was made was want of diligence in the service of summons and consequent failure to prosecute the action with reasonable diligence. The motion was supported by the affidavit of an officer of the defendant, setting forth the facts upon which the latter claimed to be entitled to favorable action upon said motion. The plaintiff filed a counter affidavit, in which he details a history of the litigation of which the proceeding now before us is the outgrowth, and sets forth his reasons for postponing the service of summons. These affidavits are incorporated into the record, which was made up in accordance with the provisions of sections 941a, 941b, and 941c of the Code of Civil Procedure.

The action, the purpose of which was to obtain a decree quieting, as against the defendant, the plaintiff's alleged title to certain real property situated in the city of Oakland, Alameda county, was commenced and summons issued on the 16th day of May, 1910, but the summons was not served upon the defendant up to the time of the noticing and filing of the motion to dismiss the action.

The affidavit of Victor H. Henderson, secretary of the defendant corporation, shows that his office, as well as those of the treasurer and president of said corporation, were, during all of the time ever since the date of the institution of the action and the issuance of summons, maintained, respectively, on the grounds of the State University, in the city of Berkeley, at San Francisco, and at the city of Sacramento. The affiant during all of said time was the secretary and maintained his office at the place above stated, and during the same period of time I. W. Hellman, Jr., was treasurer, and, by virtue of the provisions of law, the Governor of the state, whose office was and is at Sacramento, was president of said corporation. It is averred that these facts were well known in Alameda county to the general public and to all persons having business or desiring to do

business with the defendant or with the University of California, and that the existence and respective locations of said offices were recorded in the public directories, "and if the existence and location of said offices, or the identity of the individuals occupying the positions of such secretary, president, and treasurer were not known to plaintiff and his attorney, such knowledge could have been immediately obtained by them by inquiry in said county of Alameda." The affidavit then avers that summons "in said action has not been served upon the defendant, and, as far as affiant is aware, no attempt has been made by the plaintiff, or his attorney, to serve the same; that it has always been possible and practicable for the plaintiff, or his attorney, without difficulty, to serve said summons personally on said defendant."

By his affidavit, counsel for the plaintiff does not deny that he was familiar with the fact of the existence and the respective locations of the executive officers of the defendant referred to in the defendant's affidavit, nor does he claim that, for any reason, he was precluded from securing legal service of summons upon the defendant corporation. The excuse for the delay in the service of summons is, however, stated in his affidavit in substance as follows: That on or about the 24th day of July, 1900, the defendant corporation commenced an action in the superior court in and for the county of Alameda for the purpose of foreclosing a mortgage, executed on the land described in the complaint to secure an indebtedness in the sum of \$26,398.37, alleged to be due the said defendant from one W. A. Knowles and which indebtedness was evidenced by the promissory note made by said Knowles to the defendant on December 6, 1890; that in said foreclosure suit said Knowles appeared by filing an answer in which, among other things, he set up the plea of the statute of limitations as to all sums in excess of \$10,000 of said alleged indebtedness, and that at the trial of said action the court sustained the plea of the statute and awarded the defendant here judgment in said action in the sum of \$10,000 only, with interest and costs, aggregating the sum of \$16,276.66%, "but in its order of sale under said foreclosure directed that the property be sold to pay the entire amount demanded in the complaint, to wit, the sum of \$32,533.33," which included the principal of the original indebtedness and interest and costs; that, at the sale under said judgment, sufficient property was sold by the commissioner appointed by the court for that purpose to pay the full amount demanded in the complaint, which, as is manifest, amounted to the sum of \$16,276.66% in excess of the amount awarded by the judgment against said Knowles. The plaintiff, it is stated in the affidavit, having acquired title to the property sold to satisfy such excess, commenced this action, not for the purpose of promoting litigation, but with the intention

of making every possible effort to settle and adjust the matter out of court, and to that end "affiant advised the plaintiff to raise the necessary money to pay the defendant the full amount of its demand, to wit, \$32,555.33, with interest, taxes, liens, expenses, and costs to date, and make full tender to the defendant of such sum and demand a reconveyance of said property," notwithstanding that "the excess sale under said judgment was and is absolutely void and of no force or effect whatever"; that, "acting under said advice, effort has been made to raise that sum, with the result that plaintiff, on the 30th day of December, 1911, was ready and willing to make such tender and demand, and thereupon affiant wrote and mailed to the defendant the following letter." Then follows a copy of a letter addressed to the defendant by the affiant, attorney for the plaintiff, and dated December 30, 1911. In that letter he called attention to the invalidity of the "excess sale" of property whereby the whole of the indebtedness due from Knowles to the defendant was satisfied after the court, in the foreclosure suit, had found that the defense of the statute of limitations against all of said indebtedness in excess of the sum of \$10,000 was established, informed the defendant that the plaintiff had commenced an action against it and others to quiet title to the property, and offered, in consideration of a conveyance by the defendant to the plaintiff of the property sold by the defendant under the decree, to pay to the former the full sum of \$32,553.33, together with interest thereon, at the rate of 7 per cent. per annum from the date of the decree of foreclosure. That letter, proceeds the affidavit, was responded to by the defendant by letter dated January 4, 1912, in which it was stated that plaintiff's letter had been turned over to Mr. Warren Olney, Jr., attorney for the regents, "who has charge of legal matters affecting the Broadway terrace tract (the land in question was so named and known), the property of the regents." Mr. Olney, so the affidavit states, replied to the letter of affiant by serving upon him a notice of the motion which is responsible for this appeal. "The delay in this matter," concludes the affidavit, "was occasioned by an honest effort to raise the necessary money to do full and complete equity by the plaintiff to the defendant, and in an honest effort to adjust the matter without resort to trial and litigation in court."

[1] By section 581a of the Code of Civil Procedure it is made mandatory upon the court to dismiss an action in which summons has not been served and return thereon made within three years after the commencement of such action. *Bernard v. Parmalee*, 6 Cal. App. 537, 545, 92 Pac. 858, and cases therein cited. In all other cases, whether there has been inexcusable delay in the prosecution of an action is a question which the court, in the exercise of a sound

judicial discretion, must determine from all the facts and circumstances of the particular case. "The Code section (581a) does not mean that the plaintiff may have the full time in all cases; it is still discretionary with the court to dismiss, as before the amendment, even though summons be issued and served within the time." *Stanley v. Gillen*, 119 Cal. 176, 51 Pac. 183; *Kreiss v. Hotaling*, 99 Cal. 386, 33 Pac. 1125; *Bernard v. Parmalee*, supra.

So, in this case, in which less than three years intervened between the commencement of the action and the date of the filing of the motion to dismiss, the sole question is whether, under the facts as presented on the motion, the court, in ordering a dismissal on the ground of unreasonable delay in the prosecution of the action after it was commenced, transcended the bounds of a sound judicial discretion.

[2] The affidavit of counsel for the plaintiff, in our opinion, contains nothing which even approximates a reasonable excuse for the long elapsion of time after the commencement of the action before attempting to start the cause to issue by the service of summons. The only reason which affiant offers as an excuse for the delay in serving summons is, as seen, that he desired time within which to raise a large sum of money with which he might do an act which, affiant declares, the plaintiff was not legally bound to perform as a prerequisite to his right to a decree quieting his title, if any he has, to the land. This is not a sufficient reason for excusing the delay. As well might it be claimed that a plaintiff, after bringing suit, could justly be excused for delaying service of summons and so postpone bringing the cause to issue for a year or two or a long period of time upon the ground that he first desired to procure evidence which would support the allegations of his complaint. A party bringing an action should be prepared, when he files his complaint, if he is proceeding in good faith, to meet, as far as he is able to, every requirement which the nature and circumstances of the action and the averments of the complaint call for. If the plaintiff in this case, as he claims is true, was not legally or equitably obliged to pay the large sum mentioned in his affidavit to the defendant in order to secure the relief sought for by him, then there was no necessity for raising the money referred to, and therefore no occasion for the long delay in the service of summons. If, on the other hand, he conceived it to be requisite to offer and be prepared to pay said sum to the defendant, in order to obtain favor in the premises from a court of equity, if the facts otherwise entitled him to such favor, he should have been prepared to meet that equitable prerequisite before instituting his suit, or at least, before bringing suit, have placed himself in a situation whereby he could have so prepared himself within a reasonable time after he had filed

his complaint. At any rate, assuming that the excuse offered by the plaintiff for his delay in causing summons to be served might, under some circumstances, possess merit, it certainly loses its force when it is considered that the alleged right of the plaintiff to the relief sought by his complaint is founded upon an alleged void foreclosure sale which occurred ten years prior to the commencement of this action. Presumably the plaintiff and Knowles, from whom the first named acquired whatever rights he claims in the land in controversy, were, during all that period of time and from the very beginning of the transaction from which this action arises, fully cognizant of the circumstances which rendered the sale void in part, if in truth it was void. Thus it is readily to be noted that a period of nearly 12 years intervened between the date on which the cause of action upon which the plaintiff relies accrued to him or to his predecessor in interest and the time at which, after the action had been filed for nearly two years and the plaintiff notified of the intention of the defendant to make the motion with which this inquiry is concerned, any effort was made to bring the matter to issue in court. And, if they were familiar with all the facts during all or even any considerable part of that time, it seems to us that there can be little, if any, support for the excuse set up by the plaintiff for allowing his action to remain dormant for a period of over a year and seven months after it was begun, thus leaving the question whether the defendant's record title to the land in controversy was valid or invalid in the air, so to speak, for the same period of time.

The plaintiff, according to his attorney's affidavit, recorded a *lis pendens* in this case immediately upon the filing of the complaint. A *lis pendens*, upon its face, constitutes a cloud upon the title to the real property to which it relates. For nearly two years, then, the defendant's record title was under a cloud. Readily, therefore, must the importance of such a proceeding to one whose title is thus mixed up and complicated be appreciated. He should be given the earliest opportunity, consistent with the exigencies of the cause, to clear up the matter, if he can. Where, therefore, the record title to real property is challenged by an action at law or a suit in equity, it is the duty of the party thus attacking such title to act with all proper diligence in bringing the question to issue in the court, so far as it is within his power to do so, and when he does not do so for a long period of time (that is to say, where he fails, for what appears to be an unreasonable length of time, to legally notify the party upon whose title he has thus made an assault that he has done so), he should not be excused for his neglect, where, as here, he is called upon to account for it, except upon a showing of the most satisfactory and conclusive character. In this case we think that

the mere reading of the affidavit filed in behalf of the plaintiff in resistance to the motion to dismiss will make it perfectly clear to any reasonable person that the plaintiff has signally failed to sustain the burden cast upon him of reasonably accounting for and excusing the long delay in serving summons. In any event, it cannot be said that, in granting the motion to dismiss, the court below abused the discretion committed to it in such matters.

The facts in the case of *Ferris v. Wood*, 144 Cal. 426, 77 Pac. 1037, cited by appellant, are entirely at variance with these here, as a reading of that case will show. But cases of this character must be wholly determined upon their own peculiar facts. As is said in *First Nat. Bank v. Nason*, 115 Cal. 626, 47 Pac. 595, where a similar motion was considered: "Each particular case presents its own peculiar features, and no iron-clad rule can justly be devised applicable alike to all."

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

WOOD et al. v. FRENCH.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. ESCROWS (§ 14*)—VENDOR AND PURCHASER (§ 232*)—WRONGFUL DELIVERY OF DEED—EFFECT.

Where the grantor retains the actual possession of the land, although such possession is not notice of his adverse claim of ownership, his escrow deed is invalid to transfer any right, in absence of performance of condition; and the wrongful yielding of possession of such deed to grantee by depositary transfers no title, even though the claimant thereunder be an innocent purchaser for value.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 17-20; Dec. Dig. § 14;* Vendor and Purchaser, Cent. Dig. §§ 540-545, 548-562; Dec. Dig. § 232.*]

2. VENDOR AND PURCHASER (§ 243*)—INNOCENT PURCHASER—NOTICE OF DEFECT—INADEQUACY OF PRICE.

Where the grantor in an escrow deed retains the actual possession of the land, and his grantee, after wrongfully obtaining possession of such deed, without performance of the escrow condition, sells the land at a very inadequate price to an otherwise innocent purchaser for value, such inadequacy of price is evidence of notice of adverse claim of ownership by the grantor in such escrow deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 606-608; Dec. Dig. § 243.*]

3. CONTINUANCE (§ 37*)—APPLICATION—SUFFICIENCY.

Application for continuance because of absence of witness, without showing that applicant believes to be true the material facts he believes the witness would prove, is insufficient under section 4207, St. 1898 (section 5045, Rev. Laws 1910).

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 117-121, 127; Dec. Dig. § 37.*]

4. CONTINUANCE (§ 26*)—GROUNDS—DILIGENCE.

In showing diligence to procure evidence, failure to take deposition of witness not amenable to nor served with subpoena is not excused by the promise of such witness to appear and give evidence at the trial, neither the reliance upon such promise nor the breach thereof being blamable to the adverse party; and it is not an abuse of judicial discretion to deny application for continuance based upon absence of such witness.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Thomas F. French against Tim Wood and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Roach & Bradley, of Muskogee, for plaintiffs in error. Thomas J. Watts, of Muldrow, for defendant in error.

THACKER, C. Plaintiff in error will be designated as "defendant" and defendant in error as "plaintiff," in accord with their respective titles in the trial court.

Plaintiff, a three-eighth blood Cherokee Indian, residing and engaged in business in Los Angeles, Cal., owned in Sequoyah county, Okl., 80 acres of inherited allotted land worth \$3,200, which he wanted to sell when, in May, 1909, at Chouteau, Okl., while en route to Muskogee, Okl., he met one John Culver, who claimed to have known him at the Male Seminary the plaintiff had attended at Talequah, but, although believed, Culver was not remembered by plaintiff. Culver told plaintiff he knew a party who bought land, and took him to the office of and introduced him to H. R. Pierson the morning after their arrival in Muskogee. Pierson was engaged in some way in the land business and, representing himself to be authorized to purchase lands for the defendant H. B. Fields, who was by Pierson and Culver falsely represented to plaintiff as a wealthy oil man temporarily out of the city, he offered to purchase plaintiff's land at the agreed price of \$3,200. Accordingly, plaintiff as seller, Pierson as purchaser for Fields, and Culver as disinterested depositary of escrow deed, came to an agreement whereby plaintiff's deed to Fields was signed, acknowledged, and so put in escrow and left with Culver to be by him delivered to Fields when he paid or mailed to plaintiff said \$3,200. Plaintiff waited in Muskogee a few days and attempted to get in communication with Fields by phone, thinking he might get the money from Fields before leaving; but, failing in this, he left without having seen or heard from Fields and went to and spent some time at one or two places in each of the states of Colorado, Idaho, and Washington; and while on that trip he wrote Culver and, failing to get an answer, wrote Pierson, demanding a return

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the deed if the purchase price was not forthcoming, receiving from Pierson a letter under date of June 20, 1909, which, so far as pertinent here, reads as follows: "Yours received. Contents noted. I have not seen Fields. I learn he is in Colorado Springs. Just as soon as he returns I will send you all papers."

Fields was not, in fact, wealthy, nor an oil man, but was a carpenter with an earning capacity of from \$3.50 to \$4.50 per day; and he had not been out of Muskogee on or about May 21, 1909, when plaintiff's deed was made and placed in escrow. Although Fields had stated to plaintiff, soon after the latter had discovered his deed had been wrongfully delivered and recorded, that he had, by his own check, provided Pierson with the \$3,200 to pay plaintiff for the land, he testified at the trial more than a year later he had not provided \$3,200 nor any amount by check, but had advanced, in money, \$1,000, of which Pierson returned to him all in excess of \$300, as the full amount of the purchase price, and \$40 additional retained as agent's commission. Fields further testified he did not do business with banks and had kept the \$1,000 so advanced, with \$1,500 more, in the form of money in his trunk in his room at a boarding house in Muskogee; and he further claimed to have sold the land to the defendant Wood for \$1,000, which is \$2,200 less than the land was worth, the same amount less than he told plaintiff in the first instance it had cost him, and \$160 more than he finally testified it had cost him. Fields admits the agency of Pierson in the purchase of the land for him; and the facts and circumstances in the case tend to show that, in respect to the representations made to plaintiff by Pierson, no less intimate legal relation than that of principal and agent existed between these parties. It also seems clear that Culver can be deemed to bear no more intimate legal relation to plaintiff than that of a disinterested depository of the deed; and, if he was more intimately connected with those interested in procuring from plaintiff the making and wrongful delivery of the deed, it does not appear that knowledge of such fact can be imputed to plaintiff, so, in relation to plaintiff, he must be regarded as a disinterested depository of the escrow deed.

Some time in the summer or about September 1, 1909, plaintiff returned to Muskogee, and Culver assured him he was still holding the deed in escrow for payment of the purchase price; but, some time in August or September, plaintiff got information to the effect that the deed to Fields had been recorded, which upon investigation he found to be true. Plaintiff further found that the deed had been recorded on May 21, 1909, the day next following the day he acknowledged it and put it in the hands of Culver as escrow holder; that it had been delivered to Fields; and that on July 2, 1909, Fields had executed to the defendant Wood a deed, which was

recorded on July 17, 1909, purporting to convey this land for a consideration of \$1,000, the receipt of which is acknowledged in the deed. Plaintiff had fruitless conferences with Fields, Pierson, Culver, and Wood, in which, accepting plaintiff's evidence as true in deference to the findings and judgment of the trial court, Fields claims to have advanced Pierson \$3,200 for plaintiff by check, Pierson claimed to have thought Culver had paid the \$3,200 to plaintiff, but without explaining from what source he thought the money had been obtained, Culver claimed to have thought plaintiff had been paid by Fields directly or through Pierson and admitted he had not paid him, and Fields, upon being finally charged by attorney for plaintiff with not having paid, and asked how much he had received for the use of his name in the transaction, said, "\$200," but thereupon got mad and left the room with the statement that, if any more information was wanted, plaintiff and his attorney would have to see Pierson. Plaintiff, having failed to more definitely fix responsibility for the wrong done him or to obtain satisfactory amends, attempted to give public notice of his claim and the grounds therefor by making on September 27, and filing for record on September 28, 1909, in the office of the register of deeds of Sequoyah county an affidavit of the same, which was recorded in the Miscellaneous Records of that office; and on February 24, 1910, he commenced this action, recovering judgment on January 20, 1911, canceling the said deeds, together with the records thereof, removing cloud from his title, and perpetually enjoining defendants from setting up any claim adverse to plaintiff to said land and from disturbing him in the peaceful and quiet enjoyment of the same. The defendant Fields suffered judgment by default; but the defendant Wood answered by denying that plaintiff's deed was ever in escrow, by alleging in effect that plaintiff had delivered it to Fields, and that Wood, without notice of any defect in Fields' title, had, in good faith and for a cash consideration of \$1,000, purchased the land of Fields, with prayer for judgment vesting the title in him and giving him immediate possession; and this defendant brings the case here by appeal from the aforesaid judgment in favor of plaintiff.

[1] The actual possession of the land at the time of the making and placing in escrow of plaintiff's deed was, and at all times since has been, in the plaintiff, through his tenant.

In 1 Devlin on Real Estate (3d Ed.) § 322, it is said: "Until the condition has been performed and the deed delivered over, the title does not pass, but remains in the grantor. If the condition is not performed, the grantee, we have seen, is not entitled to the deed. If the depository deliver the deed without authority to do so from the grantor, or if the grantee obtain possession of it fraudulently, without performing the condition, the deed is void. The deed thus obtain-

ed conveys no title either to the grantee or purchasers under him, although, as was previously shown, the possession of a deed by the grantee is prima facie evidence of its delivery, yet, where it appears that the final transfer was dependent upon the compliance with certain terms and conditions, the party who claims under the deed must prove such compliance. His right to the deed and to the property conveyed is subject to the performance of a condition precedent, and this performance it is necessary to prove. That the condition upon which he was to receive the deed has been performed cannot be inferred from the fact that the grantee has the unexplained possession of the deed. 'If the party to be bound suffer the paper to go into the hands of a third person, with authority to deliver it in case certain conditions are complied with, a transfer of the paper without compliance with the conditions is no delivery, for want of authority in the agent to do the act. It is the duty of the party thus accepting a tradition of the instrument to see to it that the agent, in the act of transfer, is authorized to do it, unless he be the party's general agent.' An owner of a tract of land, having subscribed for stock in a railroad company, signed and acknowledged the deed for the land, which, it was agreed, the company should take in payment for the stock subscribed. The deed was placed in the hands of a third person, the grantor telling him that an agent would call in a short time, and deliver a certificate for the stock subscribed, and the depositary was instructed, upon receipt of the certificate, to deliver the deed to the company's agent. The agent called, but did not have any certificate of stock; he, however, requested the depositary to place the deed in his hands, so that he might give it to the attorney of the company for examination. This was done, and the company sold the land. But it was held that the delivery by the depositary before the performance of the condition did not convey the title, and that the owner was entitled to have his deed and the deed made by the railroad company to its grantee set aside as void. But where persons, after an exchange of lands, had deposited their deeds in escrow, and transferred to one another the possession of their respective tracts of land, and the depositary had one of the deeds recorded without the grantor's knowledge, and a person in good faith took a mortgage on the land for a loan, it was held that, although the mortgagor neglected to pay off certain incumbrances, as he agreed to do with his grantor, still the lien of the mortgagee was valid."

In *Tiffany, Real Property*, § 406, pp. 932, 933, it is said: "An escrow is, it has been held, utterly invalid to transfer any rights until the performance of the condition; so that, if the person with whom it is deposited wrongfully yields possession thereof to the grantee, it cannot transfer any title, even

though the claimant thereunder be an innocent purchaser for value. There are, however, several decisions to the effect that an innocent purchaser from one in possession of the land cannot be affected by the fact that the conveyance to his grantor was an escrow, and this view seems most in conformity to right and justice, and the policy of the recording laws."

Also, see: *Powers et al. v. Rude*, 14 Okl. 381, 79 Pac. 89; *Hunter Realty Co. v. Spencer et al.*, 21 Okl. 155, 95 Pac. 757, 17 L. R. A. (N. S.) 622; *County of Calhoun et al. v. American Emigrant Co.*, 93 U. S. 124, 23 L. Ed. 826; *Young v. Clarendon Twp.*, 132 U. S. 354, 10 Sup. Ct. 107, 33 L. Ed. 362; *Evarts v. Agnes*, 4 Wls. 343, 65 Am. Dec. 314; *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. 311; *Smith v. Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179; *Taft v. Taft*, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68; *Hicks v. Goods*, 39 Va. 479, 37 Am. Dec. 677; *Stone v. French et al.*, 37 Kan. 145, 14 Pac. 530, 1 Am. St. Rep. 237; 11 Am. & Eng. Enc. Law (2d Ed.) 350; *Raymond v. Glover*, 104 Cal. Unrep. Cas. 780, 37 Pac. 772, 918; *Jackson v. Lynn*, 94 Iowa, 151, 62 N. W. 704, 58 Am. St. Rep. 386; *Steffan et al. v. Milmo Nat. Bank*, 69 Tex. 513, 6 S. W. 823.

We are of opinion that where the grantor retains the actual possession of the land, as in the present case, although such possession be not notice of his adverse claim (*Smith v. Phillips*, 9 Okl. 297, 60 Pac. 117; *Flesher v. Callahan et al.*, 32 Okl. 283, 122 Pac. 489), an escrow deed is utterly invalid to transfer any right, in the absence of performance of the condition, so that the wrongful yielding of possession of the deed to the grantee by the person with whom it is deposited transfers no title, even though the claimant thereunder be an innocent purchaser for value.

[2] The defendant Wood claims to have paid \$1,000, a very inadequate price, for this land; and, in view of the fact that plaintiff was in possession by his tenant, this would seem sufficient to have put him on inquiry with the resultant effect of charging him with notice of plaintiff's claim of ownership. In *Tiffany, Real Property*, § 479, p. 1036, it is said: "The fact that a purchaser obtains the property at a very inadequate price is also, it is said, a fact which should put him on inquiry, and is accordingly at least evidence of notice by him of an adverse claim."

[3] The foregoing views leave for consideration only the question as to whether the trial court erred in overruling defendant's motion for a continuance. The application was based upon the failure of Culver, who resided in Muskogee county and had promised defendant to be present as a witness at the trial in Sequoyah county, to appear as such witness; but the application did not show that applicant believed to be true the facts

he believed such witness would prove, nor in any manner excuse the failure to take and have his deposition at the trial. An application for a continuance must show that the applicant believes the facts he believes the absent witness would prove to be true. Section 4207, Stat. 1893 (section 5045, Rev. Laws 1910); *Swope & Son v. Burnham, Hanna, Munger & Co.*, 6 Okl. 736, 52 Pac. 924; *Kirk v. Territory*, 10 Okl. 46, 60 Pac. 797; *Murphy v. Hood et al.*, 12 Okl. 593, 73 Pac. 261; *Terrapin v. Baker*, 26 Okl. 93, 109 Pac. 931; *Crutchfield v. Martin*, 27 Okl. 764, 117 Pac. 194; *Kilmer v. St. L. & Ft. S. & W. Ry. Co.*, 37 Kan. 84, 14 Pac. 465; *Struthers v. Fuller*, 45 Kan. 735, 26 Pac. 471; *M., K. & T. R. Co. v. Horton*, 28 Okl. 815, 119 Pac. 233; *Standifer v. Sullivan*, 30 Okl. 365, 120 Pac. 624; *Fire Ass'n of Philadelphia v. Farmers' Gin Co.*, 134 Pac. 443.

[4] In a showing of diligence to procure evidence, the failure to procure the deposition of a witness resident in another county and not amenable to nor served with subpoena is not excused by his promise to voluntarily appear in person and give his testimony at the trial, the adverse party having in no wise contributed to cause reliance upon such promise or to cause the breach thereof and being free from blame; and it is not an abuse of judicial discretion to deny an application for a continuance based upon the absence of such witness. *Banker Min. & Mill Co. v. Allen*, 20 Colo. App. 351, 78 Pac. 1070; *Louisville & N. R. Co. v. Bishop*, 89 S. W. 221, 28 Ky. Law Rep. 321; *Continental Casualty Co. v. Hagarty*, 90 S. W. 561, 28 Ky. Law Rep. 925; *Texas & N. O. Ry. Co. v. Bancroft* (Tex. Civ. App.) 56 S. W. 606.

We are therefore of the opinion that the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

WALLACE et al. v. GAY et al.
(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 545*)—PRESENTATION FOR REVIEW—MOTION TO REINSTATE.

A motion to reinstate a cause, not presented in the transcript by bill of exceptions, so as to make it a part of the record, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2416; Dec. Dig. § 545.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Jackson County; Frank Mathews, Judge.

Action by Sanford Gay and others against Reid Wallace and others for injunction. From an order of reinstatement after dismissal, defendants bring error. Dismissed.

Petry & McConnell, of Altus, for plaintiffs in error. Lawson & Dabney and Garrett &

Castleman, both of Altus, and W. C. Austin, of Eldorado, for defendants in error.

ROBERTSON, C. This case involves the consideration of the identical question decided by this court in its companion case, *Hicks et al. v. Gay et al.*, 31 Okl. 150, 120 Pac. 636; and for the reasons therein given, this appeal should be dismissed.

PER CURIAM. Adopted in whole.

JONES v. FIRST STATE BANK OF BRISTOW.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 178*)—DIRECTION OF VERDICT—EVIDENCE.

The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence that has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn therefrom, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

2. REPLEVIN (§ 88*)—DIRECTION OF VERDICT—EVIDENCE.

The court may direct a verdict for plaintiff or defendant, as the one or the other may be proper, only where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 343-348; Dec. Dig. § 88.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Creek County; Josiah G. Davis, Judge.

Action by Robert Jones against the First State Bank of Bristow. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

W. H. Odell and Lucien B. Wright, both of Sapulpa, and S. D. Decker, of St. Cloud, Fla., for plaintiff in error. Pryor & Rockwood, of Sapulpa, for defendant in error.

SHARP, C. Plaintiff sued defendant in a justice of the peace court to recover possession of a mule. The trial resulted in a verdict in plaintiff's favor, and defendant appealed to the county court, where, at the conclusion of all the testimony, the court, on defendant's motion, instructed a verdict for the defendant upon the theory, apparently, that plaintiff had failed to prove the value of the animal, and that such proof was indispensable. It will not be required of us to consider the necessity of proving the value of property in a replevin action, in cases where a delivery cannot be had, or the meaning of section 5696, Comp. Laws 1909 (Rev. Laws 1910, § 4807), in this regard, for, as we

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—47

view the evidence, there was sufficient proof of value to have taken the case to the jury. The plaintiff, Robert Jones, without objection testified that he bought the mule on the 10th day of November, 1909, at Bristow, and paid therefor \$200, which was less than four months prior to the time the mule was taken from his possession by the bank. He further testified that the mule was sound in every way at the time it was taken from him. Frank Washburn, on the part of plaintiff, testified that the mule in question was a mare mule, 4 years old, about 15 or 16 hands high, and weighed 1,000 pounds or better. W. B. Bennett testified, on the part of defendant, that he sold the mule to M. Jones, an officer of defendant bank, during the preceding fall (presumably of 1909) for \$155 and considered the price very reasonable; that the mule was 16 or 16½ hands high and was a "pretty good mule." J. M. Cummins testified, on the part of the defendant, that he sold the mule to Mitchell Jones, a brother of the plaintiff, Robert Jones, on the 8th day of November, 1909, for \$200.

At the conclusion of this testimony, and after both parties had rested, the defendants moved the court to direct the jury to return a verdict in its favor upon the ground that the plaintiff had entirely failed to prove the animal's value. Thereupon the plaintiff asked leave of court, which was granted, to reopen the case for the purpose of making further proof of value. By the plaintiff it was then shown that he knew the value of the mule, which was \$200; that he had observed the mule market at Sapulpa, upon which, together with his knowledge of mules, he based its value.

[1, 2] Why the court should have taken the case from the jury, we are unable to conjecture. There was testimony, admitted without objection, tending to show that the animal was worth from \$155 to \$200. The evidence upon the question of ownership was conflicting. The question presented to the trial court, on a motion to direct a verdict, is whether, admitting the truth of all the evidence that has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn therefrom, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith. *Moore v. First Nat. Bank of Iowa City*, 30 Okl. 623, 121 Pac. 626, and cases cited. Some of the evidence of value was admitted without objection; in fact, a part of this proof was supplied by the defendant bank. Though much of the evidence was by the court excluded, yet there was sufficient competent evidence, admitted without objection, to have entitled plaintiff to have his case submitted for the decision of the jury. The court may direct a verdict for the plaintiff or defend-

ant, as the one or other may be proper, only where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it. To permit this judgment to stand would mean to deprive the plaintiff of the right to a jury trial in the face of conflicting evidence of ownership and where there was sufficient competent evidence of value to sustain a verdict if one had been returned in favor of plaintiff.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

WELLS v. WELLS.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 27*)—GROUNDS—EXTREME CRUELTY—PRACTICE.

In action for divorce on ground of extreme cruelty by means of unkind and harsh treatment, the intent and ability of the accused spouse to inflict such cruelty and the susceptibility of the other spouse to such cruelty, as well as whether such other spouse is of a provocative disposition, are material points of inquiry; and in such case the trial court may take into consideration the demeanor and appearance of the parties at the trial.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 27, 62-83; Dec. Dig. § 27.*]

2. DIVORCE (§ 184*)—APPEAL—SCOPE OF REVIEW—EVIDENCE OF CRUELTY.

Where the state of the evidence adduced is such that the demeanor and appearance of the parties at the trial might be in effect determinative of the question of the sufficiency of such evidence to prove extreme cruelty, the decree of the trial court will not be disturbed.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 570-573; Dec. Dig. § 184.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Hughes County; John Caruthers, Judge.

Action by Phoebe A. Wells against Carl Richard Wells. Judgment for plaintiff, and defendant brings error. Affirmed.

Crump & Skinner, of Holdenville, for plaintiff in error. H. B. Moffit, of Holdenville, for defendant in error.

THACKER, C. Plaintiff in error, the husband, who was defendant in the trial court, being about 28 years old, and the defendant in error, the wife, who was plaintiff in the trial court, being about 22 years old, were married about June 19, 1910, and separated August 3, 1910; she leaving him. On February 16, 1911, she commenced this action against him; and on August 7, 1911, obtained a decree of divorce and, besides \$100 as suit money, judgment for \$400 as alimony, upon evidence, including the reasonable in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ferences deducible therefrom in favor of the decree, showing, in effect, that the first positive and serious trouble arose between them on July 3, 1910, although he had at times been hurtfully indifferent toward her prior to that date; that prior to that date she was sick for about a week without receiving the sympathetic attention due her, and in one instance, when she expressed a desire for some "things" she needed, he got angry and went away, uptown, without getting them for her; that on July 3, 1910, she requested him to accompany her to church and, when he refused, took hold of his sleeve, in her insistence that he do so, whereupon he jerked loose, tearing his sleeve, exclaimed loud enough to be heard by the minister across the street, "God damn it! Turn me loose," and walked away in anger; that he was manager of a telephone exchange owned by his father, and when he came home therefrom to his meals was indifferent toward her and inconsiderate of her feelings, was cross, indisposed to talk to her, and ate his meals at times with his hat on, sometimes in silence, leaving also without speaking to her, thus manifesting a feeling of contemptuous aversion for her; that he never accompanied her out to any place, and when she called to see him at his place of business resented it, as if it were a personal offense, by leaving with the remark that he wished she would hurry up and get out of his way and, in one instance, when she called on him to get him to tell her "some things," said he was tired of her "durned foolishness," also of her "damned foolishness," and that he had petted her a long time before they were married, but was going to quit it; that on several occasions, once when a Miss King was at their home, he told his wife to leave him and their home, and when she asked what cause she had given for his desire to thus rid himself of her, he would only say, "I know;" that on at least one of two occasions, when she asked him for money with which to pay some debts she owed when they were married, he cursed her in connection with his refusal; that his treatment caused her mental anguish and she lost 13 or 14 pounds in weight as a result; and that she is without fault in this regard.

[1, 2] The trial court found that the husband was guilty of extreme cruelty and was amply able to pay the suit money and the amount of alimony adjudged against him; and we will not disturb the decree. The intent and ability of the husband to hurt by his conduct and the susceptibility of the wife to hurt therefrom, as well as her disposition to provoke such conduct, depending in a measure at least upon their characters, including their mentalities, their sensibilities, and their physical make-ups, in this respect, could best be determined in the light of their demeanor and personal appearance

at the trial; and the trial court had these parties before it and could better judge them in this respect than can this court. The statement of Justice Dunn, in the opinion in *Stovall v. Stovall*, 29 Okl. 125, 116 Pac. 791, that "actions, conduct, and appearances often speak louder than words in cases of this character," is equally applicable in a case like this, where there is no conflict or opposing explanation in the evidence, as in that case, where there was such conflict and opposing explanation; and the quotation in that opinion from section 1270 of Moore on Facts is especially pertinent here. The evidence in the present case, aided by the personal impression received by the trial judge from the demeanor and appearance of the parties before him, might have been, and we must assume was, in the peculiar state of the evidence, sufficient to support and justified the finding that the husband was guilty of extreme cruelty to the wife; and such conduct as that of which he was guilty might be either the acme of cruelty in one case or the almost hurtless manifestations of the want of educational preparation for the marriage relation which a few years, at most, in the school of actual experience would completely overcome in another case—depending in a large measure upon questions of characters of parties in this respect.

The husband's answer consists of denials of the allegations of the petition, with incidental charge that the wife deserted him without just cause, and he offered no evidence upon the trial; but we cannot assume, in view of the decree, that this was because he loved his wife and wanted her back, with the opportunity it would afford him to make amends—he made no such offer to take her back.

The amount of suit money and alimony allowed was not excessive, but, on the contrary, was much less than might have been allowed without presenting the appearance of excessiveness, if, as we must assume in the light of the evidence, there was no error in granting the divorce.

We are of the opinion that the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

FARROW v. WORK.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 32*)—DEED AS MORTGAGE—WHAT CONSTITUTES.

A deed absolute in form is, in fact, a mortgage when given to secure the payment of money, even though the parties may have agreed that, upon default in payment within a fixed time, the deed should become absolute.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. MORTGAGES (§ 32*)—DEED AS MORTGAGE—WHAT CONSTITUTES.

Although a deed may be absolute on its face, if given merely as a security for debt, and is so intended by the parties, it will be held to be a mortgage, with the right of redemption.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

3. MORTGAGES (§ 32*)—DEED AS MORTGAGE—WHAT CONSTITUTES.

Whether any particular transaction amounts to a mortgage, or a sale upon condition, or with agreement to reconvey upon a contingency, is to be determined by ascertaining whether the transaction was intended to secure a debt. If a debt remains, for which the conveyance is security, and the collection of which may be enforced independently of such security, the transaction is in law a mortgage, whatever language the parties may have used in expressing their agreement.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4596-4606; vol. 8, p. 7725.]

4. APPEAL AND ERROR (§ 1022*)—FINDINGS OF FACT—CONFLICTING EVIDENCE.

A finding of fact, which has been determined on conflicting evidence by the referee, and subsequently by the court, will not be disturbed in this court, where there is evidence reasonably supporting the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

5. CHAMPERTY AND MAINTENANCE (§ 7*) — CONVEYANCES—POSSESSION.

Under section 644, c. 27, Mansf. Dig., the Laws of Arkansas, put in force in the Indian Territory by act of Congress of February 19, 1903 (32 Stat. p. 841, c. 707), any person claiming title to real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner and with like effect as if the land conveyed was in his actual possession.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by Nathaniel F. Work against Martin T. Farrow. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilmott & Dean, of Wewoka, for plaintiff in error. Crump & Skinner, of Holdenville, for defendant in error.

SHARP, C. October 16, 1905, Eugene Walker and Dinah Walker, the latter a Seminole freedwoman, executed and delivered to E. S. Billington a warranty deed to 80 acres of land, located in Seminole county, and constituting a part of the allotment of the latter. The deed was of the usual form, and recited a consideration of \$598.30. On the 20th day of March, 1906, said E. S. Billington, joined by his wife, Stella, executed a warranty deed to said land to the plaintiff in error, Farrow, which deed recited a cash consideration of \$605. Thereafter, and during the month of May, 1906, said Eugene Walker and Dinah Walker, by warranty deed duly executed and delivered, attempt-

ed to convey said lands to the defendant in error, Work. On August 16, 1908, said Work brought suit, seeking to have the deed from the Walkers to Billington declared a mortgage, and the deed given by Billington to Farrow as an assignment of the said mortgage, and tendered to said defendant the sum of \$625, being the amount, with interest, alleged to be owing by the Walkers to Billington, and for which, it was charged, the deed was given as security. Defendant's answer consists of a general denial. By agreement of the parties the case was referred to T. S. Cobb, as referee, with authority to take the testimony and report to the court both his findings of fact and conclusions of law. The report, thereafter made, contained, among other findings, the following:

"First. I find that on the 6th day of October, 1905, Eugene Walker and Dinah Walker made, executed, and delivered their warranty deed to E. S. Billington to the east half of the northwest quarter and the northeast quarter of the southwest quarter of section 35, township 10, range 5, save and except the 40-acre homestead of Dinah Walker therein included; that said warranty deed purported to be executed for and in consideration of the sum of \$598.30; that said deed was duly recorded on October 10, 1905, in the office of the recorder of deeds of the Thirteenth recording district of the Indian Territory, the district wherein said land lies, as required by law.

"Second. That said deed was in truth and in fact executed for the purpose of securing the payment to said E. S. Billington of the sum of \$598.30 by Eugene Walker and Dinah Walker within 60 days from that date; that said deed was intended by the parties thereto as being given for the purpose of securing the payment of said sum of money; and that at the time said deed was executed it was agreed by the parties thereto that, in case said sum of money was paid within 60 days, that the land described in said deed should be by the said E. S. Billington reconveyed to said Eugene Walker and Dinah Walker. I therefore conclude as a matter of fact that said deed was and is a mortgage upon said land, securing the payment of said sum of money."

"Sixth. I find that C. W. Rodman, that V. R. Biggers, and that Sam Norton knew at the time the deed to said Farrow was executed and delivered that the deed to said Billington was given for the purpose of securing a lumber bill in the said sum of \$598.30; that said Sam Norton was also the agent of said Martin T. Farrow. W. F. Evans, and the Canadian Valley Investment Company; and all persons who expected to profit by said deed to Farrow had knowledge and were informed that said deed to Billington was made for the purpose of securing a lumber bill in the sum of \$598.30."

"Eighth. I find that the said deed from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Billington to Farrow operated as an assignment of the mortgage and claim of Billington against said Eugene Walker and Dinah Walker, and that he got no greater right or title to said land than that held by said Billington."

In his conclusions of law, it was found by the referee that the deed from the Walkers to Billington should be decreed to be a mortgage to secure the payment of \$598.30, which, with interest, then amounted to \$625; that the deed from Billington to Farrow should be decreed to be an assignment of said mortgage, and the debt thereby secured; that the plaintiff be required to pay into court said sum of \$625 in satisfaction of the mortgage and debt; and that upon said payment the deeds from the Walkers to Billington and from Billington to Farrow be canceled. The report coming on to be heard before the court was sustained, and a decree entered in conformity thereto.

Three errors are assigned in this court: (1) The finding of the referee that the deed executed by the Walkers to Billington was intended as a mortgage is not reasonably supported by the evidence. (2) The finding of the referee that Farrow bought with knowledge that the deed from the Walkers to Billington was intended as a mortgage, and not as a deed, is not reasonably supported by the evidence; but that, on the other hand, the said Farrow was an innocent purchaser for value. (3) Plaintiff in error being in possession under color of title of the lands at the time of the purchase from the Walkers by defendant in error, the latter's deed was champertous and void.

The first two questions involve a consideration of the evidence. It is contended by plaintiff in error that the deed from the Walkers to Billington evidence a conditional sale; that at the time Billington obtained the deed from them they were indebted to him on account for merchandise amounting to \$598.30; that the deed was executed in settlement of this indebtedness; that the agreement, however, was that, upon a repayment of said sum within a fixed time, the grantee therein would reconvey said lands; but the Walkers, having failed to pay the amount of the original indebtedness within the time fixed, were without further rights in the premises.

[14] On the part of the defendant in error, it was claimed that the deed from the Walkers to Billington was intended only to secure the payment of their indebtedness, the debt not being thereby extinguished, but, instead, that the relation of debtor and creditor continued to exist. In *Worley, Receiver, v. Carter*, 30 Okl. 642, 121 Pac. 669, a case also arising in the Indian Territory, we had occasion to consider the rules of law applicable to a deed, absolute on its face, intended merely as security for a debt and a conditional sale, and it was there said: "A mortgage and a conditional sale differ

materially; the latter is not a security for money, while the former is. 'A conditional sale is not a security for money, but is what its designation imports, namely, a sale in good faith, and a sale on condition that the vendor may repurchase on certain terms, which must be strictly complied with. Of course, therefore, no equity of redemption is incident to such a sale, because, as it is not the design of the transcription to secure the payment of money, a court of equity has no ground to say the substantial object can as well be reached by the payment at a subsequent time, with interest, as by a prompt compliance with the condition, nor does it follow that the party can thereby be put in statu quo.' Minor's Institutes, art. 329. In *Pomeroy's Equity Jurisprudence*, § 1193, defining the difference between a mortgage and a sale with a contract to repurchase, it is said: "This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language they may have used, and whatever stipulations they may have inserted in the instruments. On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a mere sale and contract of repurchase. The writings may show on their face that the relation of debtor and creditor still continues, and that its existence and consequences are contemplated by the parties, or they may entirely fail to show any such fact, and may consist simply of an absolute conveyance and of a naked agreement to reconvey. While in the former case parol evidence is clearly inadmissible to contradict the terms of the writing, and to destroy their necessary character as a mortgage, in the latter case extrinsic parol evidence is always admissible to show the real situation of the parties, the existence of a debt, * * * and the actual character of the instruments as constituting a mortgage. While each case must involve its own special facts, the following circumstances are regarded by the courts as important, and as throwing much light upon the real intent and nature of the transactions: The existence of a collateral agreement by the grantor to pay money; his liability to pay interest; where a debt existed antecedent to the conveyance,

the surrender or cancellation of the evidence of such indebtedness, or the suffering them to remain outstanding and operative, or the substitution of others in their place; the price of the conveyance being inadequate; the grantor still left in possession; an application or negotiation for a loan preceding or pending the transaction." The opinion reviews numerous authorities, and correctly and fully announces the applicatory rule of law. There being evidence reasonably tending to support the referee's findings of fact, it is not the province of this court on appeal to disturb the decree based upon said report. Such findings of fact must be given the same conclusiveness as a verdict of a jury or the findings of act by the court sitting as a jury. *Hope v. Bourland*, 21 Okl. 864, 98 Pac. 580; *Richardson et al. v. Harsha*, 22 Okl. 405, 98 Pac. 897; *Town of Sapulpa et al. v. Sapulpa Oil & Gas Co.*, 22 Okl. 347, 97 Pac. 1007; *Locust et al. v. Caruthers et al.*, 33 Okl. 373, 100 Pac. 520.

[5] Was the deed under which Work claims title champertous? It will be remembered that it was executed in the month of May, 1906, and that the land therein described was situated in what was then the Indian Territory. Plaintiff in error cites, in support of his contention, *Huston v. Scott*, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721; *Powers v. Van Dyke*, 27 Okl. 27, 111 Pac. 939, 36 L. R. A. (N. S.) 96; 6 Cyc. 883. The cases cited arose in Oklahoma Territory, and were governed by the statutes of that territory. The section of Cyc. to which we are referred reads: "Both at common law and under statutes adopting the common law or the statute of Henry VIII (32 Hen. VIII, c. 9), a conveyance of land, though by the rightful owner, while it is in the adverse possession of another claiming to be the owner thereof, is absolutely void as to the party in possession and his privies. In those states, however, which have either never recognized the common-law rule or have abrogated it by a statute, such a conveyance is clearly valid."

Among the states abrogating by statute the common-law rule is Arkansas. Section 644, *Mansfield's Digest*, at the time in force in the Indian Territory, by act of Congress of February 19, 1903 (32 Stat. p. 841, c. 707), provides: "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof."

Referring to the statute of that state, it was said, in *Drennen's Ad. et al. v. Walker et al.*, 21 Ark. 539, 546: "The objections made to Walker's purchase, because it has resulted in a suit promoted by him, because he was a lawyer, and his vendors were not in possession of what they sold, and Drennen was

in adverse possession, hardly need to be answered, as our statute allows a person to sell and convey his interest in real estate, though it be in the adverse possession of another."

We must look to the law in force at the time the deed was executed, and not to the statutes of Oklahoma, which did not become the law in that part of the state of which the Seminole Nation formed a part until November 16, 1907, the date of the admission of Oklahoma into the Union. *Purcell v. Barnett et al.*, 30 Okl. 605, 121 Pac. 23. It is clear from the statute mentioned that the deed from the Walkers to Work was not champertous.

Finding no error, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

GAULT v. THURMOND.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 692*)—PRESENTATION FOR REVIEW—EXCLUSION OF EVIDENCE.

In order that this court may consider assignments of error relating to the exclusion of evidence, there must be a showing in the record as to what the excluded evidence would have been, before the court can say that there was reversible error in the ruling.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

2. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where the answer of a witness is stricken out on motion duly made, but later on the same witness is permitted to answer practically the same question, no reversible error is committed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

3. USURY (§ 114*)—ACTION TO RECOVER—EXCLUSION OF EVIDENCE.

It is not error to reject irrelevant and incompetent testimony.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 324, 325, 327; Dec. Dig. § 114.*]

4. USURY (§ 50*)—WHAT CONSTITUTES—COMPUTATION OF INTEREST—DAYS OF GRACE.

In the calculation of interest at the full legal rate upon promissory notes, executed and payable before the adoption of the present *Negotiable Instrument Act* (Sess. Laws 1909, c. 24, pp. 386, 420), it was not usurious to compute the same from the time for which the note was made to run, and three days of grace, the statute in force at the time (Comp. Laws 1909, § 4694) allowing three days of grace on all promissory notes, unless expressly stipulated to the contrary.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 107; Dec. Dig. § 50.*]

5. APPEAL AND ERROR (§ 1011*)—FINDINGS—EVIDENCE.

Where a case is tried by the court without the intervention of a jury, upon controverted questions of fact, and there is evidence rea-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sonably tending to support the findings made, such findings will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

6. USURY (§ 53*)—WHAT CONSTITUTES—FEES PAID.

Fees paid by a lender for procuring an abstract of title to real estate, where offered as security for a loan then under negotiation, together with recording fees so advanced, where incurred in good faith, and reasonable, are proper and legitimate charges, and may be included in the note given, without rendering it usurious, even though the total cost to the borrower exceed the lawful rate of interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 91, 114-118; Dec. Dig. § 53.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Dewey County; G. A. Brown, Judge.

Action by Sam Gault against I. C. Thurmond. Judgment for defendant, and plaintiff brings error. Affirmed.

D. W. Tracy, of Sayre, for plaintiff in error. George E. Black, of Oklahoma City, for defendant in error.

SHARP, C. [1] The first, second, and seventh assignments of error are based upon the action of the court in the exclusion of evidence. While it is doubtful if either of the questions asked were competent, from the character thereof, there being no offer made on the part of counsel as to what the excluded evidence would have been had the court permitted the witness to answer the questions asked, we cannot say that any error was committed. *Lamont Gas & Oil Co. v. Doop & Frater*, 135 Pac. 392; *Hutchings v. Cobble*, 80 Okl. 158, 120 Pac. 1013; *Turner v. Moore*, 84 Okl. 1, 127 Pac. 487; *Muskogee Electric Traction Co. v. Staggs*, 84 Okl. 161, 125 Pac. 481.

[2] As to the fourth assignment of error, that the court erred in striking out and not considering the answer of the witness Shafter as to the contention of the plaintiff and defendant, at the time of the attempted adjustment of plaintiff's account, it is only necessary to say that practically the same question was asked and answered by the witness later on in the progress of the trial.

[3] The sixth assignment, that the court erred in excluding the statement of plaintiff's account with the First National Bank of Elk City, is without merit. The bank was not a party to the suit, nor is it claimed that it had any interest in the controversy, and a statement made by it of the plaintiff's account could in no wise have been binding upon the defendant, and the court properly sustained the defendant's objection to the proffered testimony on the ground that it was incompetent and irrelevant. It was not denied that the sum of \$400 was originally paid on the note for \$2,127.20, on November 23, 1907. Aside from the fact that the testimony was both incompetent and irrelevant,

on the part of plaintiff it was contended that the \$400 was never paid back to him, but that instead he was credited on his note. On the part of the defendant, it was not claimed that the \$400 was passed to the plaintiff's account at the bank, but instead was repaid him in cash.

Under the third assignment of error, that the court erred in allowing the defendant to testify as to his intentions in charging and taking usurious interest, no error is presented, for the reason that the trial court found that no usury was contained in the \$2,394.87 note, and in the note for \$200 found that usury did exist, and imposed the penalty prescribed by article 14, § 3, of the Constitution (section 314, Williams' Anno. Const.).

The fifth assignment of error, it is admitted by counsel, is not sufficient to cause a reversal, and will not be given further consideration.

[4] The eighth and ninth assignments of error are to the effect that the court's findings are not supported by the evidence, and are contrary to law. The tenth assignment is to the effect that it was not shown that certain charges made by defendant for abstract and recording fees had been by him paid out. These several assignments may be considered together. A careful calculation of the interest due, adopting, as did trial court, the testimony of the defendant and the cashier, Queenan, that, at the time of the execution of the \$2,394.87 note, the \$400 originally credited on the note for \$2,127.20 on November 23, 1907, was returned to plaintiff in cash; and adding to the amount due on the old note, \$55, admittedly paid at plaintiff's direction by defendant to Fred L. Wenner, secretary of the state school land board, together with \$200 interest for eleven months and one day, with the \$12 paid by defendant for abstract and recording fees (to which we shall presently refer), the only usurious interest charged amounted to less than 25 cents. Under the statute in force at the time (section 4694, Comp. Laws 1909), three days of grace for the payment of promissory notes were allowed, in the absence of an express stipulation to the contrary. *Dunbar v. Commercial Electrical Supply Co.*, 32 Okl. 634, 123 Pac. 417. Including days of grace, and the item expended for abstract and recording fees, no usury attached. The exact question was passed upon by this court in *Sullins et al. v. Farmers' Exchange Bank*, 17 Okl. 419, 87 Pac. 857, 10 L. R. A. (N. S.) 839, where it was said: "Counsel for plaintiff in error in their brief admit that interest is chargeable, in proper cases, on the period of grace allowed; which is probably correct, because of the fact that the law concerning contracts enters into and forms a part thereof, and as no remedy is allowed for its enforcement until the lapse of the three days of grace, the end of such three days of grace

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

might properly be taken into consideration in the computation of interest."

[5] While the testimony as to the item of \$400 was conflicting, and, if in fact it was not repaid, the \$2,394.87 note was clearly usurious, yet to this fact both the defendant and the witness Queenan testified in positive terms, and the trial court, from the evidence adduced, found that no usurious interest was charged, reserved, or deducted by the defendant. This court will not disturb the findings of the trial court on the facts, where there is any material evidence reasonably tending to support such finding. *Hobbs v. Smith*, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Grimes v. Wilson*, 30 Okl. 322, 120 Pac. 294; *Lynch et al. v. Halsell*, 34 Okl. 307, 125 Pac. 725; *Kennedy v. Pawnee Trust Co.*, 34 Okl. 140, 126 Pac. 548.

[6] Likewise, the court found that deductions had been made by the defendant to secure abstracts and to pay recording fees. Plaintiff's note of \$2,394.87 was secured by real estate mortgage on land in Dewey county, as well as by personal property in said county, and which mortgages were duly placed of record. The defendant testified as to the items entering into the large note, which included, as stated by him, "about \$12 for abstract and recording fees of his papers." While there is no positive testimony that this money was actually paid out for an abstract and for recording fees, in the absence of any evidence to the contrary, we think it fairly inferable that this item was expended by defendant for the purposes named. Such charges may properly be made. Procuring an abstract of title of real estate, where offered as security for a loan, is a proper and legitimate charge, and when advanced by the lender may be included in the note given. *Sidway v. Harris*, 66 Ark. 387, 50 S. W. 1002; *McCall v. Herrin*, 118 Ga. 522, 45 S. E. 442; *Cobe v. Guyer et al.*, 237 Ill. 516, 86 N. E. 1071; *Comstock v. Wilder et al.*, 61 Iowa, 274, 16 N. W. 108; *Daley et al. v. Minnesota L. & I. Co.*, 43 Minn. 517, 45 N. W. 1100.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

E. G. RALL GRAIN CO. v. FIRST STATE BANK OF McQUEEN.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 773*)—CERTIFICATE TO TRANSCRIPT—SUFFICIENCY.

Where a case is presented to the Supreme Court on appeal upon a transcript of the record of the court below, the certificate thereto must be full and complete, and specifically show

that the record contains a full, true, and complete transcript of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

2. APPEAL AND ERROR (§ 612*)—BRIEF—DISMISSAL.

Rule 25 of this court (95 Pac. viii) is to the effect that the brief of plaintiff in error shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court. A failure to comply, substantially, with the requirements of this rule will result in a dismissal of the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Harmon County; C. W. King, Judge.

Action by the E. G. Rall Grain Company against the First State Bank of McQueen, formerly the First State Bank of Looney. Judgment for defendant on demurrer, and plaintiff brings error. Dismissed.

Tisinger, Clay, Robinson & Hamilton, of Mangum, for plaintiff in error. A. M. Stewart, of Hollis, and Gray & McVay, of Oklahoma City, for defendant in error.

ROBERTSON, C. [1] The defendant in error has filed a motion to dismiss this appeal for many reasons; the first being that the transcript cannot be considered, for the reason that it is not properly certified. An examination of the certificate discloses that it is not in compliance with rule 16 of this court (95 Pac. vii), which requires that the certificate shall show that the transcript is "a full, true, and complete transcript of the record." The certificate in question certifies that the transcript is a full, true, and complete copy of certain pleadings, naming each of them. Among the pleadings named is a petition and an amended petition. It is urged that there may have been several amended petitions. It is required by the rule that the certificate should show beyond question that the complete record is before the court, so that no speculation can be indulged in concerning the completeness of the record, or lack of any part thereof. "Where a case is presented to the Supreme Court on appeal upon a transcript of the record of the court below, the certificate thereto must be full and complete, and specifically show that the record contains a full, true, and complete transcript of the record." *Bruce v. Casey-Swasey Co.*, 13 Okl. 554, 75 Pac. 280. "Where an appeal is attempted to be taken upon a transcript of the record, the clerk of the court from which the appeal is taken must certify that the transcript contains a true and correct copy of the record of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proceedings of the lower court." Makatch v. State, 5 Okl. Cr. 34, 113 Pac. 200. "The record must be authenticated by the clerk, and it must appear from his certificate that it is a complete transcript. If the certificate shows less than this, the case will be dismissed." Wade v. Mitchell, 14 Okl. 168, 79 Pac. 95; Fortune v. Parks, 29 Okl. 698, 119 Pac. 134. "A transcript of the record is not sufficiently authenticated unless the clerk's certificate states that it contains all the records and proceedings in the case." Walcher v. Stone, 15 Okl. 130, 79 Pac. 771. The certificate under consideration measured by this rule is insufficient.

[2] The next ground in the motion to dismiss is on account of the failure of plaintiff in error to conform in his brief to the requirements of rule 25 of this court. It is pointed out that the brief does not comply with this rule: First. That it contains no abstract of the record. Second. Failure to index the abstract, or to make reference, in the abstract or brief, to the pages of the record. Third. Failure to separately state and number the specifications of error. Fourth. Failure of plaintiff in error to set out the amended petition to which the demurrer was sustained.

An examination of the brief shows it subject to the criticisms above enumerated. In Seminole Townsite Co. v. Town of Seminole, 35 Okl. 554, 120 Pac. 1098, it was said: "Rule 25 [95 Pac. viii] is to the effect that the brief of plaintiff in error shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court."

In Berry v. Woodward, 133 Pac. 1127, which is a case directly in point, wherein it was sought to review an order sustaining a demurrer to the petition, it is said by the court, speaking through Mr. Justice Kane: "As counsel for the plaintiff in error has not complied with rule 25 * * * of this court by setting forth material parts of the petition against which the demurrer was directed, the court declines to review the question raised. * * * A substantial compliance with this rule is mandatory." To the same effect, see Ebey v. Crouse, 35 Okl. 689, 130 Pac. 1100; Vanselous v. McClellan, 35 Okl. 505, 131 Pac. 172; Indian Land & Trust Co. v. Widner, 35 Okl. 652, 130 Pac. 551; Arkansas Nat. Bank v. Clark, 31 Okl. 413, 122 Pac. 135.

The foregoing defects in the briefs and certificate to the transcript have been called to the attention of counsel for plaintiff in error by the brief of defendant in error;

but, for reasons not apparent of record, no attempt has been made to answer or explain them, and they therefore stand confessed; the presumption being that the charges are true, and cannot be answered. Such being the case, there is no discretion left for the court to exercise, and the appeal should be dismissed.

PER CURIAM. Adopted in whole.

BUCKHOLTS v. FARRELL

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 147*)—APPEAL—"JUDGMENT"—ORDER OVERRULING MOTION TO QUASH EXECUTION.

An order overruling a motion to quash an execution issued by a justice of the peace is not a "judgment" within the meaning of section 14, art. 7 (section 199, Williams') Constitution or of section 6386, Compiled Laws 1909; and therefore no appeal lies therefrom to county court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 493-501; Dec. Dig. § 147.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

Commissioners' Opinion, Division No. 1. Error from County Court, Atoka County; Baxter Taylor, Judge.

Action between R. E. L. Buckholts and J. W. Farrell, brought before a Justice of the Peace. The County Court dismissed an appeal from an order of the Justice overruling a motion to quash a writ of execution, and Buckholts brings error. Affirmed.

J. M. Humphreys, of Atoka, for plaintiff in error. D. H. Linebaugh, of Atoka, for defendant in error.

THACKER, C. This is an appeal from an order of a county court dismissing for want of jurisdiction an appeal thereto from an order of a justice of the peace overruling a motion to quash a writ of execution issued by such justice and attacked by motion as being unsupported by any proper judgment of record and for an excessive amount.

In the appeal from the justice court there was a petition in error and bill of exceptions; but there was also an appeal bond entered into, which we assume, without deciding, complies with section 6387, Compiled Laws 1909; and, besides a transcript of the justice's docket, the case-made seems to justify the inference that not only the petition in error and bill of exceptions, but all the original papers in the case, were filed in the county court.

It has been repeatedly held by this court that sections 6376-6378, Compiled Laws 1909, relating to bills of exception, are repugnant to article 7, § 14 (section 199, Williams') Con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stitution, providing that trials shall be de novo on appeals to the county court until otherwise provided by law, and therefore was not extended over and put in force by section 2 of the schedule of the Constitution (Fooshee & Brunson v. Smith, 34 Okl. 247, 124 Pac. 1070; and Cullen et al. v. Sloniker, 135 Pac. 341, not yet officially reported), and at the time of the appeal of this case there had not been a re-enactment of these repugnant sections; but, as an appeal bond was given and, we assume, all of the original papers, as well as the transcript of the justice's docket, were sent up to the county court, it does not appear material that plaintiff in error also attempted to avail himself of a bill of exceptions on appeal.

The question here seems to be this: Was the order overruling the motion to quash the execution from which the appeal was attempted to the county court a "judgment" within the meaning of the provision of the Constitution cited supra and section 6386, Compiled Laws 1909? In 17 Cyc. 1162, it is said: "Whether an appeal or writ of error will lie from an order quashing or refusing to quash an execution is a question upon which the authorities are in conflict; some authorities, among them the federal courts, hold that the order is not a final judgment from which a writ of error will lie; others hold the contrary." That a motion to quash an execution issued by a justice is not only a proper practice but a necessary prerequisite to the right to bring and maintain a suit for injunction against a judgment upon the grounds of its invalidity is shown by the case of Missouri, O. & G. Ry. Co. v. Riley et al., 34 Okl. 760, 127 Pac. 391; but it does not follow that there is any right of appeal from an order of a justice disposing of such motion, as the right of appeal must depend entirely upon the constitutional and statutory provisions in that regard. If such an order is not a "judgment" within the meaning of the constitutional and statutory provisions cited, the party aggrieved by such order is apparently without remedy other than a resort to a court having equity powers or, if his exempted property is wrongfully seized upon such writ, to an action of replevin; but, on the other hand, if such an order is a "judgment" from which an appeal lies to the county court the judgment debtor may always prevent or stay execution for an indefinite time by moving to quash the writ, and, if his motion is overruled, appealing first to the county court and then to this court; and in section 4436, Stat. 1893 (changed by including county and superior courts in section 5236, Rev. Laws 1910), after specifying "judgment," reads: "The Supreme Court may also reverse, vacate or modify any of the following orders of the county, superior or district court, or a judge thereof: First. A final order. * * *" Which quoted pro-

vision, of course, is superfluous if the word "judgment" includes such an order and indicates that the Legislature there used the words "judgment" and "final order" as having different meanings.

We are of opinion that the word "judgment" as used in authorizing appeals from justices of the peace does not include an order, overruling a motion to quash an execution; that the county court did not err in dismissing the appeal for want of jurisdiction; and the judgment of the county court should be affirmed.

PER CURIAM. Adopted in whole.

OKLAHOMA TRUST CO. v. STEIN et al.
(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 408*)—TIME FOR TRIAL—WAIVER OF OBJECTION.

Where a reply to an answer is filed out of time, but no motion to strike same or other objection is presented to the court, and the case being called for trial and both parties announce ready, and a jury is impaneled and sworn, after which defendant asks leave of court to amend its answer, which leave is granted and the amendment is made, and the defendant thereupon objects to going to trial for the reason that the issues have not been joined ten days as provided by statute, it is not error to deny such request and require the parties to proceed to trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 969; Dec. Dig. § 408.*]

2. TRIAL (§§ 370, 374*)—JURY IN EQUITY CASES—SUBMISSION OF ISSUES—DISCRETION—ADVISORY VERDICT.

In cases of equitable cognizance the judge may call in a jury or consent to one for the purpose of advising him on questions of fact, and he may adopt or reject their conclusions as he sees fit inasmuch as the whole matter must be left to him to determine eventually, and it is not error for him to refuse to submit all questions of fact to the jury, but he may submit such as are controverted or such as he may desire to be advised upon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 881, 884, 885; Dec. Dig. §§ 370, 374.*]

3. INDIANS (§ 36*)—CHAMPERTOUS CONVEYANCE.

"Any person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor." Section 2260, Rev. Laws 1910.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 63, 66; Dec. Dig. § 36.*]

4. INDIANS (§ 15*)—CHAMPERTOUS CONVEYANCE.

L., a minor Creek Freedman, by fraudulently misrepresenting his age, in 1906 sold his surplus allotment to the Oklahoma Trust Com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pany, which went into and remained in possession thereof until August, 1909, when L., who at that time had reached his majority, again sold the said land to S., who in turn sold an undivided half interest therein to W. Thereafter S. and W. joined in bringing suit against the Oklahoma Trust Company to quiet title. L. was not, nor had he been, in possession of the land for more than a year prior to his sale to S. in 1909, nor had he taken the rents or profits from said land during said time. Held, his deed to S. in 1909 was void as against the Oklahoma Trust Company by virtue of the champerty statute (section 2260, Rev. Laws 1910), and neither he nor his grantee, nor the subsequent grantee, could maintain the action to quiet title as against the Oklahoma Trust Company, L.'s first grantee, who was in possession at the time of the second sale.

[Ed. Note.—For other cases, see *Indiana*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by P. H. Stein and another against the Oklahoma Trust Company and others. Judgment for plaintiffs, and defendant Trust Company brings error. Reversed and remanded.

E. G. Wilson, of Oklahoma City, for plaintiffs in error. M. L. Williams, of Muskogee, for defendants in error.

ROBERTSON, C. This action was commenced in the superior court of Muskogee county on the 2d day of May, 1910, by P. H. Stein and Felix Winkler, plaintiffs, against Dan McKeever, the Oklahoma Trust Company, a corporation, E. T. Browning, J. C. Scully, John Grason, Roy Keeny, N. J. Hamilton, and B. F. Wineland; the object and purpose of the suit being to quiet title in the plaintiffs to the S. W. $\frac{1}{4}$ of section 17, township 13 north, range 16 east, containing 160 acres. All parties defendant named above were eliminated prior to the trial in the lower court, except the Oklahoma Trust Company, who is now the plaintiff in error herein.

The petition of the plaintiffs below charged that they were the owners of and in the actual possession of the land above described and had derived title thereto by warranty deed on August 2, 1909, from one Silas London, who was a Creek Freedman, duly enrolled as such, and that said land was his surplus allotment; that plaintiff in error, who hereafter will be designated as defendant, secured a warranty deed from said Silas London to the land in controversy on June 16, 1906, and the same was duly recorded; that it also secured a deed from B. J. Beavers and Anna Beavers to the same land on July 31, 1906, but that the said deeds, except the one executed on August 2, 1909, were void, for the reason that Silas London was a minor at the time of their execution. To this petition the defendant, the Oklahoma Trust Company, filed a demurrer, which was

overruled, and thereafter it filed its answer and cross-petition in which, after a general denial, it admitted that Silas London was a Creek citizen and the allottee of the land in controversy; that he executed and delivered to plaintiff in error a warranty deed to the land in question; that it purchased the land in good faith in the usual course of business and paid therefor \$1,600, which was a fair and reasonable value thereof. It also alleges that B. J. Beavers thereafter made, executed, and delivered to said Oklahoma Trust Company his quitclaim deed for said land; that it is in possession of said land; that neither Silas London nor the plaintiffs were in possession of said land at the time of the execution of the deed by Silas London to the said plaintiffs on August 2, 1909, nor for the space of one year before said deed. Defendant further charged in its said answer that at the time of execution of the said deed to it by Silas London on June 16, 1906, the said Silas London was doing business for himself and appeared to be of age and represented to defendant that he was of age, by his own affidavit and that of his father and mother, and that the said representations and affidavits were made for the purpose of inducing it to purchase the said land, and that defendant, believing said representations to be true and relying on the adult appearance of the said Silas London, was induced thereby to purchase the said land. To this answer and cross-petition the defendants in error, plaintiffs below, on the 23d day of February, 1911, filed a reply, denying each and every allegation thereof, except as therein admitted, and specifically denying that defendant had paid to the said Silas London \$1,600 for his said allotment.

The case was called for trial on the 23d day of February, 1911, at which time the defendant objected to going to trial at that term of court for the reason that the issues were not made up in time and said cause was not triable at that term of the court. This objection was overruled, to which ruling defendant excepted. The cause proceeded to trial and resulted in a judgment in favor of the plaintiffs. A motion for new trial was filed, overruled, and defendant brings this appeal to reverse the judgment of the court below and relies upon four assignments of error for reversal, which are:

(1) The court below erred in compelling the plaintiff in error to go to trial on the day the issues were joined.

(2) The court erred in failing to submit all questions of fact to the jury.

(3) The court erred in refusing to admit proper and material evidence on the part of the plaintiff in error.

(4) The court erred in giving certain instructions to the jury.

We will consider these assignments in their order.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] As hereinbefore stated, the demurrer of defendant to the petition was overruled on the 12th day of November, 1910, and ten days given to answer. On the 14th day of November defendant filed its answer and cross-petition. No reply was filed to this answer and cross-petition until the 23d day of February, 1911, and on the 23d day of February, 1911, the parties appeared in court by their counsel and all announced ready for trial. A jury was impaneled and sworn to try the issues. At this juncture the defendant, with knowledge that plaintiffs' reply had that day been filed, asked leave of court to amend its answer. No objection to this request was made by plaintiffs, and the court granted the request, and the answer was accordingly amended. As soon as the amendment to the answer had been made, defendant objected to proceeding with the trial that had already been commenced on the ground that the issues had not been joined ten days prior to the first day of the term. This question was in no wise in the case, and the objection was very properly overruled by the court. No objection had been made to the filing of the reply out of time, and it is to be presumed that defendant had no objections thereto, else a motion to strike same from the files would doubtless have been made. After the reply, which was a simple general denial, had been filed by plaintiffs without objection of any kind being made by defendant and leave taken to amend its answer, and after its announcement of ready for trial, and after the jury had been impaneled and sworn, the objection, as made, came too late. To have sustained the same would have given defendant the advantage of its own carelessness and fault and would have countenanced trifling with the court, a thing never to be sanctioned.

[2] It is next urged that the court erred in failing to submit all questions of fact to the jury. Not so. This is an equity case as distinguished by statute from a law case; it is one in which the litigants, as a matter of right, were not entitled to a jury at all. The court had a right to impanel a jury and to submit to it any question of fact it desired, but the verdict would have been advisory only and not in any sense binding upon the court.

In *Barnes et al. v. Lynch et al.*, 9 Okl. 191, 59 Pac. 1008, it was said by the court: "The law is, however, in cases of equitable cognizance, that, while the judge may call in a jury or consent to one for the purpose of advising him upon questions of fact, he may adopt or reject their conclusions, as he sees fit, and that the whole matter must eventually be left to him to determine, and that the instructions furnish no ground of error upon appeal. It was not only the right but the duty of the court to finally determine all questions of fact as well as of law."

In *McCoy v. McCoy*, 30 Okl. 393, 121 Pac.

182, Ann. Cas. 1918C, 146, it was said by Harrison, C.: "Our statutes define what issues must be tried by a jury and what issues may be tried by the court. Comp. Laws 1900, § 5781: 'Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other. There are two kinds: First, of law; second, of fact.' St. Okla. 1893, § 4151. Section 5782: 'An issue of law arises upon a demurrer to the petition, answer, or reply, or to some part thereof.' St. Okla. 1893, § 4152. Section 5783: 'An issue of fact arises: First, upon a material allegation in the petition, controverted by the answer; or, second, upon new matter in the answer, controverted by the reply; or, third, upon new matter in the reply, which shall be considered as controverted by the defendant without further pleading.' St. Okla. 1893, § 4153. Section 5785: 'Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided.' St. Okla. 1893, § 4156. Section 5786: 'All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code.' St. Okla. 1893, § 4157. Section 5781 defines how issues arise. Section 5782 defines how issues at law arise. Section 5783 how issues of fact arise. Section 5785 prescribes what issues of fact shall be tried by a jury unless a jury is waived or a reference be ordered. Section 5786 provides that all other issues of fact shall be tried by the court, subject to its powers to order any issue or issues to be tried by a jury or referred, as provided in the Code. These statutes, viewed in the light of the authorities above cited, are susceptible of but one logical construction, viz., that all issues of fact, arising in actions for the recovery of money or for the recovery of specific real or personal property, shall be tried by a jury unless a jury is waived or a reference ordered. They are mandatory both in meaning and language, and to refuse a jury in such cases would constitute reversible error; and in section 5786 the language is equally strong, and the provisions equally mandatory, that all other issues shall be tried by the court subject to its power (discretion) to submit the issues to a jury or direct a reference."

From a consideration of the foregoing authorities, it is clear that defendant has no cause for complaint under its second assignment of error.

It is next urged by defendant that the court committed error in excluding material and competent testimony offered by it at the trial. Among other things, defendant offered to prove that, at the time it purchased the land from Silas London, it was given full and

complete possession thereof and had retained the same from said date, to wit, January 6, 1906, up to August 2, 1909, the date of the second deed executed by Silas London to P. H. Stein, one of the plaintiffs, and that said Silas London had not been in possession of said premises in any manner for a year next preceding the bringing of this suit, nor had he received the rents and profits therefrom, and that therefore the deed to Stein was void as to defendant as being in violation of the provisions of the champerty statute. Plaintiffs, on the other hand, contend that such evidence is incompetent and immaterial for that the possession of defendant, being dependent upon a void deed, would not amount to an adverse possession of the land of the allottee upon the alienation of which there was restrictions imposed by the United States, and that no possession, however long and hostile it might be to the allottee, could ripen into a title. The record discloses that the plaintiff Stein took his deed to the land in question from the allottee, Silas London, on August 2, 1909, and that plaintiff Winkler took his deed from Stein to an undivided one-half interest to said land on April 30, 1910. The defendant took its deed to the premises from Silas London June 16, 1906, and in its answer and cross-petition alleges: "That after the purchase of said land by this defendant from Silas London on June 16, 1906, defendant entered into possession of the same, and that neither Silas London nor any of his grantors (grantees) were in possession of said land, nor any part thereof, nor of any reversion or remainder thereof, nor had they collected the rents or profits thereof at the time of the execution of the deed by Silas London to plaintiff P. H. Stein on August 2, 1909, nor for the space of one year before said conveyance, but that said land was at that time held by adverse possession by this defendant, by reason of which plaintiff's pretended title to same is void."

[4] At the time plaintiffs took their deeds as hereinbefore mentioned, section 2260, Rev. Laws of 1910 (section 2215, Comp. Laws 1909), was in force and effect in this state and is as follows: "Any person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor." This statute has been construed by this court in several cases and has been invariably sustained. See *Martin v. Cox et al.*, 31 Okl. 543, 122 Pac. 511; *Powers et al. v. Van Dyke et al.*, 27 Okl. 27, 111 Pac. 939, 36 L. R. A. (N. S.) 96; *Hus-*

ton v. Scott et al., 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721.

In *Miller v. Fryer*, 35 Okl. 145, 128 Pac. 713, it was said by Hayes, Chief Justice, in discussing *Martin v. Cox et al.*, supra: "In this case the court held that the foregoing statute, making it a misdemeanor to buy or sell any pretended right or title to land, where the grantor or those by whom he claims have not been in possession or taken the rents and profits thereof for the space of one year before such conveyance, is declaratory of the common law, and that a conveyance made in contravention thereof by the rightful owner as against the person holding adversely is void, and that it is not necessary in order that such shall be the result of the statute that the person holding shall hold under color of title at the time of the conveyance. It is sufficient if he was in possession adversely to plaintiff and his grantors." Continuing the court says: "Counsel for plaintiff in error contends that the foregoing statute does not operate to render the deed of plaintiff void for the reason that, although defendant had been in possession of the land for more than one year prior to the conveyance thereof to plaintiff, defendant had not been in adverse possession for such period of time. He contends that there can be no adverse possession of the lands of an allottee upon the alienation of which there are restrictions imposed by the federal government; that no possession, however long and hostile it may be to the allottee, can, under the statutes of limitation, ripen into title. It is well settled that there can be no adverse possession against the federal government which can form the basis of title by estoppel or under the statutes of limitation; and it has been held that the same rule applies where the lands involved are lands that have been allotted to Indians with restrictions upon the alienation of title thereto by the Indians, so long as such restrictions upon alienation exist. * * * The common-law rule did not require, nor does the statute here involved require, as an element of its violation that the person in possession at the time of the conveyance shall have been in adverse possession for a period of one year. On the other hand, the statute is violated, not only if the grantor is out of possession, and there is some one in adverse possession at the time of the conveyance, but if the grantor is in possession, but has not been in actual or constructive possession in person or by those by whom he claims for the period of one year, or has taken the rents and profits thereof for said period of time. Whatever may be the character of the defendant's possession before the removal of the restrictions upon the alienation by the allottees at the time this conveyance was made, plaintiff was not in possession. Defendant, then, was in adverse possession under the admitted facts in this record; and by reason of that

fact the deeds executed by the allottees to plaintiff constituted the violation of the statute and are, as between plaintiff and defendant in possession, void."

The foregoing case is valuable to us in this connection, not only because it sustains the champerty statute, *supra*, but also because it holds that the law applies where the grantor is "an allottee of the Chickasaw and Choctaw Tribes of Indians upon whose power to alienate his allotment the restrictions have been removed prior to the time of the execution of the deed and where the person in possession originally obtained possession and claims title to the conveyed premises by virtue of a void deed executed by the allottee before the removal of restrictions upon his power to alienate his allotted lands." This authority is conclusive on us and renders further discussion of the question involved unnecessary. It follows that the trial court erred in refusing to permit defendant to show that neither plaintiffs nor their grantor had not been in possession of the premises, or had they collected the rents and profits therefrom for a period of one year next preceding the attempted conveyance from Silas London to P. H. Stein. There are other questions urged by defendant in its brief, but it becomes unnecessary to give them consideration.

For the reasons assigned the judgment of the trial court should be reversed, and the cause remanded, with directions to grant a new trial.

PER CURIAM. Adopted in whole.

WORRELL et al. v. FELLOWS.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 757*)—BRIEF—REQUISITES.

Rule 25 of the Supreme Court (20 Okl. xii, 95 Pac. viii), which provides that in all cases, except felonies, the brief of the plaintiff in error, in substance, shall set forth the material parts of the pleadings, proceedings, and facts upon which reliance is had for reversal, so that no examination of the record itself need be made in said court, and shall also contain specifications of the errors complained of, separately set forth and numbered, is mandatory; and where it is not observed, and counsel for the defendant in error in his brief insists that such rule has not been complied with, and the plaintiff in error, making no request for permission to amend its brief, permits said cause to be submitted with the briefs in that condition, the alleged errors will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

2. APPEAL AND ERROR (§ 696*)—CASE-MADE—REQUISITES.

A case-made itself must contain the positive averment by way of recital that it contains all the evidence submitted or introduced in the trial of the case, and in the absence of such recital this court will not review any questions depending upon the facts for its determination.

(a) Neither the certificate of counsel that the

case-made contains all the evidence, nor the certificate of the stenographer that his transcript contains all the evidence, being authorized by law, can be substituted for the certificate hereinabove mentioned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2916, 2917; Dec. Dig. § 696.*]

3. APPEAL AND ERROR (§ 701*)—RECORD—INSTRUCTIONS—EVIDENCE.

Record examined, and held sufficient to sustain the judgment entered in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933-2935; Dec. Dig. § 701.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Garfield County; Dan Huett, Judge.

Action by J. H. Fellows against Ollie L. Worrell and another, to recover damages for breach of contract. Judgment for plaintiff, and defendants bring error. Affirmed.

Rush & Smith, of Enid, and W. K. Snyder, of Oklahoma City, for plaintiffs in error. H. J. Sturgis, of Enid, for defendant in error.

ROBERTSON, C. [1] The brief of plaintiff in error does not comply with the requirements of rule 25 of this court (20 Okl. xii, 95 Pac. viii), in that it contains no abstract or abridgement of the transcript, setting forth the material part of the pleadings, proceedings, facts, and documents upon which plaintiff in error relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that examination of record itself need not be made by this court. Neither does the brief contain any assignment or specification of error complained of, separately set forth and numbered. It is impossible to gather from the briefs of plaintiffs in error just what questions are intended to be presented for review. On page 16 of the original brief, it is said: "The sole contention of the plaintiffs in error upon which they rely for reversal of the judgment of the trial court is that, conceding that the finding of the jury was correct, and that the plaintiffs in error failed to inform the defendant in error of the foreclosure of said mortgage and the sale of said property, still the plaintiff in-error, Ollie Worrell, then had a right any time prior to the trial to acquire title to said land and tender it to the said Fellows under the terms of their contract." Yet, notwithstanding the absence of an assignment or specification of errors, and the foregoing statement that there is but one question in the case, it appears that counsel for plaintiffs in error have argued several different propositions upon which they rely for a reversal, and also complaint of the refusal of the court to give certain instructions. The defendant in error is here objecting to a consideration of the questions in this case for various reasons, one of which is that plaintiffs in error have failed to comply

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with the requirements of rule 25 of this court, above referred to. This objection is good and must be sustained. It has been frequently held by this court that the failure of litigants to substantially comply with rule 25, supra, relating to specifications of error, arguments, and authorities, will result in the appeal being dismissed. The original brief of plaintiffs in error in this case in no respect complies with the provisions of said rule. *Lawless v. Pitchford*, 33 Okl. 633, 126 Pac. 782; *Vanselous v. McClellan*, 35 Okl. 505, 181 Pac. 172; *Indiana Land & Trust Co. v. Widner*, 35 Okl. 652, 180 Pac. 531. The brief of defendant in error calling attention to this defect of the brief of plaintiffs in error was filed on August 4, 1913, and yet the plaintiffs in error have made no request for permission to amend their brief, but have permitted the cause to be submitted with the briefs in such condition, and, on the contrary, have filed a reply brief, attempting to justify the shortcomings of the original brief. This is insufficient.

In the *Arkansas Valley Nat. Bank v. Clark*, 31 Okl. 413, 122 Pac. 135, it was said by the court: "Rule 25 of the Supreme Court (20 Okl. xiii, 95 Pac. viii), which provides that in all cases, except felonies, the brief of the plaintiff in error, in substance, shall set forth the material parts of the pleadings, proceedings, and facts upon which reliance is had for reversal, so that no examination of the record itself need be made in said court, and shall also contain specifications of the errors complained of, separately set forth and numbered, is mandatory; and, where it is not observed, and counsel for the defendant in error in his brief insists that such rule has not been complied with, and the plaintiff in error, making no request for permission to amend its brief, permits said cause to be submitted with the briefs in that condition, the alleged errors will not be reviewed." The appeal should, for the reasons above given, be dismissed, but there are other questions raised that will render such action unnecessary.

[2] It appears that the questions plaintiffs in error desire reviewed require an examination of the evidence in this case. The defendant in error raises an objection to the consideration of these questions, for the reason that the case-made contains no certificate, or averment, by way of recital, to the effect that it contains all the evidence adduced at the trial, and cites many cases from this court sustaining that contention. The plaintiffs in error in their reply brief, filed September 29, 1913, attempted to answer this objection by showing that the case-made on page 266 contains a certificate signed by Geo. P. Rush and McKeever & Walker, attorneys for defendant, which certificate, among other things, recites that: "The within and foregoing case-made contains a full, true, and complete and correct copy of the transcript of all the proceedings in said cause above en-

titled, including all pleadings filed and proceedings had, all the evidence had and introduced," etc.

The reply brief of counsel for the defendant in error also calls attention to the fact that there is in said case-made a certificate by one A. B. Hugos, the official stenographer at the trial, to the effect that he was the duly appointed and qualified court reporter for said court, and that he was present and reported and made a full, true, and complete and correct shorthand report and record of all the proceedings had in said trial of said cause, including all evidence, objections, rulings, etc. Attention is also called to the certificate of the trial judge, to the effect that the case-made is a true and correct case-made, etc., and further, on page 268 of the case-made, the return of the case-made by Sturgis & Manatt, attorneys for the plaintiffs in error, in which they return to the attorneys for the defendant in error the case-made without suggestions or amendment. But it must be observed that in this return they do not agree or stipulate that the case-made contains the evidence, or that it is a true and correct case-made. Thus it is seen from an examination of the case-made that there is no compliance whatever with the rule that requires the case-made to contain a recital to the effect that it contains all the evidence introduced at the trial of the cause. This is not a new question in this jurisdiction, and has been passed upon frequently by this court.

Thus in *Sawyer-Austin Lbr. Co. v. Champlain Lbr. Co.*, 16 Okl. 90, 84 Pac. 1093, it is said: "This question requires an examination of the evidence. The case purports to contain the evidence, but the record contains no recital or other statement that it contains all the evidence introduced in the trial of the cause. There is a certificate of counsel that the case contains all the evidence, also a certificate of the stenographer that his transcript contains all the evidence; but neither of these certificates are authorized or recognized. The case itself must contain the positive averment by way of recital that it does contain all the evidence submitted or introduced on the trial of the cause; and, in the absence of such recital, this court will not review any questions depending upon the facts for its determination."

This question has been repeatedly decided. See *Frame v. Ryel*, 14 Okl. 536, 79 Pac. 97; *Board of Washita County v. Hubble*, 8 Okl. 169, 56 Pac. 1058; *B. & S. W. Ry. Co. v. Grimes*, 38 Kan. 241, 16 Pac. 472; *Ryan v. Madden*, 46 Kan. 245, 26 Pac. 680; *Pelton v. Bauer*, 4 Colo. App. 339, 35 Pac. 918; *Eddy v. Weaver*, 37 Kan. 540, 15 Pac. 492; *Hill v. Bank*, 42 Kan. 364, 22 Pac. 324. See, also, in support of this rule, *Tootle, Wheeler & Motter Merc. Co. v. Floyd*, 28 Okl. 303, 114 Pac. 259; *Wagner v. Sattley Mfg. Co.*, 23 Okl. 52, 99 Pac. 643; *Crocker v. Shamleffer*, 18

Okl. 407, 80 Pac. 106; Board of Com'rs D. Co. v. Wright, 8 Okl. 190, 57 Pac. 203.

It is seen by the foregoing authorities that none of the certificates relied upon by plaintiffs in error are sufficient, or are authorized or warranted by statute, and that the case-made is not sufficient under the law, especially in the face of positive objection by the defendant in error, to authorize this court in examining the evidence.

[3] Having disposed of the foregoing, it appears that the only thing in the record that we are at liberty to examine is the pleadings, the instructions of the court, the verdict of the jury, the judgment, and the motion for new trial. Without the evidence in the record, the instructions cannot be examined, and the presumption necessarily follows that the instructions were fully authorized and warranted by the evidence introduced. An examination of the record proper shows that the court had jurisdiction of the parties and the subject-matter; that the issues were properly submitted to the jury, and the verdict returned was within the issues; that the judgment entered on the verdict was authorized by the pleadings and seems to be regular in every respect. It follows, therefore, that the judgment of the superior court of Garfield county should be affirmed.

PER CURIAM. 'Adopted in whole.

SHULER et al. v. COLLINS.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 252*)—INSTRUCTION—EVIDENCE.

It is not error to refuse an instruction based upon a state of facts, to support which there is no evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. APPEAL AND ERROR (§§ 263, 292, 501*)—PRESENTATION BELOW—INSTRUCTIONS.

This court will not review an instruction given on the trial of a cause, unless the instruction is excepted to at the trial, and exception made to appear of record, and the objection pointed out in the trial court by motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532, 1697-1699, 2300-2305; Dec. Dig. §§ 263, 292, 501.*]

3. APPEAL AND ERROR (§ 758*)—BRIEF—SUFFICIENCY.

Where a party is content to merely set out in his brief an instruction complained of, and states that he complains thereof as prejudicial error, without attempting to point out what parts of said instruction are erroneous, or wherein it does not correctly state the law, and without supporting his contention either with argument or with the citation of authorities, such assignment of error will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.*]

4. APPEAL AND ERROR (§ 171*)—CHANGE OF THEORY.

Where a party tries his case upon one theory in the trial court, he will not be permitted in this court to change front and try to prevail upon another theory, not presented in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by James S. Collins against C. E. Shuler and another. Judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed in part.

Clint C. Steinberger and Griffith & Prichard, all of Oklahoma City, for plaintiffs in error. Carlisle & Edwards, of Oklahoma City, for defendant in error.

HAYES, C. J. Defendant in error, herein-after called plaintiff, brought this action in the court below to recover damages for fraud, and deceit alleged to have been practiced upon him by the defendants in error, whereby he was induced to exchange a quarter section of land located in Roger Mills county in this state for a tract of land located in Wright county, Mo.

There is evidence in the record to establish that on the 8th day of January, 1910, plaintiff was the owner of a certain quarter section of land located in Roger Mills county in this state. On that date he entered into an agreement with plaintiff in error, C. E. Shuler, whereby he agreed to convey to said Shuler said tract of land for a certain quarter section of land located in Wright county, Mo., and further to assume an incumbrance on the land in Missouri in the amount of \$200, and to pay to Shuler \$50 in cash. The deeds were executed and delivered in accordance with said agreement. The evidence establishes that the conveyance made by plaintiff of his land was procured upon the representations of said Shuler that his farm in Missouri consisted of 80 acres, two miles from the town of Mansfield, all tillable, fenced, and cross-fenced, seven room house, barn, cider mill, good well, 18 acres in orchard, fenced with woven wire. The evidence establishes that all these representations were false; that the land was located 30 miles from Mansfield; that none of the same was tillable, or fenced, or cross-fenced; that it had no improvements thereon whatever, but was a waste piece of land, of extremely poor soil; that it had never been under cultivation, and was worthless, and could not be used for any useful purpose. Plaintiff, prior to the execution of the deeds, had never seen the property in Missouri, and Shuler had never seen plaintiff's property. Each relied upon the representations of the other in making the exchange. After the exchange had been made, plaintiff visited Missouri, and discovered the fraud that had been

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

practiced upon him, and tendered to Shuler a deed, reconveying to him the property received by plaintiff from Shuler, and demanded that Shuler reconvey to him the farm he received from plaintiff, which Shuler refused to do, and thereafter he sold and conveyed the land to another person, and is therefore in no position to restore said land to plaintiff.

In one of these assignments of error, plaintiffs in error complain that their motion for a directed verdict in their favor should have been sustained, and that the verdict is contrary to the evidence. We have examined the record carefully, and find that as to plaintiff in error, C. E. Shuler, this contention is without merit. It is true that Shuler testified that before the trade was consummated between him and plaintiff he informed plaintiff that he had never seen the land in Missouri; and that all his information relative thereto had been received from one Truitt, the real estate agent through whom he (Shuler) had acquired the land, and that he advised plaintiff that before he made the trade, plaintiff should go to Missouri and inspect the land, and in this evidence he is corroborated by the testimony of his wife; but plaintiff, on the other hand, testified that these statements by Shuler were not made by him until after the trade had been consummated, and that he relied wholly upon the representations of Shuler as to the kind, character, and location of the land, and was induced by his false representations relative thereto to make the conveyance to him that he did.

The trial court, in an instruction to which no exception was taken, submitted to the jury that, if they found before the trade was consummated Shuler advised plaintiff that he had never seen the land and knew nothing of it, except as he had been informed by others, and gave to plaintiff the source of his information, then the verdict should be for plaintiffs in error. Under the conflict in the evidence, the court properly submitted this issue to the jury as to C. E. Shuler; but a careful examination of the record fails to disclose that plaintiff in error, Emma E. Shuler, ever made any representations about the land for which plaintiff traded, or that plaintiff was in any manner induced by any representation of hers to make the trade. She had no interest in the land conveyed by her husband, and received no part of the land conveyed by plaintiff to her husband. We fail to find any evidence in the record that would support a verdict against her in favor of plaintiff for any damages, and the judgment as to her should, for this reason, be reversed.

[1] Plaintiff in error requested the court to instruct the jury that if they believed from the evidence that the farm in Roger Mills county was of no more value and was equal to the value of the farm in Wright county, Mo., then their verdict should be for the de-

fendants. The court properly refused to give this instruction, for the reason that there is no evidence in the record to which it could apply. There is considerable evidence as to the value of the farm in Roger Mills county conveyed by plaintiff, but the only evidence as to the value of the Wright county farm conveyed by Shuler is that it is worthless. It is not error to refuse an instruction, based upon a state of facts to support which there is no evidence. *Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107.

[2] Upon the authority of *Howe et al. v. Martin et al.*, 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840, plaintiffs in error complain that the trial court committed error in its instructions to the jury upon the measure of plaintiff's damages, in that the jury was instructed that if they found for the plaintiff, they would then assess his damages at an amount equal to the value of his farm in Roger Mills county at the time of such transfer; but it does not appear that any objection or exception was taken to this instruction. Before an instruction of the trial court can be presented to this court for review on appeal, exceptions to the giving thereof must be taken in the trial court at the time it was given, and such exceptions saved by a motion for a new trial, in which such alleged error is assigned as a ground for a new trial. *Dunlap v. Flowers*, 21 Okl. 600, 96 Pac. 643; *Boyd et al. v. Bryan*, 11 Okl. 56, 65 Pac. 940.

[3] By several other assignments, plaintiffs in error complain of the court's refusal to give instructions requested by them, or of the giving of instructions to which they excepted; but they have been content in their brief merely to set out such instructions and state that they complain thereof as prejudicial error, without attempting to point out what parts of said instructions are erroneous, or wherein they do not correctly state the law, and without supporting their contention with either argument or citation of authorities. These assignments, therefore, will not be considered. *Boyd v. Bryan*, 11 Okl. 56, 65 Pac. 940.

Plaintiff was permitted to testify that shortly after the trade was made he made a trip to Missouri to inspect the land, and that the expense of such trip was \$25. It is insisted that the introduction of this evidence was error, for the reason that such expense constitutes no element of plaintiff's damages. Assuming, without deciding, that this evidence was inadmissible, no prejudicial error could have resulted, for the reason that the court, by its instructions, limited plaintiff's damages to the value of his farm at the time the exchange was made.

Complaint is made of the admission of other testimony, and of the rejection of certain testimony; but it appears that these contentions are either without any merit, or that they were without prejudice to the substantial rights of plaintiffs in error.

[4] Nor can their contention that the verdict is excessive be sustained. This contention they make upon the ground that there was no evidence to show what the value of the farm in Missouri would have been, if it had been as represented by Shuler, at the time the exchange was made, but the case was not submitted to the jury upon the theory that the measure of plaintiff's damages was the difference between the value of the Missouri farm and what its value would have been in the condition it was represented to be by Shuler, but upon the theory that the measure of his damages was the value of plaintiff's farm in Roger Mills county; and no objection was made to the instruction submitting the case upon this theory, and there is ample evidence to support the verdict in the amount of damages assessed upon this theory, for the evidence as to the value of plaintiff's farm in Roger Mills county varies from \$2,000 to \$3,000. Plaintiff in error cannot stand by and permit his case to be submitted to the jury upon one theory without objection, and then, after the verdict and judgment of the trial court has gone against him, try to prevail on a different theory in this court. *Harris v. First Nat. Bank of Bokchito*, 21 Okl. 189, 95 Pac. 781; *Border v. Carrabine*, 24 Okl. 609, 104 Pac. 906; *Duffey v. Scientific Amer. Compil. Dept.*, 30 Okl. 742, 120 Pac. 1088.

Finding no error in the record requiring a reversal of the cause as to plaintiff in error C. E. Shuler, the judgment of the trial court as to him is affirmed; but the judgment as to plaintiff in error Emma E. Shuler is reversed. All the Justices, except WILLIAMS, J., not participating, concur.

COODY v. COODY et al.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 917*)—RULING ON DEMURRER—PRESUMPTION.

Where the two defendants in an action file separate demurrers to a petition, charging (1) a misjoinder of causes of action, (2) that the petition failed to state facts sufficient to constitute a cause of action against the demurrant, and the court sustains the demurrer generally, and the record being silent as to the ground or grounds of the decision, it will be presumed that the demurrer was sustained upon the latter ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.*]

2. PLEADING (§ 64*)—DEMURRER—MISJOINDER.

The test of whether there is more than one cause of action stated or attempted to be stated in a petition in a suit in equity is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. If there is, the pleading is demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

3. PLEADING (§ 204*)—DEMURRER.

Where a general demurrer is filed to a petition as a whole, if any paragraph of the pleading is good and states a cause of action, a demurrer should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

4. DEEDS (§ 68*)—ASSENT—INTOXICATION.

A deed, executed by a person so destitute of reason as not to know the nature or consequences of his act, though his incompetency be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary and not produced by the circumvention of the other party.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.*]

5. INDIANS (§ 15*)—DISAFFIRMANCE OF CONTRACT—INABILITY TO RESTORE CONSIDERATION.

In a suit in equity brought by a Cherokee Indian, immediately upon attaining his majority, to cancel certain leases and a mortgage given by him during minority on his allotted lands, a petition which charged that all of the money paid him on account thereof during his minority had been spent and squandered prior to attaining his majority sufficiently excused the failure of an offer to return the consideration received.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Washington County; John J. Shea, Judge.

Action by Edward Coody against D. R. Coody and another. From a judgment sustaining a demurrer to plaintiff's amended petition, plaintiff brings error. Reversed and remanded.

Haskell B. Talley, of Tulsa, for plaintiff in error. P. J. Carey and W. C. Franklin, both of Muskogee, for defendants in error.

SHARP, C. On September 13, 1909, plaintiff in error, plaintiff below, brought suit in the district court of Washington county against defendants in error, defendants below, seeking the cancellation of certain leases, a mortgage, and a deed on lands in said county theretofore owned by him. It appears from the petition: That plaintiff was a one-fourth blood Cherokee citizen, and the lands covered by the instruments sought to be canceled constituted his allotment of lands in the Cherokee Nation. That at all times prior to August 31, 1909, plaintiff was a minor, under the age of 21 years, and was poorly educated, being scarcely able to read and write the English language, and totally ignorant and inexperienced in business affairs. That he had executed instruments affecting said lands as follows: Oil and gas lease during the month of January, 1909, to the defendant D. R. Coody; mortgage to defendant O'Keffe during the month of March, 1909; oil and gas mining lease also to the defendant O'Keffe during the same month; oil and gas mining lease during the month of May, 1909, to the defendant O'Keffe; and warranty deed August 31, 1909, to the defendant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

O'Keiffe. That during the month of March, 1909, the oil and gas lease, executed to defendant Coody, was by him assigned to the defendant O'Keiffe, and that all of said instruments had been recorded in the office of the register of deeds for Washington county. That the total consideration received by him on account of the said several instruments did not exceed the sum of \$400, \$75 of which was paid at the time of the execution of the warranty deed.

Various grounds for setting aside the said instruments are charged in the amended petition, among which are: (1) Legal disability of infancy at the time of the execution of said instruments, except that of August 31, 1909; (2) that, at the time all of said instruments were executed, plaintiff was under the influence of intoxicants and wholly unable to transact business and understand the nature of the instruments signed; (3) undue influence practiced upon him by a kinsman and confidential adviser, the defendant D. R. Coody; (4) conspiracy to defraud; (5) duress; (6) inadequacy of consideration. To the petition as amended the defendants filed their separate demurrers, each upon the same grounds, namely: (1) That the petition did not state facts sufficient to constitute a cause of action against the demurring defendant; (2) that several causes of action were improperly joined.

[1] These demurrers were sustained, but upon what ground the journal entry does not show. Had the court sustained them upon the ground of misjoinder of causes of action, it would have been its duty to so state at the time in order to afford plaintiff an opportunity to move to be allowed to file separate petitions, each to include such of said causes of action as might have been joined, and had them each docketed pursuant to section 4743, Rev. Laws 1910. *Weber v. Dillon*, 7 Okl. 568, 54 Pac. 894; *Goldsbrough v. Hewitt*, 23 Okl. 68, 99 Pac. 907; *Owen et al. v. City of Tulsa et al.*, 27 Okl. 264, 111 Pac. 320. As the court made no such indication, and counsel were therefore afforded no opportunity, it is but fair to presume that the court sustained the demurrer upon the ground that the petition failed to state a cause of action.

[2] In passing, however, we may say that it has been said upon high authority (*Abbott's Trial Brief, Pleadings*, pp. 739, 740) that the test of whether there is more than one cause of action stated or attempted to be stated in a petition in a suit in equity is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. If there is, the pleading is demurrable. Our statute (section 4738, Rev. Laws 1910), provides for the uniting of several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of one of the classes therein named. Under this provision of the statute, claims

affecting several defendants, such as might have been brought within the compass of a single suit in equity, may be regarded as one cause of action; and in such suits, therefore, equitable rules as to the joinder of parties defendant are still applicable.

[3] The second ground of demurrer being general, no attempt being made to specify distinctly the grounds of objection urged to the petition, if there is one paragraph in the petition which states a cause of action, such demurrer must be overruled. *Hanenkratt v. Hamil*, 10 Okl. 219, 61 Pac. 1050; *Berry v. Gelser Mfg. Co.*, 15 Okl. 864, 85 Pac. 699; *Cockrell v. Schmitt*, 20 Okl. 207, 97 Pac. 521, 129 Am. St. Rep. 737; *Emmerson v. Botkin*, 26 Okl. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953. The amended petition charges that the defendants, acting together, wrongfully conspired to cheat and defraud plaintiff of his land, and that the said deed of August 31, 1909, was the final consummation of a scheme theretofore entered into by said defendants at and during the time said leases and the said mortgage were taken, and that, at the time all of said instruments were made, the plaintiff was under the influence of intoxicants and wholly unable to transact business and understand the nature of the instruments by him signed.

[4] Without passing upon the sufficiency of the petition as to the other grounds upon which relief was sought, we think the court erred in sustaining the defendants' demurrers, for if, at the time the deed of August 31, 1909, was executed, plaintiff was so under the influence of intoxicants as to be wholly unable to transact business and to understand the nature of the deed which he signed, he may plead his disability from such drunkenness in an action to cancel the deed. Intoxication which is absolute and complete, so that the party is for the time entirely deprived of the use of his reason and is wholly unable to comprehend the nature of the transaction and of his own acts, is a sufficient ground for setting aside or granting other appropriate affirmative relief against a conveyance or contract made while in that condition, even in the absence of fraud, procurement, or undue advantage by the other party. *Pomeroy's Equity Jurisprudence*, § 949. The following texts announce the rule applicable to the question presented by the demurrer: *Story on Contracts*, p. 15: "Drunkenness must be such as to incapacitate the party from the proper exercise of his judgment and prevent him from understanding his contract." *Clark on Contracts*, pp. 274, 275: "A contract made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable, * * * (but his intoxication) must be so excessive as to render him incapable of knowing what he is doing." In *Bishop on Contracts*, §§ 980, 981, it is said: "Intoxication so deep as to take away the agreeing mind (in other words, to disqualify the mind

to comprehend the subject of the contract and its nature and probable consequences) impairs such contract, if made while it lasts, the same as insanity. To have this effect, it must render the party non compos mentis for the action." Anson on Contracts, p. 150: "The contract of a * * * drunken person is voidable, at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing." 1 Benjamin on Sales, § 30: "A drunkard, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract." In 1 Pothier, Obligations on Contracts, 49: "It is evident that drunkenness, when it goes so far as to absolutely destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent." 11 A. & E. Enc. L. p. 773: "An express contract, entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding, is voidable."

The early law, as well as the modern rule of decision, with the reason for the change, is perhaps nowhere better expressed than in *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532, from which we quote at length. "The question presented for our consideration arises upon an exception to the charge of the court regarding the drunkenness of the plaintiff's agent and its sufficiency to avoid the contract. It is held by some authorities to be a principle of the common law that every contract, which a man non compos mentis makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself and to set up his own disability in avoidance of his acts. *Beverly's Case*, 4 Rep. 123. And Coke, as appears in his Institutes, was of the same opinion: 'As for a drunkard who is voluntarius daemon, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it.' Coke on Littleton, 247a. But Blackstone observes that this doctrine sprung from loose authorities and he evidently agrees with Fitzherbert, who rejects the maxim as being contrary to reason. 2 Blackstone's Commentaries, 291. Whatever was the true principle of the common law as anciently understood, there can be no doubt that since the reign of Edward III, if not since the time of Edward I, it has been settled according to the dictates of good sense and common justice that a contract made by a person so destitute of reason as not to know the nature and consequences of his contract, though his incompetence be produced by intoxication, is void, and even though his condition was caused by his voluntary act and not procured through the cir-

cumvention of the other party. Mere imbecility of mind is not sufficient as a ground for avoiding the contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding. 2 Kent's Commentaries, 451. This court has adopted Coke's definition that a person has sufficient mental capacity to make a contract if he knows what he is about. *Moffit v. Witherspoon*, 32 N. C. 185; *Paine v. Roberts*, 82 N. C. 451. And it has been held not error to charge that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its full extent and effect. *Cornelius v. Cornelius*, 52 N. C. 593. The doctrine that a party may plead his own disability to defeat the alleged contract arises out of the very nature of a contract, which requires that the minds of the parties should meet to a common intent, and, if one of them has not 'the agreeing mind,' the contract cannot be formed. In *Hawkins v. Bone*, 4 Fost. & F. 311, Chief Baron Pollock, said: 'But the law of England is that a man is not liable on a contract alleged to have been made by him in a state in which he was not really capable of contracting. A contract involves a mutual agreement of two minds, and, if a man has no mind to agree, he cannot make a valid contract'—and the question at last is whether he was wholly incapable of any reflection or deliberate act, so that in fact he was unconscious of the nature of the particular transaction. It is not necessary that he should be able to act wisely or discreetly, nor to effect a good bargain, but he must at least know what he is doing. So far as the legal incapacity is concerned, it can make no difference from what cause it proceeded, whether from the party's own imprudence or misconduct, or otherwise. It is the state and condition of the mind itself that the law regards and not the causes that produced it. If from any cause his reason has been dethroned, his disability to contract is complete. *Bliss v. Connecticut, etc., R. R. Co.*, 24 Vt. 424. The master of the rolls (Sir William Grant) in *Cook v. Clayworth*, 18 Ves. 15, said: 'As to that extreme state of intoxication that deprives a man of his reason I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition.' Lord Ellenborough in *Pitt v. Smith*, 3 Camp. 33, thus states the doctrine: 'You have alleged that there was an agreement between the parties, and this allegation you must prove, as it is put in issue by the plea of not guilty; but there was no agreement between the parties if the defendant was intoxicated in the manner supposed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of non est factum to a deed, of non concessit to a grant, and of non assumpsit to a promise.' The authorities sustaining the view of the law we have stated and adopted are quite numerous. Clark on

Contracts (2d Ed.) p. 186; Parsons on Contracts (9th Ed.) p. 444; Matthews v. Baxter, L. R. Ex. 132; Webster v. Woodford, 3 Day (Conn.) 90; Van Wyck v. Brasher, 81 N. Y. 260; Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; Bush v. Breinig, 113 Pa. 310, 6 Atl. 86, 57 Am. Rep. 469; Bates v. Ball, 72 Ill. 108; Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; 14 Cyc. 1103; 17 Am. & Eng. Ency. of Law (2d Ed.) 399. It was held in King v. Bryant, 3 N. C. 394, that if a man was so drunk at the time of signing a bond that he did not know what he was doing, and while in that condition he was induced to sign the instrument, it was a fraud upon him which vitiated the bond, even in an action at law upon it, and to the same effect is the decision of the court in Gore v. Gibson, 13 Mees. & W. 623, opinion of Parke, B. In the latter case, Pollock, C. B., said: 'Although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice.'

The rule is also well stated and the authorities reviewed in Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440.

The notes in these two cases contain citations of decisions of many of the courts, both American and English, and from which we may epitomize as follows: The rule formerly was that intoxication was no excuse and created no privilege or plea in avoidance of a contract; but it is now settled, according to the dictates of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetence be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary and not produced by circumvention of the other party. This language is repeated with approval in Bush v. Breinig, 113 Pa. 310, 6 Atl. 86, 57 Am. Rep. 469; Fowler v. Meadow Brook Water Co., 208 Pa. 473, 57 Atl. 959. And such is the rule announced by the authorities of the present time: Donelson v. Posey, 13 Ala. 752; Phelan v. Gardner, 43 Cal. 306; Hale v. Stery, 7 Colo. App. 165, 42 Pac. 598; Mattair v. Card, 18 Fla. 762; Bates v. Ball, 72 Ill. 109; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Mansfield v. Watson, 2 Iowa, 111; Carpenter v. Rogers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; Cavender v. Waddingham, 5 Mo. App. 457; Longhead v. Combs, etc., Com. Co., 64 Mo. App. 559; Johnson v. Phifer, 6 Neb. 401; French v. French, 8 Ohio, 214, 31 Am. Dec. 441; Birdsong v. Birdsong, 2 Head (Tenn.) 289; Barrett v.

Buxton, 2 Aiken (Vt.) 167, 16 Am. Dec. 691; Conant v. Jackson, 16 Vt. 335; Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848. From the foregoing cases, and upon principle, the failure of the amended petition to charge that plaintiff's intoxication was designedly brought about or caused by defendants is immaterial. It is the existence at the time of the necessary degree of intoxication which controls, and not who or by what means the intoxication was brought about.

[5] As already observed, the several instruments were each made during the year 1909, the deed on August 31st. Plaintiff's suit was instituted September 13, 1909, or only two weeks after the execution of the warranty deed. It is insisted on the part of defendants in error that, before plaintiff could bring his suit, it was a necessary condition precedent to entering a court of equity that he restore or offer to restore the consideration received. The petition charges that all of the money paid him during his minority he had spent and squandered, but, as to the \$75 paid him on the date that he attained his majority, this he offered to return to the defendants. The petition, in the latter particular, is not attacked. Was it necessary, therefore, to offer to return the consideration paid him during infancy, but which money had been dissipated? In *Blakemore v. Johnson*, 24 Okl. 544, 103 Pac. 554, attention was called to the conflict of authorities upon this subject, and it was there held that the rule which seemed to be the most generally followed by the courts was that an infant is not to be defeated in his effort to disaffirm and avoid his contracts by his inability to return the consideration received by him. See, also, *Stevens v. Elliott*, 30 Okl. 41, 118 Pac. 407; *Gill v. Haggerty*, 32 Okl. 407, 122 Pac. 641; *Tirey v. Darneal*, 132 Pac. 1087; *Tirey v. Darneal*, 133 Pac. 614; *Colbert v. Alfrey*, 168 Fed. 231, 93 C. C. A. 517; *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326.

Nor is the present case influenced by the fact that the several instruments executed by plaintiff, affecting his allotted land, were made since the passage of the act of Congress of May 27, 1908 (35 Stat. 312, c. 199), removing restrictions upon alienation or incumbrance of allotted lands of the Five Civilized Tribes, "enrolled as * * * mixed-blood Indians, having less than half Indian blood, including minors," as according to the rule announced in *Blakemore v. Johnson*, supra, even though the instruments executed during infancy were voidable and not void, an offer to restore the consideration, it having been squandered and spent, was unnecessary. While the plaintiff's amended petition is loosely drawn, and it may well be doubted if, independent of the allegation of inability to contract on account of intoxication, it states a cause of action, yet in this regard we deem it sufficient and conclude that the court

erred in sustaining defendants' separate demurrers.

The judgment of the trial court should be reversed, and the cause remanded, with leave to amend, if desired.

PER CURIAM. Adopted in whole.

STATE NAT. BANK v. MEE et al.
(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. ACKNOWLEDGMENT (§ 48*)—TAKING OF ACKNOWLEDGMENT.

The act of a notary public in taking the acknowledgment of a person to a deed, mortgage, or other instrument is purely ministerial, and in no wise judicial.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 241-243; Dec. Dig. § 48.*]

2. ACKNOWLEDGMENT (§ 48*)—TAKING OF ACKNOWLEDGMENT.

The fact that such act is ministerial and not judicial does not lessen the importance of the act, nor justify a notary in failing to give due consideration to the discharge of a grave and responsible duty.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 241-243; Dec. Dig. § 48.*]

3. ACKNOWLEDGMENT (§ 22*)—NOTARIES—NEGLIGENCE—WHAT CONSTITUTES.

A notary is guilty of negligence if he certifies that he knows a person whom he does not know, or certifies that he knows a person on a mere introduction (without further proof) by some third person, or if he certifies that he knows a person to be the identical one who executed an instrument without such person actually appears before him, and personally acknowledges the instrument in his presence.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 123, 134; Dec. Dig. § 22.*]

4. ACKNOWLEDGMENT (§ 48*)—NOTARIES—NEGLIGENCE—RIGHT OF ACTION—PROXIMATE CAUSE.

M., a notary public, certified that Lula S. and Mary S. personally appeared before him, and acknowledged the execution of a deed. Mary S. was the owner of the real estate described in the deed. Lula S. presented the deed, together with a check purporting to be signed by one Smith, who was a depositor at the bank at which the presentation was made (but which check was a forgery), and requested payment of the check. The bank, on the strength of the certificate of the notary to the deed, showing that Mary S., the owner of the land, had personally appeared and acknowledged execution thereof paid to Lula S. the sum of \$750 on the forged check. Suit was brought by the bank against the notary and his bondsmen for breach of his notarial bond in making a false certificate. A demurrer was urged against the petition, and sustained by the court. *Held*, there was no error in sustaining the demurrer. The forged check, and not the false certificate made by the notary, was the proximate cause of the loss, and therefore no cause of action existed in favor of the bank and against the notary and the sureties on his bond.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 241-243; Dec. Dig. § 48.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by the State National Bank against Robert Mee and others to recover money judgment. Judgment for defendants on demurrer to petition, and plaintiff brings error. Affirmed.

Wilson & Tomerlin and E. E. Buckholts, both of Oklahoma City, for plaintiff in error. Winn & Brill, of Oklahoma City, for defendants in error.

ROBERTSON, C. This is an action by the State National Bank against Robert Mee, a notary public, and G. M. Stephenson and J. A. J. Baugus, sureties on the notarial bond of said Robert Mee, to recover damages for failure to faithfully discharge his duties as such notary public. The material part of the petition reads as follows:

"Fourth. Plaintiff alleges that the said Robert Mee has failed to faithfully perform the duties required of him by law as such notary public, and has been negligent in the performance and discharge of said duties, whereby this plaintiff has been damaged, for that on or about April 13, 1910, he, the said Robert Mee, did purport to take the acknowledgment of one Mary Stone, colored, and Lula Shields, colored, to a certain warranty deed, whereby the said Mary Stone and Lula Shields purported to convey to one Alfred Smith, for the sum of seven hundred and fifty (\$750.00) dollars, lots 23 and 24 in block 35 in Park Place addition to Oklahoma City, Oklahoma. The certificate of the said acknowledgment made by the said Robert Mee on said deed is in words and figures as follows, to wit:

"State of Oklahoma, Oklahoma County, ss.:

"Before me, Robert Mee, a notary public in and for said county and state, on the 13th day of April, 1910, personally appeared Mary Stone, a single woman, and Lula Shields, a single woman, to me known to be the identical persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

"Witness my hand and official seal the day and year above set forth. Robert Mee, Notary Public. My commission expires 2-15-1912."

"A copy of said deed with acknowledgment thereon is attached hereto, and made a part hereof, and marked Exhibit B for identification. Plaintiff alleges that said certificate of acknowledgment was false, in that the said Mary Stone did not personally appear before the said Robert Mee on the said 13th day of April, 1910, or any other time, and that the said Mary Stone did not execute the said deed, nor did she acknowledge to the said Robert Mee that she had executed the same; that the said Robert Mee certified to said acknowledgment of said deed without personal knowledge as to the identity of the per-

sons appearing before him, and without any investigation of the identity of said persons.

"Fifth. Plaintiff alleges that Mary Stone is the owner of said real estate described in the said deed, but that the said Lula Shields is not interested in the same in any manner whatsoever.

"Sixth. Plaintiff avers that the said Alfred Smith, mentioned as grantee in said deed, was at the time mentioned herein a depositor in the said bank of said plaintiff, and had a sum credited to his account on deposit of more than seven hundred and fifty dollars (\$750.00); that on or about April 13, 1910, said Lula Shields delivered said deed to the said plaintiffs, and at the same time she exhibited a check, payable to the said Lula Shields, and purported to be signed by the said Alfred Smith, which check was the purported consideration for the execution of the said deed. Plaintiff alleges that the check so exhibited to it as the consideration for said deed was a forgery, and was not executed by the said Alfred Smith; that, by reason of the fact that the said deed in the possession of the said Lula Shields bore certificate of acknowledgment as aforesaid, said plaintiff was deceived and led to believe the check to be genuine; and that, upon the faith of the acknowledgment upon said deed, and relying upon the truth of same, said plaintiff was induced to honor and pay said forged check. Plaintiff states that it has received back two hundred fifty (\$250.00) dollars of said amount so paid, and that the net amount which it has been damaged by reason of the premises is five hundred dollars (\$500.00)."

To this petition defendants filed a general demurrer, which was sustained by the trial court, and plaintiff brings this appeal, by transcript of the record, to reverse said order and judgment. The only question presented is whether or not the petition states facts sufficient to constitute a cause of action in favor of plaintiff and against defendants.

It is urged by plaintiff that it was induced to pay the forged check, and was deceived and led to believe that the same was genuine by reason of the fact that Lula Shields was in possession of and exhibited a deed bearing the certificate of acknowledgment of the notary public, and that it was upon the faith of this acknowledgment that the bank paid the check. The defendants contend, on the other hand, that the making of the false certificate by the notary was not the proximate cause of plaintiff's damage, but that the forged check was the direct cause thereof, and that therefore they should not be held liable. The plaintiff replies to this by saying that the loss and damage was occasioned by reason of the certificate of the notary to the deed, because it was upon the faith of this certificate that the bank was induced to believe that the check was genuine, it being the purported consideration of the deed, and,

had not the notary affixed to the deed his false certificate, thereby giving the deed its genuine appearance, the bank would not have paid the check.

Let us first examine into the liability of a notary's bond.

Section 4241, Rev. Laws 1910, which was in force at the time, provides that: "Every notary public before entering upon the duties of his office shall file with the county clerk of the county for which he is commissioned, his oath of office, and a good and sufficient bond to the state of Oklahoma, in the sum of one thousand dollars, with one or more sureties, to be approved by said clerk, conditioned for the faithful performance of the duties of his said office," etc.

Section 5349, Rev. Laws 1910, provides: "When an officer, executor or administrator within this state, by misconduct or neglect of duty, forfeits his bond or renders his sureties liable, any person injured thereby, or who is, by law, entitled to the benefits of the security, may bring an action thereon in his own name, against the officer, executor or administrator and his sureties, to recover the amount to which he may be entitled by reason of the delinquency," etc.

[1-3] The act of a notary public in taking the acknowledgment of a person to a deed, mortgage, or other instrument is purely ministerial and in no wise judicial. 1 Cyc. 557; 1 Am. & Eng. Ency. Law (2d Ed.) 485; *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966. But that fact does not lessen the importance of the act, nor justify a notary in failing to give due consideration to the discharge of a most grave and responsible duty. A notary is guilty of negligence if he certifies that he knows a person whom he does not know, or certifies that he knows a person on a mere introduction (without further proof) by some third person, or if he certifies that he knows a person to be the identical person who executed an instrument, without such person actually appears before him, and personally acknowledges the instrument in his presence. A notary may be deceived, no matter how careful and painstaking he may be, in the matter of making the identification; but that does not change his duty, or excuse him from using such care and prudence as may be required to convince him that the person who appears before him is in fact the person he claims to be.

In *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966, it was said: "A notary public is not a guarantor of the absolute correctness of his certificate of acknowledgment, nor does he undertake to certify that the person acknowledging the instrument owns or has any interest in the lands therein described; but he does undertake to certify that the party personally appearing before him is known to him to be the person described in and who executed the instrument. If the notary does not personally know the party appearing before him, he should proceed with caution,

and either decline to certify to the acknowledgment or investigate the question of the identity of the party with such care and prudence as the gravity of the case demands, and only certify to his identity upon being clearly satisfied of the fact as a result of such investigation. If a notary public certifies to an acknowledgment of an instrument without such personal knowledge and investigation, he is guilty of negligence, and he and his sureties are liable for all damages proximately resulting therefrom."

The foregoing seems to be the general rule with reference to the duties and responsibilities of a notary public. *Barnard v. Schuler*, supra; *Heldt v. Minor*, 113 Cal. 385, 45 Pac. 700; *Joost v. Craig*, 131 Cal. 504, 63 Pac. 840, 82 Am. St. Rep. 374; *Kleinpeter v. Castro*, 11 Cal. App. 83, 103 Pac. 1090; *Wilson v. Gribben*, 152 Iowa, 379, 132 N. W. 849. The Missouri statute goes much further, and makes his sureties liable for *any* injuries resulting from the false certificate.

[4] In *Barnard v. Schuler*, supra, it seems that defendant was a notary public, and Frances Winterhalter, a single woman, of Canton, Ohio, was the owner of certain real estate in the city of St. Paul; that on the day named in the petition three men and a woman appeared before defendant at his office; one of the men he had known for 20 years; the other man he knew only by sight; the man he had known so long introduced the woman to defendant as Miss Winterhalter, and another of the men, Mr. Winterhalter, introduced her as his sister, and asked him to take her acknowledgment of a mortgage in which Barnard, the plaintiff, was named as mortgagee, and which purported to be signed by Frances Winterhalter; the defendant, the notary, had never before seen the woman so introduced to him, and without inquiry or investigation of any kind as to her identity took her acknowledgment of the execution of the mortgage, and stated in his certificate that Frances Winterhalter, a single woman, to him personally known to be the person described in and who executed the mortgage, appeared before him as a notary public, and acknowledged the same to be her free act and deed; that the mortgagor was described as Frances Winterhalter, a single woman, of Minneapolis; that the woman who acknowledged the mortgage was an imposter, but who she was or what her name was is not shown by the record. It is further shown that Frances Winterhalter, who owned the lots, never gave any mortgage on them, and that plaintiffs, relying upon the defendant's false certificate, sustained damages in a sum equal at least to the amount of the verdict. The verdict was for the plaintiff as against the notary; but it must not be forgotten that that case was between the notary and mortgagee,

and that the loss occurred, not by reason of a forged check, but on account of the false certificate of the notary which gave character to the mortgage, and which of itself occasioned the loss of money. In the case at bar the action is not between the notary and the grantee named in the deed, but is between the notary and the bank who claims to have paid the grantee's forged check by reason of the false certificate. Had the grantee in fact given his check by reason of the false certificate, there could be no doubt of his right of action against the notary; but can the bank, by paying a check purporting to be signed by the grantee, but which in fact was a forgery, be permitted to maintain an action against the notary on account of his false certificate? We think not. To our minds the proximate cause of the bank's loss was not the false certificate of the notary but the forged check. It may be urged that both together combined to produce the loss, and that the forgery and the presentation of the deed with the false certificate of the notary were in fact an interrelated act; but this contention in sound reason cannot be maintained. Before this conclusion would be warranted, it would be necessary to show that the notary had in mind, or by the use of ordinary care and diligence could have known, the ultimate object or purpose of the unlawful act of the forger of the check, without which the bank would not have been defrauded. In other words, he would have to be one of the conspirators working together with his fellow conspirators for the purpose of defrauding the bank. Of course there is no such contention as that in this case. That being true, it is plain that the act of the notary, though negligent, was not the proximate cause of the loss; neither can it be said that it was a concurring act of negligence which caused the loss, but that the forgery of the check, the presentation of the same to the bank with the deed, and the failure of the bank to use sufficient means to discover the fact of the forgery, such as the identity of the parties, the proving of the signature to the check, etc., were in fact such independent, efficient causes as in themselves would be sufficient to break the chain of sequence, and thereby render the original act of negligence of the notary, not the proximate nor (in this case) even the remote cause of the loss, and therefore he nor his bondsmen are liable to the bank for the same. Had the grantee named in the deed been deceived by the false certificate, a wholly different situation would have been presented. But of that it is unnecessary to inquire now.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

SIPES et al. v. DICKINSON et al.
(Supreme Court of Oklahoma. Nov. 13, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 977*)—NEW TRIAL (§ 6*)—DISCRETIONARY RULING.

In the granting of motions for new trials as well as on petitions to vacate judgments, trial courts are vested with a large and extended discretion, and their orders in such matters will not be interfered with or reversed in this court unless it is clear that manifest and material error with respect to some pure, simple, and unimixed question of law has been made, and that except for such error the ruling would not have been made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977; * New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

2. CANCELLATION OF INSTRUMENTS (§ 37*)—PETITION—RESCISSION FOR FRAUD—"FRAUD."

A petition to rescind a contract for fraud must charge that a material representation was made by defendant to plaintiff; that this representation was false and that defendant knew it to be false when made; that it was made with the intention of inducing plaintiff to perform the act complained of; that plaintiff relied on the truthfulness of the representations and was deceived thereby; and that damage resulted from such deception.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

3. CANCELLATION OF INSTRUMENTS (§ 37*)—RESCISSION FOR FRAUD—PETITION—SUFFICIENCY.

Petition examined, and held to be good as against a general demurrer and sufficient to sustain the judgment of the trial court.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Pontotoc County; Robt. M. Rainey, Judge.

Action by J. M. Dickinson and others, partners, etc., against the Little Crater Company, Charles B. Sipes, and others, to vacate a judgment. From an order refusing to vacate, defendants bring error. Affirmed.

See, also, 122 Pac. 216.

Blanton & Andrews, of Pauls Valley, for plaintiffs in error. Clinton A. Galbraith, of Oklahoma City, for defendants in error.

ROBERTSON, C. On May 19, 1910, the plaintiffs below commenced an action against the defendants below in the district court of Pontotoc county, and sought thereby to cancel a deed to 320 acres of land in said county and to recover back a sum of money theretofore paid the defendants by the plaintiffs. On the 20th day of June thereafter, the defendants filed a general demurrer to the petition of plaintiffs, and specially urged therein that said petition did not state facts sufficient to constitute a cause of action in favor of plaintiffs and against defendants. From the rec-

ord it appears that this demurrer was regularly set for hearing and, on the 29th day of September following, in the absence of the defendants and their counsel, the same was overruled, but an exception was given them by the court, and at the same time an order was entered giving defendants ten days in which to answer and of which order they had due notice. The ten days elapsed, and on the 10th day of November following, default was taken against the defendants, and the cause was tried to the court and a judgment, entered in favor of the plaintiffs, canceling the conveyance described in plaintiffs' petition and decreeing the title to the land in controversy in the plaintiffs and giving judgment for \$500 and costs against the defendants in favor of the plaintiffs for money fraudulently obtained. Thereafter and on November 19, 1910, the defendants filed their petition in said cause to vacate said judgment and asking that a new trial be granted them, alleging, as grounds therefor, irregularity on the part of the plaintiffs, by which defendants were prevented from having a fair trial, and accident and surprise which ordinary prudence could not guard against, and challenging the sufficiency of the petition, and alleging that the judgment was contrary to law, and also alleging error in the action of the court in overruling their demurrer to the petition of plaintiffs. This petition to vacate the judgment was filed during the term of court at which the judgment was entered, and was, on the 26th day of November, 1910, denied by the court, to which action and ruling the defendants then and there excepted and took time to make and serve a case-made for this court, and they urge here two propositions, viz.: (1) That the court abused its discretion in denying the petition to vacate the judgment; and (2) that the petition upon which the judgment is based did not state facts sufficient to confer jurisdiction upon the court to render judgment thereon.

We will consider these assignments in their order. As has been seen above, the record discloses that the petition was filed May 19, 1910; that the general demurrer was filed June 20th thereafter; that on September 29th following, this demurrer was by the court overruled. The order overruling the same was in words as follows: "Now on this 29th day of September, 1910, the same being one of the juridical days of the regular July, 1910, term of said court, the above cause coming on for hearing on the demurrer of the defendants to the plaintiffs' petition filed herein; the plaintiffs being present by their counsel, and the defendants' counsel being absent, and this cause being regularly set for trial this day, the court after reading the said petition and demurrer, and being otherwise fully advised in the premises, finds that said demurrer is not well taken and should be overruled. It is therefore ordered and ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judged by the court that the demurrer of the defendants to the plaintiffs' petition be and the same is hereby overruled, to which action of the court the defendants except. It is further ordered by the court that the said defendants are ruled to answer the said petition of the plaintiffs filed herein in ten days from this date."

It appears from the record that defendants' attorneys were notified of the action of the court in overruling their demurrer, and, on October 12th, they wrote plaintiffs' attorney as follows: "October 12, 1910. Judge C. A. Galbraith, Ada, Okla.—Dear Judge: We will forward you the answer in the Statler-Waide case within a very short time. We hope that the delay will not inconvenience you in the least, and we do not see how it could, as the court is not in session. We will let you have an answer within the next few days. Yours truly." (C.-M. p. 48.) So far as the record discloses, this letter was not answered. The November term of the district court of Pontotoc county began on November 7th, and, on November 10th, the cause being reached on the regular call and the defendants still being in default, judgment was rendered against them. It seems from the record that shortly thereafter counsel for defendants called counsel for plaintiffs in error over the telephone and asked them to agree that the judgment might be vacated and a new trial granted. No agreement was reached at that time, counsel for plaintiffs asking time for consultation, and later, on November 19th, in a letter addressed to Messrs. Blanton & Andrews at Pauls Valley, Okl., attorneys for the plaintiffs in error, the request to have the judgment set aside was refused. The above are all of the facts disclosed by the record, upon which the first assignment of error is based, and it is upon these facts that counsel for plaintiffs in error rely.

We are of opinion that no abuse of discretion on the part of the trial court in denying the motion to vacate the judgment has been pointed out by plaintiffs in error in their brief. In fact, on page 41 they say: "The plaintiffs in error are frank to confess a grave doubt as to whether or not the showing made by them for the vacation of the judgment because of unavoidable casualty and misfortune preventing their appearing or defending is sufficient to require this court to reverse. It was ample to warrant the trial court's doing so."

[1] In the granting of motions for new trials, as well as on petitions to vacate judgments, trial courts are vested with a large and extended discretion, and their orders in such matters will not be interfered with or reversed in this court unless it is clear that manifest and material error with respect to some pure, simple, and unmixed question of law has been made, and that except for such error the ruling would not have been made. The principle involved in the granting or re-

fusal to grant a new trial is the same as that involved in the vacating or refusing to vacate a judgment, especially where the judgment was rendered at the same term at which the application to vacate is presented. This seems to be the universal rule of appellate courts on this subject. As was said in *Ardmore Lodge No. 9, I. O. O. F., v. Dawson et al.*, 33 Okl. 37, 124 Pac. 66: "The condition upon which this court will reverse an order of a trial court granting a new trial is well settled to be that such ruling will not be set aside unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been so made." See, also, *Jacobs v. City of Perry*, 29 Okl. 743, 119 Pac. 243; *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890; *Duncan v. McAlester-Choctaw Coal Co.*, 27 Okl. 427, 112 Pac. 982; *Farmers' & Merchants' Nat. Bank of Hobart v. School District No. 56 et al.*, 25 Okl. 284, 105 Pac. 641; *Cit. State Bank of Lawton v. Chattanooga State Bank of Chattanooga et al.*, 23 Okl. 767, 101 Pac. 1118; *Ten Cate v. Sharp*, 8 Okl. 300, 57 Pac. 645; *Yarnell v. Kilgore*, 15 Okl. 591, 82 Pac. 990; *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113; *Nat. Refrigerator & Butchers' Supply Co. v. Elsing*, 29 Okl. 834, 116 Pac. 790; *Chapman v. Mason et al.*, 30 Okl. 500, 120 Pac. 250; *Stapleton v. O'Hara*, 33 Okl. 79, 124 Pac. 55; *Jamieson v. Classen Co.*, 33 Okl. 77, 124 Pac. 67; *Davis v. Stilwell*, 32 Okl. 757, 124 Pac. 74.

The rule of decisions in the state of Kansas is the same as adopted in this state. *Anthony v. Eddy*, 5 Kan. 127; *Ffield v. Kinnear*, 5 Kan. 233, 238; *Owen v. Owen*, 9 Kan. 91; *Atyeo v. Kelsey*, 13 Kan. 212; *Brown v. Atchison, etc., Ry. Co.*, 29 Kan. 186; *City of Sedan v. Church*, 29 Kan. 190; *McCreary v. Hart et al.*, 39 Kan. 218, 17 Pac. 839; *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518; *Willis v. Wyandotte Co.*, 86 Fed. 872, 30 C. C. A. 445.

Had the trial court, from a consideration of the premises, deemed the application sufficient, and ordered the vacation of the judgment and awarded a new trial, its action would not have been interfered with here; but, from a consideration of the foregoing authorities and the condition of the record in this case, together with the admission of counsel in their brief, we cannot say that there was an abuse of discretion on the part of the trial court in denying the petition to vacate the judgment, and, inasmuch as none has been pointed out, we will not disturb the order made denying such relief.

It is next urged that the court erred in refusing to vacate the judgment for that the petition failed to state facts sufficient to constitute a cause of action in favor of plaintiffs and against defendants. It is also argued that the judgment should have been va-

cated because of error in overruling defendants' demurrer to the petition.

[2, 3] In order to properly consider this assignment, we must examine the petition. It reads as follows:

"First. That at all times hereinafter specified, the Little Crater Company was a corporation duly organized and doing business in the state of Oklahoma, and that the defendant Charles B. Sipes was its duly appointed agent, acting under a written power of attorney, and that the defendants Harry F. Hall and W. M. Waide were parties to and participated in the transactions hereinafter complained of.

"Second. That on the 16th day of November, 1909, the plaintiffs were the owners in fee of 320 acres of land, a part of section 17, township 8 north and range 8 east, located in Pontotoc county, state of Oklahoma, the same being the allotment of Richard Dearing, and for more particular description of said land reference is hereby made to Homestead Patent Record, vol. 1, p. 322, and Allotment Patent Record, vol. 1, p. 381, in the register of deeds office in Pontotoc county, state of Oklahoma, which was of the value of \$4,500, and the legal title to said land was then in Gale Statler for the use and benefit of the plaintiffs.

"Third. That on said 16th day of November, 1909, the plaintiffs entered into a contract with the defendant the 'Little Crater Company, acting through its agent, Charles B. Sipes, whereby the said defendant pretended to sell to the plaintiffs the right and license to sell anywhere within the United States certain patented rights or devices designated as crude oil burners, oil burning heaters, oil burning cooking stoves, atomizing oil burners, and oil burning system for stoves and furnaces during the life of said alleged patents for a consideration of \$5,000, then and there paid the said defendant, Charles B. Sipes, which said consideration was paid as follows, to wit, \$500 in cash and by the conveyance of 320 acres of land above described to the said Charles B. Sipes et al, by the said Gale Statler upon the request of these plaintiffs.

"Fourth. That when these plaintiffs undertook to sell and barter the aforesaid alleged patented devices, they discovered that the same were fraudulent and void, and that their continuing to attempt to sell and barter said devices upon the terms and conditions prescribed by the defendants would render them liable to prosecution for violating the law of the United States and of the state of Oklahoma. That said patented devices and the scheme under which the defendants stipulated that the same should be placed on the market were illegal, and the operation of said scheme was in violation of the laws of the United States and of the state of Oklahoma; and said defendants knew at the time they made the deal with

these plaintiffs, or should have known at that time, that their scheme was fraudulent and prohibited by the law of the United States and of the state of Oklahoma; and in making the deal with these plaintiffs as aforesaid they were guilty of fraud and deception and obtained from these plaintiffs by the contract aforesaid the consideration of \$5,000 in fraud of the plaintiffs' rights, and without giving anything of value therefor. That although the defendants knew their said scheme was illegal, they represented it to the plaintiffs to be legitimate and lawful, and the plaintiffs believed it to be such at the time said deal was made. That there was a total failure of consideration for the deed for the said 320 acres of land to said defendants, and of the \$500 in money paid the defendants. That these plaintiffs did not sell or barter any of said alleged patented articles or devices, and did not realize anything of value by reason of said trade, but have been compelled to pay out a large sum of money in expenses and attorney's fees, and have been annoyed and harassed on account thereof to their great damage in the sum of \$1,000. That C. L. Jackson, the principal agent of the Little Crater Company, was subsequently arrested for operating the same scheme the said Charles B. Sipes worked with these plaintiffs, and is now defendant in a criminal charge pending in the United States Court for the Western District of Oklahoma, at Oklahoma City.

"Fifth. That the defendant Harry F. Hall, on the 20th day of December, 1909, deeded his interest in said 320 acres of land to W. M. Waide. That the said deed was filed for record January 11, 1910, and recorded in Book 6, p. 158, on the deed records of Pontotoc county. That said Hall and Waide were parties to the aforesaid illegal and fraudulent transaction, and were acquainted with the facts connected therewith.

"Wherefore, the plaintiffs pray that the said conveyance of said 320 acres of land of said defendants be canceled, and that the defendants be adjudged to convey said land to these plaintiffs and deliver possession thereof to them, and for judgment against said defendants for \$500 cash paid them, and for damages occasioned these plaintiffs by said fraudulent transaction in the sum of \$1,000 and for such other and further relief as may be equitable and just and for the cost of this action."

As may be seen, this is an action to rescind a contract for fraud. The petition fairly charges that a material representation was made by defendants to plaintiffs; that these representations were false, and defendants knew them to be false when made; that they were made with the intention of inducing plaintiffs to make the deal complained of; that plaintiffs relied upon the truthfulness of these representations; and,

finally, that they were deceived thereby and damage resulted from such deception. This constitutes a good charge of fraud. This court has repeatedly so held. *Hobbs v. Smith*, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Gilpin v. Netograph Machine Co. et al.*, 25 Okl. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477; *Clark et al. v. O'Toole et al.*, 20 Okl. 319, 94 Pac. 547; *Prescott v. Brown*, 30 Okl. 428, 120 Pac. 991; *Edwards v. Miller*, 30 Okl. 442, 120 Pac. 996.

The petition construed liberally, as it must be in this connection, was good as against a general demurrer and amply sufficient to sustain the judgment, and in our opinion the court did not abuse its discretion in denying the petition to vacate on this ground.

It follows that the judgment of the district court of Pontotoc county should be affirmed.

PER CURIAM. Adopted in whole.

**ST. LOUIS & S. F. R. CO. et al. v.
FITZMARTIN.**

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

**1. MASTER AND SERVANT (§ 33*)—REFUSAL TO
GIVE SERVICE LETTER—DAMAGES RECOVERABLE.**

Where plaintiff, a freight train conductor, at the time he was discharged from such service of defendant for failure to prevent, by watching, the burglary of a car in his charge, has passed the age limit at and after which employment is not obtainable with most railway companies; where, within three weeks thereafter, in response to plaintiff's request to be reinstated with pay for all time lost, defendant offers to reinstate him without such pay, and renews such offer nearly three months after such discharge; where plaintiff declines such offer, and makes no proof of effort to find employment which his age would not prevent, or where there is a vacancy, and only made one application for employment before demanding, more than eight months after his discharge, a service letter showing cause of said discharge (under section 4056, Comp. Laws 1909), and another application a few days before he commenced this action, which was about a month after demanding such letter, where a service letter, in conformity with contract antedating enactment of said section 4056 and omitting statement of cause of his discharge, is by defendant issued to plaintiff immediately after such discharge, which letter plaintiff retains, and, until said demand under said section 4056, without objection thereto; where defendant, without oppression, fraud, or malice, refuses to give such second letter; and where there is no evidence that such second letter would have been of actual value or benefit to plaintiff—not more than nominal damages, if any could be recovered by plaintiff against defendant because of such refusal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 39; Dec. Dig. § 33.*]

**2. MASTER AND SERVANT (§ 33*)—REFUSAL TO
GIVE SERVICE LETTER—RIGHT.**

Where a discharged employé of a railroad company immediately after discharge receives and, without objection thereto, retains for more than eight months a service letter, in conformity with his contract with the company, whereupon

on he demands another service letter, conforming to the provisions of the statute cited in the preceding paragraph, and the company offers to comply with his demand upon condition that he first surrender the contract letter, which he refuses to do, but offers to surrender it upon condition that the statutory letter be first given him, defendant may rightfully refuse to issue such statutory letter.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 39; Dec. Dig. § 33.*]

**3. MASTER AND SERVANT (§ 33*)—RIGHT TO
SERVICE LETTER—CONTRACT—STATUTE.**

Neither the contract nor the statute, to which reference is made in the foregoing paragraph, contemplates that a discharged conductor shall, at the same time, be entitled to have more than one service letter on account of a single discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 39; Dec. Dig. § 33.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by Thomas Fitzmartin against the St. Louis & San Francisco Railroad Company, a corporation, and another. Judgment for plaintiff, and defendants bring error. Reversed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt, of Oklahoma City, for plaintiffs in error. W. D. Cardwell, Stringer & McQueen, and Jno. C. Wall, all of Oklahoma City, for defendant in error.

THACKER, C. Plaintiff in error will be designated as defendant, and defendant in error will be designated as plaintiff, in accord with their respective titles in the trial court.

Plaintiff, upon the verdict of a jury, recovered judgment in the trial court for the sum of \$10,000 as damages for the alleged unlawful, wrongful, willful, and malicious failure and refusal of the defendant, after demand by him made upon it, to give him what is known as a service letter, stating the cause for which it had discharged him from its service as its freight train conductor, and otherwise complying with the requirements of the act of April 24, 1908 (Laws 1907-08, c. 53, art. 3), which is section 4056, Comp. Laws 1909. Plaintiff was such conductor on defendant's railroad from April 30, 1907, to October 27, 1908, inclusive. During about 90 days prior to September 22, 1908, burglary (referred to as "robbery" throughout the record) of unwatched freight cars in transit on its road between Sherman, Tex., and Sapulpa, Okl., was of frequent occurrence; and on said date a bulletin was issued by M. A. Gossette, its trainmaster, notifying its conductors, including the plaintiff, that they, and their brakemen, would be held responsible and dismissed for any such burglaries thereafter occurring, the notice reciting, as reason therefor, that no reasonable excuse could be seen for such burglaries if trains were properly watched. On October 19, 1908, defendant's car No. 120927, in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

its train No. 529, in charge of plaintiff as conductor, was burglarized while in transit and not watched between the stations mentioned, and on October 27, 1908, the aforesaid trainmaster, by letter of that date, informed plaintiff that he was "taken out of service" for "allowing" said car No. 120927 to be burglarized.

[1] It appears from the evidence that "negligently failing to prevent" is meant by the word "allowing" as used in the last aforesaid letter, and that there was no intent to charge plaintiff with more than this.

A few days later plaintiff received, and thenceforth retained (without objection until July 10, 1908), a service letter in words and figures as follows:

"St. Louis & San Francisco Railroad Company. Certificate No. 362. Impression copy to be taken in book kept for that purpose. Francis, Okla. Nov. 2, 1908. This is to certify: That Thomas Fitzmartin has been employed in the capacity of brakeman and conductor at Francis, Okla. on the Red River Division from April 10, 1907, to October 27, 1908. Reasons for leaving service, discharged. Promoted to freight conductor April 30th 1907. Age 41; weight 160; height 5 ft. 5 in.; complexion light; hair auburn; eyes blue. George Geiger, Superintendent.

"No letters will be issued to employes leaving the service except on this form. They must be signed by head of department personally. W. C. Nixon, Vice Pres. and Gen'l Mgr."

Plaintiff had misrepresented his age in his applications to defendant for employment; and the foregoing letter, following his own statement, stated the same about five years younger than he was. At the time of his discharge plaintiff was a member of O. R. C. (Order of Railway Conductors), with immediate membership in local order No. 53 at Denison, Tex., where he resided; and he was in the service of defendant under the conductors' and brakemen's schedule of June 1, 1907, the same being a contract (known generally as "Trainmen's Schedule") between conductors and brakemen, entered into by them through their respective orders, and the defendant, which contain the provisions following:

"Article 24. Any trainman leaving the service of this company after employment of thirty days or more, will, at his request, be given a letter by his superintendent, stating his term of service, capacity in which employed, and whether he is leaving the service of his own accord or has been discharged.

"Article 26. Conductors and brakemen will not be discharged, suspended or given demerit marks without just and sufficient cause. Before inflicting punishment in form of dismissal or suspension, trainmaster or superintendent will hold investigation if requested by employe involved, except in cases of head-end collision or drunkenness. If

investigation is deemed necessary they may be present, together with a disinterested employe of their choice. All decisions will be rendered within 15 days when practicable. In case of dismissal, suspension or demerit marks, if any conductor or brakeman thinks sentence unjust, he shall have the right within 10 days to refer his case by written statement to his superintendent. Within 10 days of receipt of this notice the case shall have a thorough investigation by proper officers of the company, at which investigation he may be present if he so desires, and also be represented by any disinterested employes of his choice. In case he is dissatisfied with result of investigation, he shall have the right of appeal to the general officers. In case punishment is inflicted and subsequently found to be unjust, he shall be reinstated and paid at regular rates for all time lost."

Soon after being discharged plaintiff, through his said local order No. 53, procured E. L. Hill, who was chairman of the grievance committee of the Sapulpa Division of the Order of Railroad Conductors, to apply to defendant's division superintendent, Geo. Geiger, for reinstatement and pay at regular rates for all lost time; and Superintendent Geiger, within three weeks after plaintiff was discharged, proposed to reinstate him without pay for lost time, but plaintiff declined that proposition. About and not later than January 18, 1908, C. H. Hasel, chairman of the general grievance committee of the Order of Railroad Conductors, with Local Chairman Hill and plaintiff both present, took this matter of reinstatement with pay for all time lost, up in conference with J. E. Hutchinson, defendant's general superintendent, at Springfield, Mo.; but, after conference, this official declined to do more, and formally offered to reinstate plaintiff without pay for time lost. During the conference in this regard with Superintendent Hutchinson, plaintiff made a statement, as to the burglary mentioned and as to a prior burglary of a car in a train in his charge between the aforesaid stations, which convinced Chairman Hill that he had been wrong in his former view that plaintiff was entitled to pay for lost time; and, at the time of that conference, both Chairman Hasel and Chairman Hill thought plaintiff guilty of negligence in failing to prevent the burglary for which he was discharged, and thenceforth recommended his acceptance of the proposition of reinstatement without pay for lost time. Plaintiff appealed from this action of Chairman Hasel to the full general grievance committee of the Order of Railroad Conductors, but subsequently dismissed the appeal, and this committee approved Mr. Hasel's report of his action.

On July 10, 1908, plaintiff, for the first time, made demand of defendant for a service letter as follows: "Denison, Texas, July 10, 1908. Mr. J. F. Hickey, Ass't. Supt. St. L. & S. F. R. R. Co., Francis, Oklahoma—Dear Sir: About Oct. 27th, 1908, I was dis-

charged from the service of your company, and on Nov. 2d. same year, Mr. Geo. Geiger, then superintendent, undertook to give me a service letter which is neither satisfactory to me, nor does it conform to the laws of the state of Oklahoma, and in addition to this, it absolutely precludes my seeking employment elsewhere. I will therefore thank you to at once provide me with a service letter in compliance with the Okla. Statutes, under the title "Service Letters" and the act approved April 18th, 1908, of the Oklahoma Legislature; and to aid you in an exact compliance with this request and this law, I am enclosing you a sheet of white paper, upon which the service letter can be prepared as is required by such act. Trusting that I will receive this service letter at the earliest possible date consistent with the duties of your office, I am, Very truly, Thos. Fitzmartin, 512 W. Day St., Denison, Texas." Mr. Hickey referred this letter from plaintiff to defendant's division superintendent, Mr. H. F. Clark; and the latter answered same as follows: "St. Louis & San Francisco Railroad Company, Sapulpa, Oklahoma, July 17, 1909. Mr. Thomas Fitzmartin, 512 West Day Street, Denison, Texas—Dear Sir: Your letter of July 10th in regard to service letter. Please be kind enough to return to me the original service letter issued to you by Mr. Geiger, at which time we will furnish you with a service letter compiled in line with the present Oklahoma law. Yours truly, H. F. Clark, Superintendent." Plaintiff answered the last foregoing letter as follows: "Denison, Tex. Station, July 19, 1909. Mr. H. F. Clark, Supt., Sapulpa, Oklahoma—Dear Sir: Have received your reply to my request for service letter. Please send to me the service letter in compliance with the present Oklahoma law and I will then return to you the one given to me by Supt. Geiger. Yours truly, Thos. Fitzmartin, 512 W. Day St." On August 8, 1909, defendant answered the last preceding letter as follows: "Service Letter, Former Conductor Fitzmartin. Sapulpa, August 8, 1909. Mr. Thomas Fitzmartin, 512 West Day St., Denison, Texas—Dear Sir: Your favor of the 19th: If you will call on me personally I will be glad to give you another service letter written on any piece of paper which you will present. Yours truly, Superintendent."

There is no evidence whatever against defendant of oppression, fraud, or malice, nor of actual damage to plaintiff resulting from refusal of his demand of statutory service letter, and, if plaintiff could recover any amount whatever in this action, he would be limited to merely nominal damages (see *Ft. S. & W. Ry. Co. v. Ford*, 34 Okl. 575, 126 Pac. 745, 41 L. R. A. [N. S.] 745); but, as will hereinafter appear, there is an insuperable legal obstacle to his recovery of even nominal damages. It appears from his own testimony that at the time of his discharge, the plaintiff had passed the age limit at and aft-

er which "most" railroad companies would not employ. Plaintiff not only declined reinstatement in his former position as an employé of defendant without apparent cause, other than its refusal to pay him for the short time lost, but has, since his discharge, made little effort to secure employment from other railroads, and had made none to secure same from any other source before he commenced this action. After his discharge and during the same fall he applied to the Houston & Texas Central Railway Company, through a yardmaster or roadmaster who was his personal friend and had previously seen the letters given him by defendant, but it does not appear that this yardmaster or roadmaster was authorized to employ; that the question of service letter was in any manner mentioned; that his age would not have prevented his employment by that company; nor whether that company had any position open which he desired or could have filled. In August, 1909, and before commencing this action, he applied to the trainmaster of the Missouri, Oklahoma & Gulf Railway Company at Muskogee, Okl., getting the information in response that there was nothing for him; and, although he did not exhibit his service letter, he told said trainmaster he had one and what its contents was. It appears the trainmaster was a proper person to whom such application might be made; but it does not appear that there was a vacancy, nor that his age would not have prevented his employment, and it does not appear that the form or character of his service letter in any way affected the question. About a month before the trial of this case in September, 1910, he applied to the roadmaster of the Texas & Pacific Railway Company at Dallas, Tex., and afterward to the American Express Company for a job and failed to get it; but no service letter was exhibited, and it appears that no question in that regard arose; the cause of his failure to secure a job being undisclosed. Up to the time of the trial of this action, nearly two years after the discharge, it appears he had made no effort, further than stated above, to secure employment, except he went to the Midland Valley Railroad Company, and failing to see the trainmaster, informed his personal friend, a man named Dean, who, according to his designation, was a conductor, but who, according to the otherwise uncontradicted evidence for defendant, had not been in the service since plaintiff's said discharge, and who does not appear to have had any authority in that regard, that he, the plaintiff, desired a position with that road; and this man Dean promised an effort in his behalf, which is the end of the evidence in that regard.

It does not in any manner appear that plaintiff was ever refused employment for want of a service letter showing that he was discharged because of his failure to prevent the burglary of car No. 120927, or otherwise

comply with the provisions of section 4056, supra; and it nowhere appears that a service letter, merely stating that plaintiff was discharged would militate against his ability to obtain employment from another railroad company by reason of any agreement or understanding in that regard between such companies; but, to the contrary, there is an overwhelming amount of uncontradicted evidence to the effect that a letter merely showing the fact of discharge has no peculiar meaning or significance whatever, and is not less valuable to the bearer than a letter showing discharge for such cause as existed in this case. It appears that in all cases of giving employment by railway companies the employé is first taken upon probation pending an investigation of his past record; and this is true no matter what the form and character of his service letter may be, as well as in cases where he has no letter.

In the absence of extraneous evidence throwing light upon the comparative values of such letters, it would seem reasonable to infer that a letter omitting to state such cause of discharge would be the more valuable to the bearer because of the fact that he would have an opportunity to minimize the effect of such cause by stating the facts as fully and favorably as the truth would permit in his favor, and so ingratiate himself, by faithful and efficient service, into the favor of his new employer pending the latter's investigation of his record, that a subsequently obtained less favorable or more derogatory statement of the cause of his discharge, made by his former employer, would not result in a loss of his new position; but, of course, if there was any understanding between railroad companies by which such letters had a peculiar meaning or significance, and thereby prevented or tended to prevent, employment of the bearer, or if through malice, or other improper motive, those of whom the new employer inquired would give exaggerated or false derogatory information as to the cause of discharge, a service letter specifically stating the cause thereof, issued at the time of discharge, might tend to prevent the giving or minimize the effect of such exaggerated or false information, and be preferable and more valuable to the discharged employé; but, under the evidence in this case, no fact or inference whatever appears in support of the view that a letter showing the cause of discharge would be the more valuable.

When the cause of discharge is derogatory to the person discharged, as when it is purely economic or is clearly wrongful, we are able to believe that such letter may be helpful in securing probative employment; but it is inconceivable that such a letter as conformity to the statute would have required in this case could have had any value, above the value of the letter given plaintiff, as long as it does not appear either that there was any understanding between railroad com-

panies, any derogatory information actually given, any probative employment secured, or anything whatever to give the letter given a lesser value than the letter demanded would have had.

Although a much larger number of witnesses, apparently far better qualified in point of knowledge to give testimony in this regard, including many railroad officials and Chairmen Hasel and Hill of the Order of Railroad Conductors, testified for defendant to the contrary, witnesses for the plaintiff testified that an applicant for employment, with a service letter showing that he had been discharged and not specifying the cause therefor, could not get employment with another railroad company, but, at best, this appears to have been merely opinion evidence, based upon no disclosed facts within their own knowledge which supports such opinion; and these witnesses for plaintiff in every instance gave further testimony, almost, if not quite, destroying any possible probative value in their prior statement that an employé with such a letter could not get employment; and we assume they did not mean to say that one having a service letter giving a serious wrong, such as dishonesty or other serious deficiency, as the cause of discharge would have any better chance to secure employment than one having a letter merely showing "discharged," although the testimony for plaintiff does not discriminate in this regard. Allowing every proper presumption, and indulging every reasonable inference from the testimony in favor of plaintiff upon this point, it appears, when the evidence of plaintiff is considered as a whole, that these witnesses had, without actual knowledge of the cause of failure to get employment in certain, and, so far as was specified, very few, instances, erroneously concluded from the bare fact of failure in these instances, and notwithstanding success in others, that an applicant for employment with such a letter was at so great a disadvantage if his service letter merely stated that he was discharged that they were justified in testifying that he could not get employment. As an instance illustrating a lack of value in the testimony for plaintiff that such letters precluded the bearer from securing employment, one of the witnesses, so testifying most strongly on direct examination, admitted on cross-examination, touching the only instance of failure to get employment he specified, that he was employed notwithstanding he presented such a letter, and was retained pending investigation of the references given in his written application for the job, after which he was rejected—evidently because of answers to private inquiries which we cannot assume to have been more derogatory than a true statement of the cause of discharge—and it appears from the testimony given, both for plaintiff and defendant, when the same is considered as a whole and its appar-

ently conflicting parts are harmonized, which may be done by harmonizing the apparent conflicts in the several parts of the evidence for plaintiff, that applicants in search of employment in vacant positions, with or without service letters, and regardless of lack of statement of cause of discharge when they have such letters, if they make the impression of being reliable and capable upon the mind of the employing officer, are taken on probation pending investigation of their past record, which investigation is always made, and are retained if they sustain the good impression thus made and their past record is found to disclose no fact preventing their retention. Whatever may be the real facts as to the treatment given bearers of letters showing merely that they have been discharged, granting for the sake of argument that it may be true that the company and its superintendent issuing such discharge may, in response to inquiries from the company to which it is presented, and who has taken the bearer on probation, by private letter make statements more derogatory to him as to the cause of his discharge than they would do if they had previously given him a letter showing the cause, it must be conceded, we think, that the evidence in this case does not justify such imputation against the defendant or any one representing it. Indeed, it does not appear that plaintiff's record with defendant was ever investigated by any other company, and the very few persons, in several instances his personal friends, to whom he applied for employment with other companies apparently had only his own statement, if that, as to the cause of his discharge.

[2, 3] Assuming without deciding that the provision of the contract between these parties relating to service letters (article 24, *supra*) was entirely for the benefit of plaintiff, and gave him an optional right to a certain form of letter without so much as by implication limiting his right to that particular form of letter as against the subsequently enacted statute, and that he could waive that right, and assert a right under the statutory provision in that regard without the assent of the defendant—i. e., that the contract was not necessarily the exclusive measure of the rights and duties of the parties as to service letters as against this statute—we are of the opinion that neither the statute nor the contract contemplated that a discharged employé should be entitled to have more than one service letter at the same time on account of a single discharge.

In view of the undisputed evidence to the effect that there is a demand for service letters, resulting in their forgery in some instances and in untrustworthy persons falsely assuming the name of the persons given genuine letters in other instances, defendant's demand of plaintiff, in response to the latter's demand for a statutory form of let-

ter, that the service letter issued to plaintiff on November 2, 1908, under the contract or trainmen's schedule, should be returned to it as a condition precedent to the issuance of a letter under the act of April 24, 1908, appears reasonable and just; and defendant's rule forbidding the issuance of a second letter until the prior letter has been surrendered, in deference to which such demand was made of plaintiff, seems to be subject to no fair or reasonable adverse criticism.

The fact that the statute imposes a penalty upon a railroad company for willfully or negligently failing or refusing the letter thereby required, and none upon the demandant for failing or refusing to surrender another and different letter theretofore received and retained by him, as well as the fact that the lesser danger of possible harm would seem to require that the contract letter should be surrendered before the issuance of the statutory letter should be required, emphasize the reasonableness of defendant's refusal to issue the statutory letter. Assuming, without deciding, that plaintiff has not waived his right to afterwards demand and receive a statutory letter by accepting and, for more than eight months, without objection, retaining the contract letter that was issued to him immediately after his discharge, we are of the opinion that, upon defendant's demand therefor, plaintiff was bound to surrender the first issued letter as a condition precedent to his absolute and unconditional right to the statutory letter demanded by him on July 10, 1909. The statute by its terms takes no account of pre-existing contracts; we cannot assume it was thereby intended, if it was constitutionally possible, to supplement plaintiff's contract by giving a right to an additional letter—it seems more reasonable to say that it contemplated the issuance of only one letter to a discharged employé, and that an employé holding a different form of letter, which he had accepted under a contract entered into before the enactment of the statute, is not, while he holds such letter, in position to rightfully demand a letter in the statutory form.

Among the numerous questions presented upon the errors assigned, it is urged by defendant that the act of April 24, 1908, is violative of the "due process" and "equal protection" clauses of the fourteenth amendment and the provision against "any law impairing the obligations of contracts" in the federal Constitution, as well as of the "due process," "obligation of contracts," and "liberty of speech" provisions of the state Constitution, and it is also urged that, if the statute be held valid, it gives no right to civil damages for failure to comply with its provisions, in view of the absence of such right at common law; but it is unnecessary to determine any of these questions in this case.

However, as tending to show that the statute is not unconstitutional, we direct attention to the cases of *St. Louis Southwestern Ry. Co. of Texas v. Hixon* (Tex. Civ. App.) 126 S. W. 338, and *St. Louis Southwestern Ry. Co. of Texas v. Griffin* (Tex. Civ. App.) 154 S. W. 583, and, as tending to show that a private action for civil damages for breach of duty imposed by the statute can be maintained, we direct attention to cases cited in and editorial conclusion of notes to *Wolf v. Smith*, page 338, and *Leathers v. B. D. T. Co.*, page 349, in 9 L. R. A. (N. S.).

For the reasons stated, the judgment of the trial court should be reversed.

PER CURIAM. Adopted in whole.

J. I. CASE THRESHING MACH. CO. et al.
v. WALTON TRUST CO. et al.
(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. TRUSTS (§ 63½*)—EQUITABLE INTEREST—“RESULTING TRUST.”

Resulting trusts are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition, or from accompanying facts and circumstances, that the beneficial interest is not to go to or be enjoyed with the legal title. In such a case, a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 91, 92, 98, 99, 100; Dec. Dig. § 63½.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 6188-6192.]

2. TRUSTS (§ 70*)—RESULTING TRUSTS—CORPORATION.

A deed executed by a corporation to one of its officers, without consideration, that the grantee might procure a loan thereon for the corporation's benefit, and which loan is procured and the entire consideration paid over to the grantor in the deed, there being no fraud in the transaction; and where shortly thereafter the land is reconveyed to the corporation, which assumed payment of the mortgage debt. *Held*, that the only interest acquired by the grantee was the naked legal title, and that the equitable estate in the land remained in the grantor, which was in fact the true owner.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 95-97; Dec. Dig. § 70.*]

3. TRUSTS (§ 88*)—PAROL EVIDENCE—ESTABLISHMENT OF RESULTING TRUSTS.

Resulting trusts are not within the statute of frauds, and may therefore be established by parol evidence, where not otherwise incompetent.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 130-133; Dec. Dig. § 88.*]

4. JUDGMENT (§ 780*)—LIENS—PROPERTY SUBJECT—LEGAL TITLE—TRUSTS.

The lien of a judgment does not attach to the mere legal title to land, standing in the name of the judgment debtor, when the equitable estate is in another, and a transitory seisin of lands by the judgment debtor, in trust for another,

will not subject them to the lien of a judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1341, 1343-1349; Dec. Dig. § 780.*]

5. JUDGMENT (§ 780*)—LIENS—PROPERTY SUBJECT—LEGAL TITLE—TRUSTS.

This rule applies where the judgment debtor, although having the legal title to the lands, holds it subject to a resulting trust in favor of another.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1341, 1343-1349; Dec. Dig. § 780.*]

6. JUDGMENT (§ 780*)—LIEN—PROPERTY SUBJECT.

The judgment lien contemplated by section 5941, Comp. Laws 1909, is a lien only on the actual interest of the judgment debtor, whatever that may be; therefore, though he appear to have an interest, if he has none in fact, no lien can attach.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1341, 1343-1349; Dec. Dig. § 780.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Walton Trust Company against the J. I. Case Threshing Machine Company and others. Judgment for plaintiff, and the threshing company and another bring error. Affirmed.

Chas. A. Cook, of Muskogee, for plaintiffs in error. J. B. Furry, of Muskogee, for defendant in error Walton Trust Co. Gibson & Thurman, of Muskogee, for defendants in error Bank of Commerce, James K. Edmonds, and Susie Edmonds.

SHARP, C. This is a suit brought by the Walton Trust Company, against James K. Edmonds, Susie Edmonds, the Bank of Commerce, the Caney Creek Oil Company, Charles C. O'Dell, the Indian Land & Trust Company, W. M. Martin, J. I. Case Threshing Machine Company, and J. L. Wisener, sheriff, the primary purpose of which was to foreclose six certain real estate mortgages, given by the defendants Edmonds and wife to the plaintiff, to secure the payment of a loan of \$5,472, together with interest, and the payment of which was assumed by the defendant Bank of Commerce. The other defendants were made parties for the purpose of determining any interest they might have in and to said real estate, and the priority of all claims or liens thereon. The defendant J. I. Case Threshing Machine Company answered setting up a judgment lien on the lands included in the mortgage foreclosure proceedings, which judgment was recovered by it on the 6th day of July, 1907, in an action theretofore pending in the United States court for the Western District of the Indian Territory at Muskogee, in which the Territorial Land & Trust Company, J. K. Edmonds, and others were defendants, and on which judgment there was a balance due and unpaid of \$1,712.32, and interest, and charging that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—49

said judgment was duly entered and indexed in the records of said United States court, and constituted a lien upon the lands of the said J. K. Edmonds, situated within Muskogee county, prior in point of time, and paramount to the several mortgages executed by Edmonds and wife to the Walton Trust Company. In the reply of the latter company to the answer of the threshing machine company, as well as in the answer of the Bank of Commerce, it was contended that the defendant J. K. Edmonds at no time had any beneficial interest in the lands conveyed to him by the Bank of Commerce on the 8th day of February, 1908; that the said Bank of Commerce was, from June 7, 1905, the owner by purchase from one C. K. Marks of all and singular the lands in question; and that it had been and was at all times thereafter, including the date of the execution of the deed to Edmonds, and then was, the real owner, subject to no equities save and except the lien of the mortgages in process of foreclosure; that its deed to said lands had been placed of record on the day following its purchase, and that on the 8th day of February, 1908, said Bank of Commerce, being desirous of borrowing money upon the security of said land, and for convenience, executed an instrument in form a warranty deed to the defendant Edmonds, and which said deed was placed of record in the office of the register of deeds of Muskogee county on February 19, 1908; that although it was in form a warranty deed, reciting a cash consideration, no consideration in fact passed to said bank for said conveyance, but the sole and only purpose was to enable the Bank of Commerce to procure a loan thereon, of the plaintiff trust company, the same to be secured by mortgage upon said lands; that said Edmonds was the holder of the naked legal title thereto, for the accommodation and use of the Bank of Commerce, of which bank he was at the time an officer and employee; that the entire proceeds of the several mortgages by him executed to the Walton Trust Company had been then and there paid over to the said Bank of Commerce; and that thereafter, and on the 30th day of April, 1908, said Edmonds, joined by his wife, without consideration, reconveyed the legal title of all said land to said bank. It was further contended on the part of the trust company and the bank that the judgment had never been entered and indexed in the records required by law to be kept by the clerk. The conclusions that we have reached render unnecessary a consideration of this question.

The case was tried largely upon an agreed statement of facts and admissions appearing in the pleadings. Upon the issue of what title Edmonds received by the deed from the bank, no other evidence was introduced than the admission of the execution of the deed, and the testimony of the defendant Edmonds. This testimony is brief, and upon this issue is as follows: "Q. Do you remember the

transaction between yourself and the Bank of Commerce when the land in controversy was conveyed to you on or about the 8th day of February, 1908? A. I do. Q. State what, if any, consideration was paid by you to the Bank of Commerce for that conveyance to you. A. Not a cent. Q. Do you know why the land was conveyed to you by the Bank of Commerce, Mr. Edmonds? A. To get a loan on it. They wanted Jim Dooley to take it in his name, but his wife objected to signing a mortgage to it. I told Mr. Rowsey I would do it. I understand they would not make a loan to a corporation. Q. Subsequently, on the 30th day of April, 1908, you reconveyed this land by deed to the Bank of Commerce. State whether or not you received any consideration from the Bank of Commerce for this conveyance. A. No, not a cent. Q. State whether or not you had any interest in the land during the time that it was in your name, or whether it was conveyed to you solely for the purpose of making this loan, as you say. A. It was conveyed to me for the purpose of making this loan. Q. At the time you and Mrs. Edmonds signed the notes and mortgages described in the plaintiff's petition in this case, to procure a loan on the land in controversy in this case, what was the agreement, if any, between you and the Bank of Commerce as to who would pay the mortgage? A. Well, I was to be out no expense whatever to pay the loan or anything. Q. Was it the understanding that the Bank of Commerce assumed the payment of these notes and mortgages? A. Certainly. Q. Was that the agreement when you conveyed the land back to the Bank of Commerce on April 30th? A. Yes, sir. Q. Who was Mr. Rowsey? A. President of the Bank of Commerce, I think; president or cashier. Q. This arrangement was made through him? A. Yes, sir." While a part of this testimony was objected to, the witness was not cross-examined, and the facts testified to stand admitted.

It is insisted on the part of the plaintiffs in error that: (1) Regardless of the foregoing evidence, by the execution of the deed from the bank to Edmonds, both the legal and equitable title to the lands included therein passed to and vested in the grantee, and that its judgment, having been duly entered and indexed, became a lien thereon, prior to that of the mortgagee, the Walton Trust Company; (2) the court erred in admitting the above parol testimony of the defendant Edmonds.

[2] Obviously, at no time was James K. Edmonds the owner of other than the naked legal title, and that at all times the equitable estate in said lands remained in the grantor, the Bank of Commerce, who remained in possession and continued to exercise full control and ownership thereover, there can be no question. The very purpose of the transfer was to enable the bank, acting through the medium of its officer, to obtain

a loan, not for the individual benefit of the grantee, but of the bank. None of the consideration named in the deed was paid by the grantee, and no beneficial estate in the land was at any time claimed by him. It is not charged that the conduct of the bank or Edmonds was in any way fraudulent; in fact, the former assumed the payment of the borrowed money. Nor is there claim that a gift was intended.

[1] No better illustration of a trust arising by operation of law could be stated than here. The conveyance was made without consideration to one occupying a position of confidence and trust toward the grantor. Immediately thereafter a loan for the benefit of the grantor was procured, and the entire proceeds paid over to the bank. The latter at all times remained in possession of the land conveyed, and assumed payment of the debt contracted in the name of its officer, and in a few weeks thereafter a deed of reconveyance was made to the bank; no consideration therefor being received. In *Flesner v. Cooper*, 134 Pac. 379, we said that a resulting trust arose where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears, or is inferred from the terms of the disposition, or from accompanying facts or circumstances, that the beneficial interest is not to go to or be enjoyed with the legal title; that in such a case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner. By section 7268, Comp. Laws 1909, it is provided that when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made, while by section 7267 trusts created by operation of law are expressly recognized. Although the deed executed by the bank to Edmonds purported on its face to be a warranty deed, conveying the absolute title, yet having been made wholly without consideration by a corporation to one of its officers, for the corporation's benefit, while no writings were entered into declaratory of the terms and conditions and the purposes for which the conveyance was made, it is clear that it was not intended by the deed to convey to the grantee the absolute title or to vest in him a beneficial interest in said lands, but instead to convey only the naked legal title.

[4,5] Section 5941, Comp. Laws 1909, in force at the time, under which it is claimed the judgment lien of the plaintiff attached, provides that judgments of courts of record in this state shall be liens upon the real estate of the debtor within the county in which the judgment is rendered from and after the time the judgment is entered on the judgment docket. Section 5968 provides that all real estate not bound by the lien of a judgment, as well as goods and chattels of

the debtor, shall be bound from the time they are seized in execution. It goes without saying that the real estate of one party cannot be made subject to a judgment in favor of a stranger, and that only the property of the judgment debtor can be subjected to its satisfaction, as it would be unconscionable and violative of the first rule of property to hold that that which belongs to one may be taken on execution, or made liable to the satisfaction of the debt of another.

[6] The lien of a judgment does not attach to the mere legal title to the land existing in the judgment debtor, when the equitable and beneficial title is in another, and a transitory seisin of lands by the judgment debtor, in trust for another, will not subject the lands to the lien of a judgment. This rule applies where the judgment debtor, although having the legal title to the lands, holds it subject to a resulting trust in favor of another. *Black on Judgments*, § 421; 23 Cyc. 1371. A judgment is a lien only on the interest of the debtor, whatever that may be; therefore, though he seems to have an interest, if he had none in fact, no lien can attach. *Freeman on Judgments*, §§ 357, 357a.

Referring to *Dassler's Comp. Laws 1879*, p. 656, § 419, of the state of Kansas, of which section 5941, *supra*, as regards this question, is a counterpart, Judge Brewer, in *Holden v. Garrett*, 23 Kan. 99, in a very thoroughly considered opinion, said: "This evidently contemplates actual and not apparent ownership. The judgment is a lien upon that which is his, and not that which simply appears to be his. How often the legal title is placed in one party when the equitable title, the real ownership, is in others! Many reasons induce this—convenience in managing, facility in passing title, number of parties interested, and others needless to mention. And yet the record discloses only the naked legal title. Now if the judgment is a lien upon all that appears, it will cut off all the undisclosed equitable rights and interests. To extend the lien to that which is not, but which appears of record to be, the defendant's, is to do violence to the language. 'Real estate of the debtor' plainly means that which is in fact of or belonging to the debtor." See, also, *Baird v. Williams*, 4 Okl. 173, 44 Pac. 217; *Harrison v. Andrews*, 18 Kan. 535; *Bowling v. Garrett*, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377; *Markley v. Carbondale Investment Co.*, 67 Kan. 535, 73 Pac. 96. This rule, supported by many authorities unnecessary to cite, was the law in Arkansas, hence by congressional enactment the law in force in the Indian Territory at the time of the rendition and recordation of the judgment in favor of the J. I. Case Threshing Machine Company, and is announced in *Watkins v. Wassell*, 15 Ark. 73, in the following language: "The lien of a judgment is subject to every equity that exists against the land in the hands of the debtor, at the time of docketing the judg-

ment, and the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor has in the estate." *Byers v. Engles*, 16 Ark. 543; *Tuley v. Ready*, 27 Ark. 98; *Doswell v. Adler*, 28 Ark. 83; *Apperson v. Burgett*, 33 Ark. 328; *Jones et al. v. Fletcher*, 42 Ark. 422.

It may be asserted as a rule very generally recognized that a judgment creditor is not a bona fide purchaser. He parts with nothing to acquire his lien. He is in a very different position from one who has bought and paid, or who has loaned, on the face of the recorded title. The equities are entirely unlike, as one has, and the other has not, parted with value relying upon the record. If the real avails over the apparent title, the one is no worse off than before he acquired his lien—has lost nothing; while the other has lost the value paid or loaned. Hence equity will help the latter, while it cares nothing about the former. *Harrison et al. v. Andrews*, 18 Kan. 535; *Holden v. Garrett*, supra; *Burke v. Johnson*, 37 Kan. 337, 15 Pac. 204, 1 Am. St. Rep. 252; *McCalla v. Knight Investment Co.*, 77 Kan. 770, 94 Pac. 126, 14 L. R. A. (N. S.) 1258; *Good v. Williams*, 81 Kan. 388, 105 Pac. 433, 135 Am. St. Rep. 392; *Allen v. McGaughey*, 31 Ark. 253; *Williams v. McIlroy*, 34 Ark. 85. Such is the case of plaintiff in error. Its judgment against Edmonds antedates by many months the transfer from the bank to Edmonds. It extended no credit on the strength of the record title, and could not have been influenced in its previous dealings, by the subsequent transaction between its debtor and the bank.

[3] Resulting trusts, not being embraced within the statute of frauds, their existence need not be evidenced by any writing, and may therefore be established by parol evidence. *McCoy v. McCoy*, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146; *Flesner v. Cooper*, 134 Pac. 379; *Pomeroy's Equity Jur.* §§ 1036, 1040, 1041; 1 *Greenleaf on Evidence*, § 266; *Underhill on Evidence*, 312; 9 *Enc. of Evidence*, title "Parol Evidence"; 1 *Perry on Trusts*, title "Resulting Trusts."

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole

WALRUS MFG. CO. v. McMEHEN.
(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. SALES (§ 255*)—WARRANTIES—RIGHTS ACQUIRED—ASSIGNMENT.

A right of action in original purchaser and debtor against original seller, who is the creditor, does not run with chattel purchased in contracting the debt in the first instance to a second purchaser in succession, who assumes

payment of the debt upon release of original debtor, in absence of such intent of the parties to such novation and of any assignment of such right by original to substituted debtor.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 715, 716; Dec. Dig. § 255.*]

2. SALES (§ 445*)—ASSIGNMENT OF WARRANTY TO SECOND PURCHASER—QUESTIONS FOR JURY.

Where, in respect to failure of consideration, it cannot be said, as matter of law, that the parties to a novation (by which plaintiff releases N. from liability upon notes in consideration of defendant's assumption to pay the same, the defendant having acquired by purchase from N. the chattel for which N., as original purchaser, executed such notes to plaintiff and having assumed to pay said notes in consideration, as between himself and N. only, of his said acquisition) so intended nor that N. assigned his right to the defendant, it was error for the court to instruct the jury, as matter of law, that defendant was subrogated to all the rights of N. as against plaintiff in respect to the latter's implied warranty, if any, of the quality of the chattel to N.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1303-1308; Dec. Dig. § 445.*]

Commissioners' Opinion. Division No. 1. Error from Superior Court, Pittsburg County; P. D. Brewer, Judge.

Action by the Walrus Manufacturing Company against C. A. McMeheh. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Wright & Boyd, of McAlester, for plaintiff in error. Carl Monk, of McAlester, for defendant in error.

THACKER, C. The position of the parties, in respect to their descriptive titles, remains the same here as in the trial court. Plaintiff sold the Nix Pharmacy and installed in its place of business at McAlester, Okl., a soda fountain, with articles for use in connection therewith, including a patented carbonator, for \$1,100, of which \$200 was paid at the time; the balance of \$900 being evidenced by the purchaser's notes secured by his chattel mortgage on all the property. And about 2½ months later defendant purchased with the consent of plaintiff, if not from it, and installed in his place of business in said McAlester all the said property upon the representation of the Nix Pharmacy that the carbonator, which he saw before purchasing, was a fine and first-class carbonator, guaranteed by plaintiff to do the work any other carbonator would do (these representations being repeated in the presence of a representative of plaintiff in this transaction), at the same time, in substitution for the obligations of certain of the Nix Pharmacy notes and mortgage, by indorsement thereon, assuming to pay the said notes in the sum of \$622 and giving his own chattel mortgage on the same property as security therefor; the Nix Pharmacy being thus released on its obligations to plaintiff. But it is not shown how the amount of the original purchase price representing the difference between said \$900

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and said \$622 was eliminated as a liability, nor whether the price at which the defendant purchased exceeded said sum of \$622. It appears that defendant paid plaintiff the sum of \$418, leaving an unpaid balance evidenced by said note in the aggregate sum of \$204; but, in the meantime, the carbonator had failed properly and almost entirely to perform the function for which it was intended, although three times sent to plaintiff for repairs and as often returned to defendant with such repairs as plaintiff deemed proper or could make thereon; and defendant, having offered to return the carbonator and demanded a surrender of his unpaid notes, to which plaintiff would not assent, ultimately discontinued payment of these notes, this action by plaintiff following as a sequence.

The evidence tended to show that, although the carbonator would have been worth \$250 if it would properly have performed the function for which it was intended, it was worthless when defendant purchased it and at all times thereafter, it being, in point of mechanism and material, inherently unsuited to perform such function; but there is nothing further to throw light upon how the carbonator was valued or what portion of the purchase price was apportionable to it in either the original sale to the Nix Pharmacy or the later sale to defendant. Defendant, waiving any right he might have had to damages in excess of the face value of the seven notes sued on, tendered the carbonator to plaintiff in court at the time of the trial and defeated plaintiff's action upon evidence tending to prove the facts as stated.

The application of the Nix Pharmacy to plaintiff for the purchase of this property, in the first instance, recited that the title should remain in plaintiff pending discharge of deferred payments on the purchase price; but this reservation of title in plaintiff was waived and lost by its acceptance of the Nix Pharmacy notes and chattel mortgage for such deferred payments, the taking of the notes and mortgage being inconsistent with plaintiff's ownership of the property; and it appears inferentially that that portion of defendant's testimony in which he said he purchased the property of plaintiff may have been given upon the erroneous theory that plaintiff held the legal title to the property at the time of his purchase by reason of said order, although the idea that there was a rescission of plaintiff's sale to the Nix Pharmacy and a new sale by it to defendant is not so clearly excluded as to remove all doubt in this regard. However, it appears that the transaction between the plaintiff, the defendant, and the Nix Pharmacy, to which each was privy, was merely a novation of parties in which the plaintiff released the Nix Pharmacy, and, supported by the consideration thereof, the defendant assumed and became legally bound for the payment of the Nix Pharmacy notes to the plaintiff—no other

intent appears. See 29 Cyc. 1136, and Michigan Stove Co. v. A. H. Walker Co., 150 Iowa, 363, 130 N. W. 130, 25 Ann. Cas. 505, and notes thereto at page 508.

[1] The evidence adduced upon the trial does not raise this case above the plane of doubt and uncertainty as to the actual facts and the elemental character of the transaction in which the defendant acquired the property mentioned and assumed the payment of the Nix Pharmacy notes; and several possible explanatory theories suggest themselves for consideration in trying to ascertain what the evidence does show or tend to show in this regard. If the Nix Pharmacy, as owner, sold the property to defendant without assignment to him of its right of action, if any it had, upon plaintiff's original warranty, if any there was, to it, and plaintiff did not warrant the property to defendant, it would seem clear that defendant could not successfully defend against these notes, assumed by him, by a promise to pay supported by the consideration of plaintiff's release of the Nix Pharmacy from its obligation thereon. It appears that such a novation of parties could not operate to cause the Nix Pharmacy's right of action for breach of warranty, if any it had, to run with the property to the defendant, nor to subrogate defendant to any right of the Nix Pharmacy in respect to such warranty as against plaintiff. As, in effect, against the new debtor's right of action or defense upon such warranty, see 29 Cyc. 1137, 1138; 21 Am. & Eng. Enc. L. (2d Ed.) 671; Keller v. Beatty, 80 Ga. 815, 6 S. E. 598; Adams v. Power, 48 Miss. 450. As to assignment of right of action see, in connection with section 4268, St. 1890 (section 7349, Comp. Laws 1909), the following: 4 Cyc. 7, 8, and 111, 112; Gustafson v. Stockton, etc., 132 Cal. 619, 64 Pac. 995; Nelson v. Armour P. Co., 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237.

If plaintiff, as owner, sold the property, in part or in whole through the agency of the Nix Pharmacy, to the defendant, the representations of the Nix Pharmacy as to the quality of the carbonator, the defects being latent, would be binding upon plaintiff; and it appears that defendant, if he relied upon such representations, would be entitled to set off against the face value of the notes sued on damages for breach of warranty measured by the difference between the value of the carbonator as it actually was at the time to which the warranty relates and its value as it would have been if it had conformed to the requirements of the warranty (Wiggins v. Jackson, 31 Okl. 292, 121 Pac. 662, 43 L. R. A. (N. S.) 153, and Spaulding Mfg. Co. v. Holiday, 32 Okl. 823, 124 Pac. 35); but, if there was any evidence whatever justifying the same, which we deem it unnecessary to determine, the case was not tried upon that theory, and the judgment cannot be affirmed upon the same for obvious reasons.

This case, in respect to ground of defense,

was tried upon the theory of a failure, or partial failure, of the consideration supporting defendant's assumption and promise to pay the notes sued on; but, if it be conceded that the purchase price is severable and this defense allowable in that respect, a want or failure of consideration to which plaintiff was not privy, such as a want or failure of beneficial consideration passing from the Nix Pharmacy, as owner of the property constituting the same, to the defendant, is not available as a defense to defendant as against plaintiff's action on these notes; and plaintiff's release of the Nix Pharmacy from liability, if the obligation was valid, on the notes would appear to be sufficient consideration to support the promise to pay involved in said assumption, which, in view of the Nix Pharmacy's apparent title to the property at the time of the sale to the defendant, is apparently the only consideration to which plaintiff was privy, unless whatever benefit to defendant or detriment to plaintiff may be found in the latter's consent, as mortgagee, to the former's purchase of all the property mentioned from the Nix Pharmacy, may be regarded as a distinct consideration and not included in the release of the Nix Pharmacy from liability, which it is not material to consider.

[2] It seems clear, in the light of the authorities already cited, that the trial court erred in assuming as a matter of law, and in instructing the jury, that defendant was subrogated to all the rights of the Nix Pharmacy and so as to permit a verdict for the defendant upon the ground of a failure or partial failure of the original consideration upon which the Nix Pharmacy notes were given to the plaintiff in its purchase of the property about 2½ months before the defendant acquired it.

Uncertainty as to the material facts involved in the transaction which might change the legal aspect of defendant's position forbid, in reversing and remanding this case, any extended discussion of the rule that, in the absence of fraud or express warranty, "the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely, and necessarily relied, on the judgment of the seller, and not upon his own" (Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86, in order to ascertain if there is an implied warranty (2 Mechem on Sales, 1311-1318; 2 Benjamin on Sales, 862, 863; Gold Ridge Min. Co. v. Tallmadge, 44 Or. 34, 74 Pac. 325, 102 Am. St. Rep. 602, and notes at page 607; McQuaid v. Ross, 85 Wis. 492, 55 N. W. 705, 39 Am. St. Rep. 864, 22 L. R. A. 187, and notes; and Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. [N. S.] 855, and notes). But, in anticipation of another trial, we suggest that it might be well to observe the distinction in form between a counterclaim or cross-action

for damages for breach of warranty (which damages are measured by the difference between the actual value of the article as it is and its value as it would have been if it had been as warranted), available as a set-off without regard to whether the purchase price of the article is severable from the whole purchase price, and want of consideration involving a rescission of the contract and designed to defeat the action to the extent of the purchase price of the article, which is not available unless the purchase price of the article may be ascertained and severed from the whole of the purchase price of all the articles purchased together.

For the reason stated, this case should be reversed and remanded, with instructions to grant plaintiff a new trial.

PER CURIAM. Adopted in whole.

BOTTOMS v. NEUKIRCHNER et al.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*) — CASE-MADE — SERVICE.

The first section of the syllabus in Devault et al. v. Merchants' Exch. Co., 22 Okl. 624, 98 Pac. 342, is made the syllabus of this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2560; Dec. Dig. § 564.*]

Error from District Court, Garvin County; R. McMillan, Judge.

Action between Z. T. Bottoms and Clara Neukirchner and others. From the judgment, Bottoms brings error. Dismissed.

Alvin F. Pyeatt and Albert Rennie, both of Pauls Valley, for plaintiff in error. J. T. Blanton and H. M. Carr, both of Pauls Valley, for defendants in error.

PER CURIAM. After the opinion in Z. T. Bottoms v. Clara Neukirchner et al. was rendered, and the mandate of this court had gone down to the district court of Garvin county, the plaintiff Clara Neukirchner was placed in possession of the land in controversy and thereafter sold the same to J. T. Blanton and J. M. Carr. After they had been in possession of the lands for some time, an affidavit was made by one of the attorneys who represented Bottoms in the former trial, seeking to impeach the validity of the former judgment, and a motion was thereupon filed to vacate and set aside the judgment in said cause on the ground that the same was void. A joint demurrer to this motion by Clara Neukirchner, J. T. Blanton, and H. M. Carr was sustained, and Bottoms was granted an extension of 90 days in which to make and serve a case-made, and plaintiff 10 days thereafter to suggest amendments. To reverse the action of the trial court in sustain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing this demurrer the plaintiff in error brings the case here.

The defendants in error have filed a motion asking that the case-made be stricken from the files, for the reason that the same was not served upon J. T. Blanton. While such failure is disclosed by the record, plaintiff in error contends that defendant in error Blanton is estopped to relying thereupon, for the reason that he suggested amendments to the case-made, all of which were duly incorporated into the record. There is no merit in this contention, as the Blanton amendments were not suggested until after the time granted by the trial court, in which to prepare and serve case-made and suggest amendments thereto, had expired. *Devault et al. v. Merchants' Exch. Co.*, 22 Okl. 624, 98 Pac. 342; *Turley v. Hayes & Shirk*, 28 Okl. 655, 115 Pac. 769; *American Nat. Bank et al. v. Mergenthaler Linotype Co.*, 31 Okl. 533, 122 Pac. 507.

The motion to strike the case-made from the files and dismiss the appeal is therefore sustained. All the Justices concur.

HILL v. CITY OF KINGFISHER.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—BRIEF—DISMISSAL.

Where plaintiff in error has filed no brief, as required by rule 7 of this court (20 Okl. viii, 95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Kingfisher County; John M. Graham, Judge.

Action by the City of Kingfisher against R. G. Hill. Judgment for plaintiff, and defendant brings error. Dismissed.

See, also, 131 Pac. 1197.

Cunningham & Weiss, of Kingfisher, for plaintiff in error. John T. Bradley, Jr., of Kingfisher, for defendant in error.

ROBERTSON, C. This appeal was filed in this court October 14, 1911. Neither party has filed a brief, nor have they offered any excuse for the failure to do so. It is evident that the proceedings have been abandoned. The appeal should therefore be dismissed for want of prosecution under rule 7 of this court (20 Okl. viii, 95 Pac. vi). *Streeter v. McCoy*, 34 Okl. 490, 126 Pac. 216; *Thompson v. Murray*, 34 Okl. 521, 125 Pac. 1133; *Streeter v. Huene*, 34 Okl. 491, 126 Pac. 216; *Reliable Ins. Co. v. Newcomer*, 34 Okl. 759, 127 Pac. 260; *M. O. & G. Ry. Co. v. Johnson*, 34 Okl. 816, 127 Pac. 386; *First Nat. Bank v. Baldwin*, 34 Okl. 825, 127 Pac. 260; *Snow v. Frye*, 34 Okl. 826, 127 Pac. 422.

PER CURIAM. Adopted in whole.

ROMINE v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 6, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 603*)—WITNESSES (§ 2*)—CONTINUANCE—GROUNDS.

It is the right of every citizen, when prosecuted for an offense, to have compulsory process to compel the attendance of his witnesses, but where the record does not show that a precept was filed, or that a subpoena was issued or served upon absent witnesses, it will be presumed that a motion for a continuance on account of the absence of witnesses was properly overruled.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.* *Witnesses*, Cent. Dig. §§ 2-4; Dec. Dig. § 2.*]

2. CRIMINAL LAW (§ 603*)—CONTINUANCE—MOTION—DILIGENCE.

A motion for continuance should show diligence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

Appeal from District Court, McCurtain County; A. H. Ferguson, Judge.

Newt Romine was convicted of manslaughter in the first degree, and appeals. Affirmed.

Hosey & Leggett, of Idabel, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (O. J. Davenport, of Oklahoma City, of counsel), for the State.

DOYLE, J. Plaintiff in error, Newt Romine, was indicted and tried for the murder of one Steve Etchieson, alleged to have been committed in McCurtain county on or about the 25th day of March, 1911. He was convicted of manslaughter in the first degree. On the 26th day of February, 1912, in accordance with the verdict, the court sentenced the defendant to imprisonment in the penitentiary for the term of four years.

The evidence shows that the defendant and the deceased, with their families, occupied the same house on the defendant's farm near Bethel; the deceased had rented the farm; that on the day alleged in the indictment they, with two others, Sid Sanders and F. F. Miller, had been hunting wild ponies in the hills, and the deceased and F. F. Miller returned to the house early in the evening; later the defendant appeared. They were all somewhat intoxicated. About 10 o'clock the defendant fired two shots at Miller, one hit him in the arm and the other in the leg. He then shot the deceased. The shooting occurred in the dooryard. Several witnesses testified that the defendant after the shooting stepped upon the porch and said, "If I ain't killed them I am going to." The deceased's wife and one or two of her children went to a neighbor's named Baker, about a quarter of a mile distant, and asked him to send for a doctor. The defendant followed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

them, and talked to Baker in Choctaw, and said in English: "I have killed both of them." The deceased was found dead the next morning, lying near a path that led to Baker's. The defendant claimed that Miller and the deceased assaulted him, and that the shooting was in self-defense. His testimony is without corroboration.

The only error assigned that is argued in the defendant's brief is the overruling of the motion by the defendant for a continuance. The indictment was returned September 30, 1911. The defendant was arraigned on the 4th day of December, 1911. The case was called for trial on the 24th day of February, 1912, 11 months after the homicide. Thereupon the defendant moved for a continuance, supporting the motion with his affidavit, in which he states: "That he cannot safely proceed to trial at this time because of the absence of material witnesses, to wit, J. A. Morgan, Bob Anderson, and Sid Sanders. That these witnesses would testify to threats made by the deceased against the defendant, which threats are set out in the affidavit. That the following witnesses: H. M. Coker, Joe Blalock, Ed Graham, Gb Howard, Emmett Anderson, W. C. Cooper, Joe Dedwiler, Claud Addington, Sherman McClain, George Trotter, and Clint Clark—if present, would testify that the general reputation that defendant bore in the community in which he lived as a peaceable law-abiding citizen was good, and that that of the deceased was that of a violent dangerous man." That these witnesses are residents of the extreme northern part of McCurtain county, about 60 to 90 miles from the county seat, and that he had filed a *præcipe* for subpoenas for them. That he has been informed, and verily believes, that the nonattendance of these witnesses was occasioned by their belief that they would be unable to secure the necessary expenses and remuneration for their time, and that he is without money or property with which to secure their attendance.

[1, 2] It is well settled by a long line of decisions of this court that the granting or refusal of a continuance in a criminal case is largely a matter of discretion of the trial court. The defendant's affidavit presented no facts which, in the exercise of reasonable discretion by the court, would have warranted a continuance of the case. While it is the right of every citizen, when prosecuted for an offense, to have a fair and impartial trial, and compulsory process to compel the attendance of his witnesses, no proper showing was made that a *præcipe* was filed, or that subpoenas were issued and served upon these witnesses. Nothing in the record shows when a *præcipe* was filed, and if these witnesses had been duly subpoenaed, then it was the duty of the defendant to ask that attachments issue. He does not state that these witnesses were not absent through

his procurement or consent. The law requires diligence in these matters, and a defendant cannot sit still and wait until his case is called for trial before he begins to get ready. In our opinion, the affidavit does not disclose such diligence on the part of the defendant to procure the attendance of these witnesses as the law requires, or such that made it the duty of the court to grant the continuance.

The defendant was convicted of manslaughter in the first degree, and the minimum punishment assessed. We think he was fortunate, and should be satisfied with his conviction, for under the evidence for the state, he was guilty of nothing less than murder. A careful examination of the whole case leads to the conclusion that no error has been committed to the defendant's prejudice. The judgment of conviction is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

PHILIPS v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 5, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1110*)—APPEAL—CORRECTION OF RECORD—PRESENCE OF DEFENDANT.

The presence of a defendant is not necessary when an investigation is being made for the purpose of correcting a case-made or a transcript of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2903-2917, 2919; Dec. Dig. § 1110.*]

2. CRIMINAL LAW (§ 1110*)—APPEAL—CASE-MADE—CONCLUSIVENESS.

If any statement contained in a case-made or a transcript of the record is questioned in the Criminal Court of Appeals, the statements contained in such case-made or transcript of the record will not be accepted as conclusive; but the court may order an investigation in such manner as it sees fit, and correct the case-made or transcript of the record so as to make it speak the truth.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2903-2917, 2919; Dec. Dig. § 1110.*]

3. CRIMINAL LAW (§ 1099*)—APPEAL—CASE-MADE—SERVICE—NECESSITY.

If a case-made is not served upon the county attorney at the time fixed for that purpose by the trial court, such case-made will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2866-2880; Dec. Dig. § 1099.*]

Appeal from District Court, Jefferson County; Frank M. Bailey, Judge.

Grover Philips was convicted of rape, and appeals. Appeal dismissed.

This is an attempted appeal from a judgment rendered in the district court of Jefferson county, on the 9th day of December, 1911, upon a verdict wherein appellant was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

convicted for the crime of rape; and his punishment was assessed at five years' confinement in the penitentiary. It was provided in the judgment that appellant should have 60 days in which to prepare and serve a case-made, and thereafter on February 5, 1912, the court made an order extending the time within which to serve the case-made, 30 days from February 7, 1912; and thereafter on March 2, 1912, the court made an additional order, further extending the time to prepare and serve the case-made, 5 days, thereby granting appellant 35 days from February 7th to serve the case-made, which said time expired on the 13th day of March, 1912. The record, as filed in this court, shows acceptance of service of the case-made by the county attorney of Jefferson county on the 12th day of March, 1912. The Attorney General, however, suggested a diminution of the record, and in support thereof alleged that the case-made was not served until or after March 15, 1912, and after the expiration of the time allowed by the trial court in which to serve the case-made. On the 8th day of March, 1913, this court made an order permitting the state to withdraw the record from this court to be transmitted to the district court of Jefferson county, with directions to the trial court to hear the testimony, and determine as a matter of fact just when the case-made was served on the county attorney of Jefferson county. The trial court heard the testimony of the witnesses in the case, and certified to this court its finding that the case-made was served on the county attorney of Jefferson county on or after the 15th day of March, 1912. All of which appears in the record before us. Appeal dismissed.

J. H. Harper, of Waurika, for appellant.
C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). Counsel for appellant has filed a brief in this cause in which he attacks the finding of the trial court as to the date on which the case-made was served on the county attorney.

[1] First. The first contention is that appellant was not present when the investigation, upon which this finding was based, was held, although the appellant was represented by counsel. Counsel assumes the position that, as testimony was heard affecting a substantial right of appellant, his presence was absolutely necessary in such hearing. In support of this position he cites section 5761, Revised Laws, which is as follows: "If the indictment or information is for a felony the defendant must be personally present, but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel." It will be seen that this section is the second paragraph of article 8 of the Re-

vised Laws under the heading of, "Pleadings and Proceedings before the Commencement of Trial." It only requires the presence of a defendant in a felony case at the trial upon which the question of his guilt or innocence of the crime charged is determined by the jury. It does not require the presence of a defendant at any hearing in which the question of guilt is not directly passed upon. See *Ward v. Territory*, 8 Okl. 12, 56 Pac. 704; *Saunders v. State*, 4 Okl. Cr. 264, 111 Pac. 965, Ann. Cas. 1912B, 766; *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 356; *Newton Henry v. State*, 136 Pac. 982, decided present term. If it be true that appellant should be present when such matters are under investigation, then if he were confined in the penitentiary, it would be necessary to take him out and carry him to the place where the investigation was being conducted, although his presence there would not subserve any good and lawful purpose. Appellant might just as well contend that it was necessary that he should be present when the case-made was settled and signed by the trial judge.

[2] Second. Counsel for appellant contend that after the case-made had been signed and settled by the trial judge it was conclusive, and could not be amended, and that this court was without jurisdiction to refer the case-made back to the trial judge for correction, in order that the case-made might speak the truth. In support of this contention he cites the case of *Day v. Terr.*, 2 Okl. 409, 37 Pac. 806. It is not necessary for us to determine as to whether or not the law is correctly stated in *Day's Case*; it is enough for us to know that this is not the law of the state of Oklahoma. Section 1771, Revised Statutes, is as follows: "Said court shall have power, upon affidavit or otherwise, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction." This statute is similar to one in force in Texas, relating to the matter now under consideration. In the case of *Thompson v. Hawkins* (Tex. Civ. App.) 88 S. W. 236, the Civil Court of Appeals, of that state, said that it had the jurisdiction to inquire as to the truth of a record transmitted to it from the trial court, and with reference to the statute said: "The discretion given could scarcely be broader and more extensive." Under the statute above cited this court could determine the question upon affidavits, or in any manner it deemed proper. The best and safest policy was to refer the matter to the trial court which, without unnecessary expense, could have all of the witnesses before it. This was fair alike to the state and appellant and his counsel. Section 5248, Revised Laws, is as follows: "The certificate of the judge who settles and certifies the case-made shall be prima facie evidence of the facts therein recited, unless the case-made on its face shows affirmatively that such certificate is in some material respect incorrect, or the said certificate be proven

incorrect by affidavits or other competent evidence introduced in the appellate court in connection with a motion to correct the record or case-made, under such rules and regulations as the court may prescribe."

[3] Third. It has always been the law of Oklahoma that an appeal in a criminal case may be taken as a matter of right, but that the manner of taking and perfecting such appeal is a proper subject for legislative control, and that the legislative direction must be observed. *Bailey v. Terr.*, 9 Okl. 461, 60 Pac. 117; *Arispi v. Terr.*, 2 Okl. Cr. 79, 99 Pac. 1099; *Boneparte v. U. S.*, 3 Okl. Cr. 345, 106 Pac. 347; *Chesney v. State*, 3 Okl. Cr. 454, 106 Pac. 651; *Dobbs v. State*, 5 Okl. Cr. 475, 114 Pac. 358, 115 Pac. 370; *Lyons v. State*, 6 Okl. Cr. 581, 120 Pac. 665.

It has also been repeatedly held that a case-made will not be considered on appeal if it was not served on the county attorney at the time fixed for that purpose by the trial court. *Cohn v. State*, 4 Okl. Cr. 498, 113 Pac. 216; *Hawkins v. State*, 5 Okl. Cr. 276, 114 Pac. 356; *Talley v. State*, 5 Okl. Cr. 528, 115 Pac. 603; *Billus v. State*, 7 Okl. Cr. 37, 121 Pac. 790.

This being the settled law of this state, and as no case-made in this cause was served upon the county attorney until after the expiration of the time directed by the trial court, and as this is an attempted appeal upon a case-made alone, we have no discretion except to dismiss the appeal, and it is therefore so ordered.

ARMSTRONG, P. J., and DOYLE, J., concur.

SIMPSON v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 2, 1913.)

(*Syllabus by the Court.*)

APPEAL FROM CONVICTION.

In a prosecution for burglary, the evidence held sufficient to sustain the verdict and judgment of conviction, and that no reversible error was committed on the trial.

Appeal from District Court, Comanche County; J. T. Johnson, Judge.

Charley L. Simpson was convicted of burglary, and appeals. Affirmed.

J. F. Thomas, of Lawton, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the district court of Comanche county on the 29th day of January, 1912, in which the defendant was found guilty of burglary and his punishment assessed at imprisonment in the penitentiary for a period of seven years.

It is disclosed by the record that plaintiff

in error and L. L. Dorsey were jointly charged in the information with the crime of burglary, alleged to have been committed on the 25th day of December, 1911, by breaking and entering into, in the nighttime, a certain store building in the city of Lawton. The defendant Dorsey pleaded guilty.

The proof on the part of the state amply justified the jury in finding the defendant guilty, and no evidence was introduced in behalf of the defendant. No authority is cited in support of the contentions made, and after a careful examination of the questions raised we are satisfied that under well-settled rules, sustained and upheld by the decisions of this court, no error was committed prejudicial to the substantial rights of the defendant.

The judgment of conviction is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

WILLIAMS v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 2, 1913.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§ 351*)—EVIDENCE—ADMISSIBILITY—LARCENY.

Over the defendant's objection a witness for the state was permitted to testify that the defendant's father offered to pay him \$50 to testify in favor of the defendant. There was no proof tending to show that such offer to pay witness was made by the authority, consent, or knowledge of the defendant. The court, overruling motion to strike out this testimony, said, "This man being the defendant's father, I will let it stay in." Held, that the evidence was incompetent and inadmissible and was calculated to prejudice the defendant, and that the erroneous rulings of the court constitute reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.*]

Appeal from District Court, Choctaw County; A. H. Ferguson, Judge.

Will Williams was convicted of larceny of a domestic animal, and appeals. Reversed.

Richardson & Warren, of Hugo, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

DOYLE, J. Plaintiff in error was indicted for the larceny of a two year old heifer and upon his trial was found guilty and was sentenced to be imprisoned in the penitentiary for one year. The judgment of conviction is here for review.

Among the numerous errors assigned is one, the consideration of which must result in a reversal of the judgment. As a witness for the state, Earl Hunt testified that he saw the defendant, Will Williams, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his codefendants, Dave White and George Hughes, driving a yearling, and that the defendant, Will Williams, shot it. He was then asked if he talked to Mr. J. T. Williams, the father of the defendant, about this case, and answered, "Yes." He was then asked, "I will ask you how much he offered you to testify in this case?" and answered: "You want me to tell what he said to me?" "Yes, go ahead and state it." Over the defendant's objection the witness was permitted to answer as follows: "We was coming on this train one day and down here at this little station, McCanns Spur, they stopped the train, something got wrong with it, and Mr. Williams came up and slapped me on the shoulder and said, 'I want to speak to you.' We stepped off, and he said, 'What do you know about the case against the boys?' I says, 'Mr. Williams, I cannot tell you anything about the case and ain't going to tell a thing about it.' He says, 'You know what the boys swore and I will give you \$50 in money (and he put his hands in his pocket) if you will get up and swear that you were with the boys that day and did not see anything like this.' I says, 'I won't do it,' and about that time the train started on. That's what I told him." The defendant moved to strike out the answer, which was overruled; the court saying: "This man being the father of the defendant, I will let it stay in." To which language of the court the defendant excepted. In the brief for the state it is said: "We are unable to see how this testimony was admissible." The defendant was not present when this alleged conversation occurred, and the evidence of the state fails to in any way connect him with the alleged proposition of his father. As a witness in his own behalf, the defendant denied any knowledge of such proposition; and his father, J. T. Williams, as a witness denied making any such offer to the state's witness Earl Hunt. That this testimony was incompetent and prejudicial to the defendant we think there can be no doubt. If the minds of the jury were wavering on the question of the innocence or guilt of the defendant, this incompetent testimony which the court had sanctioned with judicial approbation was sufficient to turn the scale against the defendant.

In the case of Bruner v. U. S., 1 Okl. Cr. 205, 96 Pac. 597, a witness testified that the defendant's brother had offered to pay her \$25 if she would testify in the defendant's behalf. Counsel for the defendant moved to strike this testimony out for the reason that it was not shown that the defendant was connected with the making of the offer. The court overruled the motion to strike. Mr. Justice Dunn, delivering the opinion of the court, after reviewing numerous decisions said: "Nor, as we have above said, are we able to say that this evidence was not prejudicial to the defendant. He was entitled to

have the issue of his guilt or innocence presented to the jury upon the relevant and competent evidence properly applicable thereto, and he was entitled to be relieved of the damaging cloud which evidence of this character would throw over his entire case unless he was responsible for it. The illimitable scope of undeserved damage the cause of a defendant might suffer through friends or enemies, should evidence of this character be admissible, is readily seen; and where in a case such evidence appears, and it is not clearly shown that the defendant is responsible for it, and proper exceptions are saved, a conviction will not be sustained."

We deem it unnecessary to review the other errors assigned. For error in the rulings of the court with regard to the admissibility of the testimony discussed, the judgment of conviction is reversed, and the cause remanded for another trial.

ARMSTRONG, P. J., and FURMAN, J., concur.

KINCAID v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 6, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 829*)—REFUSAL OF INSTRUCTION COVERED.

When the law pertaining to the defense has been clearly and correctly expounded in the instructions given, it is not error to refuse instructions which are merely cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

2. CRIMINAL LAW (§ 1171*)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

In determining the effect of an improper statement made by the prosecuting attorney in the closing argument to the jury, the question is, Was the defendant prejudiced thereby? and the strength of the evidence supporting the conviction will be considered, and, where the guilt of the defendant is clearly established, it is not sufficient for a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

(Additional Syllabus by Editorial Staff.)

3. HOMICIDE (§ 341*)—HARMLESS ERROR—FAILURE TO INSTRUCT.

Failure to instruct pursuant to Rev. Laws 1910, § 5902, relative to the burden resting on defendant in a murder case to prove mitigation or justification, being error in defendant's favor, is harmless.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. § 341.*]

Appeal from District Court, McCurtain County; A. H. Ferguson, Judge.

J. W. Kincaid was convicted of manslaughter in the first degree, and appeals. Affirmed.

Under an indictment which charged him with the murder of Levi Davis, in McCurtain county, on the 18th day of November, 1911, the defendant was convicted of manslaughter

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the first degree. On the 20th day of February, 1912, the court, in accordance with the verdict of the jury, sentenced him to imprisonment in the penitentiary for the term of seven years. A substantial statement of the evidence is as follows:

A. C. Wood was the first witness for the state. He testified: That he was 48 years of age and lived at Hochatown and was justice of the peace there. That he was in Kincaid's store and heard Davis say to Kincaid that he had to settle with him right now or one or the other of them had to leave the world, and Davis walked out of the store still talking back to Mr. Kincaid. That Kincaid followed him out with a pistol and he heard the pistol click and he spoke to him, calling him "Jim," and Kincaid fired two shots. He went out and Davis was lying on the ground. One shot entered the point of the left shoulder and the other shot entered above the eye. The shooting occurred about 3 o'clock in the afternoon, and Davis died about two hours later. That he saw Mr. Watson, Mr. Graham, Mr. Wilson, and Mr. Wiser in the store at the time of the killing.

A. T. Wood, the next witness, testified: That he was 22 years of age and son of witness A. C. Wood and at the time of the killing was working for Kincaid as bookkeeper. That Davis had been working for Kincaid as fireman at the gin, and just prior to the killing Davis was at the office wanting a settlement out of Kincaid. That the dispute between Davis and Kincaid was over both the store account and the time worked at the gin. That Davis said that he would not settle and walked out. That Kincaid kept a pistol there in the office at the store, and after Davis walked out some one came into the office, but witness could not say whether it was Kincaid or not.

T. W. Watson testified that he lived one mile and a quarter north of Hochatown, on a farm owned by Kincaid, and was running the gin for Kincaid at that time, and Davis was firing the engine. That he was in the store at the time of the killing. He described the killing as follows: "Mr. Davis was in behind the counter at the book desk, and just about the time I went in the store he came out from behind the counter and was walking towards the store door and made the remark that his time wasn't right, and they better settle with him and settle with him right or one or tother of them would quit the country, and repeated that word about the third time and stepped out on the store gallery. * * * About the time he came out from behind the counter, Mr. Kincaid told him that he would settle with him; to go on and get sober and he would settle with him; and, when he made the remark that they would settle with him right or one or tother of them would quit the country, the next thing I noticed Mr. Kincaid came out from behind the counter and made a start towards the door and shot Davis." That he

heard Mr. Kincaid say that, "You say you would take my life or kill me or something about those words." That Davis did not say a word. That Levi Davis and John Woods were working with him at the gin that day and both were drinking.

Will Wiser, the next witness for the state, testified: That he lived at Hochatown; was present at the shooting. He described it as follows: "A. Well, the first I noticed of any dispute when I entered the house was when Mr. Davis come out from behind the counter where they was supposed to have been having a settlement, and he told Mr. Kincaid when he got ready to settle and settle right they would settle, and Mr. Kincaid told him that he would settle by them books; so Mr. Davis told him that he would settle with him and settle right or one or the other of them would leave the country, and walked on, and told him that he couldn't do him like he had been doing some of them Choctaws around there, or something to that effect; and Mr. Kincaid asked him did he say he would kill him, and he said 'No'; he didn't say that; and he asked again, and he said he didn't say it, and he fired on him the first shot." That he helped dress the body of the deceased and the wound on the forehead was powder burnt. That the deceased had nothing but a pocketknife which he had closed in his pocket. That he saw no other weapons.

Charley Burk, the next witness, testified: That he was present at the killing. He described the circumstances as follows: "Q. Please state to the jury as best you can just what occurred there and what was said between Mr. Davis and Mr. Kincaid. A. Well, Mr. Davis come in there for a settlement. He was in there when I went in, and when I went in there I went after something; I don't remember what it was; I think it was some nails probably; and I stood there a few minutes. Mr. Kincaid was out then, went after some change for an old gentleman; so he said he would go to the house after the change, and, when he come back, why they was something said about the settlement, and Mr. Kincaid told Mr. Davis that he would settle according to them books, and that's the only way he would settle with him; said if he wanted to settle with them books they would settle; and Mr. Davis told him that he wouldn't settle with those books; that he didn't have him enough time for the day before, Friday; and he told him, well, he wouldn't settle with him that way; and Mr. Kincaid told him, 'All right, then;' that the books was there and he could settle with them if he wanted to; and so Mr. Davis told him whenever he—he just says, 'Whenever you commence to settle with me,' he says; and using some oath he says, 'You ain't beating any Choctaw over the head with a plow point;' and Mr. Kincaid was standing there and he started back toward that little office on the north side of the house, and as he come out from behind the counter he says,

'If I have to kill you, I will kill you;' and he walked on past me, and I was standing something near eight feet of them, I guess, six or eight feet, and I told him, I says, 'Don't do that, Jim; that's bad business;' and he went on. He got something like a foot or two feet of the door, and he raised his gun and fired a shot, and Mr. Davis fell, and, after he fell, why he walked up and stuck the gun down and shot him in the forehead, and when he done that he turned around and walked toward the north end of the porch about six or eight feet, I suppose about six feet, and he says, 'Is there anybody else here wants to kill me?' and when Mr. Kincaid walked on around the house I just turned around myself and walked out the back door, and as I walked out the back door Mr. Kincaid he was walking around at the west door or north of the west door, that I come out of, and that's the last I saw of him."

Roy Wilson testified that he lived at Hochtstown and was present at the killing. He described it as follows: "A. Well, when I came into the house, Mr. Davis was behind the counter where the bookkeeper was, Mr. Fred Wood. He was keeping books at that time. I supposed he was trying to straighten up his time. He had been working for Mr. Kincaid and just as I came into the house I heard Mr. Davis ask Mr. Wood if seven hours was all he got for a day's work. That's the first thing I heard as I came into the house; and Fred Wood said, 'That's all I give you; that's all the time I give you;' or something to that effect. That Mr. Davis turned towards Mr. Kincaid and walked towards him and asked him if seven hours was all he got for a day's work, or over a day, from daylight until dark; and Mr. Kincaid just answered, 'I didn't keep the time; Fred Wood keeps the books;' and Mr. Davis just turned and walked out from behind the counter behind me and walked towards the front door, and, as he walked towards the door, he just says, 'I won't settle that way; you are going to settle with me right;' and he walked to the front of the house and got out of the door on the edge of the porch, just on the outside of the door, and turned back facing the house, and as he turned back he says, 'Jim,' he says 'you are going to settle with me and you are going to settle with me right;' he says, 'You are not going to do me like you do these damned Indians, beat me around over the head.' He repeated it again, 'You are going to settle with me right, and going to settle right or me or you one will leave the country.' Mr. Kincaid was to my back. I just heard him say, 'Do you mean that you are going to kill me?' and turned and walked back towards the bookkeeper's office. I never looked at him to see what he was going after or anything about it. I was watching Mr. Davis more than anything else. But as he come out, around the counter behind me (he had his right side to me), come

out around me, and after he got far enough past me towards the door that I could see his right hand, I saw the gun. He got somewhere near the center of the house from the end of the counter and the door and he asked Mr. Davis, 'Did you say that you was going to kill me?' and Mr. Davis just raiser his hand and says, 'No, I didn't say that, Jim;' and then Mr. Kincaid repeated it again, says, 'Did you say that you was going to kill me?' He raised his hand the second time and said, 'I didn't say that;' and about that time the first gun fired. Q. About what part of the building—how far was it from the door? About how far when he fired this first shot? A. Well, as well as I understand it, somewheres between 8 and 12 feet. Q. Somewhere about halfway between the end of the first section of the counter and the door? A. Yes, something near that. Q. All right; go ahead and state what else, if anything? A. Well, when Mr. Kincaid fired the first shot, why Mr. Davis fell backwards and he hit the post; his shoulders or some part of him hit the post; fell backwards and struck a post, and it knocked him forward, and he just fell kinds hunkered down sort of on his side; not side, but side of his head and back. Not plumb on his side, but the side of his head was on the floor. Didn't lack much; and Mr. Kincaid had just went up and made a second shot; didn't look to me like he checked up; just walked up and got right close to him and sort of stooped over and fired the second shot in his head. Q. Did you see the wounds, Mr. Wilson? A. Yes, sir; I did. Q. How many, and what part of the body did the balls take effect? A. One of them struck him in the left shoulder right about there (indicating), and the other one struck him in the head right along there and come out right by his right ear—over it. Q. Did you say Mr. Davis raised his hand and you held up your left hand? Which one did Mr. Davis raise? A. Mr. Davis raised his left hand. Q. Who was in the room, if you know, in the store at that time? A. Well, there was several. I don't know how I could call all the names. There was Fred Wood, he was in the office. Mr. Cam Wood was in the store, and Mr. Wiser and a fellow by the name of Graham, Charley Burks, and Mr. Watson, and there were an Indian woman in there. I don't remember now—yes, Will Wiser. I don't remember whether there was anybody else or not. Q. Did you see Charley Burk in there? A. No, I didn't see Charley Burk until after this happened, and they all began to stir around, and Charley was there then. Q. Did you help dress the dead man? A. Yes, sir; I did. Q. How long after the shooting was it before you was out to the body? Out to where he fell? A. I believe about three or four minutes. Q. Did you notice any weapons, any gun or any kind of weapon, on Mr. Davis during any of the time of the quarrel up until the time he was shot? A. Did not.

Q. Did you see any weapons on or about him after he fell and was shot? A. Well, they were a pocketknife in his pocket that night when we dressed him. Q. Do you remember how he was dressed? A. Yes, sir; he was running the engine there at Hochatown for Mr. Kincaid for the gin, and he had on a pair of pants and a pair of overalls over them, and the knife was in his pants pocket under the overalls."

The state rests. James W. Kincaid, the defendant, as a witness in his own behalf, testified: That he had been living in Hochatown and vicinity for about seven years. That he had been engaged in farming, stock raising, gin, mercantile, and sawmill business. That deceased had been working for him as fireman at the gin. That on the morning of the difficulty witness went from his store to the gin and there was nobody there, and he got his team and hauled wood to the gin; got back with the first load about 10 o'clock, and saw that Davis was drinking; unloaded and went after second load and got back between 12 and 1 o'clock. At that time he considered Davis drunk and went up into ginhouse and told Watson to shut down the gin; then went home to dinner. Watson came while eating dinner and asked to let him run until he could finish the ginning they were then on. Witness told him to do it but to look after the boiler. After dinner went back to gin and had it shut down. "Davis came up and said I had fired him. I told him I hadn't fired him. He said, 'By God, he was going to have a settlement with me; that he had been wanting to do something for me to fire him for; and by God he done it, and he could whip me and could whip that long-legged clerk of mine.' Left the gin and went to the store and wasn't there but a short time until they come and wanted me to number and brand a bale of cotton. Went back to the gin for this purpose. Davis come up again and told me I had fired him and had to settle with him; that, 'By God, he was the best man there was on the ground.' I said if I had to fight my way out I had as well get ready for it. I again went to the store to keep away from him. After I was there some little bit I had to weigh some cotton at the scales about 20 or 30 steps northeast of the store. Davis followed me out there. I had my pistol. While I was weighing the cotton he helped me roll the cotton on the scales and take it off and roll it inside of the cotton yard, and when I would do that he would throw himself up against me, and when I would go to weigh the cotton he would pass, and he would rub against me and tell me he was the best damned man there was there, and if I said anything he would whip me. I never said anything to him. After I weighed the cotton I went to the house to keep away from him. After this it seemed like Davis had quieted down, and I went and put up

my gun. Davis met me as I was going from the store to the house and said, 'By God, you are slipping off, by God, trying to keep from settling with me.' I told him, 'No, I am not.' He says, 'You are going to settle with me.' I says, 'Levi, I ain't fired you at all; go and get sober and let's have no trouble at all.' During the afternoon Cam Wood told me to be on my guard; that Davis had said that one or the other of us would quit the world. After I came back from the house to the store I noticed Davis looking through the front window. He appeared to be mad. After that I again went and got my gun. Some minutes after that Davis came into the store. I was in the north side waiting on a customer. He demanded a settlement, and I told Fred to straighten up the books and settle with him, if nothing else would do. Davis then went into the office. After he and Fred Wood was there some time, Wood called me. I didn't go up until he called again, and when I got there Davis said he had put in more time than that and wasn't going to settle that way. I said, 'I haven't kept the books; I am willing to settle with you and give you all the time that's coming to you.' That I didn't want anything only what was right both ways. When I said that Davis passed out by me. He was mad and said; 'No, I am not going to settle by your books at all. I won't settle any such way. By God, I am going to have my time, and you have got to settle with me, or you or me one will quit the world.' He repeated that as many as three times. He went quartering towards the south side of the door as he went out. I thought his intention was to try to get the advantage of me and kill me. I had my gun and just walked up quartering towards the door in order to keep in sight of him. When he got outside the door he turned and said, 'I will kill you, and I will kill you now.' Instantly as he turned back and said that, he threw his right hand to his hip pocket like and the left hand holding his pants like he was trying to get a gun. I immediately shot twice as fast as I could. The first shot didn't make any change in him. I shot to keep him from killing me. I was near the door when I shot the first time and right at the door the second shot. I was stepping forward all the time. Davis was standing when I fired both shots. He had a coat on. Davis never said he didn't want to hurt me."

Armstrong & Etheredge and Steel, Lake & Head, all of Idabel, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. (after stating the facts as above). The assignments of error relied upon for a reversal of the judgment are in effect as follows: That the court erred in refusing to give the instructions requested by the defendant. Misconduct of the prosecuting attorney in his argument to the jury.

[1] The charge of the court contained 19 instructions. No objection was made or exception taken to any instruction given. The defense requested the court to give 11 additional instructions. It is our opinion that the requested instructions were properly rejected, as all the law pertaining to the defense had been clearly and correctly expounded in the instructions given, which were more favorable to the defendant than the law contemplated.

[3] Our Code of Criminal Procedure provides (section 5902, Rev. Laws) that: "Upon a trial for murder, the commission of the homicide by the defendant being proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

The court should have given an instruction based upon the foregoing section. See *Culpepper v. State*, 4 Okl. Cr. 103, 111 Pac. 679, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668. However, its failure to do so was an error in favor of the defendant, of which he cannot complain. When the defendant has had the benefit of a fair trial by an impartial jury, selected conformably to law, and fully and fairly instructed in every principle of law applicable to his defense, with no rulings against him that would tend to prejudice a substantial right or deprive him of his defense, he has received all that any citizen can rightfully demand.

[2] During the closing argument of counsel for the prosecution, the assistant prosecutor made the following statement: "Now, gentlemen of the jury, of all the dark and bloody and black murders that have ever been committed in McCurtain county, this is the blackest and the dirtiest, and unless you convict the defendant you may expect many more such dark and bloody murders." At which time counsel for the defendant took an exception. Thereupon the court admonished the counsel not to make use of any such language before the jury. We think this statement went beyond the limits of legitimate argument and was improper. In determining the effect of an improper statement made by the prosecuting attorney in the closing argument to the jury, the question is, Was the defendant prejudiced by such improper statement? and the strength of the evidence supporting the conviction will be considered.

The evidence in this case is that the defendant, without any provocation, deliberately shot the deceased, and, not satisfied with this, he stepped up to the prostrate form of his victim and shot him a second time. The evidence proved beyond all reasonable doubt that the homicide was murder. There was no room for even a probability that it was

manslaughter in the first degree, nor was there any evidence fairly raising, or tending to raise, the issue of self-defense. We would not have reversed the judgment if the court had omitted to charge upon the issue of manslaughter in the first degree, because in our opinion the facts of the case did not demand that this issue be submitted.

The defendant, without excuse, unjustifiably, with a premeditated design to kill and murder, shot and killed Levi Davis. The jury in mercy, or in charity for the weakness of human kind, or possibly through a mistaken view of the law, lessened his crime to manslaughter in the first degree, and he should be satisfied with his conviction for the lesser offense.

A careful examination of the whole case leads to the conclusion that no error has been committed to the defendant's prejudice. The judgment is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

NARCOME et al. v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 13, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1120*)—HOMICIDE (§ 255*)
—APPEAL—RECORD.

In a prosecution for murder, the defendants were convicted of manslaughter in the first degree. *Held*, that no reversible error was committed upon the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120; * Homicide, Cent. Dig. §§ 539-541; Dec. Dig. § 255.*]

Appeal from District Court, Hughes County; John Caruthers, Judge.

Daniel Narcome and Jim Franks were convicted of manslaughter, and appeal. Affirmed.

Crump & Skinner, of Holdenville, for plaintiffs in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and Joseph L. Hull, Sp. Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiffs in error were convicted of manslaughter in the first degree, upon an information filed in the district court of Hughes county, on the 3d day of June, 1912, wherein it is charged that Daniel Narcome and Jim Franks, in said county, did on or about the 6th day of April, 1912, commit the crime of murder, by shooting and killing one Isaac Kernal. On the 10th day of June, 1912, in accordance with the verdict of the jury, the court sentenced the defendants to imprisonment in the penitentiary for the term of five years each. To reverse the judgment, the defendant appealed by filing in this court on October 9, 1912, a petition in error with case-made.

The evidence shows that Ben Reed, John

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Marks, and Isaac Kernal, the deceased, full-blood Indians, left the town of Holdenville about sundown on the day of the killing, and were overtaken at the edge of town by Daniel Narcome and Jim Franks, Indians, and that all went along together for about two miles. There Ben Reed had a fight with the defendants. After that the defendants rode on ahead. About five miles south of Holdenville, near the home of Narcome, they met the defendants standing by the side of the road, and Narcome had a shotgun and fired, hitting Isaac Kernal in the breast. Franks shot at them with a pistol. Ben Reed and John Marks jumped out of the wagon and ran away. The next morning, the body of Kernal was found lying upon the spring seat of the wagon.

The defendants took the stand as witnesses in their own behalf. Narcome testified that they were all drinking medicine together at Holdenville that day; that he and Jim Franks left town together and overtook Ben Reed, John Marks, and Isaac Kernal, and he had a fight with Ben Reed; that they met them again near Birdcreek, and Ben Reed struck him with a pistol; that he had a shotgun and handed it to Jim Franks, and Jim Franks fired the shotgun; that two pistol shots came from the men in the wagon, and he ran away.

The defendant Franks testified to substantially the same state of facts, and that he fired the shotgun at no particular person.

It is claimed that the court erred in refusing to admit an almanac in evidence, offered for the purpose of showing that the moon rose at 11:34 on the night of the killing. The record does not contain the purported almanac, and for this reason no question is presented for this court to pass upon.

Error is assigned upon one of the instructions given, No. 7, and the first part of this instruction is criticised; but no objection was made or exception taken to this instruction. We see no objection to the instruction as a whole and can only regard the criticism made upon it as hypercritical.

The charge of the court fully and fairly presented the law of the case. A careful examination of the whole case leads to the conclusion that no error has been committed to the prejudice of the defendants.

It follows that the judgment of the district court of Hughes county must be affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

METZ v. JACKSON.

(Supreme Court of Utah. Nov. 10, 1913.)

1. APPEAL AND ERROR (§ 1042*)—REVIEW—PREJUDICIAL ERROR.

Where a demurrer was sustained to defendant's answer, and an amended answer was filed, the original went out of the record, and hence

the improper refusal of the motion to strike the answer was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

2. EXCEPTIONS, BILL OF (§ 43*)—ALLOWANCE.

Notice of the decision was served on defendant's attorney the 6th of January, 1913. March 31st leave was given to prepare and serve a bill of exceptions on or before April 10th. Held, that where no bill was presented for settlement until May the court was without jurisdiction to settle and allow the proposed bill of exceptions.¹

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.*]

3. APPEAL AND ERROR (§ 544*)—BILL OF EXCEPTIONS—NECESSITY.

In the absence of a bill of exceptions embracing the testimony, the only question which can be determined on appeal is whether the pleadings are sufficient to sustain the findings of fact and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.*]

Appeal from District Court, Rich County; W. W. Maughan, Judge.

Action by J. I. Metz against David Jackson. From a judgment for defendant, plaintiff appeals. Affirmed.

R. S. Spence, of Evanston, Wyo., for appellant. B. C. Call, of Brigham City, for appellee.

FRICK, J. This action was commenced by the appellant as indorsee of a certain promissory note dated May 8, 1906, payable to S. Metz & Sons or order one year after date, which was signed by the respondent. Neither the note nor the complaint disclosed whether the appellant obtained the note before or after maturity, but in that respect he relied upon the presumption created by Comp. Laws 1907, § 1611. The respondent filed an answer in which, after stating that the appellant was not a holder in due course, he set up various defenses. One defense was that the note was obtained by fraud and false representations, and another that the consideration had wholly failed. The case was tried to the court; a jury having been waived by both parties. The court made findings of fact, which, in substance, are: That on the 8th day of May, 1906, respondent made and delivered to S. Metz & Sons the promissory note sued on; that on said date said S. Metz & Sons by M. C. Metz, made certain material representations concerning the qualities and physical condition of what they represented to be a thoroughbred stallion, which they offered to sell or trade to respondent; that respondent relied on said representations, all of which were false, and made to deceive and defraud, and did deceive, the respondent; that as soon as respondent learned that the representations were false, and of the actual physical condition of said stallion,

¹ Butter v. Lampson, 29 Utah, 439, 82 Pac. 473; Bryant v. Himbel, 32 Utah, 377, 90 Pac. 1079; Ins. Agency v. Investment Co., 35 Utah, 542, 101 Pac. 699.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he "rescinded the contract for the sale of said stallion, including said promissory note," and it is further found "that defendant (respondent) did not receive from the said M. C. Metz, or any other person, any consideration whatever for the said promissory note, and said S. Metz & Sons, by M. C. Metz, thereupon agreed with the defendant that said note be rescinded, and agreed to return the said promissory note to the defendant to be canceled; that said S. Metz & Sons failed to deliver said note to defendant to be canceled as aforesaid; that said S. Metz & Sons, upon the refusal of the defendant to accept said stallion, took same away, and that said stallion was not at any time in the possession of the defendant." The court further found that said note was not indorsed to appellant before the maturity thereof, "but on the contrary the said note remained in the possession of said S. Metz & Sons, and under their control until after the maturity of the said note." As conclusions of law the court found that "said promissory note was obtained by the said S. Metz & Sons from the defendant by fraud and false representations," that neither the appellant nor the person under whom he claims "is or was a holder in due course prior to the maturity of said note," and that respondent is entitled to judgment canceling said note, which was accordingly entered.

[1] The principal contentions on the appeal are that the court erred in not sustaining appellant's motion to strike respondent's first amended answer to the complaint and in not sustaining appellant's general demurrer to the second amended answer. The court did sustain a demurrer to the first amended answer and gave respondent leave to file a second amended answer, which was done. The first amended answer, therefore, went out of the case, and the court could not have prejudicially erred in not striking it. Nor did the court commit error in overruling the general demurrer to the second amended answer. While the facts are inartificially stated, yet the answer as a whole was sufficient to withstand a general demurrer.

[2] In passing to the assignment that the findings of fact are not sustained by the evidence, we are met with a motion interposed by respondent to strike appellant's proposed bill of exceptions, in which it is sought to preserve the evidence adduced at the trial. The motion is based upon the grounds that the bill was not prepared, served, nor settled within the time fixed by our statute, and that the same had not been served on respondent, nor upon his attorney. Objections to the allowance of the bill were interposed by respondent in the court below for the reasons stated, and that court certifies that the grounds stated in the motion are true, but it nevertheless signed the bill of exceptions and certified it up so that this

court might pass upon the objections. The record discloses that judgment was entered on the 18th day of September, 1912, and that notice of the decision was served on appellant's attorney on the 6th day of January, 1913. It further shows that no attempt was made to obtain an extension of time to prepare and serve a bill of exceptions until more than 30 days had elapsed after notice of decision was served. Such an attempt was, however, made on March 31, 1913, at which time leave was given by the district court to prepare and serve a bill of exceptions on or before April 10, 1913. The proposed bill of exceptions, however, never was served on respondent nor upon his attorney and was not presented for settlement until the 14th day of May, 1913, at which time the district court allowed and settled the bill over respondent's objections, under the circumstances before stated. It is very clear that under the former decisions of this court the district court had no authority to settle and allow the proposed bill of exceptions. The following cases squarely so hold, *Butter v. Lamson*, 29 Utah, 439, 82 Pac. 473; *Bryant v. Kunkel*, 32 Utah, 377, 90 Pac. 1079; *Insurance Agency v. Investment Co.*, 35 Utah, 542, 101 Pac. 699. The motion to strike the bill of exceptions must therefore prevail.

[3] In view that there is no bill of exceptions the only question we can determine is whether the pleadings are sufficient to sustain the findings of fact and judgment. We think they are.

Judgment is therefore affirmed, with costs.

MCCARTY, C. J., and STRAUP, J., concur.

STATE ex rel. BROOKS v. FIRST JUDICIAL DIST. COURT OF CACHE COUNTY et al.

(Supreme Court of Utah. Nov. 13, 1913.)

1. CRIMINAL LAW (§ 90*)—DISQUALIFICATION—PREJUDICE.

Comp. Laws 1907, § 5132, relating to criminal procedure in justices' courts, provides that a change of place of trial may be had before the trial commences, sections 239, 240, make the general Code of Criminal Procedure relating to justices' courts applicable to city justices, and section 242 provides that, where any city justice is disqualified, the mayor shall appoint some other justice of the peace residing within the county. *Held*, that a showing of prejudice of a city justice was a disqualification within the meaning of the statute, and that defendant in a criminal case was required to proceed under section 242, and not under section 5132.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129-136; Dec. Dig. § 90.*]

2. CRIMINAL LAW (§ 90*)—PREJUDICE—OUSTER OF JURISDICTION.

Whether considered under Comp. Laws 1907, § 5132, relating to criminal procedure in justices' courts, and granting a change of venue on affidavit that defendant believes that he cannot have a fair and impartial trial before the city justice, or under section 242, allowing such affidavits against justices of a city court, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—50

filing of an affidavit in the language of the statute did not oust the justice of jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129-136; Dec. Dig. § 90.*]

3. CRIMINAL LAW (§ 260*)—CERTIORARI—PROCEEDINGS—QUESTION PRESENTED FOR REVIEW.

On certiorari to review the overruling by the district court of defendant's motion to dismiss on the ground that the city justice below was ousted of jurisdiction of a prosecution for selling liquor by the filing of an affidavit of prejudice, so that the district court itself was without jurisdiction on appeal, proceedings in a similar case against relator, and his conviction and satisfaction of the judgment against him, could not be considered when in the instant case such proceedings were not pleaded as former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. § 260.*]

Certiorari by the State of Utah on the relation of Leo D. Brooks against the First Judicial District Court of Cache County, State of Utah, Hon. J. D. Call, Judge, and Smithfield City, a municipal corporation. Ruling of District Court to dismiss an action against relator affirmed; temporary restraining order revoking record returned to the District Court.

E. A. Walton, of Salt Lake City, for relator. Nebeker, Thatcher & Bowen, of Logan, for defendant.

STRAUP, J. We, on certiorari, are asked to review proceedings of the district court in a case appealed to it from a city justice, and to prohibit further threatened proceedings of the case in the district court. In an action before J. H. Melkle, the city justice of Smithfield City, Cache county, wherein Smithfield City was plaintiff, and the relator, Brooks, defendant, a complaint was filed on the 3d day of June, 1913, charging the relator with selling at Smithfield City intoxicating liquors, beer and whisky, to one A. E. Petersen on the 14th day of May, 1913, in violation of an ordinance of Smithfield City. Before trial, Brooks filed an affidavit "that he has reason to believe, and does believe, that he cannot have a fair and impartial trial of this action before the justice of the peace before whom the same is pending and about to try the same by reason of the bias and prejudice of said justice." Upon that a motion was made "to change the place of trial to another justice" of the county. The justice overruled the motion. Brooks then demanded a jury, who, on the 14th day of June, 1913, convicted him. On that verdict a judgment was rendered, sentencing him to pay a fine of \$250, and to be imprisoned in the city jail of Smithfield City for 60 days. From that judgment, and the whole thereof, Brooks prosecuted an appeal to the district court. After the record had been transmitted to that court, and on the 15th day of August, 1913, Brooks, on written notice, moved the district court to dismiss the action, on the

grounds that the district court had no original jurisdiction to try the case on the merits, and that the justice was ousted of jurisdiction by the filing of the affidavit for a change of venue. The district court denied the motion, ordered Brooks arraigned, took and entered his plea of not guilty, and set the case for trial on the 28th of August. Upon the affidavit of Brooks containing the foregoing matter, a writ was issued requiring a certified copy of the record to be transmitted to this court, and a temporary restraining order was issued. The record so transmitted shows the proceedings as heretofore set forth.

The relator contends that the filing of the affidavit before the city justice ousted that court of jurisdiction, and, as that court was then without jurisdiction to further proceed, except to transmit the papers to another justice of the county, the district court acquired no jurisdiction by the appeal, and, since that court had no original jurisdiction of the action, it was wholly without jurisdiction to try the case.

The relator relies on Comp. Laws 1907, § 5132, relating to the criminal procedure of justices' courts. That section provides that a change of place of trial may be had at any time before the trial commences. "When the defendant files an affidavit in writing, stating that he has reason to believe, and does believe, that he cannot have a fair and impartial trial of the action before the justice about to try the same, by reason of the bias or prejudice of such justice, the action must be transferred to a justice of the county agreed upon by the parties, or, if there is no agreement, to the nearest justice within the county to which such objection does not apply." By reason of that section it is contended that, when the affidavit was filed, merely in the language of the statute, the justice was ousted of jurisdiction, except to transfer the case to another justice of the county. We do not think the section applicable. The statute has created city justices of the peace. The case was commenced and was pending before the city justice of Smithfield.

Comp. Laws 1907, § 239, provides: "The city justice of the peace shall have exclusive original jurisdiction of cases arising under or by reason of the violation of any city ordinance, and shall have the same powers and jurisdiction as justices of the peace in all other actions, civil and criminal."

The next section provides: "The rules of practice and mode of procedure in a city justice's court shall be the same as are or may be prescribed by law for justices' courts in like cases, except as herein otherwise expressly provided. From all final judgments of a city justice's courts an appeal may be taken by either party in a civil case, or by the defendant in a criminal case, to the district court of the county, in the manner pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vided by law for appeals from justices' courts in similar cases."

Section 242: "If a vacancy shall occur in the office of a city justice, the mayor, by and with the consent of the city council, shall forthwith fill such vacancy by appointment for the unexpired term. The person so appointed shall qualify in the same manner as a city justice, and shall have and exercise all the powers conferred by law upon such city justice. In case any city justice shall, for any reason, be unable or disqualified to perform the duties of his office, or shall be absent, the mayor shall appoint some other justice of the peace, residing within the county, to act as city justice of the peace pro tem, and he shall have the powers, and discharge the duties, of such city justice, during the existence of such disability or absence only, in the same manner, and to the same extent, as the city justice might have done."

[1] It therefore appears that the general Code of Criminal Procedure relating to justices' courts applies to city justices of the peace, except as otherwise provided by the statute creating city justices. Such statute provides that, "in case any city justice shall, for any reason, be unable or disqualified to perform the duties of his office," the mayor shall appoint some other justice of the peace residing within the county. Now, is a showing of prejudice and bias of the justice a disqualification within the meaning of the statute? We think it is (23 Cyc. 582; In re Peyton, 12 Kan. 398), and hence the relator, for relief on his alleged ground of bias and prejudice, was required to proceed under section 242 and not 5132.

[2] In the next place, the filing of such an affidavit as here—merely in the language of the statute—does not under either section oust the justice of jurisdiction. The relator to support a contrary contention relies on the case of the State ex rel. Gallagher v. Dist. Court, 36 Utah, 68, 104 Pac. 750. We do not think that case supports his contention. It involved the consideration and application of section 3669, R. S., 1898, and as amended by section 1, c. 92, Sess. Laws 1905, and section 3672. They relate to a change of venue in civil actions before justices' courts, and provide that, when an affidavit is filed, as by that statute provided, "the court must change the place of trial without motion being made therefor, and his jurisdiction over such action shall cease, upon the filing of such affidavit, for all purposes" except to transfer the case. We think the statutes are dissimilar. In the one the Legislature expressly provided that upon the filing of the affidavit the jurisdiction of the justice "over such action shall cease for all purposes" except to transfer the case, and because of such express declaration was it held in the Gallagher Case that the filing of the affidavit ousted the justice of jurisdiction. In the other the statute con-

tains no such declaration. We are therefore of the opinion that the filing of the affidavit, whether considered under section 242 or 5132, did not oust the justice of jurisdiction, and hence the appeal conferred jurisdiction on the district court both of subject-matter and person, who, under the statute, was required to hear and try the case de novo. It therefore follows the district court did not exceed jurisdiction by refusing to dismiss the action and proceeding with the case.

There is another matter attempted to be presented. After the petition for the writ had been filed, the writ issued, and return made thereof, and on the day of the hearing thereof, the relator filed a written "suggestion," in which he stated that subsequent to the issuance of the writ such proceedings were had in the district court, in a case wherein the state of Utah was plaintiff and the relator defendant, "as to fully conclude, adjudicate, and determine the merits of the matters sought to be reviewed herein, namely, that on said date [August 29, 1913], as is shown by conclusive evidence, namely, transcripts duly certified of the record of said court herewith attached, the said L. D. Brooks [the relator] was in jeopardy of, and convicted of, and suffered and satisfied the judgment of said court for, said offense." Upon that we are asked to prohibit further proceedings of the district court in the case of Smithfield City against the relator. The certified transcript of the record referred to shows that on the 28th of June, 1913, a complaint was filed, before William Brangham, a justice of the peace, in and for Logan precinct, Cache county, in an action wherein the state of Utah was plaintiff and the relator defendant, and wherein it was charged that he "on or about the 15th day of May, 1913, at Smithfield precinct, county of Cache and state of Utah," did unlawfully sell intoxicating liquors, beer and whisky, to A. E. Petersen, contrary to the statute in such case made and provided. To that complaint the relator pleaded not guilty, and further pleaded the action commenced before the city justice wherein Smithfield City was plaintiff and the relator defendant, and pending on appeal in the district court in bar and in abatement. It does not directly appear by the record that the relator was convicted in the justice's court; but it does affirmatively appear that he, in that case, appeared before the district court for arraignment, entered his plea of not guilty and a plea of former conviction and once in jeopardy. Thereupon that case was set for trial, and later called for hearing. The relator then withdrew his plea of not guilty, and entered a plea of guilty, upon which a judgment was rendered and entered that he pay a fine of \$250. That judgment was paid and satisfied.

[3] Now, because of such proceedings had in the case of the state against the relator, and the payment and satisfaction of the judg-

ment by him, it is urged that we prohibit the district court from further proceeding with the case of Smithfield City against the relator. The matter is not properly before us. The relator asked and was granted a review of the proceedings had in the case of Smithfield City against the relator, and to restrain the district court from further proceeding in that case upon the alleged ground, as heretofore stated, of want of jurisdiction. Then, on a review of that record, we are asked to restrain the court from further proceeding in the case because of the proceedings had in the case of the state against the relator, when such proceedings were no part of the proceedings had in the case of Smithfield City against the relator. That is, in the district court, in the case of Smithfield City against the relator, former conviction or once in jeopardy was not pleaded. If the proceedings and judgment in the case of the state against the relator constitute a former conviction and once in jeopardy, and a bar to a further prosecution of the case of Smithfield City against the relator, then, to be availing, is he required to plead them in defense? He might as well ask us to restrain the district court from further proceeding with the case of Smithfield City on the ground that he is not guilty as to ask us to restrain that court from further proceeding on the ground that he has a good plea of former conviction or once in jeopardy. And as such pleas have not as yet been interposed, we are thus asked to review something which has not yet been presented to the district court. Whether the proceedings and judgment in the case of the state against the relator constitute a former conviction or once in jeopardy, and may successfully be pleaded in bar to the further prosecution of the Smithfield City Case, we express no opinion.

The ruling of the district court in refusing to dismiss the action is therefore affirmed, the temporary restraining order revoked, and the record returned to the district court.

Such is the order.

McCARTY, C. J., and FRICK, J., concur.

STATE v. KARAS.

(Supreme Court of Utah. Nov. 13, 1913.)

1. BURGLARY (§ 41*)—SUFFICIENCY OF EVIDENCE.

Evidence held not sufficient to connect accused with the offense so as to sustain a conviction for burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 339*)—EVIDENCE—OPINION EVIDENCE—VOICE.

While evidence of the sound of voice is admissible for identification purposes, it should be reasonably positive and certain, and based upon some peculiarity of the voice, or upon suf-

ficient previous knowledge by the witness thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 767-772; Dec. Dig. § 339.*]
3. CRIMINAL LAW (§ 741*)—TRIAL—PROVINCE OF JURY.

While the jury are the judges of the facts and the weight of the evidence and credibility of the witnesses, and evidence tending to prove an issue, however slightly, is admissible, it is a preliminary question for the court, and not the jury, to decide in every case whether the evidence will justify a verdict for the party adducing the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.*]

4. CRIMINAL LAW (§ 561*)—PROOF—REASONABLE DOUBT.

The accused must be proven guilty by the evidence beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

Appeal from District Court, Carbon County; A. H. Christensen, Judge.

Gust Karas was convicted of third degree burglary, and appeals. Reversed, and remanded for new trial.

S. A. King and Claude King, both of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins, G. A. Iverson, and George Buckle, Asst. Attys. Gen., for the State.

STRAUP, J. The defendant was convicted of burglary in the third degree—breaking into a tent in the daytime—and appeals.

[1] The sufficiency of the evidence to show the commission of the offense is conceded. The question presented for review is the sufficiency of the evidence to connect the defendant with it.

Near Schofield, some five tents in a row, numbered from 21 to 25, and from 10 to 100 feet apart, were maintained and occupied by miners working in a mine near by. Tent 25 was burglarized. It was occupied by two miners, who, as they testified, at about 7 o'clock in the morning locked the door and left the tent to go to work. That tent was about 100 feet from a highway to the west of it. Two tents to the east of tent 25, and about 100 feet from it, was tent 23. That tent was occupied by the defendant and about 14 other miners and a cook. The miners of that tent also left about 7 o'clock, leaving the defendant and the cook alone in the tent. The defendant, on account of an injury, had not worked for several days, and for that reason remained at home about his tent on the day in question. At about 8 or 8:30 o'clock the cook left the tent to go to Schofield, leaving the defendant alone. Between 7 o'clock and 9 o'clock in the morning some one entered tent 25 by cutting a hole through the lumber part of the tent, disarranged the furniture, and took \$125 in money and a watch chain belonging to the occupants of that tent.

A witness for the state, a grocer, testified

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that that morning at about 9 o'clock he went to the front door of tent 25 to deliver a can of coal oil. He unlocked the door with a key the occupants had put "to one side," and then tried to push the door open. Some one on the inside held it, and said: "Hello." The witness said: "Hello, there. I have some stuff to deliver here." The person on the inside: "Get out! Go on and tend to your business." The witness: "I have some stuff to deliver here." The person on the inside: "Get out! Do you want to get in my house?" The witness left without opening the door, or seeing the person on the inside, and went up the street a hundred yards or more, and there talked a little while with some one living in a house near by, and then returned to tent 25. On his way back he saw the defendant at the rear of the tents, bare-headed, and without a coat or vest. He testified that he did not see the defendant come out of tent 25, and while talking with such other he could not see it, and did not watch it, nor did he know or notice if persons were in or about tents 24, 22, or 21. Just where the defendant was when he saw him is not definite. On direct examination, in response to questions asked him, the witness testified: "I saw him come from the behind. Q. Where did he come from? A. There was two tents together, and he came from the south, you know. (Tent 25 was west of tent 23.) Q. He came from where? A. South from the tent where I was to deliver the stuff." On cross-examination he said: "I saw the defendant between tents 22 and 23, or 23 and 24. Q. You wouldn't say it was not between 22 and 23? A. No, sir." When the witness returned to tent 25 he opened the door, left the oil, and then locked the door and put the key where he had found it. He then noticed the hole in the tent. Then the witness, after he had merely testified that he knew the defendant, and that he thought he lived in tent 22 (instead of 23), and without any showing as to how long or well he had known him, or under what circumstances, or ever had previously talked with him, or heard him talk, was asked by the state: "Q. Do you know whose voice it was (inside the tent when he was first there)? A. Yes, sir. Q. Could you tell, can you tell whose voice it was? A. By myself I can tell. Q. What is it? A. I did not see in who it is; by the voice I can tell. Q. Whose voice was it? A. Gust Karas' voice (the defendant)." On cross-examination, after testifying that he was an Italian, that the defendant was an Italian, and that what he heard was spoken in English, he was asked and he answered: "Q. You did not see Gust Karas in the tent, did you? A. No, sir. Q. And you heard a voice you thought was Gust Karas? A. Yes, sir. Q. As matter of fact you do not actually know it was Gust Karas? A. By myself I am sure. Q. I am not asking you about that, by yourself. You thought that you recognized his voice? A. Yes, sir. Q. But as matter of fact you do

not know it was actually his voice, do you? A. I was certain myself. Q. Well, you could have been mistaken about that? A. Well, I might have been mistaken; I wouldn't swear it; I did not see him, but his voice told me it was him. Q. You thought it was his voice? A. Yes, sir. Q. You know there are lots of people whose voice sound alike? A. I believe that. Q. This voice that you heard you thought was his voice, and that was all there was to it? A. Yes, what I thought. Q. But as matter of absolute fact you don't know whether it was him or not, do you? A. No, sir. Q. You wouldn't swear now, as a matter of fact, that it actually was him? A. No, I just swear by myself. Q. That you thought it was his voice? A. Yes, sir. Q. That is all? A. I didn't see the fellow; but myself I think it was the fellow." This is all the evidence tending to connect the defendant with the commission of the offense.

The defendant testified that he had lived at tent 23 for about 17 months; that he had known the grocer for about a year from seeing him deliver merchandise at the tents, but he had never talked with him; that several days before the time in question he was hurt in the mine and laid off, staying about his tent; that he was not in tent 25, and denied he committed the offense; that he was at or near the rear of his tent on the occasion testified to by the grocer, but was then returning from a closet in the rear and to the south of the tents, and from gathering sticks for a fire, and that he then saw the grocer pass along in front. He further testified he could not talk English. The record shows his testimony was given through an interpreter.

At the conclusion of the state's case, and at the conclusion of all the evidence, the defendant asked, that a verdict be directed in his favor on the ground that the evidence was not sufficient to connect him with the offense. The motions were denied and the case submitted to the jury, who found the defendant guilty.

The state, to support the verdict, points to but one thing—the testimony of the grocer (1) that he recognized the defendant's voice in the tent, and (2) shortly thereafter saw him in the rear, not of tent 25, but between tents 22 and 23, or 23 and 24, coming from the south; tent 25 being to the west. The second may readily be dismissed. Had the defendant not resided there, had he been a stranger, and not there in pursuit of some proper calling or business, his unexplained presence about the tents or in the vicinity where the offense was committed shortly before or after its commission might be significant, and give rise to the inference of more or less weight that it was he who committed the offense. But, residing as he did at tent 23 for more than a year, his presence at 8 or 9 o'clock in the morning at the rear of his tent, or between his own tent and tent 24 or 23, coming from the south, the direction of the closets,

"just walking along regularly," as testified to by the grocer, without a hat, coat, or vest, does not raise any such inference. His presence under such circumstances is just as consistent with innocence as with guilt.

[3] Now, as to identity by the voice, the one thing upon which the state chiefly relies. Undoubtedly voice is a competent means of identification, and one by such means alone may be sufficiently identified. In some instances identification by such means may be as ponderous as identification by sight. But the testimony should be reasonably positive and certain, and based upon some peculiarity of the person's voice, or upon sufficient previous knowledge by the witness of the person's voice. And to that effect are the texts and cases upon which the state relies. 6 Ency. Ev. 923; 12 Cyc. 493; *State v. Babb*, 76 Mo. 502; *Evans v. State*, 62 Ala. 6; *Brown v. Commonwealth*, 76 Pa. 319; *Commonwealth v. Williams*, 105 Mass. 62; *Commonwealth v. Hayes*, 138 Mass. 185; *State v. Hopkirk*, 84 Mo. 278; *People v. Mullen*, 49 Misc. Rep. 289, 99 N. Y. Supp. 227. They show that evidence similar to that adduced in the case before us is competent and admissible; but none of them go to the extent of holding that evidence of the character here adduced is alone sufficient, as to identity, to support a judgment of conviction. In some of them the question arose only as to the competency and admissibility of the evidence; in others, where the question of sufficiency was involved, there was other evidence to connect the defendant with the commission of the offense; and in all of them it was shown that the witness had previous knowledge of the voice of the person sought to be identified, or identified him by means of some peculiarity of the voice, except the case of *State v. Mullen*, but which is strikingly against the state's contention. The cases show it is common practice to allow witnesses, as to identity, to express their belief, or best judgment, or opinion, when the facts or circumstances upon which it is based are shown, and when they appear to justify it. That is, to permit a witness to express his belief or opinion as to identity, it is not essential that he be capable of testifying that he is positive and certain as to the person; he may be permitted to express a well-founded belief, or his best judgment, or opinion, when his means of knowledge, or the facts or circumstances upon which his belief or opinion is based, are shown, and when they appear to justify it. But when a conviction is sought on such testimony alone, to be sufficient to support it, the testimony should be something more than the mere belief, or best judgment, or mere opinion, of the witness; for if the witness is not capable of testifying with that degree of positiveness and certainty as to even carry conviction in his own mind as to the identity of the accused, where by his testimony he expresses doubt and uncertainty—"I think

so," "It is my belief, or my best judgment, but I won't swear to it," "I am not positive," "I am not certain"—how can a jury, when there is no other evidence to connect the accused with the commission of the offense, be permitted to say, against positive and direct evidence that he was not the person, that they have an abiding conviction to a moral certainty that he was the perpetrator of the offense?

Portions of the testimony of the grocer were somewhat positive that the voice he heard in the tent was that of the defendant, other portions that he was not certain, and that he would not swear that it was the defendant. But the weakness or insufficiency of the testimony does not lie alone in that. Here, the witness, though he testified that he could tell whose voice he heard, and that it was the defendant's voice, yet was not shown to have previously talked with him or heard him talk; nor was it shown that he had any previous knowledge whatever of, or was familiar with, the defendant's voice; or that the voice he heard had any peculiarity, or was in any particular different from the voice of others. Nor was the witness in any respect required to show anything upon which his belief, or judgment, or opinion, was based, except the bare statement that he knew the defendant, but how well or how long, or under what circumstances or conditions was not shown. But let it be conceded the witness showed sufficient qualifications to permit him to express his belief or opinion as to whose voice he heard—he having testified that he could tell—a question upon which we express no opinion, for no objection was made and no error is assigned with respect to it, and that the evidence was admissible and properly received, nevertheless, we cannot yield assent that such evidence alone is sufficient to connect the defendant with the commission of the offense, especially as against positive and direct evidence that he was not the person who committed the offense.

[3] The Attorney General, in a way conceding that the evidence in such particular is not as convincing as he would like to urge an affirmation of the judgment, nevertheless contends that the proposition involves mere weight of the evidence, which was wholly for the jury. Of course in this, as in many other jurisdictions, the jury are the judges of the facts, the weight of the evidence, and the credibility of the witnesses. But that does not mean that the jury are permitted to find a fact without some substantial evidence to support it. Evidence which tends to prove a fact in issue, however slight that tendency may be, of course, is admissible. But whether it alone, or when considered with all the evidence in the case and in the light most favorable to the party adducing it, is sufficient to justify a finding as to such fact, is a question for the court, not the jury. We recognize that in the nature of things the law

cannot and does not provide rules or devise standards to determine the quality or amount of evidence necessary to establish a fact or to satisfy the mind and induce belief as to its existence. Undoubtedly much must be left to the unprejudiced consideration of the jury. But their province in such respect is not unrestricted or unlimited. Because evidence relevant to or bearing upon some fact in issue, and hence admissible though however slight its tendency may be to prove it, has been received does not authorize a jury, on the theory that they are the sole judges of its sufficiency to induce belief and to establish a fact, to give such effect to it, when within the range of reasonable probabilities, inferences, or deductions, such a finding cannot justifiably be made. We know in some texts and cases it has been somewhat loosely stated, both as to criminal and civil cases, that competency and admissibility of evidence is for the court; *its sufficiency* to establish a fact in issue for the jury. But in nearly all such instances "sufficiency" is spoken of or treated as being synonymous with "weight of the evidence." To say that the jury are the sole judges of the sufficiency of evidence to establish a fact in issue is but to say that they are the sole judges of the sufficiency of the evidence to support a verdict. When it is said the jury are the sole judges of the facts, the weight of the evidence, or, as has sometimes been said, its sufficiency to establish the fact or facts in issue, that of course means with respect to a case which is properly submitted to them, a case involving a conflict in the evidence, or evidence open to different inferences or deductions within the range of reasonable probabilities, a case where reasonable and unprejudiced minds upon the evidence may fairly differ and draw different conclusions as to the ultimate facts. But in every case, before its submission to the jury, there is always a preliminary question of law for the court whether there is sufficient evidence upon which the jury may properly proceed to find a verdict. There is hence nothing to the conclusion that since admissible evidence bearing on or relevant to identity was adduced and received, and inasmuch as the jury are the sole judges of the facts, the weight of the evidence, and the credibility of the witnesses, the question of sufficiency to establish the fact of identity was for the jury. For the court was called upon to determine, as a preliminary question of law, whether there was sufficient evidence to justify a finding that the defendant was the perpetrator of the offense. Had it been shown that the witness had previous knowledge of the defendant's voice, and for that reason, or because of some peculiarity of the voice, was able to tell the defendant's voice when he heard it, or had he shown such associations or acquaintances with the defendant as to fairly

presume he had such ability, and then had been able to testify with a reasonable degree of positiveness and certainty that the voice he heard was the defendant's voice, the sufficiency of the evidence as to identity might be conceded. But nothing of the kind was shown.

[4] Furthermore, the testimony of the witness, when looked at as a whole, the cross-examination with the direct examination, renders the testimony uncertain, doubtful, and open to conjecture or surmise as to whether the voice he heard was the defendant's voice. And as the jury had nothing more upon which to base their verdict, it follows that the verdict which was rendered by them was itself based on doubtful and uncertain testimony, and upon conjecture, testimony which does not meet the required quantum of proof that the defendant, before he can be legally convicted, must be proven guilty beyond a reasonable doubt.

We think the court ought to have granted the motion to direct a verdict in the defendant's favor. The judgment is therefore reversed, and the case remanded for a new trial.

McCARTY, C. J., and FRICK, J., concur.

SANDERSON v. SANDERSON et al.
(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. DEEDS (§ 54*)—NECESSITY OF DELIVERY.

The mere signing and acknowledgment of an instrument purporting to be a conveyance of land does not consummate a conveyance, but to effect such conveyance there must be an actual or constructive delivery of the instrument from the grantor named therein to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 118; Dec. Dig. § 54.*]

2. DEPOSITS IN COURT (§ 12*)—DISPOSITION.

An order of a district court, directing the clerk thereof to pay a certain sum of money to a certain person, is a final order, and is erroneous where the records of the court show that the fund never came into the hands of the clerk to whom the order was directed, but came into the hands of her official predecessor, and was paid out by such predecessor under the order of the court.

[Ed. Note.—For other cases, see Deposits in Court, Cent. Dig. § 13; Dec. Dig. § 12.*]

Appeal from District Court, Cowley County.

Action by Louzettia Sanderson against George W. Sanderson and others. Judgment for plaintiff, and defendants appeal. Affirmed in part, and reversed in part.

L. C. Brown, of Arkansas City, for appellants. Hackney & Lafferty, of Winfield, for appellee.

SMITH, J. The appellee brought suit against her husband, George W. Sanderson, for a divorce and for alimony. She also

made Carrie Sanderson and A. W. Sanderson, children of George W. Sanderson by a former marriage, parties defendant for the purpose of setting aside deeds made to them by their father just prior to his marriage to appellee. The divorce prayed for was granted, and the appellee was awarded alimony in the sum of \$500, and a lien was adjudged upon the real estate claimed by A. W. Sanderson for the amount of the alimony awarded. Of the parties to the action A. W. Sanderson alone appeals from the judgment allowing the lien.

About the time of the commencement of the action the court appointed a receiver to take charge of the real estate involved in the action, to collect the rents therefrom, and to pay such rents to the clerk of the district court. On September 15, 1911, on an application for alimony pendente lite, the court ordered George W. Sanderson to pay to appellee \$25 in 10 days from that date, and the further sum of \$25 on the first day of each month thereafter during the pendency of the action, and the further sum of \$50 to be paid to appellee's attorneys for preparing the case for trial; that said sums were to be paid to the clerk, and by the clerk to be paid from time to time to the plaintiff and her attorneys. On June 19, 1912, there then being \$225 due on the order for alimony pendente lite, the receiver was ordered to pay to the clerk of the court, then A. C. Bangs, the sum of \$108.64, "for the use of the plaintiff in satisfaction of his claims." On July 6, 1912, the receiver paid said sum to said clerk, and on the same day the clerk paid the amount to appellee's attorneys.

It seems that at the regular election of 1912, Anna L. Tonkinson, appellant, was elected to succeed Bangs as clerk of the court. On February 5, 1913, the court made a further order, commanding Tonkinson, the then clerk, to pay the said sum of \$108.64 to the appellant A. W. Sanderson. Neither of the appellants excepted to the order made on June 19, 1912, and in the notice of appeal no complaint was made thereof. From this latter order Tonkinson makes a cross-appeal. Appellant Tonkinson contends that at the time of the making of the order, February 5, 1913, she did not have and never had said sum of \$108.64 in her possession as such clerk, and that she could not comply with the order without paying the amount out of her own funds.

[2] The facts as abstracted by appellant Tonkinson on her cross-appeal are not controverted, and, assuming the facts to be as stated, the court evidently made a mistake. The court certainly could not have intended to require its clerk to pay over money which the clerk had never received, but which had been received by the preceding clerk and paid out in accordance with the order of the court. This matter should have been called to the attention of the court by a motion to correct the mistake; but, since this was not

done, and the order is a final order within the provisions of section 6161 of the General Statutes of 1909 (Code Civ. Proc. § 566), it is appealable, and the order of February 5, 1913, is reversed.

As to the appeal of A. W. Sanderson from the judgment awarding appellee a lien of \$500 against the D. street property, we are not unmindful of the case of *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441, which holds, in substance, that a parent who has made a contract of remarriage, and in view of the marriage has represented to his fiancée that he owns certain property, may, before the second marriage, make a voluntary conveyance of such property to children of his former wife, and that under the facts of that case a judgment against the second wife, in an action to set aside such conveyance as a fraud upon her marital rights, was affirmed. The decision in that case is to the effect that one has the right to give away that which is his own, and that the obligation of a man to his prospective bride is not greater than his obligation to his children by a deceased wife, who with his children assisted him in the accumulation of the property; that a gift by a father to such children a short time before the second marriage, and after he has made a statement to his prospective bride, is not necessarily a fraud upon her rights after the marriage. See, also, *Small v. Small*, 56 Kan. 1, 42 Pac. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581; *McKelvey v. McKelvey*, 75 Kan. 325, 89 Pac. 663, 121 Am. St. Rep. 435; *McKelvey v. McKelvey*, 79 Kan. 82, 99 Pac. 238.

We remark incidentally that the abstract of appellants should present to this court an abbreviated statement of the whole case—the pleadings, evidence, rulings, orders, and judgment involved in the appeal. Appellants' abstract in this case falls far short of this. It states the purpose of bringing the action, gives appellants' interpretation of the effect of a part of the evidence, and literally copies a part of the evidence of one witness. This copied evidence, not being disputed, is sufficient to prove there was no antenuptial contract for the conveyance of the property in question from George W. Sanderson to the appellee in consideration of their marriage.

[1] Following the rule in the cases above cited, if George W. Sanderson did, in fact, give a portion of his property to his children by the former marriage, this did not constitute, ipso facto, fraud upon the rights of the appellee, and the only question remains whether he did, in fact, convey the D. street property to his son, A. W. Sanderson. As abstracted by the appellee, there seems to be sufficient evidence to justify the court in finding that no such conveyance was, in fact, consummated by the delivery of the deed. Of course, the mere signing and acknowledgment of a deed to land from one person to another does not consummate the convey-

ance thereof. There must be an actual or constructive delivery of the deed. While there are no findings to indicate precisely the view taken by the court, the judgment implies that no conveyance of the D. street property was consummated by a delivery of a deed thereof to appellant A. W. Sanderson. It is certain that the court did not undertake to set aside the conveyance, if there was such a conveyance, from George W. Sanderson to the appellant A. W. Sanderson. If there was no such conveyance, the judgment of the court making the allowance for alimony a lien upon the D. street property implies that such property had not been conveyed by George W. Sanderson, but was still his property. On the other hand, if the conveyance of the property had been fully made, as we have seen George W. Sanderson had a right to make it, the judgment awarding a lien against the property of A. W. Sanderson to secure the payment of a judgment against George W. Sanderson could not be well justified in law.

There is no appeal from the judgment awarding a divorce, and the judgment awarding a lien for alimony against the D. street property is affirmed. All the Justices concurring.

NESBITT et al. v. CHESEBRO et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

On rehearing. Modified.

For former opinion, see 89 Kan. 863, 138 Pac. 545.

PER CURIAM. In their motion for a rehearing the appellants rehearse and vigorously urge a reconsideration of several errors assigned and argued in their former brief. Some of these assignments of error in the trial are technically well taken. The case is complicated and involved three parties. This court was confronted with the question whether it should reverse the judgment and remand the case for a new trial, or whether, being informed of all the facts and the situation of the parties, without additional evidence, and in view thereof, believing that the judgment failed in some particulars to do full justice, a modification thereof should be ordered. The latter course is adopted.

On a reconsideration of the whole case we have concluded that other changes in the judgment should be made, and that it is our duty, under the provisions of the new Code (section 6176 of the General Statutes of 1909), to set aside the old judgment and to order the trial court to render judgment as herein directed, after causing notice of the time and place of rendering such judgment and allowing the administratrix of the Seaton estate the option of taking or refusing judgment in its favor upon the facts pleaded

in the answer and cross-petition of John Seaton, deceased.

The judgment is to be rendered for plaintiff as of the date of the original judgment, and in amount as modified in the former decision. If the administratrix so elects, judgment to be for the estate for the amount pleaded as due in the answer; also orders are to be made as follows: For the sale of the land under plaintiff's judgment in bulk, subject, first, to remainder of indebtedness on the Seaton mortgage not included in the judgment; second, to remainder unpaid on plaintiff's contract not included in the judgment. Proceeds of sale to be applied, first, to costs; second, to judgment, if any, for Seaton; third, to plaintiff's judgment.

No order should be made for procuring judgment, without a formal action, for any indebtedness maturing in the future to the Nesbitts on the contract or on the Seaton note and mortgage.

ANDREW et al. v. REID et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 810*)—ACTION TO TRY TITLE—EVIDENCE—SUFFICIENCY.

A finding that the defendants, owners of the fee subject to the plaintiffs' tax title, took actual possession of the land in controversy within four years after the tax deed was recorded is sustained by the evidence referred to in the opinion.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605-1606; Dec. Dig. § 810.*]

2. TAXATION (§ 805*) — RIGHTS UNDER TAX DEED—LIMITATIONS.

The land was vacant and unoccupied when the tax deed was issued, and so remained until possession was taken by the defendant, as above stated, and this action of the plaintiff to recover possession under his tax deed, which was recorded October 8, 1902, was barred by the two-year statute of limitations before April, 1911, when this action was commenced. Code Civ. Proc. § 15, subd. 3; Gen. St. 1909, § 5608.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

Appeal from District Court, Greeley County.

Action by George H. Andrew and others against George L. Reid and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

D. R. Beckstrom, of Tribune, for appellants. George L. Reid, of Tribune, for appellees.

BENSON, J. This is an action in ejectment by the holder of a tax title against the defendants, who are the owners of the land in fee, unless their title is extinguished by the tax deed. The judgment was for the defendants, awarding, however, a tax lien in favor of the plaintiff for taxes for over \$250.

Several questions are discussed; but only one need be considered, since it determines the controversy. The tax deed was issued September 18, 1902, and was recorded October 8, 1902. The land was vacant and unoccupied until the defendants took possession, which was in April, 1907, as the district court found. This action was commenced in April, 1911. The holder of a tax title has two years from the date of the recording of the tax deed in which to commence an action to recover possession. Code Civ. Proc. § 15; Gen. St. 1909, § 5608. But, where the land is vacant and unoccupied for more than two years after the deed is recorded, he has two years from the time the original owner takes actual possession in which to commence his action. *Case v. Frazier*, 30 Kan. 343, 2 Pac. 519; *Coale v. Campbell*, 58 Kan. 480, 483, 49 Pac. 604; *Gibson v. Hinchman*, 72 Kan. 382, 83 Pac. 981.

[1] The finding that the defendants took actual possession in April, 1907, is, however, disputed. The evidence must therefore be examined to determine the fact. It appears that in February, 1907, the defendants leased the land to J. J. Banks. At that time there was a dugout upon the land constructed upon the belief that it was upon another tract. The defendants paid for the dugout, and their tenant occupied it. The tenant broke out two acres, and laid off the boundary lines by plowing furrows around it. The following year, 1908, the defendants leased the land to another tenant for three years, who agreed to put in a crop; but on account of dry weather he did not plow upon the land, but herded some cattle upon it that year. He plowed ten acres, and put a crop upon it in the year 1909. He disked the land in cultivation for a crop in the year 1910, but did not plant it because it was too dry. The tenant herded cattle for the defendants on the land in the years 1908, 1909, and 1910. This evidence is sufficient to sustain the finding that the defendants took actual possession of the land in the spring of 1907.

There is also a finding that the plaintiff took possession in March, 1911, although it was not shown how long he held it. The time must have been quite short, for the defendants were in possession when this suit was brought in April, 1911, as the plaintiff alleges and the evidence shows, and it was occupied at the time of the trial by the same tenant who leased it from the defendants in the year 1908. The district court found that the possession so taken by the plaintiff was forcible, and held that it was of no effect in this litigation, but allowed him to remove the improvements made during his brief occupancy.

Our conclusion is that the plaintiff's cause of action was barred by the two-year statute of limitation, and that the court did not err in holding that the alleged possession of the plaintiff in March, 1911, was not effectual.

The defendants complain of the lien for taxes and interest, because there was testimony that a tender had been made; but the evidence relating to tender was conflicting, and the allowance of the lien is approved.

The judgment is affirmed. All the Justices concurring.

HUBER v. ROTH.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

PARENT AND CHILD (§ 14*)—MONEYS EXPENDED BY STEPFATHER—IMPLIED CONTRACT TO REPAY.

Moneys expended by a stepfather for the benefit of a stepson while the latter is a member of his family, and which neither intended should be repaid, cannot be recovered upon any implied contract.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 152-159; Dec. Dig. § 14.*]

Appeal from District Court, Kearny County; Wm. H. Thompson, Judge.

Action by Thomas V. Huber against W. J. Roth. From a judgment for plaintiff, defendant appeals. Affirmed.

Foster & Gaskill, of Lakin, and J. J. Bulger, of Wichita, for appellant. A. R. Hetzer, of Lakin, for appellee.

PORTER, J. Practically the only question presented by the appeal is the denial of the defendant's counterclaim. In his testimony the defendant frankly admitted that he never had any intention of making any charges against the plaintiff until after this suit was commenced. For the same reason that the plaintiff was not permitted to recover on his first and second causes of action, the defendant cannot recover on his counterclaim. The sums of money he paid out for the use and benefit of the plaintiff are in law regarded as mere gifts to a member of his family. Neither party intended repayment, and the relations existing between them prevent any implied contract from being raised. *Story v. McCormick*, 70 Kan. 323, 330, 78 Pac. 819. The defendant, therefore, was not prejudiced by finding No. 10 to the effect that he had not expended anything for improvements on the plaintiff's land. He had expended money, but doubtless the jury regarded the expenditures as money given to the plaintiff.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MERRILL v. STATE.

(Supreme Court of Wyoming. Dec. 8, 1913.)

LARCENY (§ 83*)—VERDICT—STATEMENT OF VALUE.

A verdict of "guilty as charged in the information," not finding the value of the property stolen, is insufficient to support the judgment, though the indictment charges larceny of a head of neat cattle.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 208; Dec. Dig. § 83.*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Ote Merrill was convicted of larceny, and brings error. Reversed and remanded for new trial.

Camplin & O'Marr, of Sheridan, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

BEARD, J. The plaintiff in error, Ote Merrill, was convicted, in the district court of Sheridan county, of the crime of larceny and sentenced to a term in the penitentiary. From that judgment he brings the case here on error.

The information charged the defendant (plaintiff in error) with the larceny of one head of neat cattle, the property of one Stella Kosine. On the trial the jury returned a verdict as follows: "We, the jury, duly impaneled and sworn in the above-entitled cause, do find the defendant, Ote Merrill, guilty as charged in the information." It is contended that the verdict was insufficient to support the judgment because the jury did not find and return in the verdict the value of the property stolen. Since this case was tried the case of Thomson v. State, 130 Pac. 850, was decided by this court, and the Attorney General in his brief concedes that the cases are parallel, as we find them to be. Following the decision in the Thomson Case, the judgment in this case will have to be reversed and the cause remanded for a new trial; and it is so ordered.

Reversed.

SCOTT, C. J., concurs. **POTTER, J.**, did not sit.

REYNOLDS v. MORTON.

(Supreme Court of Wyoming. Dec. 8, 1913.)

1. EVIDENCE (§ 83*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

It is presumed that a notary public acted within his jurisdiction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

2. EVIDENCE (§ 83*)—PRESUMPTIONS—ACT OF NOTARY—JURISDICTION.

If a notary public for L. county took an acknowledgment of a chattel mortgage, the fact that the venue was stated to be "County of C.—sa.," would not overcome the presumption that it was taken in G. county.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. CHATTEL MORTGAGES (§§ 61, 84*)—ABSENCE OF ACKNOWLEDGMENT.

A chattel mortgage was valid as between the parties without being acknowledged or filed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 116-124, 152; Dec. Dig. §§ 61, 84.*]

4. CHATTEL MORTGAGES (§ 173*)—ACTIONS FOR POSSESSION—BURDEN OF PROOF.

The burden was upon plaintiff, in an action to recover cattle claimed under a chattel mortgage, to establish a lien on the property as claimed.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 307, 309, 316-326; Dec. Dig. § 173.*]

5. CHATTEL MORTGAGES (§ 173*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to recover cattle claimed under a chattel mortgage, a mortgage admitted in evidence, which was valid as between the parties, when taken with the secured note and evidence of its nonpayment, made out a prima facie case for plaintiff.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 307, 309, 316-326; Dec. Dig. § 173.*]

6. TRIAL (§ 84*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

An objection that a certified copy of a chattel mortgage offered in evidence was immaterial, incompetent, and irrelevant was too general to raise the objection that the county clerk's seal was not affixed to the certificate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.*]

7. CHATTEL MORTGAGES (§ 173*)—PRESUMPTION OF PAYMENT.

There is no presumption that a past-due note is unpaid and remains the property of the payee, where it is not produced and its nonproduction is not accounted for; it being necessary for one claiming a lien under a chattel mortgage to produce the secured notes or account for their nonproduction.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 307, 309, 316-326; Dec. Dig. § 173.*]

8. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—INSTRUCTION.

Where defendant did not offer sufficient evidence to entitle him to recover had been permitted to introduce all of the evidence offered, he cannot complain on appeal of an instruction directing a verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4137, 4209-4211; Dec. Dig. § 1061.*]

Error to District Court, Carbon County; Charles E. Carpenter, Judge.

Action by John Morton against William Reynolds. Judgment for plaintiff, and defendant brings error. Affirmed.

Allen G. Fisher and William P. Rooney, both of Chadron, Neb., for plaintiff in error. Norton & Hagens, of Casper, for defendant in error.

BEARD, J. This action was brought by John Morton against William Reynolds in the district court of Converse county to recover the possession of certain cattle. The case was transferred on change of venue to Carbon county, where the cause was tried and judgment rendered in favor of plaintiff. Defendant brings error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The plaintiff claimed the right to the possession of the cattle in dispute by virtue of a chattel mortgage executed to him by Frederick W. Rimington and wife August 26, 1909, and filed in the office of the county clerk of Converse county August 30, 1909, and given to secure a promissory note of said Rimingtons for \$12,726.52, dated August 26, 1909, and due August 26, 1912. The action was commenced October 7, 1911. The defenses pleaded were: First, a general denial. And, second, what is denominated a cross-petition, in which it is alleged, in substance: That one Porter G. Fowler on July 13, 1907, purchased the cattle from Reynolds and gave him a chattel mortgage thereon to secure three notes of that date for \$1,113.33 each and due, one in one year, one in two years, and one in three years from date, which mortgage was filed in the office of the county clerk of Converse county July 13, 1907. That about December 12, 1907, Fowler sold the cattle to Rimington, who assumed and agreed to pay the notes secured by the Fowler mortgage, and that Rimington then took possession of the cattle. "That from time to time, the said Powell (Porter?) G. Fowler, from the offspring of said registered Hereford cattle aforesaid, paid unto the said defendant such sums of money, so that on August 10, 1910, there yet remained of said indebtedness due and owing, the sum of \$1,500, and thereupon the said defendant agreed to extend payment of said remaining indebtedness to the amount of \$1,500 for one year from that date, to evidence which agreement and in consideration of the foregoing chattel mortgage and notes the said plaintiff (probably meaning Rimington, as it was Rimington's mortgage which was offered in evidence) made and delivered his note, dated August 10, 1910, for \$1,500, due one year after that date, payable to the order of defendant, and executed, acknowledged, and delivered unto said defendant an additional chattel mortgage, describing said note of that date, again mortgaging the 24 head of said cows, and the one bull of the said original herd." Alleged the filing of the mortgage, and that it remained unpaid and unsatisfied. Alleged "that there is now due upon said notes and mortgages from the said Porter G. Fowler unto the said defendant \$1,875, no part whereof has been paid." To the cross-petition or new matter pleaded by the defendant, the plaintiff replied, denying each and every allegation therein contained.

On the trial plaintiff offered in evidence a certified copy of the mortgage under which he claimed the right to the possession of the cattle in controversy, to the introduction of which defendant objected as incompetent, irrelevant, and immaterial, because not acknowledged in compliance with the statute for the acknowledgment of chattel mortgages to entitle it to record. The objection was overruled and the certified copy of the mortgage admitted in evidence. That ruling is assigned as error. The acknowledgment

as it appears on the certified copy of the mortgage, omitting immaterial parts, is as follows: "State of Wyoming, County of Converse—ss: I, Jas. W. McDevitt, a notary public in and for said county, in the state aforesaid. * * * Given under my hand and notarial seal this 26 day of August, A. D. 1909. My commission expires Aug. 4, 1910. Jas. W. McDevitt, Notary Public. [Seal.]" The defendant contended, and offered to prove in support of his objection, that McDevitt was not a notary of Converse county, but was in fact a notary in and for Laramie county, and that his official seal impressed on the original mortgage was his seal as a notary of Laramie county. The court sustained an objection to the evidence offered to so prove. Without deciding whether the ruling was right at that stage of the case, or whether the certificate on its face was sufficient to admit the mortgage to record, or rather to be filed in the clerk's office as provided by our statute, we think the defendant was not prejudiced by the admission in evidence of the certified copy of the mortgage for the reason that, if the acknowledgment was in fact as defendant claimed, it would have been sufficient.

[1] The presumption is that the notary acted within his jurisdiction, and Rimington testified that his wife was in Laramie county at the date of the acknowledgment and that he was there about that time.

[2] Taking it for granted that McDevitt was a notary for Laramie county, the presumption is that the acknowledgment was taken in that county, which presumption is supported by the testimony above referred to, and, unless there is sufficient in the certificate to overcome that presumption, it must be held to have been so taken. In *Angier v. Schieffelin*, 72 Pa. 106, 13 Am. Rep. 659, the acknowledgment was before E. H. Chase, a justice of the peace. The certificate was as follows: "Erie County—ss: Before the subscriber, a justice of the peace of said county," etc., and was signed, "E. H. Chase. [L. S.]" It was admitted that Chase was not a justice of the peace of Erie county, but was of Crawford county, where the mortgage was recorded. The court said: "Had Chase been a justice of the peace of Erie county, the acknowledgment before him by the mortgagor, although the land lay in Crawford, or any other county in the state, would have been all right, and the duty of the recorder of Crawford county to enter it of record, when offered for that purpose, would have been undoubted. This being the appearance of things, it was properly put on record by the recorder, and was thence prima facie notice to terre-tenant of the incumbrance. * * * It is very evident that the mortgage was filled up on an Erie county blank, and that the justice neglected to alter the name of the county referred to, in the scilicet, from Erie to Crawford; hence the error. But in point of fact the mortgage was well acknowl-

edged, as the testimony showed." It appeared that the mortgage was in fact acknowledged in Crawford county. In *Alexander v. Houghton*, 86 Tex. 702, 26 S. W. 937, the certificate of acknowledgment was as follows: "The State of Texas, Runnels County. Before me, Geo. W. Caldwell, a notary public in and for said county," etc. "Given under my hand and seal of office, this 5th of June, 1882. Geo. W. Caldwell, Notary Public, Bexar County, Texas." In the opinion that court said: "Article 3366, Revised Statutes, prescribed what character of seal the notary should have, and required that he should use it to authenticate his official acts. The seal was required to have engraved upon it the county for which he was appointed (see section 3565, Wyo. Comp. Stat. 1910, for similar requirements), and it is to be presumed that a seal with the words 'Bexar county' was affixed to this certificate. We do not believe that the caption furnishes the more certain guide as to the place where the certificate was made. * * * It is a common thing for deeds to be prepared in a county where the land is situated and where the title must be examined for the purchaser, upon blank forms printed for that county, with like blanks for certificates of acknowledgment in which that county is printed in the caption, and these deeds sent to other counties to be acknowledged by the grantors. If the officer in the latter county fails to change the name of the county in the caption, such conflict as appears in this case is inevitable. The common sense solution of this matter is that this deed was prepared in Runnels county upon a blank form printed for transfers in that county, with a like blank form for a certificate to be used by officers of that county, and that the notary public in Bexar county failed to change the county in the caption from Runnels to Bexar. It is much more probable that it should have so occurred than that the notary public should have gone from Bexar to Runnels county to take the acknowledgment, or that he should have been there accidentally, and been called upon by the parties in preference to an officer of that county. We answer that the certificate of acknowledgment in this case was sufficient in itself to admit the deed to record, and that if properly made the record was such as the law requires to support the statute of five years."

[3-5] The mortgage was good between the parties to it without acknowledgment or filing. *Boswell v. Bank*, 16 Wyo. 161-182, 92 Pac. 624, 93 Pac. 661; *Schlessinger v. Cook*, 9 Wyo. 256, 62 Pac. 152. And it was incumbent upon plaintiff to establish a lien upon the property in order to maintain the action. The mortgage was competent, relevant, and material evidence tending to prove that fact and was admissible for that purpose, and when it and the note which it was given to secure were introduced in evidence, and evidence produced that the note was unpaid, that made a prima facie case for plaintiff.

[6] It is argued here that the certified copy of the mortgage should not have been admitted because the seal of the county clerk was not affixed to the certificate. That objection was not made in the trial court. The objection that the evidence was immaterial, incompetent, and irrelevant was too general to present that objection, especially so when by the objection the court's attention was directed to the specific ground on which it was claimed it was immaterial, irrelevant, and incompetent, viz., that the mortgage was not properly acknowledged. Nothing was mentioned in the objection about the clerk's certificate. *Noonan v. Caledonia Mining Co.*, 121 U. S. 393, 7 Sup. Ct. 911, 30 L. Ed. 1061; *Gregory v. Langdon*, 11 Neb. 166, 7 N. W. 871; *Falk v. Gast L. & E. Co.*, 54 Fed. 890, 4 C. C. A. 648; *Jochen v. Tibbells*, 50 Mich. 33, 14 N. W. 690.

[7] The defendant sought to prove a superior lien on the cattle by virtue of the Fowler mortgage and also by virtue of the Rimington mortgage of date August 10, 1910. He offered each of those mortgages in evidence and they were excluded. But, had they been admitted, they would not have made out a defense. As shown on their faces, the notes alleged to be secured thereby were past due, and neither of the notes was produced or offered in evidence, or their nonproduction accounted for. There is no presumption that a past-due note, not produced or its nonproduction accounted for, is unpaid and still remains the property of the payee. For aught that appears in the record, the notes may have been paid or assigned. In *Hendrie v. Canadian Bank of Commerce*, 49 Mich. 401, 13 N. W. 792, the property was in the possession of the bank, claiming under a chattel mortgage, and *Hendrie* replevied. The court said: "In reference to the rights of the mortgagee. It appears that this mortgage was given to secure the payment of certain promissory notes, and they were not offered in evidence. Had *Hendrie* in attempting to gain possession of this property been a wrongdoer, perhaps no proof thereof would have been necessary, as the prior possession by the bank would, as claimed, have entitled it to recover. As, however, *Hendrie* was entitled to the possession, it is clear the bank could only succeed by showing a better right, and this was not done." So here, *Morton* proved his lien and right to possession unless defendant established a better right, which he failed to do. That it was necessary for the defendant to produce the notes, or account for their nonproduction in order to establish his lien, see *Bassett v. Hathaway*, 9 Mich. 28; *George v. Ludlow*, 66 Mich. 176, 33 N. W. 169; *Ward v. Munson*, 105 Mich. 647, 63 N. W. 498; *Schumpert v. Dillard, Pinson & Co.*, 55 Miss. 348; *Bergen v. Urbahn*, 83 N. Y. 49; *Field v. Anderson*, 55 Ark. 546, 18 S. W. 1038; *Lucas v. Harris*, 20 Ill. 166; *Flynn v. Hathaway*, 65 Ill. 462; 2 *Jones on Mortgages* (6th Ed.) § 1469.

[8] At the close of the evidence the court instructed the jury to return a verdict for plaintiff. The defendant, having failed to offer sufficient evidence to establish a lien upon the property, had he been permitted to introduce all he offered, is not in a position to complain of the instruction. On the record here presented, the instruction was not erroneous. The judgment is affirmed.

Affirmed.

SCOTT, C. J., concurs. POTTER, J., did not sit.

**FIRST NAT. BANK OF CLARKSTON,
WASH., v. OREGON-WASHINGTON R. & NAV. CO.**

(Supreme Court of Idaho. Nov. 1, 1913. Rehearing Denied Dec. 3, 1913.)

1. CARRIERS (§ 83*)—SHIPMENT CONTRACT—CONSTRUCTION.

Where a bill of lading between a shipper and a railroad company contains the following provision: "The property described below, in apparent good order except as noted, * * * which said company agrees to carry to its usual place of delivery at said destination if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on the back hereof), and which are agreed to by the shipper and accepted for himself and his assigns. The surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property." *Held*, that this provision applies alike both to the railroad company and the shipper and does not apply alone to limitations in favor of the railroad company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 308-315; Dec. Dig. § 83.*]

2. CARRIERS (§ 83*)—SHIPMENT CONTRACT—CONSTRUCTION.

Where it is provided in the bill of lading "that the surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property," this provision is prohibitory against the railroad company and prohibits the railroad company from delivering the property until the bill of lading is indorsed, and there should be no delivery until such provision is complied with or excused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 308-315; Dec. Dig. § 83.*]

3. CARRIERS (§ 83*)—WRONGFUL DELIVERY—LIABILITY FOR CONVERSION.

When a bill of lading is outstanding, the railroad company delivers goods at its peril without requiring the bill of lading, and, if it so delivers them to some one other than the bona fide holder for value of the bill of lading, it is liable to him for conversion of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 308-315; Dec. Dig. § 83.*]

Sullivan, J., dissenting.

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by the First National Bank of

Clarkston, Wash., against the Oregon-Washington Railroad & Navigation Company to recover upon a bill of lading for breach of its provisions. From judgment for plaintiff, defendant appeals. Affirmed.

Fred E. Butler, of Lewiston, and W. A. Robbins, of Portland, Or., for appellant. Ben F. Tweedy, of Lewiston, for respondent.

STEWART, J. The facts in this case are as follows: The Sprague Sanitary Preserving Company, of Clarkston, Wash., and Lewiston, Idaho (hereafter referred to as the preserving company), consigned a shipment of canned goods moving from Lewiston, Idaho, to Waco, Tex., on July 6, 1912, on an order bill of lading to E. F. Drake & Co., at Waco, Tex. Immediately upon the presentation of the goods by the preserving company to the defendant for shipment, the company presented the bill of lading to the plaintiff with two drafts signed by the preserving company attached thereto, aggregating the sum of \$1,863.55, which drafts were drawn on E. F. Drake & Co., at Waco, Tex., and the plaintiff paid to the preserving company said sum, and the bill of lading and drafts were assigned to the plaintiff.

The evidence shows that E. F. Drake & Co., at Waco, Tex., were fruit brokers and commission merchants and had had correspondence with the preserving company with reference to consigning to Drake & Co. the car load of fruit in controversy, and that as soon as the car was loaded the preserving company drew the drafts in question in order to secure ready cash, claiming that the fruit had been sold to Drake & Co. The plaintiff claims that a portion of the goods, amounting to \$1,863.55, was sold to Drake & Co. at the time they were loaded into the car at Lewiston. The order bill of lading shows that the appellant received at Lewiston July 6, 1912, from the preserving company, certain described canned goods. It is also shown by the evidence that the canned goods delivered by the preserving company to the appellant and loaded in the defendant's cars and consigned to E. F. Drake & Co., Waco, Tex., arrived at Waco the 22d of July, and were delivered to E. F. Drake & Co. on the 23d of July, and were so delivered at the request of E. F. Drake, and at the time of such delivery the bill of lading had been assigned to the plaintiff and the drafts had been drawn by the preserving company, and directed to E. F. Drake & Co., Waco, Tex., and made payable to the order of the First National Bank of Clarkston on the arrival of the car of the Oregon-Washington Railroad & Navigation Company No. 10558, which the evidence shows to be the car that carried the shipment which contained the canned goods as shown in the complaint.

The drafts drawn by the preserving company against E. F. Drake & Co. were trans-

mitted for collection to the First National Bank at Waco, Tex., but the drafts were not paid, and the bill of lading was not delivered. The bill of lading above referred to contains the contract of the railroad company made with the preserving company and is signed by the Sprague Sanitary Preserving Company, shipper, E. L. Willsa, agent. The bill of lading is from the Oregon-Washington Railroad & Navigation Company and is in part as follows:

"Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Lewiston, Idaho, July 6, 1912, from Sprague Sanitary Preserving Company, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

"The surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by the bill of lading will not be permitted unless provided by law or unless permission is indorsed on the original bill of lading or given in writing by the shipper. * * *

"Consigned to order of Sprague Sanitary Preserving Co. Destination: Waco, State of Texas, County of _____. Notify E. F. Drake & Co. at Waco, Texas. Route: U. P. c/o C. & S. Ry. Car Initial: O. W. R. N. Car No. 10558.

| Packages. | Description of Articles and Special Marks. | Weight. |
|-----------|--|---------|
| 804 | As Canned Goods @60 #Ea | 48240 |
| 40 | " " @100 #Ea | 4000 |
| | | 52240" |

This bill of lading contains this language: "The property described below, in apparent good order, except as noted, * * * which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, here-

in contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns. *The surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property.*"

The allegations in the complaint are based upon violations of the foregoing provisions of the bill of lading in that the company violated the provision, "the surrender of the original bill of lading properly indorsed shall be required before the delivery of the property."

The evidence clearly proves, and the jury so found, that the car of canned goods covered by the bill of lading was shipped from Lewiston, Idaho, to Waco, Tex., and there delivered to E. F. Drake & Co., the party who was named in the bill of lading and who was to be notified by the railroad company carrying the car into the city of Waco, Tex., and to whom the evidence shows the Sprague Preserving Company sold the contents of said car, and as payment of the purchase price the drafts in question were issued.

We think there can be no question but that the evidence conclusively shows a delivery to E. F. Drake & Co., and after they were delivered to Drake & Co. the evidence shows that Drake & Co. transferred the warehouse receipt to the last connecting carrier and thereupon redelivered the car of canned goods, but not until after Drake & Co. had failed to sell the canned goods and in an effort to defeat the payment of the drafts at the First National Bank at Waco. Drake knew that the bill of lading with the drafts attached were at the First National Bank before the 23d day of July, 1912, for the evidence clearly shows this in a letter written by Drake & Co. to the preserving company in which they say: "Gentlemen: The First National Bank of this city have two drafts on us from you with bill of lading attached. These drafts we presume are for car of canned goods you are shipping to us, but as you suggested consigning this car to us, we do not feel justified in paying these drafts until it has arrived and we can get the buyers here started on it." The delivery on the 23d of July is admitted, so there is no question in this case but that there was a delivery to Drake & Co.

[1-3] Counsel for appellant and respondent disagree as to the questions presented upon this appeal. After examining the record we are satisfied that the action is founded upon the bill of lading and whether the respondent can recover upon the facts of the case; that the other questions raised in the case are purely incidental and relate to whether the facts show a liability under the law. We will first consider the bill of lading and the liability of the appellant arising out of the facts, which we think disposes of this case.

In the case of First National Bank v. Northern Pac. Ry. Co., 28 Wash. 439, 68 Pac. 965, the Supreme Court of Washington had

under consideration facts very similar to the facts in the present case, and in that opinion the court very fully reviewed the effect of the bill of lading and the liability of the railroad company and said: "Primarily a bill of lading or receipt is not necessary to constitute the contract. The delivery of commodities to the common carrier, with the designation of the person and place of the shipment, is all that is requisite. Custom and the law fixes the responsibility and liability of the carrier. The presumption, then, is that the consignee is the owner, and without notice to the contrary, the carrier may safely make delivery to him. It seems from an examination of a large number of cases involving the nature of bills of lading made by a common carrier that the custom very generally exists of shippers selling or assigning such bills of lading and receiving payment therefor and advances upon the same. This custom enables the shipper to receive immediately payment from his local bank. The usage materially aids and stimulates trade and commercial transactions. It enables the small shipper or producer to realize upon agricultural products, such as wheat, at the most favorable market prices. In the case of *Ratzer v. Railroad Co.*, 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530, where a delivery was made without demanding the bill of lading, the court observed: 'We are of the opinion that on the facts found the plaintiff is entitled to judgment. A vast portion of the produce of this country is moved from the agricultural districts to the commercial centers and the seaboard by the aid of advances made on the security of such bills of lading. * * * This is well understood by the railroad companies and every one else.'" The court then discusses the result that would follow the adoption of a rule contrary to that announced in the case of *Ratzer v. Railroad Co.*, supra, and the reasoning is very convincing. The court then further in the opinion in that case cites the case of *Savings Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519, and the following cases are also cited in support of the rule: *Stock Yards Co. v. Westcott*, 47 Neb. 300, 68 N. W. 419; *Walters v. Railroad Co. (C. C.)* 63 Fed. 391; *Gates v. Railroad Co.*, 42 Neb. 379, 60 N. W. 583; *Furman v. Railroad Co.*, 106 N. Y. 579, 13 N. E. 587; *Garden Grove Bank v. Humeston & S. Ry. Co.*, 67 Iowa, 526, 25 N. W. 761. And the court concludes: "Thus the better reasoning and the weight of authority seem, by the force of general commercial usage, to require that the delivery of commodities be made upon the production of the bill of lading, if one be issued by the carrier. Hutch. Carr. (2d Ed.) § 130b, observes: 'The carrier, being thus bound to deliver the goods in accordance with the bill of lading, is, it is said, under obligation to ascertain whether or not a bill of lading was delivered to the shipper, and, if delivered, he must retain the property until it is de-

manded by one claiming under that title.'"

Many other cases support this rule and many cases hold that the rule announced by the Supreme Court of Nebraska in the *Ratzer v. Railroad Co.* case is correct. It is hardly necessary to cite authorities to the general proposition that, when a bill of lading is outstanding, the railroad company delivers the goods at its peril, without requiring the bill of lading, and, if it so delivers them to some one other than the bona fide holder for value of the bill of lading, it is liable to him for conversion of the goods.

The foregoing authorities state the rule of law which we believe should prevail in the cases where the bill of lading provides, as it does in this case, "that the surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property," and such rule is especially applicable because of such provision contained in the bill of lading, and the determination of this question, in our judgment, determines the case.

The appellant cites no authorities which hold contrary to the above holdings but relies upon the following cases: *Ryland v. Chesapeake Ry. Co.*, 55 W. Va. 181, 46 S. E. 923; *Gulf, etc., Ry. Co. v. Pitts & Son*, 37 Tex. Civ. App. 212, 83 S. W. 727; *Gulf, etc., Ry. Co. v. Everett*, 37 Tex. Civ. App. 167, 83 S. W. 257; *Baumbach v. Gulf, etc., Co.*, 4 Tex. Civ. App. 650, 23 S. W. 693; *Wells Fargo & Co. v. Hanson*, 41 Tex. Civ. App. 174, 91 S. W. 321; *Clark v. Am. Ex. Co.*, 130 Iowa, 254, 106 N. W. 642. We have examined these cases and we find that the courts properly state the law in those cases, applicable to the facts in the particular cases, and in said opinions have discussed the law where the cause of action was for delay in transportation and in delivery of the property, causing damages, and was not for damages for conversion of a car of canned fruit delivered without surrender of the original bill of lading at the time of or before the delivery, but such law does not apply to the facts in this case, where it is shown clearly that the bill of lading was not surrendered and that the bill of lading itself was a contract between the railroad company and the shipper, and in that bill of lading the defendant company and the shipper agreed to a provision that "the surrender of the original order bill of lading, properly indorsed, shall be required before the delivery of the property." This provision applies alike both to the railroad company and the shipper and does not apply alone to limitations in favor of the railroad company, and the railroad company is bound by the provisions the same as the shipper, and certainly by this agreement the facts in this case are subject to the rule of law cited and which this court approves and adopts and applies where the facts are such as in this case.

But, whether delivered or not, the bill of lading in this case specifically provides that

the surrender of the original order bill of lading properly indorsed shall be required before the delivery of the property, and the evidence shows without question that the railroad company carried the property described in the bill of lading on its road and its connections, in the identical car which was covered by the bill of lading, to Waco, and delivered the same to the party notified, E. F. Drake & Co., and that the bill of lading was not indorsed as required by the terms of the same and was never delivered to the party to whom the property was delivered, or its assigns, and has remained in the possession of the plaintiff except in its course pursued to collect the drafts involved in this case. Drake & Co., upon demand of the payment of the drafts, refused to pay the same, although admitting that they had received the car load of said canned goods from the preserving company. Upon this refusal the plaintiff in this case brought this action and seeks to recover from the defendant for the conversion of said property in violation of its contract with the preserving company in that it permitted E. F. Drake & Co. to get possession of the property before it was paid for, and contrary to the contract of sale, and thereby plaintiff was damaged.

It is immaterial whether before shipment the car of canned goods was sold to Drake & Co., or was shipped to them merely as brokers of the preserving company or any one else. Drake & Co. could not get the bill of lading from the respondent without first paying the drafts on which the respondent advanced \$1,863.55, the amount of the drafts.

The trial court instructed the jury very clearly on the law applicable to the facts in this case, and no exceptions were taken to the instructions, and the jury followed the instructions and the evidence, and the damages allowed in this case were clearly proven.

We find no error which justifies a reversal of the judgment. The judgment is affirmed. Costs awarded to respondent.

AILSHIE, C. J., concurs.

SULLIVAN, J. I dissent. Drake & Co. had not agreed to purchase any goods from the Sprague Sanitary Preserving Company. There had been considerable correspondence or negotiations between them. The Sprague Company had full knowledge that Drake & Co. were commission men and did not make purchases outright, and the Sprague Company wired Drake & Co. on June 17th that they were going to consign them a car of assorted fruits, etc., and, when this car arrived in Waco, the record shows that Drake & Co. supposed it was consigned to them to be paid for as soon as the fruit was sold; and the reason Drake & Co. instructed the agent of the railroad company to deliver the goods at Kemendo's warehouse was that they supposed that the goods were shipped on

consignment to be paid for as soon as sold. Drake testified that, as soon as he learned that it was a "shipper's order shipment," they declined to receive it but held the car for advice from the International & Great Northern Company, and advised them that the shipment was held intact with the exception of some cases that had been taken out to be inspected by would-be purchasers. The railroad company at the time of the trial still held it intact for the consignor. Drake & Co. advised the railroad company's agent that they had the papers (meaning the bill of lading) for such car. That is the reason the railroad company permitted them temporarily to take possession of it, but the goods are all held intact by the railroad company for the consignor except a few selling samples which Drake & Co. were authorized by the consignor to take, and, as I view it, it is not just and right to compel the railroad company to pay for said goods, under all the facts of this case.

SMITH v. GRAHAM et al.

(Supreme Court of Idaho. Nov. 18, 1913.)

1. EXECUTION (§ 198*)—SHERIFFS AND CONSTABLES (§ 90*)—THIRD PARTY CLAIMANT—ADVISORY VERDICT.

Under the provisions of section 4478, Rev. Codes, where an officer has levied upon property under execution, and the same is claimed by a third person, the officer may summon a jury of six persons to try the validity of the claim, "and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon."

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 578; Dec. Dig. § 198; Sheriffs and Constables, Cent. Dig. §§ 129, 130; Dec. Dig. § 90.*]

2. SHERIFFS AND CONSTABLES (§ 92*)—THIRD PERSON CLAIMANT—INDEMNITY BOND.

Where a judgment creditor gives his indemnity bond on demand of the officer, as required by the provisions of section 4478, Rev. Codes, it is the duty of the officer to proceed with the sale, unless the property is taken from his possession under regular judicial proceedings instituted in a court of competent jurisdiction. In such case, if a judgment should eventually be recovered against the sheriff for the value of the property, he is amply protected by the indemnity bond which he has demanded and received from the execution creditor.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 134, 135; Dec. Dig. § 92.*]

3. SHERIFFS AND CONSTABLES (§ 92*)—ACTION AGAINST OFFICER—FAILURE TO SELL PROPERTY—DEFENSES.

In an action by a judgment creditor against an officer and his bondsmen for failure to sell property on execution, where a bond has been demanded from the officer and given by the judgment creditor, and defense is interposed by the officer that the property belonged to a third party, the title to such property or the right of such third party thereto cannot be litigated in such action. A judgment entered in an action between a judgment creditor and an officer for failure to sell property claimed by

a third party, wherein it would be attempted to adjudicate the title to the property, would not be binding upon such third party where he is not made a party to the action.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 134, 135; Dec. Dig. § 92.*]

4. EXECUTION (§ 198*)—THIRD PARTY CLAIMANT—ADVISORY VERDICT.

The verdict of a sheriff's jury had under the provisions of section 4478, Rev. Codes, is merely advisory to the officer and for his protection, and is not res adjudicata.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 578; Dec. Dig. § 198.*]

5. CONDUCT AT TRIAL.

Comments by the trial judge on the conduct of an attorney in the case commented upon.

Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by L. C. Smith against R. A. Graham and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

James H. Wise, of Twin Falls, for appellant. Longley & Hazel, of Twin Falls, for respondents.

AILSHIE, C. J. This action was commenced against a constable and his sureties to recover damages for alleged failure of the constable to discharge official duties. Judgment was entered in the probate court of Twin Falls county on the 24th day of June, 1911, in favor of L. C. Smith, the plaintiff and appellant in this action, and against Dora Patrie for the sum of \$272.50, together with interest and costs. On the 14th day of August following a writ of execution issued directing the officer to sell the property of Dora Patrie which was subject to execution for the payment of the debt. It is alleged that at the time of the delivery of the writ of execution to the defendant Graham, constable, there was sufficient property within Twin Falls county belonging to Dora Patrie out of which to pay the debt. The constable proceeded in accordance with demand and directions from the plaintiff, and levied upon the property sufficient to pay the debt and costs, and on the 16th of August one W. L. Cherry served notice upon the plaintiff (appellant herein) that the property levied upon was claimed by him as his property. Thereupon defendant Graham as constable summoned a jury to try the right of property in accordance with the provisions of section 4478 of the Rev. Codes. The constable's jury heard the proofs, and rendered a verdict in favor of Cherry, finding that the property belonged to him. After this verdict the constable, Graham, demanded an indemnity bond in the sum of \$600 before proceeding any further in the matter of sale of the property on execution. Thereafter, and on the 29th day of August, plaintiff made, executed, and delivered to the constable in accordance with this demand an indemnity bond in

the sum of \$600, which was duly accepted by the constable, and filed by him in the probate court of Twin Falls county. The constable thereupon proceeded and advertised the property for sale. He failed, however, and refused thereafter to sell the property, and returned the writ of execution unsatisfied, and no property was sold thereunder. The plaintiff thereupon commenced this action against the constable and his bondsmen to recover the amount of the debt called for by the execution.

[1-4] Several questions are presented by the briefs; but our consideration of the statute (section 4478, Rev. Codes) over which this whole trouble arose will be sufficient to dispose of the case in this court. That part of the statute (section 4478) which provides for a sheriff or constable summoning a jury to try the right of property on which a return has been levied reads as follows: "If the property levied on be claimed by a third person as his property, the sheriff may summon from his county six persons qualified as jurors between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon."

The learned trial judge proceeded in this case upon the theory that, in an action by the execution creditor against the officer for failure to sell the property levied upon, where an indemnity bond has been given as provided for by section 4478 of the statute, the title to the property at the time of the levy becomes a material and essential issue in the case. This is the crux of the whole matter here involved. In that assumption we think the trial court was clearly in error. This statute was undoubtedly enacted for the purpose of meeting the kind of a situation which arose in this transaction. Where the officer entertains doubt as to the title to the property or the right of the third person who claims it, he may call a jury of his own selection, over which he himself presides, and have them hear all the facts presented, and return their verdict, which is in no way an adjudication of the title; but is merely advisory to the officer to enable him to proceed further with safety to himself and his bondsmen. If the jury returns their verdict that the property belongs to the third party claimant, then the statute is explicit to the effect that the officer "may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon." After this jury has decided against the title of the execution debtor, the sheriff may refuse to move a step further without he receives a satisfactory indemnity bond from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

the execution creditor. When that bond is given, it is no longer a matter of any concern to the sheriff. He must proceed and sell the property, for the reason that he has received security sufficient to cover all damages which may be recovered against him in the event the third party claimant is able to establish his title to the property in a judicial proceeding and obtain a judgment in damages for conversion of the property. The verdict of this sheriff's jury does not adjudicate the title to the property. Although a claimant may have appeared before that jury and introduced his evidence, he would in no way be barred or precluded from thereafter commencing his action in replevin to obtain the property or have his action against the officer for conversion thereof.

On the other hand, the statute provides ample protection for the judgment creditor who may be in possession of evidence which he does not care to submit to the sheriff's jury, or which that jury might not give heed to because there is no one to instruct them as to the law of the case, and so the execution creditor has a right to insist that the property be sold, notwithstanding the claim of any one else, by giving his indemnity bond. If, however, a claimant desires to have the matter judicially determined and to pursue his property in specie, he may commence his action in a court of competent jurisdiction for the recovery of the property, and take possession of it in the manner prescribed by the statute, and thereby prevent the sale taking place. Now, viewing the matter from the standpoint of the present action, it would be a useless thing to litigate the title to the property, in an action between the judgment creditor and the officer, for the reason that that adjudication would not be in any way binding upon the third party who claimed the property, and a judgment in such a case would not be res adjudicata in an action prosecuted by a third party claimant against the officer for conversion of the property. So, if the title is to be litigated in this kind of an action, it might be determined adversely to the execution creditor, and he would thereby lose the value of the property, while, in another action prosecuted by the third party claimant against the officer, another jury might return a verdict against the claimant, and the judgment debtor would be left with the property, the creditor would be defeated in his right of recovery, and the officer would have refused to do anything, and the ends of justice would be entirely defeated.

Our statute was evidently taken from the California statute (section 218 of the California Civil Code in force in 1858). In dis-

cussing this statute in *Perkins v. Thornburgh*, 10 Cal. 190, the court said: "Under the provisions of our statute, the proceeding before the sheriff is not judicial. The jury is of the sheriff's own selection. He presides upon the trial, and decides all questions as to admissibility of testimony. It would therefore be giving an extraordinary force to the verdict to say, without an express statutory provision, that it protected the officer in selling the property of another party not a defendant in the execution. Such a power might lead to great oppression. But the law has not left the sheriff without ample means of protection." Again, in speaking of this same statute, the court, in the same case, said: "It will be seen that the Code itself states the effect of the verdict, if in favor of the claimant. It also states the effect of the verdict, if against the claimant, as to costs. When a statute assumes to specify the effects of a certain provision, we must presume that all the effects intended by the lawmaker are stated." See *Strong v. Patterson*, 6 Cal. 157; *Davidson v. Dallas*, 8 Cal. 227, 252; *Freeman on Executions*, § 277.

The foregoing assignment of error being disposed of renders it unnecessary to discuss the other questions of law, for the reason that they cannot arise when the foregoing question is eliminated.

[5] An assignment of error has been made against the comment of the trial court upon the action of counsel for appellant in taking exception to the instructions by the court, and in asking for the giving of certain instructions. Since the case is to be reversed on other grounds, it is unnecessary to consider this question, as there is no probability of it arising on a new trial. This court has on several occasions reiterated the rule that prevails in this state with reference to comments by the trial court on the weight of evidence and conduct of counsel. *McKissick v. O. S. L.*, 13 Idaho, 195, 89 Pac. 629; *Goldstone v. Rustemeyer*, 21 Idaho, 703, 123 Pac. 635; *State v. Chambers*, 9 Idaho, 673, 75 Pac. 274. See, also, *Wheeler v. Wallace*, 53 Mich. 355, 19 N. W. 33; *McDuff v. Detroit Evening Journal*, 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673; *Williams v. West Bay City*, 119 Mich. 395, 78 N. W. 328. In *State v. Chambers*, supra, the opinion of this court was written by the able district judge who tried this case, and who was at the time a justice of this court.

The judgment is reversed, and the cause is remanded for a new trial. Costs awarded in favor of appellant.

SULLIVAN and STEWART, JJ., concur.

**TWIN FALLS BANK & TRUST CO. v.
TWIN FALLS COUNTY et al.**

(Supreme Court of Idaho. Nov. 17, 1913.)
COUNTIES (§ 222*)—ACTION AGAINST—COM-
PLAINT—SUFFICIENCY.

Held, that the complaint states a cause of action, and that the court erred in sustaining the demurrer.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 355-359; Dec. Dig. § 222.*]

Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by the Twin Falls Bank & Trust Company, a corporation, against Twin Falls County, a corporation, and others, to recover for work performed and material furnished at the instance and request of the county. Demurrer to the complaint sustained, and judgment of dismissal entered, and plaintiff appeals. Reversed.

James H. Wise, of Twin Falls, for appellant. A. R. Hicks, E. L. Ashton, and Babcock & Graham, all of Twin Falls, for respondents.

SULLIVAN, J. This action was brought against the county and three persons supposed to be the county commissioners of that county to recover on eight separate causes of action for labor and work alleged to have been performed and for material and supplies furnished in the performance of the labor upon a public road in Twin Falls county between the city of Twin Falls and Jarbridge City, Nev. In each cause of action the allegation in regard to the employment is as follows: "At the special instance and request of the defendants, performed labor for the defendants" upon a public road in Twin Falls county. To the complaint are attached eight exhibits, one under each cause of action, purporting to be an itemized statement of the labor done and materials furnished, of the claim as presented to the board of county commissioners for allowance, which claims were properly sworn to by the claimants and presented to said board of county commissioners, and each of which was disallowed by the board of county commissioners. A demurrer was filed to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action against the county and that there was a misjoinder of parties, which demurrer was sustained by the court and a judgment of dismissal entered. This is an appeal from that action of the court.

The only error assigned is the action of the court in sustaining the demurrer to the complaint.

The board of county commissioners is a board of limited powers, having only the powers conferred on it by statute. Under the provisions of subdivision 4 of section 1917, Rev. Codes, the board of county commissioners has jurisdiction and power to lay

out, maintain, control, and damage public roads, turnpikes, ferries, and bridges within the county and levy such taxes therefor as authorized by law. They thus are given power to maintain the public roads and highways, and that power includes the authority to enter into such contracts as are not prohibited for the purpose of keeping the same in repair. The plaintiff in this action alleges that the work was performed and the material furnished at the special instance and request of the defendant county. Now, if that allegation be true, the county ought to pay for the work performed and material furnished at its special instance and request. If the work was not performed and the material was not furnished at the special instance and request of the county, or if the work was done and the material furnished and the county can show any legal reason why it should not pay, that is a matter of defense. Only ultimate facts need be alleged in a case of this kind, and if the county exceeded its authority in procuring such work to be done, or if such work was not done at the request of the county, that may be shown on the trial of the case.

The complaint states a cause of action, and the court erred in sustaining said demurrer. The cause is remanded for further proceedings. Costs are awarded to appellant.

**AILSHIE, C. J., and STEWART, J., con-
cur.**

RYAN et al. v. GEIGEL et al.

(Court of Appeals of Colorado. Oct. 13, 1913.
Rehearing Denied Dec. 8, 1913.)

**1. JURY (§ 14*)—RIGHT TO TRIAL BY JURY—
EQUITABLE CAUSES.**

A suit to set aside a sale of a decedent's realty for the payment of his debts, and subsequent conveyances, on the ground of fraud and conspiracy, and to have the decedent's heirs declared the owners of such realty subject to the decedent's debts, was an equity case, and hence, though a jury was impaneled to try it, the trial court had a right to discharge the jury and determine the case himself.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.*]

**2. FRAUDULENT CONVEYANCES (§ 300*)—EVI-
DENCE.**

In a suit to set aside a sale of a decedent's realty which at the time was practically unimproved for \$800, in order to pay the decedent's debts, on the ground of fraud and conspiracy on the part of the administrator, his attorney, who purchased the property, and others, where a number of apparently disinterested and intelligent witnesses testified that the land brought its full market value, and it appeared that the sale was a public one and that at least one other bidder was present, while plaintiffs relied entirely on the fact that four years after such sale, when the land had been brought under irrigation and was in a high state of cultivation, and after buildings had been constructed, and when it had a growing crop thereon worth \$1,600, it sold for \$5,000, the trial court's finding

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the sale was for the full market value was binding on appeal.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 896-903; Dec. Dig. § 300.*]

3. JUDGES (§ 47*)—DISQUALIFICATION—ACTING AS COUNSEL.

Under Code, § 464, providing that a judge shall not act as such in an action or proceeding when he has been attorney or counsel for either party in the action or proceeding, unless by consent, where though a county judge before his election as such had acted as attorney for an administrator in the administration of the estate, his professional connection with the estate entirely ceased long before a proceeding was instituted to sell the realty to pay debts, he was not disqualified from entering an order for such sale, since a proceeding to sell real estate is a special proceeding separate and distinct from the administration of the estate.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 214-219, 222, 223; Dec. Dig. § 47.*]

Appeal from District Court, Garfield County; John Shumate, Judge.

Action by Patrick Ryan and others against Samuel Geigel and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Valle, McAllister & Valle, of Denver, for appellants. E. L. Clover, of Denver, for appellees.

CUNNINGHAM, P. J. The appellants, who were plaintiffs below, were the brothers and sisters and sole heirs at law of Michael D. Ryan, deceased. The appellee Hayes was the administrator with the will annexed of the estate of the said Michael D. Ryan, deceased. For the purpose of paying the debts of the said Ryan's estate, Hayes, as administrator, sold certain real estate belonging to the said estate. Appellee Dollison, who was the attorney for the administrator, purchased this real estate at the administrator's sale, paying therefor \$800. Shortly after obtaining an administrator's deed for the land, Dollison rented it to Hayes, the administrator. A little less than two years after Dollison rented the land to Hayes, the latter, while still administrator of the estate, purchased the land from Dollison, paying \$1,200 for it. A little more than two years after Dollison sold the land to Hayes, the latter sold it to the appellee Geigel for \$5,000. The appellees Darch and James were at different times the public trustee of Garfield county, and because of a trust deed made to them, in their official capacity, by Geigel, to secure a part of the purchase price which he was to pay to Hayes for the land, these two appellees were made defendants. Noonan was the county judge at the time the proceedings were had in the county court to sell the land, and early in the administration of the estate, and before his election as county judge, Noonan acted as attorney for the administrator in the preparation of the first administration papers. Appellants brought their action in the district court to set aside

these various deeds, and have themselves declared to be the owners of the said real estate, subject only to the debts of the said Michael D. Ryan. In their bill plaintiffs charge fraud and conspiracy on the part of the said Hayes, Noonan, and the appraisers of the real estate, and Dollison, who purchased the same.

[1] Although a jury was impaneled to try the cause, at the close of all the testimony the court discharged the jury, as he had a clear right to do, it being an equity case, and rendered judgment for the defendants, from which judgment this appeal is taken.

1. The evidence offered on behalf of the appellants for the purpose of establishing a conspiracy was wholly circumstantial, and consisted, among other things, in showing that the land was bought by Dollison while attorney for Hayes, the administrator, for \$800, and in less than four years thereafter that it sold for \$5,000. It is contended from this, and other facts shown, not necessary to detail, that there was an arrangement between Dollison and Hayes, at the time the land was sold, that Dollison should buy it for Hayes, in order to avoid the inhibitions of the statute which disqualify administrators from becoming purchasers, and thereafter transfer it to the administrator. In other words, that the purchase of the land by Dollison was a mere subterfuge. Appellants also showed that in his affidavit, whereby he procured an order to make service by publication on the heirs of Michael D. Ryan, Hayes, the administrator, stated that he did not know the post office address of said heirs. There was evidence tending to show that Hayes possessed such knowledge, at least as to some of the heirs, or might readily have learned their address, since he (Hayes) and the Ryan children were distantly related, and had grown up in the same neighborhood, in Tipperary county, Ireland. However, Hayes had not lived in Ireland for about 25 years, and some of the Ryan children, at least, had within that time moved to America. No good purpose can be subserved by a full discussion of the evidence offered by both parties to this action, or in incorporating in this opinion an argument based thereon. The statutes in force at the time of the sale of this property did not require the administrator, in a proceeding to sell real estate, to set forth in his petition or affidavit for publication the post office address or residence of the parties defendant. Since this proceeding, the statutes in this respect have been materially amended, and now closely resemble the divorce and other statutes governing constructive or substituted service.

[2] 2. To show that Dollison, at the time he purchased the land, paid its full market value, defendants introduced two of the appraisers (the third being dead), and three other witnesses apparently familiar from ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

perience with land values. So far as we can discover from the record, these were all disinterested and intelligent witnesses. All of them testified that the land brought its full market value. No evidence whatever was introduced by the plaintiffs, appellants here, to contradict this evidence. Seemingly the appellants rested their case on this point solely upon the circumstance that the land had, four years after Dollison paid \$800 for it, been sold for \$5,000. At the time the land was bought by Dollison, it was unimproved, or practically so. At the time it sold for \$5,000, it was in a high state of cultivation, having a growing crop upon it worth \$1,600; buildings had been constructed, and the land had been brought under irrigation. Under these circumstances, we are clearly bound by what must have been the findings of the trial court, viz., that the land brought at the administrator's sale, which was a public one, at which there was present at least one other bidder, its then full market value.

[3] 3. It is urged on behalf of appellants that Noonan, the county judge, having been the attorney for the administrator, Hayes, was disqualified under Code, § 464, Revised Statutes, to enter the order for the sale of the land. The pertinent portion of section 464 reads as follows: "A judge shall not act as such in any of the following cases: In an action or proceeding * * * when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all parties to the action." This case has been before the Supreme Court, and in *Ryan et al. v. Geigel*, 39 Colo. 355-358, 89 Pac. 775, 776, the court, speaking through the late Chief Justice Steele, said: "The proceeding to sell real estate is separate and distinct from the administration of the estate proper, and is a special proceeding, recognized by the statute." Judge Noonan's professional connection with the estate had entirely ceased long before proceedings were instituted in this case to sell the real estate. For several years after Noonan's election to the office of probate judge the title to the land in question was involved in an adverse proceeding in the land office. Inasmuch as Judge Noonan had nothing whatever to do, as an attorney, with the proceeding to sell the real estate, there was nothing in his early professional connection with the administration proceeding that disqualified him from later, as county judge, entering the order in question.

There are other technical irregularities in connection with the execution of the administrator's deed, which are urged on behalf of the appellants; but we do not regard them as vital.

Upon the whole record we cannot say that the evidence introduced by the appellants was so clear and conclusive as that it becomes our duty to set aside the judgment of the trial court, who heard the testimony, and

had the advantage of observing the demeanor of the witnesses while on the stand.

The judgment of the trial court is affirmed.

MODERN WOODMEN OF AMERICA v. INTERNATIONAL TRUST CO.

(Court of Appeals of Colorado. July 14, 1913. Rehearing Denied Dec. 8, 1913.)

1. INSURANCE (§ 819*)—FRATERNAL BENEFIT INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a fraternal benefit policy, defended on the ground of misrepresentation by insured that he did not regularly use intoxicants, *held* to show that the use of intoxicants by insured was such that no conservative insurance society would have accepted insured as a risk with knowledge of his habits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

2. INSURANCE (§ 819*)—FRATERNAL BENEFIT INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE—KNOWLEDGE OF INSURED'S INTemperance.

Evidence, in an action on a fraternal benefit certificate, defended on the ground of misrepresentations by insured as to the extent of his use of intoxicants, *held* not to show that defendant's agent who assisted in organizing the local society had knowledge of insured's intemperate habits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

3. INSURANCE (§ 724*)—FRATERNAL BENEFIT INSURANCE—KNOWLEDGE OF INSURED'S HABITS—NOTICE TO AGENT.

The fact that one authorized by a fraternal benefit society to organize a local camp was told by an old acquaintance of insured that insured drank too heavily to be a proper risk, and was told by another who knew insured well that he "was too much of a drinker, to [the speaker's] knowledge, for fraternalism," were mere vague opinions of the speakers, and not sufficient to charge the agent with the duty of investigating the extent of insured's indulgence in intoxicants.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1837, 1866-1868; Dec. Dig. § 724.*]

4. INSURANCE (§ 819*)—FRATERNAL BENEFIT INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE—AUTHORITY OF AGENT.

Evidence, in an action on a fraternal benefit policy, *held* not to show that one who solicited insured's application and forwarded it to the general offices had authority to organize a local society, or to do more than to select the examining physician and solicit and forward applications.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

5. INSURANCE (§ 724*)—FRATERNAL BENEFIT INSURANCE—MISREPRESENTATIONS—KNOWLEDGE BY AGENT—ESTOPPEL.

Where insured's misrepresentations to the soliciting agent of a fraternal association were willful, the fact that the agent knew that insured's statements were not true would not estop the company from avoiding the certificate upon that ground, since there can be no estoppel unless one of the parties is misled to his disadvantage.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1837, 1866-1868; Dec. Dig. § 724.*]

6. COURTS (§ 92*)—OPINIONS—DICTUM.

Where one of the parties claimed that a certain case controlled the decision, and the other party claimed that other cases ruled, but the judge writing the opinion held that the statute controlled and based his decision thereon, any further remarks by him about the general rules of law applicable was obiter and not authority.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.*]

7. INSURANCE (§ 726*)—CONSTRUCTION OF CONTRACT.

In absence of statute, insurance contracts are construed by the same rules as other contracts, in order to effectuate the intention of the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. § 726.*]

8. INSURANCE (§ 695*)—FRATERNAL BENEFIT INSURANCE—AGENTS—RESTRICTION OF AUTHORITY.

In absence of statute, insurance companies may limit the authority of their agents, and an applicant dealing with an agent whose authority is expressly limited by the application cannot take advantage of any act of the agent in excess of such limited authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.*]

9. CONSTITUTIONAL LAW (§ 70*)—PROVINCE OF COURT—LEGISLATIVE FUNCTION.

It is for the legislature, and not for the courts, to change a well-established rule of law, such as the rule permitting insurance companies to limit the authority of their agents.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

10. APPEAL AND ERROR (§ 169*)—PRESENTATION BELOW.

Where plaintiff does not raise a question at trial or upon appeal until after oral argument, the appellate court is not inclined to consider the question, unless it is necessary to do so to prevent injustice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.*]

11. INSURANCE (§ 756*)—FRATERNAL BENEFIT INSURANCE—RETURN OF ASSESSMENTS.

A fraternal benefit company need not tender a return of the premiums in order to forfeit a certificate on the ground of willful misrepresentations by insured in his application as to his intemperate habits, though assessments must be returned on forfeiture in case of an unintentional breach of warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.*]

Hurlbut and Morgan, JJ., dissenting.

Appeal from District Court, Denver County; Hubert L. Shattuck, Judge.

Action by the International Trust Company, as guardian of William Conter and Annie Conter, against the Modern Woodmen of America. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss.

Truman Plantz, of Rock Island, Ill., Tully Scott, of Denver, and George G. Perrin, of Rock Island, Ill., for appellant. S. D. Crump and Henry C. Allen, both of Denver, for appellee.

BELL, J. This case was ably presented in the principal and supplemental briefs orig-

inally filed and oral arguments made previous to our opinion heretofore announced, but other points are raised and authorities cited in the petition presented for a rehearing, which is denied; and, for a more orderly disposition of all the questions now herein involved, our original opinion is hereby withdrawn and substituted by the following:

The action was brought by the International Trust Company, appellee herein, as guardian of the minor heirs of Henry Conter, against the Modern Woodmen of America, appellant, a fraternal benefit society organized under the laws of the state of Illinois, and doing business in the state of Colorado under section 74, c. 70, of the Revised Statutes of 1908 (section 3160). Said society has a lodge system with a ritualistic form of work, a representative form of government, and is self-governing in its administration, and in the early part of the year 1909 organized a local camp at Globeville, Colo. On the 2d day of February, 1909, Henry Conter, above named, made application to said society for membership in said Globeville camp and for a benefit certificate in the sum of \$3,000, and in said application, which was in writing, warranted that all statements and answers by him made therein were full, complete, and literally true, and especially agreed therein that the literal truth of each answer should be a condition precedent to any binding contract issued upon the faith of such answers, and agreed that they should become a part of the benefit certificate. In the last paragraph of said application, immediately preceding the signature of the applicant, his attention was especially called to the following notice: "That inasmuch as only the head officers of the society have authority to determine whether or not a benefit certificate shall issue on any application, and as they act upon the written statements, answers, warranties and agreements herein made, no statements, promises, knowledge or information had, made or given by or to the person soliciting, taking or writing this application, or by or to any person shall be binding on the society or in any manner affect its rights, unless such statements, promises, knowledge or information be reduced to writing and presented to the head officers of the society at or before the time any benefit certificate shall be issued hereon; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with or conform to any and all by-laws of the said Modern Woodmen of America, whether now in force or hereafter adopted, that my benefit certificate shall be void."

On the same day, February 2, 1909, the applicant appeared before Dr. Van Landingham, the examining physician for the society, and, in answer to the questions contained in his application, purported to state his family history, his health condition, and habits.

The answers thus made by him were written by the examining physician in the application, which was subsequently signed by the applicant, and represented, in substance, that he had not, in the last seven years previous to the date of his application, been treated by or consulted any person, physician, or physicians in regard to personal ailments; that he never had any local disease, personal injury, or serious illness; that at the time of the examination he was of sound body, mind, and health, free from disease or injury, and of good moral character and exemplary habits; that he did not use intoxicating liquors daily; that he had never been intoxicated; and that the kind and quantity of intoxicating liquors consumed by him was "an occasional beer." On the 19th day of March, 1909, the appellant issued a benefit certificate to the applicant on said application and the answers contained therein, and on April 11, 1909, 23 days after issuing the same, the assured died from fatty degeneration of the heart. The appellee, as guardian of the minor children of the assured, sought to collect from the appellant the sum of \$3,000 as provided in the benefit certificate, and brought suit in the district court of the city and county of Denver for the amount. The appellant resists payment of this certificate because, it avers, the assured made false statements in his application in regard to his health and habits, and that at the time he made such statements he had a disease of the heart, and was intemperate in the use of intoxicating liquors, which was the indirect cause of his death, and that such false statements and intemperance on the part of the assured, under the terms of his application and the by-laws of the society, render his certificate null and void. The appellee denies the above charges, and alleges that, if they are true, the agents and officers of the appellant society knew the actual condition of affairs at and before the time of issuing the certificate, and accepted from the assured his dues, premiums, and fees with full knowledge of these conditions, and has therefore waived the conditions in this respect in the application, its by-laws and the certificate, and is estopped from asserting a forfeiture. On the 12th day of April, 1909, Drs. Carlin and Bennett held an autopsy on the body of the assured, and were able to, and did, determine that the assured died from fatty degeneration of the heart, but were unable to determine, from their examination of the body, the primary cause of the disease.

Dr. Carlin testified that fatty degeneration of the heart is an affection which "causes the muscular fibers of the heart to change into fat surface and become friable and soft," so that the finger might be pushed through with very little effort, while the ordinary heart is tough, and that, in the case of the assured, the disease was in an advanced stage and the heart reduced in size. He further testified that the primary cause of

the disease is any wasting disease of the body, such as cancer, tuberculosis, alcoholism, and long sieges of typhoid fever, diphtheria, arsenical and phosphorous poisoning, and Dr. Bennett adds to these: Torpidity of liver, poor circulation, bad digestion, and other things which tend to upset the heart.

The witness Miller, a druggist, testified that he thought the assured was suffering from heart trouble for some time before the date of his application, because of his bad complexion and complaints of dizziness, and had sold him strychnine tablets to relieve him of this trouble, but did not advise the assured that they were for this purpose.

Another witness, Jennie Sardakowski, who was well acquainted with the assured and had business transactions with him, testified that, about a year before his death, and again about two weeks previous thereto, she saw him taking tablets which he told her were for his heart.

Dr. Lee testified that he examined the assured for a policy in the Prudential Insurance Company about 30 days previous to his death, or 7 days before the certificate in question was issued, and found his heart action to be very rapid. Counsel for appellant endeavored to have the witness state the cause assigned to him by the assured for this abnormal condition; but, upon objection of the appellee, the court refused to hear the testimony.

It also developed at the trial that for the last 4½ years of the assured's life he habitually indulged in the use of intoxicating liquors, using both beer and whisky.

Charles Newman testified that he knew the assured personally for a period of five years before his death; that they lived within three blocks of each other, and for weeks at a time he would see him daily, and at times he would not see him for a week or two; that whenever they met the assured took a drink of beer and sometimes two, three, or a whole lot more; that they both drank about the same, and would send for a can of beer and drink together; that it was a daily occurrence for the assured to drink beer when they were together, and, at times, but not frequently, the witness saw him under the influence of intoxicating liquors; that they both got drunk together, but not often; and that he, the witness, solicited applications for membership in the Globeville camp, but refused to take the assured's application because he was too much of a drinker, to his knowledge, for fraternalism.

Michael Pishko testified that he worked for the assured for more than four years immediately prior to his death, that he drove the wagon in the mornings and cut meat in the afternoons, and that during this time he drank whisky and beer with the assured. His examination in part is as follows: "Q. Did his habit of taking drinks extend over the whole period of four years that you knew him? A. Yes, sir. Q. Did he become in-

toricated or under the influence of liquor? A. Under the influence? Yes, sir. Q. Did it (Conter's drinking) cover this period generally, every day, or every week? A. Yes, sir; I suppose he took his drink every day." Pishko also testified that he saw the assured drink beer the day he died.

Jennie Sardakowski testified that the assured occupied the ground floor of her building, and slept in a bunk behind the ice chest, at least part of the time, for three years immediately prior to his death; that she saw him nearly every day; that she saw him drinking whisky and beer in the store; and that the year before he died he drank heavily some days, and some days he did not.

C. M. Higdon testified that he was a Denver policeman on the beat where the assured did business, and saw him almost daily for a period of 4½ years before his death; that the assured had the reputation of being, and was, a very heavy drinker, and was frequently intoxicated during this time; that he, the witness, was called upon to arrest the assured three different times for intoxication and disturbance; and that such periods of intoxication occurred during the entire 4½ years that the witness knew the assured; that the assured during the last six or eight months of his life kept a jug of whisky and a case of beer in his place of business and served it to his customers and drank with them; that he was a customer of the assured and drank with him several times, and at such times the assured drank more than he did, he generally taking but one drink while the assured took two or three; and that the assured was exceedingly liberal in treating his friends and customers.

[1] The foregoing statement of the testimony convinces this court that no safe or conservative insurance company or society would have accepted this risk with knowledge of the excessive drink habits of the assured as above detailed. In fact appellee's counsel made no special effort to refute the evidence of the dissipated practices of the assured, but rather defended on the ground that the appellant society received the application, initiation charges, and legal fees of the assured and accepted him with full knowledge of his intemperate habits, and is therefore estopped from benefiting by his false answers. The majority of this court takes a different view of the evidence from that presented by appellee's counsel.

Dr. Van Landingham, examining physician for appellant, testified that he had seen, but thought he had no acquaintance with, the assured at the time of the examination; that he read the questions from the application, and the assured answered yes or no, whatever was required, and he wrote the answers as they were given. There is no pretense that the answers were not written as the assured gave them. It is shown by Dr. Van Landingham that he was employed by the appellant society through Mr. Hume to make

the medical examinations, but there is no evidence that he knew anything, whatever, about applicant's drink habits. It is claimed, however, that Miller and Newman notified Hume of these habits.

The testimony of Miller is that he "met him (Hume) when he first came out there to organize a lodge of Woodmen. * * * I think I was one of the first men that was consulted by Mr. Hume as a prospective member. * * * I told Mr. Hume that Henry Conter was not a desirable member for the organization; * * * that he drank too heavily, and I thought his heart was in bad condition. Q. On what did you base your information that you gave Mr. Hume as to his being a heavy drinker? A. Personal observation, I guess. Q. You knew that to be a fact? A. I knew that he drank more than I would want to drink. Q. Well, in your opinion, he drank so much that you suggested that he was not a fit person, because, as one of the reasons, that he was a heavy drinker? A. Yes, sir."

The witness Newman testified as follows: "I came in there (Conter's store) to write a party up, and I wrote him up, and he came up and started to ball me up about insurance, and I said: 'You need not talk about it. I would not have you in the Modern Woodmen or any other lodge.' Q. I mean between you and Mr. Hume. A. Well, that happened about two weeks afterwards. I told him I would not write him up, for I was—he was telling me that he is paralyzed. Q. What reason did you give for not writing him up? A. That he was too much of a drinker, to my knowledge, for fraternalism." It is difficult for us to see how the statement made by Newman could have made any substantial impression upon Hume as to assured's drink habits. Newman seems to have been a bosom companion of the assured, and stated in his testimony that they were frequently associating and drinking together and got drunk together, but not often, and that they both drank about the same. If the witness considered the assured too much of a drinker for fraternalism, we are unable to see how he could have regarded himself as a fit member for fraternalism. From the relations existing between Newman and the assured, the remark made in reply to the assured's "balling up" the witness would appear very inconsistent and unnatural, unless made in a mere spirit of pleasantry between two intimate friends.

[2, 3] After creditable efforts were exerted by counsel for appellee to obtain some fact that was put into the possession of Hume showing the intemperate habits of the assured, they dismally failed. Conter was sent to the examining physician, and told him, in substance, that his habits were exemplary; that he never had been intoxicated; that he did not use intoxicating liquors daily; and that the kind and quantity of intoxicating liquors consumed by him was an occasional

beer. The statement made by Miller to Hume that the assured drank too heavily and the statement of Newman to Hume that the assured "was too much of a drinker, to [his] knowledge, for fraternalism," were vague opinions of the witnesses which did not necessarily conflict with the statements of the assured in his medical examination. Either of the witnesses, for ought we know, may have thought that "an occasional beer" was drinking too heavily, or Newman may have thought "an occasional beer" made the assured "too much of a drinker for fraternalism." Neither of the answers of these witnesses gave Hume any idea of the amount or quality of intoxicating liquors consumed by the assured or the frequency of his indulgences. They were mere hazy opinions bottomed on no facts disclosed in the record at least, and in our opinion, under the condition of the record, no rule of ordinary diligence required the appellant to pursue its investigation beyond the medical examination. It will also be observed that the opinion of Newman was not expressed to Hume, until two weeks after the assured "balled up" the witness for insurance, and there is neither evidence nor presumption that the physician's examination and the acceptance of the application were not then completed.

There is a great dearth of evidence as to the position of the agent Hume. At the trial, counsel for appellee requested that counsel for appellant admit that Hume "was an assistant of the deputy head consul." Counsel for appellant replied: "He was assistant deputy of the head consul with the limited power, only, to solicit members." Counsel for appellee then said: "We want to offer especially out of the by-laws of the defendant chapter 27 consisting of sections 210 to 222, inclusive," which were admitted, showing the authority possessed by head and deputy head consuls—but make no reference to the authority of an assistant of such deputies. They gave deputy head consul authority to solicit members and organize local camps when and wherever the head consul might direct, and permitted him to collect and retain the membership fee of not less than \$5 for his services, and to solicit members for organized camps, when short of members, on the same terms. Counsel for appellee in argument speak of the organization of the Globeville camp by Hume; however, the evidence does not bear this out. The record shows that Hume secured Dr. Van Landingham as examining physician for the camp, consulted with Miller, when he first arrived, about the organization of said camp, solicited and obtained the applications of Miller and the assured, and this is about the extent of his participation in the business of the organization found in this record. There seemed to be a contention of counsel as to whether he really organized the camp. Counsel for appellee intimated that he did, while counsel for appellant insisted that he

did not, and each of the parties tried to establish its contention by the evidence of A. W. Miller, who was elected clerk of the local camp at the time of its organization. Appellee's counsel asked the witness: "Q. You do know, however, that he was the man who organized the local camp * * * ? A. He is the man who took my application."

Counsel for appellant later asked: "Q. Mr. Miller, as a matter of fact, Mr. Hume did not organize the camp, did he? A. I do not believe that I said he did, did I?"

[4] There is no adequate proof that the agent Hume organized the local camp or had any authority to do more than select the examining physician, solicit applications, and forward them to the head officers of the society; and, if we are to be governed by Miller's testimony, we should conclude that he did not organize the local camp.

[5] With this condition of the record before us, it is insisted that the society had knowledge, through its agents Miller and Hume, of the impaired health and intemperate habits of the assured, and therefore the law of waiver and estoppel operates in favor of the appellee. We are not prepared to admit the knowledge of the society as contended, but, even though it had been shown to our satisfaction that Miller and Hume had this knowledge, the appellee, under the authorities and in view of the willful misrepresentations of the assured, could not benefit by the fact, for it is said in 2 Bacon on Ben. Soc. & L. Ins. (3d Ed.) § 434a, that: "It is an elemental rule that where the means of knowledge are equal there can be no estoppel, nor can estoppel exist without some act of the party estopped misleading the other to his disadvantage."

In *Ketcham v. Am. Mut. Acc. Ass'n*, 117 Mich. 521, 523, 76 N. W. 5, 6, the Supreme Court of Michigan said: "The courts have always been anxious to take care of the rights of the assured when the applicant has relied upon the agent informing the company what had been truthfully told to him about the character of the risk; but the courts never have said the company is bound by statements contained in an application, when not only the agent, but the assured, knows they are untrue and calculated to deceive, and the application is to be forwarded to the company as the basis of its action. To so hold would put these organizations completely at the mercy of dishonest and unscrupulous agents." See, also, *Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *M. W. of A. v. Owens*, 130 S. W. (Tex.) 860; *Hexom v. Maccabees*, 140 Iowa, 41, 117 N. W. 19; *Kempe v. W. O. W.* (Tex. Civ. App.) 44 S. W. 688, 14 L. R. A. (N. S.) 280, note; *Bonewell v. No. Am. Co.*, 160 Mich. 137, 125 N. W. 61; *a. c. on rehearing*, 167 Mich. 274, 132 N. W. 1067, Ann. Cas. 1913A, 847; *Loftin v. Benev. Ass'n*, 9 Ga. App. 121, 70 S. E. 353; *Mudge v. I. O. F.*, 149 Mich. 467, 112 N. W. 1130, 14 L. R. A.

(N. S.) 279, 119 Am. St. Rep. 686; Collins v. Co., 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. Rep. 578; Wilhelm v. Columbian Knights, 149 Wis. 585, 136 N. W. 160; McGreevy v. Nat. Union, 152 Ill. App. 62; Dimick v. Co., 69 N. J. Law, 384, 55 Atl. 291, 62 L. R. A. 774; Maier v. Co., 78 Fed. 566, 24 C. C. A. 239; Mattson v. Samaritans, 91 Minn. 434, 98 N. W. 330.

It is intimated by counsel for appellee that Hume was influenced in soliciting the membership of the assured by reason of the fee attached, and from this they argue that, if the society is thus dominated by a desire on the part of its officers for fees and salaries, the members of the society should pay such claims as the one here presented.

It is said by the Supreme Court of Washington in *Elliott v. Knights of the Modern Maccabees*, 46 Wash. 320, 89 Pac. 929, 930, 13 L. R. A. (N. S.) 856, that, if a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent, for the rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own fraud upon the principal. It is there held that, while notice to an agent is notice to his principal as a general rule, an exception to this rule arises when the agent's conduct is such as to raise a clear presumption that he will not communicate to his principal his knowledge of the fact in controversy, and where he acts in his own interests and adversely to those of his principal. In the case there under consideration the age limit for membership was 50 years, and Elliott informed the deputy commander that he was 55 years of age. The deputy asked him to state his age as of 50 years and promised to secure his admission. The suggestion was acted upon, Elliott was admitted, and remained a member of the tent until he had paid in dues the sum of \$348, and was entitled to certain returns under the rules. It was then discovered that he had misrepresented his age, the society canceled his membership, he sued to recover the above stated amount, and the court held that he and the agent were working for their own interests, and neither of them for the interests of the society, and denied his right to a return of the dues paid by him. See, also, *Ryan v. World Mut. L. I. Co.*, 41 Conn. 168, 19 Am. Rep. 490; *Hanf v. N. W. Masonic Aid Ass'n*, 76 Wis. 450, 45 N. W. 315; 1 Enc. of Law (2d Ed.) 1144, 1145.

However, we have found that there is no substantial evidence showing that the agent Hume had knowledge of the falsity of the statements. But, if we should concede his knowledge, it could not excuse the culpability of the assured, and the trial court should have granted the request of appellant for an instruction to the jury that it return a verdict for the defendant. The foregoing con-

clusion is sufficient to dispose of this case, and we feel that it is unnecessary for us to go beyond this; but the case has been so ably and exhaustively argued on both sides, and so many authorities have been produced pro and con, and such persistent demands have been made in counsel's argument for a rehearing, that we feel constrained to present some of the points urged and authorities cited in support thereof, if for no other purpose than that the bench and bar may have the benefit of the researches of counsel.

It will be seen from a quotation, from the application of the assured, in the early part of this opinion, that a policy should issue only upon the written statements, answers, warranties, and agreements made in the application, and that no statements, promises, knowledge, or information had, made, or given by or to the person soliciting, taking, or writing the application should be binding upon the society or in any manner affect its rights, unless such statements, promises, knowledge, or information were reduced to writing and presented to the head officers of the society at or before the time any benefit certificate should be issued thereon, and that the certificate should be void if any of the statements contained in the application, which were made warranties in toto, should not be wholly true. This notice of the limited character of the soliciting or other agents of the company appeared in large type in the application immediately above where the assured signed the same, with a headline printed in large capital letters as follows: "APPLICANT WILL PLEASE NOTE THIS CLAUSE," thereby using every endeavor on the part of the society to bring the limited authority of the agents to the notice of the assured. Prior to March 29, 1886, when the Supreme Court of the United States announced its opinion in the case of *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519-536, 6 Sup. Ct. 837, 29 L. Ed. 934, on an application similar to the one under consideration, the courts showed a tendency to hold that the knowledge of the agent was the knowledge of the company regardless of the attempts of companies to limit the authority of agents; and with many courts there seemed to be no discrimination made between the decisions cited from courts of states where the Legislatures had specially provided that "persons soliciting insurance or procuring applications therefor should be held to be the agents of the insurance companies, anything in the application or policy to the contrary notwithstanding," as in the state of Iowa (Laws of 1880, c. 211, p. 209), and those where the general principles of agency only, without any statutory restrictions, were involved.

Justice Field, in writing the opinion in the *Fletcher Case*, supra, disregarded all authorities where the agent's authority was not limited, and said that in cases where the agents were not limited in their authority they would be deemed as acting for the com-

panies, but where the power of the agent was limited, and notice of such limitation given to the applicant in the application, which he was required to make and sign, and which he must be presumed to have read, he would be bound by such limitation, and that there was nothing in insurance contracts which distinguished them in this particular from others. He further said that, if the assured had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by the agent's verbal statements, unless reduced to writing and forwarded with the application to the home office, that the company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of such limitation, and that it must be presumed that the applicant read the application and was cognizant of the limitation therein expressed, when the notice was so clearly brought to his attention.

In *Iverson v. Met. Life Ins. Co.*, 151 Cal. 748, 91 Pac. 609-612, 13 L. R. A. (N. S.) 866, the Supreme Court of California had the same question under consideration, and held that, when a soliciting agent takes an insurance application in which it is stipulated that the answers of the applicant are true and are the basis of the contract of insurance; that if untrue the policy should be void; that only officers of the insurer had authority to determine whether a policy should issue; and that no statement made to the soliciting agent should be binding on the insurer, unless reduced to writing and presented to the officers of the company at the home office—the company would not be held liable on the policy issued on such application unless informed as provided therein. In that case the agent of the company solicited an application from Iverson, whom he had known for over two years, and knew that he had suffered a stroke of paralysis, but this information was not communicated to the general agent of the company, the assured stated in his application that he never had paralysis, and the court declared the policy void, and held that, under the conditions of the application, the knowledge of the soliciting agent was not the knowledge of the company. It further held that an insurance company, like any other principal, could prescribe limitations upon the power and authority of its agents, and persons dealing with such agents, with notice of the limitations upon their authority, are bound by the restrictions imposed, and that in the case before it the assured was plainly informed in the application that only the officers at the home office had authority to determine whether a policy should issue on the application, and that they acted on the written statements, answers, warranties, and agreements contained therein in determining the matter.

In *Dimick v. Met. Life Ins. Co.*, 69 N. J. Law, 384, 55 Atl. 291, 62 L. R. A. 779, 780,

involving the same questions of limitations of agencies as were considered in the Fletcher and Iverson Cases, the court said the company certainly was at liberty to limit the powers and authority of its own agents, and third parties dealing with such agents, with express notice of the limitations thus imposed, could not bind the principal by any act done by the agents in excess of the bounds of their authority; that, if a similar question were raised concerning a contract relating to any other subject-matter, not the slightest doubt would be entertained with respect to the binding force of the limitation, and, if persons seeking insurance and insurance companies are to be left free to enter into such contracts as they please with reference to life insurance, it is difficult to find any ground on which to ignore the force of these express stipulations, and, if there is any public policy requiring a rule different from that applicable to other subjects, it is for the Legislatures, and not for the courts, to declare it. See, also, to the same effect: *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *McCoy v. Met. Life Ins. Co.*, 133 Mass. 82; *Clemens v. Sup. Assembly*, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33; *Rinker v. Aetna Life Ins. Co.*, 214 Pa. 608, 64 Atl. 82-84, 112 Am. St. Rep. 773; *Cleaver v. Ins. Co.*, 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908; *Cook v. Standard L. & Acc. Ins. Co.*, 84 Mich. 12, 47 N. W. 568-571; *Ketcham v. Am. Mut. Acc. Ass'n*, 117 Mich. 521, 76 N. W. 5, 6; *Modern Woodmen of Am. v. Tevis*, 117 Fed. 369-378, 54 C. C. A. 293; *National Union v. Arnhoist*, 74 Ill. App. 482-489; *Elliott v. Knights of the Modern Macabees*, 46 Wash. 320, 89 Pac. 929-930, 13 L. R. A. (N. S.) 856; *Sun Fire Office v. Wich*, 6 Colo. App. 103-113, 39 Pac. 587.

Counsel for appellee, in their petition for a rehearing, contend that our Supreme Court in the case of *Supreme Lodge K. of H. v. Davis*, 26 Colo. 252-259, 58 Pac. 595, decided the question of agency contrary to the conclusions which we here hold. We have re-examined the Davis Case, and are satisfied that the facts therein considered involved the ratification of the acts of an agent. The facts before us involve the power of an insurance company to limit the authority of its agents and bind the assured by bringing notice of such limitation to him in the application which he is required to sign. We have also carefully examined the cases of *McGurk v. Met. L. Ins. Co.*, 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563; *Coolidge v. Life Ins. Co.*, 1 Mo. App. 109, and 1 Bacon Ben. Soc. & Life Ins., § 160, authorities relied upon by our Supreme Court in the Davis Case, all of which recognize the general rule that notice to the local agent of an insurance company, in making application for insurance, is notice to the company. The force of this general rule is not denied, and is not before us for consideration; but the question here presented is, as before stated, whether an insurance company

can create an exception to the general rule by limiting the authority of its agents and giving notice of such limitation to the applicant in the application, which is part of his contract, and which he is required to make and sign, as was done in that part of the application before us heretofore recited. Our Supreme Court in the Davis Case made no pretense of considering such a question, nor are the authorities relied upon by it applicable to the facts before us. In the case of *Ryan v. World L. Ins. Co.*, 41 Conn. 168-173, 19 Am. Rep. 490, cited with approval in the Fletcher Case, supra, the Supreme Court of Errors of Connecticut passed upon facts similar to those we are now considering, and held that such a limitation and notice was binding on the assured, and, in the case of *Ward v. Met. L. Ins. Co.*, 66 Conn. 227-240, 33 Atl. 902, 50 Am. St. Rep. 80, the same court distinguished the McGurk Case, cited by our Supreme Court as an authority in the Davis Case, and again recognized the exception which is here presented. 1 Bacon, § 160, relied upon by our Supreme Court, merely states the general rule, but, in a footnote thereto, also recognizes the exception as follows: "But when the policy limits the authority of the agent there is no presumption that such agent communicated his knowledge to the company."

Further, when the Davis Case was being considered the case of *Sun Fire Office v. Wich*, 6 Colo. App. 113, 39 Pac. 587, and also the Fletcher Case, supra, had been decided, both recognizing the right of the insurer to limit the authority of its agents and bind the assured by giving notice of such limitation in the application which was made a part of the contract or policy, and no reference whatever was made to either of these authorities by our Supreme Court in the Davis Case. From the painstaking industry and learning of the Justice of our Supreme Court who wrote the opinion in the Davis Case, it cannot be presumed that he overlooked or ignored the settled doctrine supported by the Ryan and Ward Cases, the footnote to section 160 of 1 Bacon, the opinion of our own Court of Appeals in the Wich Case, or that of the United States Supreme Court in the Fletcher Case.

But it is contended by appellee that our Supreme Court, in the case of *Pac. L. Ins. Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087, repudiated the doctrine of the Fletcher Case, and that we err in considering it as an authority here. A mere glance at the Van Fleet Case will convince any one that the facts there are essentially different from those in the case at bar, and that our Supreme Court distinguished the facts in that case from those in the Wich and Fletcher Cases rather than repudiated the legal principles declared in the latter cases. The court expressed itself as follows: "The Fletcher Case is cited with approval by our Court of Appeals in the Wich Case. The facts of these

cases may be, in one or two important particulars, distinguished from the facts of the case at bar. But whatever may be said of their doctrine, we do not think they are controlling under the facts of this case, and we cannot apply their doctrine." In the Van Fleet Case the soliciting agent of the company, who had power to solicit, prepare, and transmit applications for insurance, filled in the blank spaces in the application and inserted therein answers which he knew to be false. The court said: "It would seem that decisions of the Supreme Court of the United States of a later date than the Fletcher Case, and certainly our own decisions, make the soliciting agent the representative of the insurer *when he makes out the application himself*, and his knowledge the knowledge of the defendant, and estop the company to declare the policy void *because of the mistake or fraud of its agent*." In the case at bar the soliciting agent, Hume, did not insert in the application the answers complained of. The false answers therein were made by the assured himself to the examining physician, and written, as given, in the application by the examining physician, who was a stranger to the assured and knew nothing whatever of his habits or the falsity of his answers. In this respect, particularly, the Van Fleet Case differs materially from the case at bar, and is in no way applicable to the facts before us. It would seem that the learned Justice who wrote the opinion in the Van Fleet Case had some doubts as to the attitude of the United States courts toward the doctrines announced in the Fletcher Case. However, the subsequent decisions of the United States courts have followed and applied these doctrines and very generally distinguished *Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 841, *Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, and the Fletcher Case, as is shown in *Northern Assur. Co. v. Grand View Building Ass'n*, 183 U. S. 308-358, 22 Sup. Ct. 133, 46 L. Ed. 213, wherein the Fletcher Case is expressly approved, largely quoted from and followed; *Sawyer v. Equitable Co. (C. C.)* 42 Fed. 30; *Mutual Co. v. Robison (C. C.)* 54 Fed. 580-595; *Standard L. & Acc. Co. v. Fraser*, 78 Fed. 705, 22 C. C. A. 499; *Maier v. Fid. & Mut. L. Ass'n*, 78 Fed. 568, 24 C. C. A. 239; *Hubbard v. Mut. Reserve (C. C.)* 80 Fed. 681; *Glover v. Nat. Fire Ins. Co.*, 85 Fed. 125, 30 C. C. A. 95; *Brown v. Casualty Co. (C. C.)* 88 Fed. 38-41; *U. S. Life Ins. Co. v. Smith*, 92 Fed. 503-507, 34 C. C. A. 506; *Caruthers v. Kansas Mut. L. Ins. Co. (C. C.)* 108 Fed. 487-494; *John Hancock L. Ins. Co. v. Houtt (C. C.)* 113 Fed. 572-576; *Modern Woodmen v. Tevis*, 117 Fed. 369, 54 C. C. A. 293, and *Phoenix Ins. Co. v. Warttemberg*, 79 Fed. 245-248, 24 C. C. A. 547.

[6] In the Warttemberg Case, supra, the Circuit Court of Appeals clearly announced that the decision of the court in the case of *Ins. Co. v. Chamberlain*, 132 U. S. 304, 10

Sup. Ct. 87, 33 L. Ed. 341, did not attempt to modify the doctrine of the Fletcher Case, and said that it was based expressly upon the statute of Iowa, in which state the contract of insurance had been made, providing that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the company or association issuing the policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." The court further said: "We find no other decision of the Supreme Court subsequent to the Fletcher Case which in any way modifies that case." It is rather surprising that any one who read the Chamberlain Case should have thought that such was intended, in any wise, to modify the Fletcher Case. Justice Harlan who wrote the opinion in the Chamberlain Case expressly stated that counsel upon one side insisted that the Fletcher Case controlled, and counsel upon the other side insisted that other decisions of the United States Supreme Court controlled, and he held that the statute of Iowa controlled and based the decision thereon, and anything he said in the previous part of the opinion about general rules is obiter dictum and not authority upon any question. Justice Campbell, in the Van Fleet Case, made no pretense of overruling the doctrine laid down in the Fletcher Case, adopted by our Court of Appeals with approval in the Wich Case, to the effect that it is competent for any party, corporation, or individual, employing an agent in the negotiation of a contract, whether of insurance or otherwise, to limit his power, provided the limitation is brought home to the knowledge of the other contracting party, and that in an insurance application, which the assured is required to sign, such notice may be brought to the attention of the assured therein.

In *Merchants' Ins. Co. v. Harris*, 51 Colo. 107, 116 Pac. 147, our Supreme Court said: "Insurers should undoubtedly be allowed to protect themselves, in any legal way possible, against the fraud of their unfaithful agents, but not at the expense of innocent third parties. And when a loss caused by a dishonest agent must fall upon his principal or a third party, both equally innocent, the courts should not, and do not, ordinarily, hesitate in putting the burden upon the person who selected and controlled the agent."

It would seem from the foregoing stated conditions that neither the facts nor decisions in the Van Fleet nor Harris Cases affect those parts of the Wich or Fletcher Cases which apply to the facts of the case at bar, if it was the intention of our court to repudiate anything decided in either of these cases, and we, therefore, regard them as authority herein.

We may say here that the authorities herein cited and examined by us support the following principles:

[7] First. Contracts of insurance are to be

considered and construed, when not controlled by statute, by the same rules of law and interpretation as other contracts, in order to carry out the intention of the parties. *Merchants' Ins. Co. v. Harris*, supra, 51 Colo. 108, 116 Pac. 143.

[8] Second. Under the general principles of the law of agency, an insurance company, when not restricted by statute, is at liberty to limit the authority of its own agents, and an applicant dealing with an agent whose authority is so limited by the express terms of the application, which the applicant is presumed to read and required to sign, cannot benefit by any act done by such agent in excess of his authority so limited and declared. *Dimick v. Met. L. Ins. Co.*, 69 N. J. Law, 384, 55 Atl. 291, 62 L. R. A. 781, 782; *Sun Fire Office v. Wich*, supra, 6 Colo. App. 113, 114, 39 Pac. 587, and other cases heretofore cited.

[9] Third. If the people of any state wish to change the public policy thereof in insurance matters, by limiting the general rule of agency, it is for the Legislatures, and not for the courts, to so change it. *Dimick* and *Wich* Cases, supra.

[10, 11] Counsel for appellee, in their petition and brief for a rehearing, also complain because they say that the authorities overwhelmingly show, in a case like this, that the company must plead and tender a return of the dues and assessments paid. We did not go into this question exhaustively, as it was not raised in the court below, nor in this court until after the case had been orally argued; and, under such conditions, unless it is necessary to prevent injustice from prevailing, the courts are not inclined to consider any questions which are so untimely presented. However, in our opinion heretofore announced, we did cite the case of *Elliot v. Knights of the Modern Maccabees*, 46 Wash. 320, 89 Pac. 929, 930, 13 L. R. A. (N. S.) 856, wherein the assured defrauded the society, by collusion with the agent, in obtaining a policy, and paid \$348 in dues and assessments before the society discovered the fraud and canceled his policy or certificate. Upon action brought by him to recover the dues and assessments so paid, the Supreme Court of Washington held that, where the policy was obtained by fraud on the part of the applicant, or by collusion between the applicant and the agent, he forfeited all payments.

In *Nat. M. F. Ins. Co. v. Duncan*, 44 Colo. 472-480, 98 Pac. 634, 637 (20 L. R. A. [N. S.] 340), our own Supreme Court settled the question in this jurisdiction in the following language: "Counsel for plaintiff also contends that the defense under consideration is insufficient because it does not allege that the company has repaid the premium or any part thereof to the insured. The company is not seeking to rescind its contract of insurance, but to avoid liability thereon because of the fraud of the insured. Where a policy by

its terms is void by reason of fraud on the part of the insured, the premium cannot be recovered back." See, also, *Aetna L. I. Co. v. Paul*, 10 Ill. App. 431; *Freismuth v. Agawam M. F. I. Co.*, 64 Mass. (10 Oush.) 588; 2 May on Ins. (4th Ed.) § 567.

The general rule is stated in a footnote to *Taylor v. Grand Lodge A. O. U. W.*, 96 Minn. 411, 105 N. W. 408, 3 L. R. A. (N. S.) 114, as follows: "The general doctrine laid down by the text-book writers is that an unintentional breach of warranty on the part of the insured does not authorize a retention of the amount paid as assessments, if no risk has been run by the insurer; but actual fraud in the inception of the contract on the part of the insured forfeits his claim to a return of assessments, notwithstanding the fact that no risk has ever attached. See 2 Cooley, *Briefs on Insurance*, pp. 1037-1048; *Niblack, Accident Ins. & Ben. Soc.* § 282; *Vance, Ins.* §§ 85, 86; *Joyce, Ins.* § 1406; *Cooke, Life Ins.* p. 193; 2 May, *Ins.* (3d Ed.) § 567."

In the case under consideration we have found that the policy or certificate was obtained by willful misrepresentations on the part of the assured as to his intemperate habits, hence no such tender or pleading as is insisted upon by the appellee was required. Furthermore, we can find no direct evidence in the record as to the payment of any specific amount by the assured, but there are acknowledgments of the payment of whatever amounts that were necessary to admit the assured as a member, and, by consulting section 214 of the by-laws, we learn that the payment of a membership fee of at least \$5, together with the camp and head physician's fees, was required, and from this it is self-evident that the assured had invested but a very small amount for the certificate in question; and we feel, in view of the condition of the record before us, that we would be doing a great injustice to require the members of the appellant society to pay the judgment of \$3,190 rendered in the district court on a certificate that was evidently obtained by willful concealment of material facts, and which could not have been secured if a truthful statement of the intemperate habits of the assured had been made, or if the society had known of the impaired health of the assured at the time the certificate in question was issued, and when he accepted said certificate, April 5, 1909, 23 days before his death, upon an express warranty, over his own signature, to the effect that he was then in good health, and agreed that the same should not be binding on the society unless he was then in good health.

We think, upon the evidence, which was practically undisputed, that it was the duty of the trial court to give the instruction requested by the appellant directing the jury to return a verdict in its favor; hence the judgment is reversed, the case remanded, and the district court directed to enter judgment

for costs in favor of the appellant and dismiss the case.

Reversed and remanded, with directions.

HURLBUT, J. (dissenting). If I properly understand the majority opinion, it reverses the judgment of the trial court principally upon the ground that the insured, Henry Conter, made false answers to questions propounded to him in his application for the certificate, that the record conclusively showed such answers to be false, and that, such being the case, the warranties and statements incorporated in Conter's application, as well as in the certificate itself, concerning answers made in the application, conclusively bar the beneficiaries from recovery in this action. It further appears in the opinion that the question of waiver on the part of defendant company received but passing notice, though such issue was pleaded and earnestly maintained by plaintiff throughout the controversy. I am of the impression that such waiver is the controlling and dominating issue in this case, and that every other point raised by the record is subservient to it. I think it cannot be gainsaid that issues similar to those determined by the court in the majority opinion have been presented to the appellate courts throughout the country probably as often as any other kind or class of issues known to the law. Their determination has germinated a multitude of adjudicated cases throughout the various jurisdictions, and the same are in hopeless conflict upon the question of waiver, and liability of insurance companies under policies and beneficiary certificates such as here considered. There can be no question but that the majority opinion is supported by numerous authorities of enviable repute, while, on the other hand, authorities of equal standing have construed the same kind of contracts as in the case at bar and reached conclusions and rendered opinions in direct opposition to those here announced. The majority opinion and those authorities cited in support thereof appear to adopt an unvarying rule that in this class of cases every line, word, and syllable, found in the policy or certificate, must be strictly construed and rigidly enforced in favor of the company, taking but scant notice of defenses of waiver generally pleaded and urged by the beneficiaries; while, on the other hand, those authorities which militate against the class just mentioned appear to grasp upon anything found in the record, pertaining to the securing and issuing of the policy, which would justify a ruling that the company had waived its right to insist upon the strict letter of the contract as against the beneficiaries, and thus prevent a forfeiture of the policy. I do not want to be understood, by the language used, as intimating that this court, or others entertaining the same views on a contract of this character, is actuated by any prejudice for or against

insurance companies, their policy holders, or beneficiaries thereunder. It is to be regretted that all life insurance policies and certificates of beneficiary companies are not short, and couched in brief and simple language, so that policy holders or members could be justified in the belief (which they usually entertain) that their wives or children, upon their death, would be the possessors of certificates of indebtedness equal in financial integrity to government bonds. In my judgment it would challenge the ingenuity of the greatest living lawyer to draft an application or certificate containing more subtle, unreasonable, and inequitable warranties, provisions and restrictions, against the insured than those found in the printed application and certificate in the instant case. It is a safe suggestion, in view of the majority opinion, that but a small percentage of the million or more members of the appellant company have a clear conception of the uncertain protection afforded their wives and children under issued policies and certificates like those here considered. If there is anything in this criticism, it might be nullified if those courts holding the insured to the strict letter of the contract would require the insurance company, where the policy is being contested, to show that the attention of the insured, prior to the signing of the application and issuing of the policy, had been specifically called to the harsh and unreasonable provisions and restrictions against him, contained therein. Many courts adopt this rule in contracts of passengers and shippers with common carriers, and its enforcement has resulted in great benefit to the public at large.

I am willing to admit that, while Conter stated in his application that he had never been intoxicated, and that he used intoxicants only to the extent of "an occasional beer," the undisputed evidence showed that at the time he signed his application, and for many years prior thereto, he had indulged extensively in the use of intoxicating liquors, and had been intoxicated a number of times; and, were there anything in the record to show that, at the time the certificate was issued, neither the company nor its agents or officers had any knowledge of Conter's habits in this regard, the company should not be held to liability in any amount upon the same.

The record here shows that Hume was the assistant deputy head consul of the order, and, while holding that position, came to Denver to organize the local camp at Globeville some time in January or February; that he appointed and employed Dr. Van Landingham to examine Conter for membership; that he discussed with the witnesses Miller and Newman the proposed organization of the local lodge, and the question of presenting members for that lodge, their qualifications, and particularly the qualifications of Conter for membership. It was ad-

mitted at the trial that Hume had authority to solicit members, take the documents examined, of whatever nature, and forward the same to the authorities, and, presumably, to employ physicians and direct them to make professional examination of proposed members. The record shows that the benefit certificate was issued by the head consul, and further shows his power to appoint assistant deputy head consuls and fix their compensation. Hume, therefore, being an agent created by the head consul, could not well be considered an agent or representative of the local camp, as the same was not in existence at the time he was engaged in the business of forming it. As he was the direct representative of the chief executive officer of the society at the time of his sojourn in Denver, all knowledge and information obtained by him, respecting the qualifications of proposed members for the new camp, ought to be taken as knowledge and information of the head consul and the order itself. His agency appears to have been of a much higher degree than that of one simply soliciting members for camps already established. It seems that the occasion of his visit to Denver at the time mentioned was for the purpose of creating the new camp and seeing that it was properly established as required by the rules of the order. Certainly a mere soliciting agent is not generally empowered with authority to establish new camps, hire physicians, and direct examinations of proposed members, as was done by Hume. Under this showing, and under authority of Supreme Lodge K. of H. v. Davis, 28 Colo. 252, 58 Pac. 595, I think Hume was an agent of the order, and that knowledge and information concerning the qualifications of Conter for membership, acquired by him in the performance of his duties in that respect, is knowledge and information chargeable to the order, as well as to the head consul. It should also be presumed that Hume promptly notified the chief executive of the order at the home office of the objections urged by the witnesses Miller and Newman to Conter's becoming a member, as well as their reasons therefor. The same remarks may apply in regard to Hume's knowledge of any disorder or serious affection of Conter's heart at the time. It is undisputed that, in addition to the objection made by Miller to Conter's becoming a member of the order on account of excessive liquor drinking, he also objected to such membership by reason of his belief that Conter was afflicted with heart trouble to a degree making him an undesirable member. Miller was a druggist, and, by virtue of his occupation, more or less familiar with human ailments. These facts should have put Hume upon inquiry and to a further investigation concerning such objections. I think, however, that whatever the answers of Conter might have been, concerning the condition of his heart at and prior to the time of his application, is of but little moment, as his answer that

he had "never had any disease of the heart" was corroborated by the testimony of defendant's physician, Dr. Van Landingham. He testified that he made a careful examination of Conter's heart by modern approved methods at the time of his examination, and failed to discover any trouble whatever therewith, and certified that he believed he was free from any heart trouble at that time. Certainly the evidence of an experienced physician upon this question should be conclusive as against a layman's diagnosis of heart ailments. Here Conter's testimony was corroborated by the physician. In addition to this testimony Dr. Lee, a witness, examined Conter about one month before he died, to ascertain his physical qualification for membership in the Prudential Insurance Company, and passed him as a safe risk. All this undisputed testimony on this point ought to eliminate any question as to Conter's heart being sufficiently normal to admit of his membership in the order. The evidence is also undisputed that in January or February, 1909, and prior to the time the insured made his application for membership, the two witnesses Newman and Miller discussed with Mr. Hume, assistant deputy head consul of the order, the advisability of accepting insured as a member of the local camp, and both advised against it and gave as reasons that insured drank too heavily and was not a fit person by reason thereof for such membership; Mr. Miller further telling him that he thought insured's heart was in bad condition. It is therefore clear that for about six weeks before the membership certificate was issued Hume knew that insured was a heavy drinker, and that there was at least some question as to the condition of his heart. This knowledge was imparted to Mr. Hume while he was actively engaged in soliciting and considering the qualifications of proposed members for the new local camp at Globeville.

From the majority opinion I extract the following: "The statement made by Miller to Hume that the assured drank too heavily, and the statement of Newman to Hume that the assured 'was too much of a drinker, to [his] knowledge, for fraternalism,' were vague opinions of the witnesses which did not necessarily conflict with the statements of the assured in his medical examination. * * * They were mere hazy opinions, bottomed on no facts disclosed in the record at least." I notice here that the testimony of Miller and Newman, concerning Conter's liquor-drinking habits and heart condition, is designated in the opinion as "vague opinions of the witnesses" and "mere hazy opinions, bottomed on no facts disclosed in the record at least." Miller testified as follows: "I had a discussion with Mr. Hume over the organization of that lodge and the presentation of members for the lodge. I think I was one of the first men consulted by Mr. Hume as

a prospective member. * * * During that conversation I discussed with Mr. Hume the advisability of securing the application of Henry Conter. I had known Conter something over a year. I told Mr. Hume he was not a desirable member for the organization. The reasons that I gave were that he drank too heavily and I thought his heart in bad condition." Mr. Newman testified: "I worked with him (Hume) soliciting members for the Modern Woodmen. I had a discussion with him about taking the application of Henry Conter for membership in the Modern Woodmen. * * * The reason I gave for not writing him up was that he was too much of a drinker for fraternalism." I am at a loss to discover wherein this positive, plain, and unambiguous information given by Miller and Newman to Hume should be designated as "vague and hazy opinions of the witnesses." Both were relied upon by Hume for other information in obtaining members. One of the informants was a reputable merchant, and both had known Conter for years, were his neighbors and intimate acquaintances. Who else but the neighbors and associates of Conter could have given reliable information upon the subject? Where could Hume have applied, and to whom, with a hope of securing more reliable information concerning Conter's qualifications for membership? Who but a neighbor or intimate acquaintance of Conter could have given information, concerning the subject, more entitled to credence? Who but a neighbor or intimate acquaintance would be more likely to know the habits and general physical condition of Conter? Where is there anything vague or hazy about these statements of Miller and Newman? It is a fair presumption that the very subject-matter of the conversation was one of great importance to this company, and can safely be presumed to have been material to the risk. Here was the direct representative of the highest executive officer of the company, strictly in the line of his duty, personally seeking information of divers persons which would qualify or disqualify a prospective member for membership under the rules of the order. No other person but Hume, as shown by the record, was authorized at that time to speak for the general order or head officers thereof, or transact any business for or in their behalf. He was their sole and only representative present, at and about that time, with any power to organize a constituent branch or camp and pass upon the qualifications of the proposed members. He was told plainly and unequivocally that Conter was not a good risk, that he would be objectionable as a member of the proposed camp, for the reason that he indulged to excess in the use of intoxicating liquors, and that it was Miller's belief that his heart was not in good condition.

The court further says: "In our opinion,

under the condition of the record, no rule of ordinary diligence required the appellant to pursue its investigation beyond the medical examination." I take issue with the court in this statement. It would seem hard to imagine a situation making it more imperative for an agent or one interested, to seek further information upon a subject than the one here disclosed. This conversation took place at Globeville, a small suburban settlement of Denver, and if Hume doubted the veracity or good faith of either Miller or Newman he could easily have interrogated other merchants and members of that community and satisfied himself to the fullest extent of Conter's qualifications to become a member of the camp. These statements of facts by Miller and Newman were not mere idle, passing comments upon Conter's habits and physical condition, but important facts elicited by Hume in deciding who would be acceptable members of the local camp. It was the subject, and the only subject, under consideration at the time. The conversations were between Hume on the one part and an existing member of the order and a prospective member of the camp to be organized, on the other. Prospective members and their qualifications were the controlling subjects of the conversations, and it was strictly business of the order in which Hume was engaged. From any standpoint from which the situation may be considered, it is a reasonable view that it was the duty of this assistant deputy head consul, if governed by motives of integrity and real interest in the good of the order, to have, immediately upon receiving this information, positively rejected Conter as a prospective member of the camp, and to have seen to it that his application was not considered or received for the purpose of becoming such member; or, if he had declined to take such action, under a belief that the information he received was not entirely reliable or was subject to doubt, the only honorable thing left for him to do was to investigate further and continue his investigation until he was satisfied of the real character of Conter concerning his liquor-drinking habits and physical condition; indeed I think he should have gone further and written at once to the head office at St. Louis and informed them that Conter was not qualified to become a member of any camp of that order. He occupied a position of great trust and importance in the order, as compared with an ordinary soliciting agent who might be in the employ of the order to-day and gone to-morrow. The order should not be permitted to escape liability under the circumstances shown, by reason of the warranties and conditions contained in the application and certificate. As a matter of law the order should be held to have waived any warranty or condition contained in those documents, under the facts here shown.

As to the warranty to the effect that this information, acquired by Hume during these conversations with Miller and Newman, should have been reduced to writing and placed in the hands of the head officers before the certificate was issued, I believe this knowledge was in law the knowledge of the head officers, who were thereby presumed to know what Hume knew. The fact that such knowledge was not in writing should be held immaterial. Had Hume performed his duty, as I view it, he would have written at once to the head officers, as above suggested, informing them of Conter's disqualifications.

In the case of Supreme Lodge K. of H. v. Davis, supra, our Supreme Court had under consideration a defense interposed to an action upon a beneficiary certificate upon the ground that the insured, at the time he made his application for membership, falsely stated his age. The uncontroverted evidence there showed that in May, 1890, after the membership certificate had been issued, the beneficiary notified the reporter of the local lodge that the age of insured was greater than represented by him when he became a member, but after such notification the assessments thereafter becoming due for May and June were received and retained by the lodge. The Supreme Court held that under the circumstances the order could not escape liability by reason of the false representation as to age, and that such defense was waived by accepting and retaining the two assessments mentioned, after it became aware of such falsity. Justice Gabbert, speaking for the court, used this language, viz.: "A material, willful misstatement of an applicant for membership in the order regarding his age would doubtless vitiate the contract of insurance if not known by the lodge or its officers to whom applications for membership are addressed. * * * It will also be presumed that he (the agent) has communicated all information to the order which he obtains in the discharge of his duties in making collections on its behalf, which affects its rights; or, if he has not, still, the order having intrusted him with the particular business, the member paying his assessments to him has the right to deem his acts and knowledge those of the order. * * * Appellant could not continue to collect assessments after knowledge of misstatements regarding the age of deceased which would affect its rights, and then, when the contract is executed, escape liability upon the ground that he was guilty of a fraud in procuring his insurance, and the financial reporter of the subordinate lodge of which deceased was a member, having received his assessments after notice of alleged misrepresentations regarding his age, and being the agent of the order for the purpose of making these collections, the knowledge which he then had regarding the age of deceased, or his misstatements on that subject, was the knowledge of the order (McGurk v. Met. L. I. Co., 56 Conn. 528 [16 Atl. 263,

1 L. R. A. 563]; Bacon's Benefit Societies, § 160; Coolidge v. Life Ins. Co., 1 Mo. App. 109, and its acceptance and retention of these assessments, with that knowledge, is a waiver of its right to now raise any question on that subject; and, therefore, whether the evidence sought to be introduced by appellant, regarding the age of Davis was competent or incompetent, it is not necessary to determine, for, according to the admitted facts, it was precluded from asserting that defense in this action. Niblack's Benefit Societies, pp. 565, 566; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622 [52 Am. Rep. 227]; Watson v. Centennial Mut. Aid Ass'n [(C. C.) 21 Fed. 698]; [Ball v. Granite State Mut. L. Ass'n] 64 N. H. 291 [9 Atl. 103]; Masonic Benefit Ass'n v. Beck, 77 Ind. 203 [40 Am. Rep. 295]." In that case the benefit certificate contained a statement to the effect that the statements made in the insured's application for membership, and those made by him to the medical examiner, were to become part of the contract. It will be noticed that the knowledge of the false statement made by the insured, concerning his age, did not come to the society until after the policy had been issued and delivered. In the case at bar the falsity of the statements of the insured, concerning his intemperate habits, was known to both the assistant deputy head consul and Miller (who afterwards became clerk of the local camp) before the benefit certificate was issued. Such knowledge was possessed by them before Conter filed his application for membership.

It may be well at this time to notice that the witness Miller was one of the charter members of the local camp, and elected clerk thereof when it was organized. He had full knowledge of the extent to which Conter used intoxicating liquors, as well as the possibility that his heart might be affected. This knowledge should be considered knowledge of the local camp, which knew that Conter was one of its members. The record does not show any correspondence between the local camp and the home office, concerning Conter's disqualifications, or any objection to Conter remaining a member of the camp. Many reputable courts, including those next hereinafter cited, hold in cases of this kind that the local lodge or camp bears the relation of agent to the parent organization with reference to the business transacted at the place where the local camp is situated. Order of Columbus v. Fuqua (Tex. Civ. App.) 60 S. W. 1020; M. W. A. v. Breckenridge, 75 Kan. 373, 89 Pac. 661, 10 L. R. A. (N. S.) 136, 12 Ann. Cas. 636; Knights of Pythias of the World v. Bridges, 15 Tex. Civ. App. 196, 39 S. W. 333.

The appellant, in so far as the insurance features of the organization are concerned, is in effect a mutual life insurance company, and the general rules governing associations of that character control it in the transac-

tion of this branch of its business. Chart-rand v. Brace, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am. St. Rep. 235; Supreme Lodge K. of H. v. Davis, supra; Titus v. G. F. Ins. Co., 81 N. Y. 410.

On the question of waiver, defendant received the initiation fees, dues, etc., from Conter, and accepted him into full membership of the order after complete knowledge of his false answers touching his liquor habits. This should be sufficient to estop the company from insisting on forfeiture. In law the head officer (head consul) possessed this information before the certificate was issued, by reason of the fact that his appointee and representative, Hume, was fully informed of the same. In Prudential Ins. Co. v. Hummer, 86 Colo. 208, 84 Pac. 61, the Supreme Court resubmitted the case on the question as to whether certain warranties made by the insured, in his application, concerning his health, were or were not true, and if untrue whether or not the company *by estoppel or waiver* was precluded from relying upon such false statements as a defense to the action. See Shotliff v. M. W. A., 100 Mo. App. 138, 73 S. W. 326; Order of Columbus v. Fuqua, supra; M. W. A. v. Breckenridge, supra; M. W. A. v. Colman, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; Biermann v. G. M. L. I. Co., 142 Iowa, 341, 120 N. W. 963. In the last-cited case the facts are similar to those in the case at bar. The court says: "It is true the defendant made a strong showing to the effect that the deceased was greatly addicted to the use of intoxicants, or, as put by some of the witnesses, was a drunkard, at the time the policy was applied for; but it is equally apparent that appellant had notice and knowledge of the truth in this respect when it accepted the application, and entered into the contract. The appellant had a local office in Marshalltown, where the deceased lived and was evidently a well-known character. An agent in charge and several subagents or soliciting agents worked in and about the city and vicinity. The soliciting agent who took the application of the deceased knew of his drinking habits. When the insurance was being negotiated, it was a subject of conversation between the several agents of the appellant in the city as to the doubtful insurable condition of the deceased because of his habits. The application itself discloses his habits, to some degree at least; for, while saying that the applicant did not use malt or spirituous liquors, 'to excess,' it further informs the company that he did take 'a glass of beer occasionally.' This was a sufficient disclosure to suggest to a discreet person the advisability of further inquiry if the subject was one deemed of vital importance. * * * Under such circumstances, the fact that the warranty was broken when made constitutes no defense."

In Colver v. M. W. A. 154 Iowa, 615, 135 N. W. 67, the action was against the same

company which is appellant here, and the by-laws and warranties pertaining to the contract are practically the same in both cases, except that the warranty requiring information to be in writing and submitted to the head officers is not mentioned in the Colver Case. The court there held the company to have waived the conditions of the certificate by receiving assessments from the member after knowledge of his intemperance subsequent to the issuing of the certificate. See, also, *Thomas v. M. B. A.*, 25 S. D. 632, 127 N. W. 572; *Miller v. M. B. L. I. Co.*, 31 Iowa, 216, 7 Am. Rep. 122. In the latter case the court held that the knowledge acquired by a soliciting agent in the line of his duty is knowledge of the company he represents, the court saying: "To this latter view the judicial mind seems rapidly tending, and it is certainly more in accord with the enlightened and progressive spirit of the age. These companies select their own agents, require them to enter into bonds for the faithful discharge of their duties, and send them forth provided with blanks and clothed with all the insignia of authority. If their ignorance or their cupidity leads them to recommend improper risks, it is more in consonance with reason that the loss should be borne by the company than that the assured should be made the victim of the incompetency or the avarice of the agents. More especially is this true in view of the fact that the company has the means of indemnity through the bond of the agent. Just principles of public policy require that these companies should be held to a strict degree of responsibility for the acts of their agents. They will thus be led to the exercise of greater circumspection in the selection of agents. * * * It is quite time that the technical constructions which have pertained with reference to contracts of this kind, blocking the pathway to justice, and leading to decisions opposed to the general sense of mankind, should be abandoned, and that these corporations, grown opulent from the scanty savings of the indigent, should be held to the same measure of responsibility as is exacted of individuals." *Kausal v. M. F. M. F. I. A.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; *Garfinkel v. Alliance Life Ins. Co.*, 140 Ill. App. 380; *Pringle v. M. W. A.*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231.

Innumerable cases, in addition to those already mentioned, could be cited, which are in harmony with them, but no good purpose can be accomplished by further extending the list.

The evidence appears to be undisputed that Conter's death was caused by fatty degeneration of the heart, but I find nowhere in the record any testimony showing that the intemperate use of liquor directly or indirectly caused his death. The testimony of the physicians goes no further than to show that the intemperate use of liquor is one of

the primary causes of fatty degeneration of the heart. But nowhere do they intimate that Conter's death resulted from intemperate drinking. Dr. Bennett, a witness, testified that he assisted in performing the autopsy on the body of Conter, and stated: "The only cause of death of Henry Conter that I could determine, assisting Dr. Carlin, was fatty degeneration of the heart. There may be many causes of fatty degeneration of the heart. A person that has lived a careful life, through no fault of their own, may be subject to it and die from it, and persons leading careless lives will be more subject to it. * * * Many causes may contribute to it. The torpidity of the liver, poor circulation, a bad digestion, and all these things which tend to upset the heart." The claim by appellant that Conter's death was caused indirectly by intemperate drinking is entirely wanting in proof to sustain it.

Appellant contended that the certificate was forfeited by Conter's false answer to the question, "Do you use intoxicating liquors daily?" to which he answered, "No." This issue was fairly left to the jury, and is presumed to have been decided in favor of plaintiff.

Another point urged by appellant is that the certificate was forfeited by the alleged false answer given to the question, "Have you within the last seven years been treated by or consulted any person, physician or physicians, in regard to personal ailment?" to which question Conter answered, "No." This was another issue presented by defendant as a defense, upon whom the burden was placed to establish the same by a preponderance of the evidence. In my judgment, considering the testimony in the light most favorable to defendant, sufficient proof was wholly wanting to establish that defense. Miller testified on this point as follows: "He (Conter) bought some strychnine tablets from me on one or two occasions. * * * To my knowledge he at no time said anything to me about affliction of the heart, nor that his heart was acting badly. We (Conter and witness) were in the store one day and he (Conter) complained of dizziness. * * * I suggested to him his stomach was out of order and it might be a good idea for him to take a few strychnine tablets. Prior to that time I noticed Mr. Conter's complexion, and I thought he did not have a very strong heart, but did not care to say anything to him. * * * Later on he came in and bought strychnine tablets. Q. You gave him those strychnine tablets believing yourself, from the observation you had made of his condition, that it was caused by trouble of the heart? A. Not necessarily. I did not know whether that was why he bought them or not. Q. I am asking you why you gave him the strychnine tablets. A. I gave them to him because he wanted them. Q. No; but you said he became dizzy and you thought his heart was in trouble. A. I did

not tell him that. I said I thought so." This certainly does not show that Miller was treating Conter for heart trouble or had any settled conviction that he had heart trouble. The evidence entirely fails to show that any physician or other person treated Conter for any heart trouble whatever.

I have no criticism of the rule as stated in the majority opinion to the effect that insurance companies generally, and their policy and certificate holders, are at liberty to enter into any contract they desire, not prohibited by law, and that it is the duty of courts to enforce such contracts as they find them. At the same time I know of no law or rule that prohibits a party to a civil contract from waiving warranties or conditions inserted therein for his own benefit. When such waiver is satisfactorily shown, the party so waiving is estopped from pleading or insisting upon forfeiture of the contract. I think in this case the company *did* waive the warranties and conditions contained in the application and certificate, that the knowledge of Hume, concerning Conter's disqualification for membership in the order, by reason of his liquor habits, was, under the facts disclosed by the record, knowledge of the head officers of the company, and that receiving from Conter all fees and dues chargeable to him as a member, and issuing to him a full certificate of membership, after such information, ought to, and should, be taken as a waiver on the part of the company of such warranties and conditions.

In the consideration of this case, and in searching authorities, I am forcibly impressed with the fact that the printed reports of the several states are honeycombed with cases wherein this appellant appears as a party, and seemingly has felt itself called upon, with deplorable frequency to protect its treasury from the "attacks" of widows and orphans of deceased members, which members in their simplicity have indulged the belief that in case of death the silent certificates held by them spelled comfort, sustenance, education, and support, to those most cherished and loved by them.

It appears to me that the majority opinion in effect suggests to every association of this character that it is neither its legal nor moral duty to exercise any caution or discrimination in selecting agents to secure members or transact its business, and that it need not concern itself as to the probity or veracity of such agents. The direct result of the opinion places the entire responsibility of an agent's dishonesty or derelictions upon the insured, or, more unfortunately, upon the innocent beneficiaries. By inserting in policies a warranty, such as here found, requiring written notice to head officers, etc., all consideration by the company of an agent's honesty or veracity becomes useless and unnecessary.

I think the judgment should be affirmed. I am authorized to say that MORGAN, J., concurs in this dissent.

MUTUAL LIFE INS. CO. OF NEW YORK v. GOOD.

(Court of Appeals of Colorado. Nov. 10, 1913.
Rehearing Denied Dec. 8, 1913.)

1. EVIDENCE (§ 471*)—OPINION EVIDENCE— CONCLUSION OF WITNESS.

Testimony from the sister of the mother that a certain man was the father of assured was a mere conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

2. PARENT AND CHILD (§ 1*)—PRESUMPTION OF PATERNITY.

Where it appeared that assured's mother had never been the legal wife of a certain person by a common law or ceremonial marriage, there was no presumption of law that such person was assured's father, and the burden of proving that fact by a preponderance of the evidence was upon the person asserting it to defeat a life insurance policy.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

3. TRIAL (§ 311*)—KNOWLEDGE BY JURORS.

Jurors are permitted to use their common knowledge and observations of life in determining the question of paternity out of wedlock.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 311.*]

4. PARENT AND CHILD (§ 1*)—RELATIONSHIP —ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a life insurance policy, in which it was claimed that a certain person who died of tuberculosis was assured's natural father, *held* to sustain a finding that such person was not assured's father.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

5. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—REQUEST BY APPELLANT.

Defendant insurance company cannot question a finding that its insurance policy would have been issued even had the company known of the existence of another policy held by insured, where it submitted the issue by requesting a charge that, if insured held another policy and defendant's policy would not have been issued had it known of the existence of the first, the jury should find for the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

6. TRIAL (§ 48*)—RECEPTION OF EVIDENCE— EVIDENCE ADMISSIBLE IN PART.

Where the affidavit of a physician who had treated assured was admissible, in an action on a life policy, merely to show the falsity of the statement in the application that assured had only consulted a certain physician named in the last five years, but defendant did not ask that it be admitted for that particular purpose, there was no error in excluding the whole affidavit under Mills' Ann. St. 1912, § 8072, prohibiting evidence by a physician as to information acquired in attending a patient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.*]

7. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR.

Appellant cannot complain of instructions given at its request on the ground that some of them treated answers in insurance policies as

warranties, while others treated them as representations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Appeal from District Court, Conejos County; Chas. C. Holbrook, Judge.

Action by Venita A. Good against the Mutual Life Insurance Company of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

Macbeth & May, of Denver, for appellant. James D. Pilcher, of Alamosa, and Jesse Stephenson, of Monte Vista, for appellee.

BELL, J. The record shows that on December 12, 1907, Harry E. Good, of Alamosa, Colo., a train dispatcher for the Denver & Rio Grande Railroad Company presented to an agent of the Mutual Life Insurance Company of New York, appellant herein, an application in writing for a \$2,000 life insurance policy, which was issued to him, and, among many other things, stated in his application that his father died at the age of 33 years from an injury received in a run-away accident, and that there was no suspicion of tuberculosis or consumption as a cause of his death, and further stated in his application that: "I am insured in other companies and associations, as follows: None and in no others." The assured died August 23, 1909, and the company refused payment of the policy, assigning as its reason the alleged false answers of the assured in his application concerning his family history and other insurance. Action was brought on the policy and resulted in a verdict for the plaintiff, Venita A. Good, widow of the assured, and appellee herein, in the sum of \$2,000 and costs.

Among the defenses set up by the appellant company, it alleged that, at and prior to the time of making application for the policy sued upon, the assured was affected with pulmonary tuberculosis, which fact he failed to make known to it either in his application or to its medical examiner, and that he subsequently died from the disease. At the trial the appellee testified that the assured died after a five-minute illness from an unknown cause. Dr. Herbert Van Sands, a witness for the appellant, testified that he examined the assured, about 18 months previous to his death, on behalf of the company, for the policy in question, and that the assured was at that time in good health and not affected with the disease; that the assured consulted him subsequently, February 12, 1908, complaining of a tapeworm; and that, when he saw the assured three or four days before his death, he was blue and emaciated. It would seem that the witness issued a certificate on the death of the assured in which he stated the cause of death as pulmonary tuberculosis, but he testified that he could not recollect having issued

such a certificate, and, if he did issue it, it was based upon his general information or knowledge of the deceased and not upon any examination which he made of him, and, without such an examination, neither he nor any other physician could determine whether he had tuberculosis. The appellant insists that the assured's father was Joseph Rist, who died of tuberculosis at the age of 24 years, and that the assured misrepresented this fact in his application.

There seems to be no doubt that Joseph Rist was notoriously affected with tuberculosis from the time he was 21 years of age until he died at the age of 24. The evidence shows that he died after a lingering illness of about three years, the last four or five months of which he was confined to his bed, and that his mother also died of the same type of tuberculosis. This evidence is not disputed, and the real question involved in this phase of the case is whether Joseph Rist was the father of the assured. A brief synopsis of the evidence on this point is that one Ellen Burns gave birth to the assured about three years before Joseph Rist died. About the time of the birth of the child, Barbara Mauch, Rist's half-sister, and by vocation a nurse, gave him money, and he left Lafayette, Ind., because Ellen Burns accused him of being the father of her child, and he stayed away three or four months.

[1] Lydia M. Gurley, a sister of Ellen Burns, in her deposition testified that Joseph Rist was the father of the assured. However, this was a mere conclusion of the witness and was not evidence. Charles Ashby, another son of Ellen Burns, and an alleged half-brother of the assured, between one and two years younger, testified that he never knew Joseph Rist, but that "I knew from my mother that his name (the assured's father) was Joseph Rist." He produced a family Bible containing the following entry under the heading "Births": "Harry E. Rist, born February 8, 1881," and further testified that the assured was known as Harry E. Rist until he was about six years of age, when his mother married Samuel Good, and thereafter he was known as Harry E. Good.

[2] There is no evidence in the abstract showing that Ellen Burns was ever married until about six years after the birth of the assured, and we infer from the evidence before us that the assured was not conceived nor born in wedlock, or that his mother ever sustained a common law or ceremonial marriage relation with Joseph Rist; hence there was and is no presumption of law that Joseph Rist was the father of the assured, and the burden of proof rested upon the appellant to establish this fact by a preponderance of the evidence.

Under the very nature of things, no one but the mother can positively identify the father of her offspring, and it may be im-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

possible for her to do so. In that part of India where most of the female children are destroyed at birth, and each woman lives with from three to six husbands, it is conceded by both husbands and wives that it is impossible to identify the paternity of children; hence there is no affection or close sympathy existing between husbands and children, such as is recognized where monogamous marriages prevail. It is equally impossible to identify the fatherhood of a child where the sex privileges of the mother are extended to more than one male at or about the time of conception.

[3] Jurors are permitted to use their common knowledge and observations in life; in fact judges could not prevent them from doing so, if they would, in determining the weight of evidence admitted for their consideration. When it is shown that a child is conceived through unlawful sex indulgence or commerce, without any appearance of deception, seduction, or other extenuating circumstances, jurors are not likely to hold one so unlawfully conceived as the child of any particular male person after his lips are closed in death, and where the truth of a charge of paternity of an illegitimate child would work a heavy loss upon a widowed wife, unless the proof be quite direct or the circumstances such as to make the evidence convincing.

The jury probably considered the written statements of the assured in his application, though not made under oath, showing that he occupied the important position of train dispatcher, and that his father died at the age of 33 years from injuries sustained in a runaway accident, while the evidence shows that Joseph Rist died at the age of 24 years of a slow wasting type of consumption. It was probably impossible for the jury to reconcile these statements as both referring to Joseph Rist. Barbara Mauch, a half-sister of Joseph Rist, who took care of him through his long sickness, swore that she did not know the assured either personally or by reputation. There was no one to whom Ellen Burns was so likely to give the true surname of the father of her child as to the child itself. The history of court proceedings often shows that mothers of unlawfully conceived children, for various reasons, charge different male persons of being the father of the same child, and for these and other reasons it becomes the duty of courts and juries to closely scrutinize the evidence before placing the fatherhood of a child upon any accused person under such circumstances as are shown in this record.

One of the leading authorities on evidence states the rule as follows: "It is hardly necessary to add that, while hearsay declarations as to pedigree * * * are admissible and often valuable in the absence of other evidence, it must be borne in mind that such declarations are subject to many of the objections which may be urged against hearsay

evidence, and hence are to be received with considerable caution. Family pride may have tempted the declarant to allege or deny the relationship; and, although persons may be presumed to know the facts connected with their own family history, yet, as is well known, this presumption is often contrary to the fact." Jones on Evidence (2d Ed.) § 317.

Contrary to the general practices of those who are regarded as reputable witnesses, the half-brother and aunt of the assured seemed to have been very willing witnesses for the appellant in its endeavor to avoid payment of the policy to the assured's wife. That may have been, if we put the proper interpretation on the evidence, a scrupulous endeavor to willingly tell the whole truth on the part of the witnesses. It was, however, for the jury, and not for us, to say whether this was in pursuance of a purpose of the sister and son of Ellen Burns to save her good name as much as possible.

[4] We think, under the character of the evidence and the circumstances, it was for the jury, and not for this court, to say whether the appellant showed by a preponderance of the evidence that Joseph Rist was the father of the assured. They must have found this issue in favor of the appellee.

[5] The next serious question urged by the appellant for a reversal is that the assured made a false representation as to his having other insurance when he made his application to the appellant for a policy. The statement complained of is as follows: "I am insured in other companies and associations, as follows: None and in no others." It appears from the evidence that, at the time the answer was given, the assured held a policy in the Prudential Insurance Company of America for \$500. This question, with the materiality of the statement, was submitted to the jury on instruction No. 14, given at request of appellant, which reads as follows: "If you believe from the evidence that said Harry E. Good at the time of making the application for said policy held a policy of insurance on his life in the Prudential Insurance Company of America, and was in fact then insured, and if you further believe that the defendant company would not have issued the policy of insurance sued upon had said company been truthfully informed in regard to said other insurance, your verdict will be for the defendant." The jury must have found that the defendant company would have issued the policy sued upon if it had known of the existence of the policy held by the assured in the Prudential Insurance Company.

At an early day insurance companies concluded that, from time to time, persons, who were without means or embarrassed in their affairs or burdened with impaired health, obtained large insurance upon their lives and resorted to self-destruction largely for the purpose of bestowing comfort upon their families; hence, life insurance companies gener-

ally interrogate all applicants as to other insurance, and the courts generally recognize the rights of such companies to provide for forfeitures, if the application is made a part of the policy and the answers are false. However, some of the courts and many of the Legislatures have limited such rights of forfeiture to cases where juries find that the policy would not have been issued if the companies had known the truth. This case was tried upon the assumption that the jury must find that the appellant would not have issued the policy of insurance sued upon had the company been truthfully informed in regard to the existence of the other policy. This question was submitted to the jury on instruction No. 14 above quoted, tendered by appellant without objection on the part of the appellee, and, under these conditions, we do not understand that the appellant is now at liberty to question the finding of the jury on this phase of the case.

In *L. D. G. M. Co. v. A. G. M. Co.*, 30 Colo. 431-435, 71 Pac. 389, 390, the Supreme Court said: "The court adopted their (appellant's) theory in answering the question of the jury, and whether right or wrong is wholly immaterial, because appellant is bound by the theory which its counsel advocated and which the court adopted." *Witcher v. Gibson*, 15 Colo. App. 163-174, 175, 61 Pac. 192; *De St. Aubin v. Marshall Field Co.*, 27 Colo. 414, 62 Pac. 199; *Denver, etc., R. R. v. Ryan*, 17 Colo. 98-104, 105, 28 Pac. 79; *Denver v. Stein*, 25 Colo. 125-128, 53 Pac. 283; *D. & R. G. R. Co. v. Peterson*, 30 Colo. 77-87, 69 Pac. 578, 97 Am. St. Rep. 76; *Mountz v. Apt*, 51 Colo. 497, 119 Pac. 150.

In *Pacific Mutual Life Insurance Co. v. Van Fleet*, 47 Colo. 401-406, 107 Pac. 1087, 1089, the statement of the assured was: "I have never received or been refused compensation for accidental injuries or sickness, except as herein stated." The applicant made no statement of what he received. The evidence showed he had been insured in a mutual association, had been injured and received compensation for the injury, and the company asked a forfeiture because of the alleged false statement. The Supreme Court said: "In what we have already said, we have assumed with defendant that this answer is equivalent to a statement by the assured that he had never received compensation from an insurance company for an injury. The alleged false answer on its face is imperfect and incomplete. It suggests that compensation might have been received."

The statement of the assured in the case before us, viz.: "I am insured in other companies and associations, as follows: None and in no others"—is confusing and liable to make the applicant innocently give a wrong answer. If a direct interrogatory had been propounded to him, as, "Have you a policy in any other insurance company?" he could not have been misled thereby. The policy in the Prudential Insurance Company

was small, and we see no reason why the assured should have given a false answer, especially since the application stated that an untruthful answer would avoid the policy. However, it is not necessary to decide, and we do not decide, this question or base our decision herein on this point. It would seem that the policy sued upon did not specifically make the application a part thereof, and many well-considered cases hold under these conditions that the answer in the application as to other insurance is not a warranty but a representation. The Supreme Court of Oklahoma, in considering this point on a policy similar to the one before us, issued by the same company to one Morgan, held that such answers are but representations. *Mutual Life Insurance Company of New York v. Morgan (Ok.)* 135 Pac. 279-281, and cases cited; *Northwestern Life Insurance Co. v. Tietze*, 16 Colo. App. 205-210, 64 Pac. 773; *Security Mut. Life Ins. Co. v. Webb et al.*, 106 Fed. 808, 45 C. C. 648, 55 L. R. A. 122; *Webb et al. v. Bankers Life Ins. Co.*, 19 Colo. App. 456-458, 76 Pac. 738.

Appellant's counsel say that: "The legal effect of such conduct (making false statements as to other insurance) depends upon whether the statement is regarded as a warranty or a mere representation; but, in view of the glaring errors in the record, we do not propose to take up the time of the court in discussing this particular statement."

However, for the disposition of this case, it is not necessary to decide whether the statement as to other insurance is a warranty or a representation, and, as the question was not argued, we prefer to base our opinion on other grounds.

Appellant insists that the trial court abused its discretion in not granting an application for a continuance because of the absence of appellant's subpoenaed witness, Dr. Freiberger. The affidavit for a continuance set forth in detail what this witness would testify to if present, which included extensive treatment of assured for tuberculosis. Counsel for appellee admitted that, if the witness were present, he would testify to the facts set forth in the affidavit, subject, however, to all legal exceptions as to the competency of such matters as evidence. The court overruled the application under section 177, *Mills' Annotated Code*. We do not think the court abused its discretion in denying the application. At the proper time the appellant offered the entire statement of facts as set out in the affidavit as evidence. Appellee objected to the offer, alleging that it was a confidential communication between doctor and patient. The court cautiously advised counsel that it did not care to pass upon it as a whole, and showed evidence of wanting assistance. Counsel for appellant, however, seemed to direct their entire efforts to having the court's ruling include all material parts of the affidavit and in saving an exception to the exclusion thereof. No intimation

was made that some small part of the long affidavit was not included within the purview of section 8072, Mills' Annotated Statutes Revised 1912, which reads: "A physician or surgeon duly authorized to practice his profession under the laws of this state, or any other state, shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

In the case of *C. F. & I. Co. v. Cummings*, 8 Colo. App. 541-551, 46 Pac. 875, 878, the Court of Appeals construed this statute and held evidence inadmissible, whenever the relation of physician and patient is shown to exist, as to any information which the physician may have acquired by attending the patient. The statute was declared to be as broad as that of any state to which the court's attention had been called and excluded an examination of the surgeon as to any information which he had acquired while attending the patient, whether the information was deduced from statements or gathered from his professional or surgical examination. The court said: "It is a common knowledge that the eye and finger of the attending surgeon is vastly more expert in locating cause or trouble than the tongue of the most astute patient. The authorities hold that no matter how the information may be acquired, whether it comes to the surgeon in the shape of oral statements or by reason of his examination, he cannot be interrogated respecting it"—and cites in support of its position *Freel v. Market St. Cable Ry. Co.*, 97 Cal. 40, 31 Pac. 730; *Gartside v. Conn. Mut. L. Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765; *Briggs v. Briggs*, 20 Mich. 34; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Masonic Mut. Ben. Ass'n v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Colo. Midland Ry. Co. v. McGarry*, 41 Colo. 398-404, 405, 92 Pac. 915.

Counsel for appellant insist in this court, under the decisions of the state of New York, that the trial court should have admitted that part of the statement in the affidavit showing that the physician attended upon the patient, the length of time the disease continued, and the fact that the patient was actually treated. The affidavit states that Good "consulted" the physician, and there is no statement therein as to attendance, length of time of sickness, etc. We think, however, that these matters were not specifically presented to the trial court, and it was not called upon to pass upon them. It was the duty of counsel, if any parts of the mass of facts set up in the affidavit were competent, to have specifically called the attention of the court to them. The question asked by the medical examiner was: "State every physician whom you have consulted in the last five years." Answer: "Dr. Herman, Logansport, Ind." The trial court had no suggestion from counsel that any part of the affidavit was com-

petent to disprove the answer as given and was reluctant to pass upon any particular part of the affidavit without the aid of counsel. Appellee insisted that the entire affidavit was incompetent, and counsel for appellant gave no intimation that the parts now relied upon were competent for any purpose. Probably no one connected with the trial had a real doubt as to the incompetency of all the facts stated, unless it was counsel for the appellant, who now rely on portions of the affidavit and urge that they were competent to prove at least the allegation of consultation, and possibly a few minor matters. We think counsel should have been as fair to the trial court as they are to the court of review, and have specified such matters as they thought were competent for any particular purposes when the affidavit en masse was excluded, and thus have given the trial court an opportunity to pass upon them, as is now done in this court.

In the case of *Denver, etc., R. R. v. Ryan*, 17 Colo. 98-104, 105, 28 Pac. 79, 81, the Supreme Court said: "Any judge in the hurry of a nisi prius trial is liable to err unless aided by the vigilance of counsel. From time immemorial it has been a well-recognized and most salutary rule of the common law that, if counsel neglect to object or to point out errors occurring at the trial in such time and manner as will give opportunity for their correction, they will not in general be heard to complain of such errors in a court of review. This rule is so reasonable and so essential to the administration of justice that we cannot believe that it could have been the intent of the Legislature to overthrow it altogether. Any other rule would enable a party to sit silently by, knowing some error had been committed against his interest of which perhaps no other person was aware at the time, and thus take the chances of a verdict in his favor, while having the sure means of setting aside the verdict if it happened to be against him. The law in this jurisdiction never has permitted, and it is to be hoped that it never will permit, such experiments with judicial proceedings. There will always be enough important questions for review in the appellate courts if parties are required to be vigilant to prevent error in the trial courts." 2 *Thompson on Trials*, § 2394; *Union Min. Co. v. Rocky Mt. Nat. Bk.*, 2 Colo. 248; *McFeters v. Pierson*, 15 Colo. 207, 24 Pac. 1076, 22 Am. St. Rep. 888; *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; *L. D. G. M. Co. v. A. G. M. Co.*, 30 Colo. 431-435, 71 Pac. 389.

[8] Counsel for appellant urge its assignment 12, i e., "The instructions of the court were conflicting and tended to confuse, or may have confused, the jury." This charge is quite true; but appellant tendered the conflicting instructions; the appellee did not object to them; and they were submitted to the jury at appellant's request. Counsel for appellant

stated to the court that some of their instructions so requested were framed upon the theory of a warranty and others upon the theory of a representation, and that, when they tendered both, they expected the court to refuse to give either one or the other. There being no objection, however, the court gave both on the assumption that one party tendered them and the other did not object, and, when appellant's counsel intimated that they would except to some of the instructions given at their own request, the court replied: "I will withdraw any that you except to. * * * If you want to withdraw them, you may do so." However, counsel did not except to or offer to withdraw any of them, and thereupon the case was submitted to the jury on the conflicting instructions. Appellants now complain as follows: "By instructions Nos. 14, 15, and 16 the jury were told the untrue answers and statements of Good did not amount to the dignity of warranties, but were mere representations, and could not be availed of by the company unless the jury believed it relied on such statements in issuing the policy."

[7] Instruction 2, which considered the statements and answers in the application as warranties, and instructions 14, 15, and 16, which considered them as representations, were all requested by the appellant and submitted to the jury without objection, and the appellant cannot now be heard to complain of the instructions given at its request. *L. D. G. M. Co. v. A. G. M. Co.*, 30 Colo. 431-435, 71 Pac. 389; *Whitcher v. Gibson*, 15 Colo. App. 163-174-175, 61 Pac. 192; *De St. Aubin v. Marshall Field Co.*, 27 Colo. 414, 62 Pac. 199; *Denver v. Stein*, 25 Colo. 125-128, 53 Pac. 283; *Denver, etc., R. R. v. Ryan*, 17 Colo. 98-105, 28 Pac. 79; *D. & R. G. R. Co. v. Peterson*, 30 Colo. 77-87, 69 Pac. 578, 97 Am. St. Rep. 76; *Mountz v. Apt*, 51 Colo. 497, 119 Pac. 150.

Under instructions 14, 15, and 16, the jury was permitted to consider the materiality of the statements and answers made in the application, and, from the nature of its verdict, it is to be presumed that this question was resolved in favor of the appellee.

The judgment is affirmed.

RYCKMAN v. MANERUD et al.†

(Supreme Court of Oregon. Dec. 9, 1913.)

1. CREDITORS' SUIT (§ 13*)—CONDITIONS PRECEDENT—EXHAUSTION OF LEGAL REMEDIES.

A creditor who has obtained a judgment against an individual partner but has no judgment against either the firm or the other partner and has not attached property either of the firm or of the second partner cannot maintain a suit in the nature of a creditor's bill against either the firm or the second partner.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 48-50, 67-72; Dec. Dig. § 13.*]

2. JUDGMENT (§ 628*)—MERGER AND BAR—PARTIES TO JUDGMENT—PARTNERS.

Where a creditor obtains judgment against an individual knowing when the suit is brought that another has an interest as partner in the subject-matter, though he did not know this when the contract involved was made, such judgment is a bar to a subsequent suit against the other partner or the firm.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1144; Dec. Dig. § 628.*]

3. PARTNERSHIP (§ 165*)—LIABILITIES—JOINT OR SEVERAL.

Debts of partnerships are joint and not several obligations.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 301; Dec. Dig. § 165.*]

4. JUDGMENT (§ 582*)—MERGER AND BAR—GENERAL RULE.

The original demand on which a judgment is based is merged in the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1079, 1082; Dec. Dig. § 582.*]

5. PARTIES (§ 84*)—DEFECTS—OBJECTIONS AND WAIVER.

Where a debt is joint, the creditor must sue all the debtors or those sued may demur for defect of parties or plead in abatement, or they may waive the defect and permit judgment to be taken against them.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 184-142, 171; Dec. Dig. § 84.*]

6. STIPULATIONS (§ 14*)—CONSTRUCTION AND OPERATION.

A stipulation between plaintiff, defendant, and a third person that defendant and the third person may on or before the last day of the term of court pay to plaintiff \$1,000 and deliver to plaintiff their note for \$3,500 secured to the satisfaction of plaintiff, or if they fail to do so plaintiff may take judgment against defendant for \$4,500 without trial, does not in any way give plaintiff the right to proceed against the third person as a partner of defendant nor against the firm after judgment has been taken in accordance with the stipulation against defendant alone.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

7. PARTNERSHIP (§ 181*)—LIABILITIES—APPLICATION OF ASSETS.

A judgment creditor of a partner is not entitled to any part of the proceeds of a judgment in favor of the firm unless there is enough to pay all of the debts of the firm in full and leave a balance to be divided between the partners, but, if there are enough assets of the firm to pay its debts and leave a balance, the creditor would be entitled to his debtor's share of such balance.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 310, 316, 317; Dec. Dig. § 181.*]

Department 1. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Suit by Carl S. Ryckman against Sam Manerud and others. From a decree for plaintiff and certain defendants, defendants Sam Manerud, Edward Quinn, and the First National Bank of Eugene appeal. Reversed, and suit dismissed.

This is a suit in equity in the nature of a creditor's bill to subject to the payment of a debt due the plaintiff the assets of the defendants Quinn and Manerud as partners and as individuals, etc. The court below rendered a decree in favor of the plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 30, 1913.

and certain of the defendants and against Manerud and Quinn.

John C. Jenkins, of Portland, for appellants Manerud & Quinn. John C. Jenkins, of Portland, in pro. per. Woodcock & Smith, of Eugene, for appellant First Nat. Bank of Eugene. H. E. Slattery and O. H. Foster, both of Eugene (Foster & Hamilton, of Eugene, on the brief), for respondent Ryckman.

RAMSEY, J. On February 18, 1909, Sam Manerud, one of the defendants, entered into a contract with the city of Eugene, by the terms of which said Manerud agreed to construct for said city a power canal. On or about April 23, 1909, the said Sam Manerud and the defendant Edward Quinn made and entered into a contract between themselves, whereby they formed a partnership and assumed as partners the contract referred to, supra, for the construction of said power canal for said city. On the 29th day of April, 1909, the defendant Manerud and the plaintiff entered into a written contract whereby Sam Manerud sublet to the plaintiff the construction of about $1\frac{3}{4}$ of a mile of said power canal. This contract was entered into about six days after Manerud and Quinn had formed said partnership. Quinn was not a party to said contract, but he signed it as an attesting witness. The plaintiff performed most of his part of said contract for the construction of said portion of said power canal, and the firm of Manerud & Quinn paid him therefor in checks, signed by said firm, sums aggregating more than \$6,000. The plaintiff claims that when he entered into said contract with Sam Manerud for the construction of part of said canal, as stated, supra, he did not have any knowledge of the fact that Manerud & Quinn had formed said partnership. On November 11, 1909, the plaintiff alleges that there was owing to him from Manerud & Quinn, for work on said canal, a balance of \$5,002.75 after crediting said payments on said work. The plaintiff avers that said sum was due to him from Sam Manerud and Edward Quinn as partners and as individuals. On October 19, 1910, the plaintiff commenced an action against the defendant Sam Manerud for the recovery, from him, of said sum of \$5,002.75 in the circuit court of Lane county. Edward Quinn was not made a party to said action, although the plaintiff knew at that time and long prior thereto that he was a partner of the plaintiff, and that the firm of Manerud & Quinn were constructing said canal, and that they had paid him more than \$6,000 on his claim for work on said canal. That on November 11, 1910, while said action was pending, a stipulation was signed which is set out below, by authority of which a judgment was rendered in said action in favor of Carl B. Ryckman, the plaintiff, and against Sam Manerud for \$4,500 on March 4, 1911. This judgment was not rendered against Quinn or Manerud

& Quinn. The plaintiff on March 10, 1911, caused an execution to issue on said judgment against Manerud, but said execution was thereafter returned without anything having been made thereon.

On motion of the plaintiff, the circuit court entered an order that Manerud appear before said circuit court of Lane county and be examined under oath concerning his property, and on May 8, 1911, he appeared and was examined, and upon said examination said court found that Manerud had no property, excepting an interest in the judgment rendered in said circuit court on the 22d day of December, 1910, against the city of Eugene and in favor of Said Sam Manerud and Edward Quinn, as partners, for the sum of \$6,525.90 and costs. It seems that Sam Manerud was insolvent at all times after February 11, 1910.

The following is a copy of the stipulation executed on November 11, 1910, and filed in the above-named circuit court in the action of Carl B. Ryckman v. Sam Manerud, omitting the name of the court and the title of the cause: "It is hereby stipulated and agreed by and between the above-named plaintiff, Carl B. Ryckman, and the above-named defendant, Sam Manerud, and Edward Quinn, that the said Sam Manerud and Edward Quinn may pay to said plaintiff, on or before the last day of the present November term of the above-entitled court, the sum of one thousand dollars (\$1,000) cash and deliver to said plaintiff their promissory note for the sum of three thousand five hundred dollars due on or before six months from the date thereof, secured to the satisfaction of plaintiff, or said plaintiff may, on the last day of said term, take judgment against said defendant in said action for the said sum of four thousand five hundred dollars (\$4,500); and the court shall be authorized to enter judgment accordingly without trial. In case said sum of one thousand dollars (\$1,000) is paid and the said note and security given as above provided, said action shall be dismissed. Dated November 11, 1910." Said stipulation was signed by Carl B. Ryckman, Sam Manerud, and Edward Quinn and assented to by Holmquist & Nelson, attorneys for the plaintiff, and John C. Jenkins, attorney for the defendant Sam Manerud.

It will be noticed that the partnership of Manerud & Quinn is not referred to in said stipulation and that it does not bind Quinn to do anything, and it does not oblige Manerud to do anything excepting to permit judgment to be entered against him for \$4,500. It makes no provision for paying the judgment, and the judgment was to be entered against Manerud only. The respondent places much stress on the foregoing stipulation and the judgment entered in accordance therewith.

On December 22, 1910, the firm of Manerud & Quinn recovered a judgment against the said city of Eugene for the sum of \$6,525.90

as the balance due them for the construction of said power canal, and said judgment was affirmed by this court after this suit was begun. Said judgment is the only asset of said firm of Manerud & Quinn.

The plaintiff alleges in the complaint that, when the stipulation set out, supra, was executed, it was mutually agreed, for the benefit of said partnership and of the plaintiff, and by and between Sam Manerud and Edward Quinn, that the said Manerud should have sufficient of the said partnership assets to secure him on the payment of said sum of \$4,500 to the plaintiff, Ryckman, and that a portion of the assets of the firm was assigned to him for that purpose; that he should have a lien upon said assets for said sum; that said sum was set aside for that purpose; and that Manerud should be allowed for that sum on a final accounting for said firm, etc. But there was a failure to prove said allegations, and the written stipulation set out, supra, contains all that the parties agreed upon at that time.

Sam Manerud and Edward Quinn refused to pay the plaintiff anything out of said judgment against the city of Eugene and gave to the First National Bank of Eugene, and other persons, whom they owed, partial assignments of said judgment, and John C. Jenkins, defendant, claims a lien on said judgment for one-third thereof and for \$650 for attorney's fees under a contract with said firm. The judgment obtained by the firm of Manerud & Quinn against said city of Eugene, as stated, supra, was in part based on work that the plaintiff had done on said canal under his said contract and for which he obtained said judgment of \$4,500 against Sam Manerud, as stated, supra. The plaintiff has not obtained any judgment against the firm of Manerud & Quinn or against Quinn; nor has he commenced any action at law against said firm or against said Quinn. The only judgment that he has obtained is an individual judgment against Manerud only.

The complaint prays *inter alia* that the assets of Edward Quinn and of the firm of Manerud & Quinn be marshaled and that the other creditors be required to exhaust the individual assets of Edward Quinn; that the judgment of the plaintiff be decreed to be a first lien on the partnership assets of Manerud & Quinn; that said sum of \$4,500, alleged to have been assigned to Sam Manerud for the benefit of the plaintiff, be decreed to be the property of the plaintiff; that the plaintiff be subrogated to the rights of Manerud in the partnership estate, etc.

The defendants Manerud, Quinn, and Jenkins answered the complaint, denying parts thereof, and setting up new matter, and, among other things, they pleaded that the plaintiff, with full knowledge that Manerud and Quinn were partners, and of the ownership by said firm of the contract for the construction of said canal, and of the subletting

by Manerud, for the benefit of said firm, of the construction of said portion of said canal to the plaintiff, and of all the facts connected with such construction, commenced the action referred to, supra, against Sam Manerud individually to recover the said sum of money due the plaintiff for his said work and by so doing elected to hold said Manerud individually upon said contract of subletting and to release said copartnership and the defendant Quinn from all liability on said contract of subletting, and that the plaintiff is now estopped to allege any liability upon said copartnership under said contract and is estopped by the judgment obtained in said action from now alleging any liability against said copartnership or said Quinn on account of any of said facts, etc. This plea of estoppel was denied by the reply, and it presents one of the principal questions for decision. The pleadings are prolix, and it is impracticable to set them out more fully. There are two principal questions for decision in this case.

[1] 1. The first question for determination is: Can the plaintiff maintain this suit in the nature of a creditor's bill against Edward Quinn, or the partnership of Manerud & Quinn, without having obtained a judgment against said Quinn or said firm, and without having attached the property of said Quinn or of said firm? The general rule is that a creditor must reduce his claim to a judgment before he will be permitted to maintain a creditor's bill to reach assets, and many cases hold that it is necessary also to have a writ of execution issued and returned nulla bona before instituting a suit in equity. Other cases, including cases decided by this court, hold that, where the creditor has commenced an action at law against the debtor and has attached his property, a creditor's bill may be maintained in aid of the attachment. 4 Pomeroy's Eq. (3d Ed.) § 1415; Scott v. Neely, 140 U. S. 106, 108, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 456, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Hollins v. Brierfield, 150 U. S. 371, 378, 14 Sup. Ct. 127, 37 L. Ed. 1113; Davidson v. Parlin, 141 Fed. 37, 40, 72 C. C. A. 525; Moore v. Omaha Life Ass'n, 62 Neb. 497, 87 N. W. 321, 322; Leavengood v. McGee, 50 Or. 233, 237, 91 Pac. 453; Dawson v. Coffey, 12 Or. 513, 8 Pac. 838; Dawson v. Sims, 14 Or. 561, 13 Pac. 506; Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; Matlock v. Babb, 31 Or. 516, 49 Pac. 873; Fleischner v. Bank of McMinnville, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. Discussing this question, Prof. Pomeroy, as cited, supra, says: "The general rule is, therefore, that a judgment must be obtained and certain steps taken towards enforcing or perfecting such judgment before a party is entitled to institute a suit of this character. In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his

judgment. It is, of course, necessary for the creditor to allege and prove that he has taken the necessary proceedings at law before he can show a case requiring the interposition of equity. Whether an equitable suit, analogous to the creditor's suit, will be allowed in aid of the lien created by an attachment before the recovery of judgment is a question to which American courts have given directly conflicting answers."

In *Cates v. Parlin*, supra, the United States Court of Appeals says: "Counsel calls his bill a creditor's bill, but it is settled since the beginning that a simple contract creditor has no standing in a court of equity to enforce payment or subject equities until after he has reduced his demand to judgment and has exhausted his remedy at law."

In *Cates v. Allen*, supra, the Supreme Court of the United States says: "The principle that a general creditor cannot assail as fraudulent against creditors an assignment or transfer of property made by his debtor, until the creditor has established his debt by judgment of a court of competent jurisdiction, and has either acquired a lien upon the property or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignments or transfer, is elementary. * * * The existence of judgment, or of judgment and execution, is necessary: First, as adjudicating and definitely establishing the legal demand; and, second, as exhausting the legal remedy."

In *Leavengood v. McGee*, supra, the rule in this state is stated thus: "This rule that a creditor must reduce his claim to a judgment before he will be allowed to attack in a court of equity a conveyance of his debtor for fraud is based upon two reasons: (1) That the claim must be a liquidated claim, so that an equity court will not be required to stop and inquire into the validity of the claim. The object of a creditors' bill is not to ascertain or determine the amount and validity of the claim or debt, but that is the province of the law. (2) A judgment and the issuance of an execution and its return nulla bona is required as an evidence that the remedies at law have been exhausted before resort is made to equity. This is the reason of the law, but there are exceptions to the general rule."

In *Dawson v. Coffey*, supra, Chief Justice Waldo says: "It is exclusively the province of a court of law to say that there is a legal debt and that it cannot be made at law. Therefore a creditor's bill must be preceded by a judgment at law, establishing the measure and validity of the demand of the complainant for which he seeks satisfaction in chancery."

In *Bennett v. Minott*, supra, the court says: "On the question whether a creditor must reduce his claim to judgment before he can maintain a creditor's bill to reach assets of his debtor which have been transferred for

the purpose of defrauding creditors, the authorities are not harmonious, but in this state it may be regarded as settled that a lien by attachment is sufficient for that purpose."

In *Dawson v. Sims*, supra, the syllabus is: "The lien created by an attachment duly levied upon the property of the debtor is a sufficient foundation for the jurisdiction of a court of equity to aid, by means of a creditor's suit, in removing fraudulent impediments or conveyances which prevent the creditor from laying hold of the property and applying it to the payment of his debt."

The citations from the authorities made, supra, show that in most jurisdictions it has been held that, before a creditor can maintain a suit in the nature of a creditor's bill to reach assets of his debtor, he must reduce his claim to a judgment and exhaust his remedy at law; but in this and some other states it appears to be settled that the commencement of an action at law, and the attaching of the debtor's property, constitute a sufficient foundation for the commencement of a creditor's suit in aid of the attachment and to reach the assets of the debtor. In this cause it appears that the plaintiff has obtained a judgment against Sam Manerud individually, but that he has not obtained any judgment against said firm or against Quinn, and that he has not sued at law either said firm or said Quinn, and that he has not attached the property of said firm or the property of said Quinn. It is clear, therefore, that the plaintiff cannot maintain this suit against either said firm or said Edward Quinn.

[2] 2. The other principal question for decision arises on the plea of estoppel interposed by Manerud & Quinn and John C. Jenkins, referred to, supra. These defendants plead that the plaintiff, with full knowledge of the fact that Edward Quinn was a partner of Sam Manerud in the construction of said power canal and of the fact that the plaintiff's contract, by which he agreed to construct a portion of said canal, was made for the benefit of said firm and that it was a partnership matter, etc., elected to bring against Sam Manerud individually the action at law referred to, supra, in which he obtained against Sam Manerud said judgment for \$4,500, and that said judgment and the proceedings by which it was obtained constitute an estoppel and bar the right of the plaintiff to allege that said firm or said Edward Quinn is liable for said \$4,500, and that said judgment is a bar to the plaintiff's right to maintain this suit against said firm or said Quinn, etc. It appears that the \$4,500 for which he obtained said judgment is the same \$4,500 that the plaintiff seeks to recover in this suit.

[3] Debts of partnerships are joint and not several obligations. *North P. L. Co. v. Spore*, 44 Or. 476, 75 Pac. 890; *Poppleton v. Jones*, 42 Or. 27, 28, 69 Pac. 919.

[4] The original demand upon which a

judgment is based is merged in the judgment. *Coles v. McKenna*, 80 N. J. Law, 48, 76 Atl. 344; *Tootle, Hosea & Co. v. Otis*, 1 Neb. (Unof.) 360, 95 N. W. 681, 682; *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783; 23 Cyc.; 30 Cyc. 596; 24 Am. & Eng. Ency. Law (2d Ed.) 760-763; 2 Black on Judgment, §§ 770, 776.

In *Coles v. McKenna*, *supra*, the facts were that the action was against the West End Company, Meyer, McKenna, and the Cottentine Hotel Company to recover a laundress' bill. Judgment by default was entered against the West End Company and the Cottentine Hotel Company, and the case thereafter proceeded against the other defendants to trial, and although the attention of the trial court was called to the fact that judgment had already been entered against two of the defendants, and that the plaintiff was thereby precluded from proceeding against the remaining defendants, the trial judge permitted the case to go to the jury, a verdict and a separate judgment were rendered against them, and, on a writ of error, the Supreme Court of New Jersey says: "It is clear that the plaintiff cannot split up his cause of action in this way. * * * He could not have sued McKenna and Meyer alone, and, even if they did not plead the non-joinder of the other defendants in abatement, nevertheless the defendant might demur or move in arrest of judgment. * * * If, therefore, the contract was a joint one, as would appear from the face of the declaration, a judgment could not be entered thereon against two of the four joint contractors, for it would still be open to them to insist that the contract declared upon was a contract of four defendants and not of two alone. * * * The cause of action merged in the judgment, and, in case of a joint debt, whatever extinguishes or merges the debt as to one merges it as to all." After referring to several cases, the court concludes as follows: "* * * But by entering that judgment she (the plaintiff) evinced an election to hold the corporations and could not thereafter hold Meyer or McKenna. * * * The cause of action was single and could not be the basis of two distinct judgments."

In *Mason v. Eldred et al.*, 6 Wall. 238, 18 L. Ed. 783, Justice Field, after reviewing the cases on this subject, says: "The general doctrine maintained in England and in the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued, with those against whom the judg-

ment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligations. They cannot be sued jointly with the others, because judgment has been already recovered against the latter, who could otherwise be subjected to two suits for the same cause."

In *Davidson v. Harmon*, 65 Minn. 402, 67 N. W. 1015, the facts were that the plaintiff brought an action against Harmon and Sherburne upon a joint partnership note. Both defendants were served with process. Judgment was entered against Harmon by default. The defendant Sherburne answered, and, after the judgment was entered against Harmon by default, he filed a supplemental answer, setting up the entry of said judgment as a bar to any further proceedings against him. On motion of the defendant Sherburne, judgment was entered in his favor on the pleadings. On appeal to the Supreme Court of Minnesota, that court said: "That the obligation sued upon was a joint one must be conceded. When an action was brought at common law upon a joint contract, the general rule was that there could be no judgment except in favor of or against all defendants, * * * consequently where several persons are summoned as defendants, and one of them pleads, and the others suffer a default, final judgment cannot properly be entered upon the default until the issue as to the other defendants is disposed of, unless the rule has been changed by statute. The plaintiff in this case elected to enter a separate judgment against one of two defendants upon a joint obligation; and this cause being joint, and not several, it cannot be divided and judgment entered against each one by piecemeal. If this could be done, there might be as many separate judgments as there are different or several defendants, and we know of no principle of law which permits it to be done." After discussing the question at length, the court concludes: "It was therefore irregular for the plaintiff to proceed and take a several judgment against the defendant Harmon; but, having elected to do so, it constitutes a bar to any further recovery against the other defendant, Sherburne."

In the case of *Lauer v. Bandow*, 48 Wis. 638, 4 N. W. 774, the court says: "It is perfectly well settled that if the holder of a joint debt or obligation sues one of the joint debtors and obtains a judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and, being indivisible, it cannot be merged or canceled as to one and existing and operative as to another joint debtor."

23 Cyc. on page 1028 says: "Where a con-

tract or obligation which is the subject of an action is a joint contract or obligation, a recovery against one of the joint contractors merges the entire cause of action and bars any subsequent suit on the same obligation against any of the other debtors, or against all jointly; and conversely a judgment against all the joint contractors bars a subsequent suit against any one of them separately. The effect of this principle cannot be avoided by consent of the parties." On page 1212 of this volume the rule is stated thus as to partners: "The liability of partners for the firm debts is generally held to be joint, so that a judgment against one of the partners for such a debt will bar a subsequent action against another, even where defendant in the second action was a dormant or secret partner, whose connection with the firm was unknown to plaintiff when the action was brought."

The twenty-fourth volume of *Am. & Eng. Ency.* (2d Ed.) 761, says: "In consonance with the doctrine that has been stated, it has been held that a judgment recovered against one of two or more partners on a partnership obligation is a bar to a subsequent suit against the other partner or partners or against all of them jointly, and this is so though the new defendant was a dormant partner at the time of the contract, and this fact was unknown to the plaintiff at the time the judgment was rendered."

Black on Judgments (2d Ed.) § 776, says: "On the principal that a judgment against one of two obligors or contractors bars an action against the other, a former recovery against one partner for a firm debt is a bar to a recovery against the other members of the firm in another suit for the same debt. And this is so even when the plaintiff was at first ignorant that the persons whom he afterwards pursues were members of the firm."

It is clear from the authorities that where an obligation is joint and not several, and the creditor sues one of the joint debtors and obtains against him alone a judgment, the obligation sued on is merged in the judgment, and such judgment is a bar to a subsequent action or suit against any of the other joint debtors or to a subsequent action or suit against all of the joint debtors.

[5] Where the debt is joint, the creditor must sue all the debtors, or those sued may demur to his complaint on the ground that there is a defect of parties defendant, if the defect appears on the face of the complaint, or, if it does not so appear, the defendant sued may plead in abatement such defect. But the defendants so sued may waive such defect of parties and permit judgment to be taken against them. A creditor, after obtaining a judgment against one of several joint debtors, cannot obtain a judgment on the same obligation against the other joint debtors, when the latter plead the judgment so obtained in bar.

In this case the plaintiff obtained a judgment against Sam Manerud individually for the sum of \$4,500, which the firm owed. The joint obligation of the firm to him merged in this judgment, and by such merger said debt became the individual debt of Sam Manerud, and neither the firm of Manerud & Quinn nor Edward Quinn individually can now be held for said debt.

A creditor holding a joint obligation against several persons cannot sue one of them at a time and obtain as many judgments as there are joint debtors. He has the right to obtain but one judgment or decree, and, when he has obtained one judgment or decree on a joint obligation, such judgment or decree is a bar to any subsequent action or suit on such obligation.

The plaintiff should have brought his original action against Manerud & Quinn and have obtained a judgment against them jointly for the \$4,500. By suing Manerud alone, he elected to look to him for the payment of his debt, and he cannot now recover from Quinn or the firm.

[6] At the argument considerable stress was placed on the stipulation, dated November 11, 1910, set out, *supra*, but a careful reading of this agreement will show that it amounted to nothing material to any issue in this case. Edward Quinn signed it, but he did not agree by such stipulation to do anything. It was agreed by that paper that Sam Manerud and Edward Quinn might pay to the plaintiff \$1,000 in cash and deliver to him their note for \$3,500, but they did not agree that they would pay any sum or give any note. However, said stipulation did provide that, if said \$1,000 should not be paid and the note for \$3,500 should not be executed, the plaintiff should have the right to take judgment, without trial, against the defendant Sam Manerud for \$4,500, and judgment was taken accordingly. Said stipulation does not mention the firm of Manerud & Quinn, nor does it imply that Quinn was in any manner or to any extent liable for said \$4,500.

The plaintiff failed to prove that there was any agreement that any part of said \$4,500 judgment was to be paid by said firm or by said Quinn or out of the assets of said firm. The plaintiff obtained a judgment against the defendant Sam Manerud, as stated, *supra*, and had issued a writ of attachment against his property, and attempted to attach, in the hands of the city of Eugene, what said city owed Manerud on said judgment.

[7] Under the law, the plaintiff's judgment against Manerud is a claim against him individually, but it is not a debt of the partnership, and the plaintiff is not entitled to be paid out of the assets of the firm. He is not entitled to any part of the proceeds of the judgment of said firm against said city, unless there is enough of said judgment to pay all of the debts of said firm in full and leave a balance to be divided between Manerud and

Quinn. If there were enough of the assets of said firm to pay all of its debts and leave a balance to be divided between the members of said firm, the plaintiff would be entitled to receive one-half of said balance, as he is entitled to the interest of Manerud therein.

According to a settlement made between said Sam Manerud and Edward Quinn as to their partnership liabilities, after they had ceased to do any business, and after this suit was brought, they owed the following sums: "John C. Jenkins, \$3,084.38; Jas. B. Kerr, \$512.83; S. M. Calkins, \$211.40; First National Bank of Eugene, \$1,093.15; Mrs. Olivia Manerud, \$124.82; H. L. Brown, \$4.20; P. D. Newell, \$34.60; H. Potter, \$17.60; C. B. Ryckman, \$14.20; R. S. Bryson, \$10.20; Wm. Morris, \$14.20; city of Eugene, \$75; and Edward Quinn, \$2,366.03. These items aggregate the sum of \$7,409.22.

The judgment of Manerud & Quinn v. City of Eugene, was rendered on December 22, 1910, and it amounted at that time to only \$6,525.90. It bears interest at 6 per cent. per annum, unless something has transpired to stop the interest; but when the firm had their accounting and allowed the accounts referred to, supra, they became accounts stated and bore interest from the date of said accounting. The claim due the First National Bank of Eugene, and possibly others, bore interest prior to said accounting. If the interest is computed on said judgment from the date of its rendition to the present time and on the partnership debts from the date that they were allowed at said accounting, and such interest is added to the principal of said debts, it will appear that the debts of said firm exceed, in the aggregate, the amount of said judgment. Said judgment is the sole asset of said firm. Hence there is nothing going to Manerud from said firm, and there is nothing that we can decree to the plaintiff, as his right to recover is confined to the part of said judgment going to Manerud on the final settlement of the business of said firm. As the partnership is insolvent, there is nothing left for either partner or for the plaintiff.

The decree of the court below is reversed, and this suit dismissed. Neither party will recover costs and disbursements in this court or in the court below.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

EDLEFSON v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. Dec. 2, 1913.)

1. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—PLEADING.

Under L. O. L. § 73, providing that an answer may contain a specific denial of each material allegation of the complaint contro-

verted by the defendant, and also a statement of any new matter constituting a defense or counterclaim, and section 74, permitting defendant to set forth by answer as many defenses as he may have, where the answer denies negligence, and avers specially that the injury complained of was caused by the negligence of the person hurt, without alleging that such negligence was contributory, the special plea is not equivalent to a confession and avoidance, and it is error to instruct that defendant, not having admitted its negligence, has not raised the defense of contributory negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

2. PLEADING (§ 76*)—ANSWER—REQUISITES IN GENERAL.

The system of common-law pleading perfected by the Code so as to conform to the principle of logical statement requires the defendant, when the complaint states a supposed cause of action, either to demur, or to controvert the facts averred, or to set forth other facts which exonerate him.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 156; Dec. Dig. § 76.*]

3. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—PLEADING.

Contributory negligence is an affirmative defense, and, to make it available, the answer must show a want of ordinary care of the plaintiff which, combining and concurring with defendant's negligence, contributed to the injury as a proximate cause thereof.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

4. NEGLIGENCE (§ 119*)—CONTRIBUTORY NEGLIGENCE.

Where the complaint does not negative plaintiff's negligence, proof of his negligence is not admissible under the general issue.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 118.*]

5. STREET RAILROADS (§ 118*)—OPERATION—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries from a collision with a street car, the failure of the court to clearly inform the jury with respect to the duty of a person about to cross a railway and failing in this respect is error, though the court instructed that, if plaintiff did not exercise, under all the existing circumstances, that care which a man of ordinary prudence would have exercised, and that such want of care brought his injuries, their verdict should be for defendant, and that the jurors should bring their good, common everyday sense into the jury-room, and do what is just and right between the parties.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 198, 199; Dec. Dig. § 118.*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Peter H. Edlefson against the Portland Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

This is an action to recover damages for a personal injury. The defendant owns in the city of Portland a system of electric railway lines, two tracks of which are laid north and south along Union avenue. The cars passing north go along the east track, and those moving in the opposite direction

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pass along the other track. Maegley street crosses Union avenue at right angles. About 11 o'clock at night on June 10, 1911, the plaintiff, driving a horse hitched to a buggy, was riding north along the east side of Union avenue. Three electric trains of several cars each were then moving in the same direction along the avenue. As the rear car of the last train passed him, the plaintiff turned his horse to the left, so as to drive west on the north side of Maegley street. When the buggy emerged from the obstruction to the view, caused by the rear car, the plaintiff beheld another car coming south on the west track, whereupon he suddenly turned his horse more to the left, but not in time to avoid a collision; the car striking the hub of the right front wheel of the buggy, throwing him to the ground, and injuring him.

The negligence alleged is a violation of city ordinances in operating the car, causing the injury, at a dangerous rate of speed in excess of that limited, and in failing to ring the bell of the car before reaching the street crossing, defective brakes, and a failure to stop the car after the motorman saw, or by the exercise of reasonable diligence could have seen, the dangerous proximity of the horse and buggy.

The answer denied each allegation of the complaint, except that the defendant admitted it was a corporation, and that the plaintiff at the time stated came into collision with one of its cars. For a further defense it was averred that the accident was wholly unavoidable as far as the defendant was concerned. For a second defense it was alleged that the injury complained of was caused by the plaintiff's negligence alone, setting forth in each defense the facts relied upon for that purpose.

The reply put in issue the allegation of new matter in the answer, and, the cause having been tried, the plaintiff secured a judgment for \$5,000, and the defendant appeals.

Harrison Allen, of Portland (F. J. Loneragan and Griffith, Leiter & Allen, all of Portland, on the brief), for appellant. Palmer L. Fales, of Portland (Platt & Platt and George J. Perkins, all of Portland, on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1] In referring to the plaintiff and to the time of the injury, the court charged the jury as follows: "If you should find that he was negligent at the time, combined with the negligence of the defendant company, brought his injuries to him, and his testimony discloses that state of facts, then he cannot recover; but, if his testimony does not disclose him to have been guilty of contributory negligence, and you think that the defendant's testimony does disclose him to have been guilty of contributory negligence, then you cannot consider it, for the reason

that the defendant company has pleaded negligence, but not the contributing negligence of the plaintiff in this case. Now, contributing negligence is a plea, in the nature of a confession and avoidance, admitting the defendant was guilty of negligence, which precludes his recovery. Now, in this case the company has not admitted it was negligent here, and contributory negligence has not been made a defense by them (it), and it is only to be considered by you in the event that the plaintiff's testimony, and only in that event, discloses that he was guilty of contributory negligence."

Exceptions having been taken to the instructions thus given, it is contended by defendant's counsel that errors were committed in using the language quoted.

Under the system of Code pleading in this state, an answer may contain a specific denial of each material allegation of the complaint controverted by the defendant, and also a statement of any new matter constituting a defense or counterclaim. L. O. L. § 73. A defendant is permitted to set forth by answer as many defenses as he may have; but they must be separately stated, and refer to the cause of action intended to be controverted. Id. § 74.

[2] It was necessary in a plea at bar, at common law, either to deny the averments of the declaration or to confess and avoid them or such thereof as were thus assailed, in which latter case it was essential that the plea should give color to the plaintiff's prima facie right of action, and that a plea which stated new matter in avoidance and discharge was double and argumentative, unless it admitted the apparent truth of the material facts set forth in the declaration. 1 Chitty, Plead. (16th Ed.) § 552. The system of common-law pleading perfected by the Code so as to conform to the principle of logical statement requires the defendant, when a complaint states facts constituting a supposed cause of action, either to demur, or to controvert the truth of the facts so averred, or to set forth other facts which exonerate him. Bliss, Code Pleading (3d Ed.) § 333. This author, at the section noted, remarks: "Under this system there is no room for a statement of new facts, except those which suppose the truth of those alleged on the other side; that is, in the language of the pleaders, those which confess and avoid. A statement of facts by way of defense which are merely inconsistent with those stated by the plaintiff is, in effect, a denial. It is not new matter; it admits nothing; it simply contradicts. This is called an argumentative denial; that is, a statement of facts which, arguendo, show that the plaintiff's statement is untrue. It is pleading evidence in support of a denial, and is subject to most of the objections against pleading it in support of an issuable fact." See, also, McDonald v. American Mortgage Co., 17 Or.

633, 21 Pac. 883; *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8.

[3] From the legal principle thus asserted, it would seem legitimately to follow that, if the injury complained of was not at all attributable to the defendant's negligence, as appears from the denials in the answer, the real cause of plaintiff's hurt, as to whether it resulted from his own carelessness or otherwise was wholly immaterial. In this state contributory negligence is an affirmative defense, and, to be available as such, the facts set forth in the answer must show a want of ordinary care on the part of the person injured which, combining and concurring with the defendant's negligence, contributed to the injury as a proximate cause thereof, and as an element without which the hurt could not have happened. *Grant v. Baker*, 12 Or. 329, 7 Pac. 318; *Johnston v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283; *Tucker v. Northern Ter. Co.*, 41 Or. 82, 68 Pac. 426; *Jackson v. Sumpter Val. Ry. Co.*, 50 Or. 455, 93 Pac. 356.

[4] Following the rule thus established, the complaint herein did not negative the fact that the plaintiff was free from carelessness in respect to the injury in question. Proof, however, of his negligence, if any, was not admissible under the general issue.

"The pleading of contributory negligence as a special defense," says a text-writer, "is not inconsistent with a denial of the negligence of the defendant. The rule of the modern Codes which prohibits the pleading of inconsistent defenses is therefore not violated by the defendant denying his own negligence and setting up the negligence of the plaintiff. Hence the defendant cannot be required to elect between two separate paragraphs of his answer, one of which denies any negligence on his part, while the other sets up contributory negligence on the part of the plaintiff. A defendant may, then, both traverse the complaint and plead contributory negligence; but, as the defenses are distinct and different, they should be set out in separate paragraphs of his answer." *Thomp. Neg.* § 390.

"The plea of contributory negligence is a plea in confession and avoidance, which admits the negligence on the part of the defendant, but seeks to avoid liability therefor by alleging that the plaintiff was guilty of negligence which contributed to his injury, and the plea is bad if it denies that the defendant was negligent. But this is not the rule in those states whose Codes permit the defendant to set up as many defenses, whether of law or of fact, as he may see fit." 5 *Ency. Pl. & Pr.* 12.

In *Pugh v. Oregon Improvement Co.*, 14 Wash. 331, 44 Pac. 547, 689, it was held that the defendant had a right to deny the matters upon which the claim of negligence was based, or that the same constituted negligence, and also to plead further, in case the

contrary should be established, that the deceased was chargeable with contributory negligence, that the plea of contributory negligence was not a confession and avoidance, and that an answer denying negligence and alleging contributory negligence did not constitute such inconsistent defenses as to prevent both when put forward to defeat an action from being efficient. To the same effect, see, also, *Leavenworth Light & Heating Co. v. Waller*, 65 Kan. 514, 70 Pac. 365; *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310; *Carter v. Seattle*, 19 Wash. 597, 53 Pac. 1102.

Though there is quite a conflict in the decisions upon the question of denying in the answer the negligence charged in the complaint, and alleging as a special defense contributory negligence, reason would seem to support the rule that, if the answer alleged contributory negligence, such averment is in the nature of a confession and avoidance, equivalent to an implied admission that the defendant was guilty of negligence as charged in the complaint. "Contributory negligence," says a text-writer, "is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." 7 *Am. & Eng. Ency. Law* (2d Ed.) 371. That definition has been approved by this court. *Moekler v. W. V. Ry. Co.*, 18 Or. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717; *Emlison v. Owyhee Ditch Co.*, 37 Or. 577, 62 Pac. 13.

In Oregon, it will be remembered, the rule is settled that, when contributory negligence is relied upon it must be specially pleaded. In *Ency. Pl. & Pr.* 12, it is said: "In those states where it is incumbent on the defendant to plead contributory negligence specially, and where the defense cannot be made under a general denial, the trend of the authorities is that a general averment that the plaintiff was guilty of negligence which contributed to the injury, and that he could have avoided all damage by the exercise of proper care, is not sufficient. The acts and defaults constituting such contributory negligence should be averred."

Though a process of reasoning seems to support the rule thus announced in cases where contributory negligence is specially alleged as a defense, it is believed that where, as in the case at bar, the answer denies the negligence charged in the complaint, and avers specially that the injury complained of was caused by the carelessness of the person hurt, without alleging that such negligence was contributory, the special plea is not equivalent to a confession and avoidance. It is possible that the injury might be sustained by a person sui juris without any negligence on the part of the party owning or controlling the instrumentality causing the hurt. In such cases to hold

that the answer must confess negligence so as to avoid its consequences, in order to introduce evidence of the carelessness of the person hurt, is to place the defendant at a great disadvantage before the jury. This being so, errors were committed in giving the instructions hereinbefore set out.

[5] The court was requested by defendant's counsel to instruct the jury to the effect that, if the plaintiff's view of the west car track was obstructed by the cars on the east track, it was incumbent upon him to have stopped and listened before attempting to cross the west track, and that, if he failed to take this precaution, and by reason thereof the accident happened, he cannot recover in this action. The request was denied, and an exception taken. The court, without particularly specifying the degree of care demanded of a person about to cross a railroad, told the jury in substance that, if they should find that the plaintiff did not exercise, under all the existing circumstances, that reasonable care which a man of ordinary prudence would have exercised, and that such want of care upon his part brought his injuries to him, their verdict should be for the defendant. The jury were further instructed as follows: "In matters of this kind you should bring your good, common everyday sense, as you have acquired it in your everyday life and affairs, into the juryroom, and now, gentlemen, take this case, and do what you think is just and right as between these parties, from the evidence, as you have heard it here from the witnesses on the witness stand, and from the deduction you have gotten from proven facts, and from the instructions and the law which I have declared to you."

We do not wish to be understood as intimating that a juror, in considering testimony submitted at the trial of a cause, should lay aside common sense or abandon his knowledge of everyday affairs; but we think, in the complicated duties devolving upon a person about to cross the track of a railroad, that most men of ordinary intelligence have not such a knowledge of what the law imposes upon a traveler under such circumstances, and for that reason an instruction should have been given clearly defining such duty. Otherwise what might be considered a rule in one cause would have no binding force at the trial of another action.

It is believed that the jury should have been clearly informed with respect to the duty devolving upon a person about to cross a railway, and, failing in this respect, an error was committed.

The judgment is therefore reversed, and the cause remanded for a new trial.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

PUTNAM v. PACIFIC MONTHLY CO.

(Supreme Court of Oregon. Dec. 2, 1913.)

1. CARRIERS (§ 240*)—MASTER AND SERVANT (§ 88*)—PASSENGERS—EMPLOYÉS—INJURIES—NATURE OF RELATION.

The relation of an office clerk to a corporation, as affecting the degree of care required in the operation of an elevator, on which the clerk, at 8:20, was being carried to her place of work, where her duties began at 8:30, was not that of servant, but that of passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 976; Dec. Dig. § 240;* Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. § 88.*]

2. CARRIERS (§ 280*)—PASSENGERS—CARE REQUIRED—ELEVATORS.

The owner of a building operating an elevator therein for the benefit of the occupants of the building and the public generally owes to its employé, as a passenger, when being carried to her place of work in the building, the highest degree of skill and foresight consistent with the efficient operation of the elevator.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

3. MASTER AND SERVANT (§ 191*)—INJURIES TO SERVANT—"FELLOW SERVANT."

The operator of an elevator is not a "fellow servant" with an office clerk who, while on her way to her work was killed through the negligence of the operator.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 475-479; Dec. Dig. § 191.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2718-2730; vol. 8, p. 7662.]

Burnett and Moore, JJ., dissenting.

In banc. On rehearing. Former judgment and opinion modified, and judgment of lower court reversed and remanded for new trial.

For former opinion, see 130 Pac. 986.

R. A. Leiter, of Portland (Griffith, Leiter & Allen and F. J. Lonergan, all of Portland, and Clarence L. Eaton, of Oregon City, on the brief), for appellant. Samuel White, of Portland (Manning & White, of Portland, on the brief), for respondent.

McBRIDE, C. J. [1, 2] Upon this rehearing we carefully examined this case, and, while a majority of the court are still of opinion that it should be reversed, we think the opinion should be modified in two respects: (1) In holding that the relation of the defendant to the deceased was that of master and servant, and that the degree of care required of defendant was only that of ordinary and reasonable care exacted from such relation; and (2) in holding that the relation of fellow servants engaged in the same common employment existed between deceased and the person operating the elevator. The testimony shows that the deceased was employed by defendant as a stenographer on the fourth floor of the building; that her duties began at 8:30 in the morning, and that the accident happened at 8:20. At the time of the accident her time was her own. She was not the servant of the defendant until it was time for her to begin such service.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This is not a case like many of those cited in the opinion, where a laborer going to his work is injured in the course of transportation. In such cases the time so occupied is the time of the employer, and is paid for by him. The service is being rendered just as effectually by the employé when he is being transported from one section of the road to another as when he is laying ties or grading. It is true that the complaint alleges that deceased was compelled to use the elevator in order to reach the room where she was employed, but this allegation is denied, and the testimony discloses that there was a stairway which she could have used instead of the elevator. But holding plaintiff strictly to the pleading, and assuming for the purpose of this case that it was necessary for deceased to use the elevator in order to reach the place where her work was to be performed, does not, in my view of the case, make her a servant of the defendant while so using it, or differentiate her in any way from any other passenger thereon. Primarily the elevator was built and operated for the use and benefit of the defendant. If it enabled persons having business with defendant, or its tenants, to reach the various floors of the building with less exertion, or more expeditiously, this was a profit to defendant in the way of an increased number of tenants, customers, or business. If it enabled employes to get from one floor to another more expeditiously, this would also be a matter of convenience and profit to defendant. It was placed there just as a stairway would have been, and for the same purpose, namely, for the use and profit of the employer. We are of the opinion that, under the circumstances here disclosed, the deceased was as much a passenger as any other person using the elevator, and that the degree of care due her was just the same that defendant owed to any person not in its employ, who might have seen fit to use it in order to transact business with the defendant.

This measure of care is fully defined by Mr. Justice Moore in *Kelly v. Lewis Investment Co.*, 133 Pac. 826, as follows: "By the great weight of authority, however, it has been determined that a landlord who for a consideration stipulates to maintain and operate, for the accommodation of his tenants and their visitors, a passenger elevator into which the public are impliedly invited to enter to be carried to desired floors is subject to the highest degree of skill and foresight consistent with the efficient use and operation of the means of conveyance, the same as is imposed by law upon public carriers of passengers" (citing *Hutchinson, Carriers* [3d Ed.] § 100; 1 *Thompson, Neg.* § 1078; *Sweeden v. Atkinson Imp. Co.*, 93 Ark. 397, 125 S. W. 429, 27 L. R. A. [N. S.] 124; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; *Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Springer v. Ford*, 189 Ill.

430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; *Ohio Valley Trust Co. v. Wernke*, 42 Ind. App. 326, 84 N. E. 999; *Cubbage v. Estate of Youngerman* [Iowa] 134 N. W. 1074; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700; *Lee v. Publishers Knapp & Co.*, 135 Mo. 610, 56 S. W. 458; *Becker v. Lincoln R. E. & Bldg. Co.*, 174 Mo. 246, 73 S. W. 581; *Luckel v. Century Bldg. Co.*, 177 Mo. 608, 76 S. W. 1035; *Quimby v. Bee Bldg. Co.*, 87 Neb. 193, 127 N. W. 118, 138 Am. St. Rep. 477).

[3] If the deceased was a passenger and not a person then engaged in the service of the defendant, defendant is liable for the negligence of its operator, unless the deceased was a fellow servant engaged in the same common employment with him, which brings us to the second error alleged in the petition for rehearing.

The definition of the term "fellow servant" has gradually undergone a change in favor of the employé. In the early history of jurisprudence a suit for damages by a servant against his master, while it was tolerated, was always looked upon with disfavor by the courts as a sort of moral petit treason, and every limitation that judicial ingenuity could devise was interposed to make recovery difficult; but in the progress of years this strictness has greatly relaxed, and the doctrine of the assumption of risk and negligence of fellow servant has been placed upon a decent and logical basis. The rule as to who are fellow servants, when reduced to its lowest terms, may be stated as follows: "The master is not responsible for an injury inflicted upon his servant by the negligence of a fellow servant engaged in the same common employment." This is the sum of all the modern authorities, and should not be lost sight of in the midst of all verbiage in which it is sometimes obscured. The definition means something, and every word and phrase means something. It is not enough that the parties should be fellow servants. The Governor of the state and the janitor of the statehouse are in a sense fellow servants of the state; the chief attorney of the greatest railroad in the state is in a sense a fellow servant with the conductors and brakemen of the same road. And right here is where many courts have gone wrong, by omitting or forgetting the concluding and important qualification of the rule, namely, that the fellow servants *must be engaged in the same common employment*.

The reason of this rule is clearly and succinctly stated in 4 *Thompson, Neg.* § 4970, in the following language: "It is perhaps on the question, What is common employment? that we find the greatest divergencies of opinion. In a few jurisdictions the rule under consideration is restricted to cases where the servant injured and the servant

inflicting the injury are so closely associated that they can watch over each other's conduct, and, if necessary, report it to the common master. The reason for the general rule is one of public policy. Its object is to secure to the public a more faithful service from the employes of railway companies, navigation companies, and other companies conducting a business wherein the safety of the public is involved, by making it the interest of each one of the employes of such persons or corporations to look after and encourage carefulness and fidelity in all the rest. This reason can have no application to employes whose situation allows them no corrective influence over each other; but where this doctrine obtains and the servants are so disassociated that the purpose of the rule is defeated, they are not deemed fellow servants within the meaning of the rule under consideration, but the rule of respondeat superior applies. * * * It has been reasoned that an application of the fellow-servant rule which would put one servant in the situation of accepting the risk of the negligence of another servant so remote from him that there is no opportunity of exercising that superintending care which the rule is intended to enforce would operate as a penalty, and would be sheer cruelty." This proposition is so clearly in accord with justice and reason that it does not require the citation of authorities to support it. The authorities cited by the learned author above quoted abundantly support the text. Now let us make a concrete application of the text to the case in hand. The deceased was a girl, a stenographer, to whom, presumably, the machinery of an elevator was an unknown quantity. She had not and could not have that intimate knowledge of the working of an elevator, or acquaintance of the person in charge of it, that would or might lead her to suggest caution in the manner in which he should perform his duties, neither would she be likely to have that acquaintance or skill in the operation of the machine necessary to enable her to judge as to whether or not it was carefully handled. She was engaged in mental and clerical work; the operator was engaged in a different and mechanical work, about which she knew nothing. Except for the fact that they were hired by the same corporation there was nothing in common between them, and to hold that deceased assumed the risk of the negligence of the person operating the elevator is to hold that all persons serving under the same employer are fellow servants in a common employment, which is contrary to justice and enlightened precedent. A stenographer employed by the Southern Pacific Railroad Company in San Francisco is not a fellow servant engaged in the same common employment with the janitor of the offices of the same company in Portland, and no legal fiction can make him so; and by the

same token the deceased did not sustain that relation to the person operating the elevator. This being so, the deceased sustained the same relation to the operator of the machine that any other person having business with the defendant would have sustained, which is, in substance, the same relation that a passenger sustains to the conductor or engineer of a train.

The recent case of *Thompson v. Northern Hotel Co.*, 256 Ill. 77, 99 N. E. 878, is exactly in point on this question. There the injured person was a maid in charge of the ladies' toilet at the hotel, and her duties required her to make several daily trips in the elevator. It is evident that her use of it was quite as frequent as that of the deceased in the case at bar, if not more so. There, as in the case at bar, she was injured by the negligence of the operator of the elevator, and there, as here, the defendant urged that she and the operator were fellow servants. The court disposed of this contention in the following language: "Plaintiff in error next contends, under this assignment of error, that defendant in error and the operator of the elevator were fellow servants. The definition of fellow servants is a question of law. *Hartley v. Chicago & Alton Railroad Co.*, 197 Ill. 440 [64 N. E. 882]. The particular relation of two servants of the same master in a given case is a question of fact; hence whether two servants of a common master are fellow servants depends upon the facts of the particular relation and the application of the law defining fellow servants to those facts, and in that sense the question is a mixed question of law and fact. *Lake Erie & Western Railroad Co. v. Middleton*, 142 Ill. 550 [32 N. E. 453]. Under the rule established by numerous decisions of this court, to create the relation of fellow servants the servants must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into habitual association, so as to afford them the power and opportunity of exercising a mutual influence upon each other promotive of proper caution. *Bennett v. Chicago City Railway Co.*, 243 Ill. 420 [90 N. E. 735]. There is no basis whatever for the contention that defendant in error and the operator of the elevator were fellow servants under the first branch of the rule. They were not co-operating with each other in any particular work. They were in different departments and under different superiors. The fact that one operated the elevator upon which the other rode in the discharge of her duties did not bring them into co-operation with each other in the performance of the duties of either. Nor do we think that the fact that defendant in error frequently rode up and down on the elevator which Le Roy Williams was operating can be said to have brought them into such association with each other in the

discharge of their duties that they might reasonably exercise an influence over each other promotive of care. The duties of these two employes were so totally different that neither could be supposed to know whether the other was exercising proper care in the discharge of his duties. The maid of the toilet room would not be supposed to be able to counsel and advise the operator of an elevator as to the safest mode of managing the machine, or to exercise any influence over him promotive of care, unless she had such knowledge of the proper manner of operating an elevator as to determine when it was properly run and when it was not. Where two servants are brought together in direct co-operation in the performance of a particular work, they have an opportunity, and, being engaged in the same line of work, they have the power and ability, to exercise an influence over each other promotive of proper caution, and where they are engaged in different lines of employment and their usual duties bring them into habitual association, the association must be sufficiently personal to furnish the same opportunity and power to exercise an influence upon each other promotive of proper caution. *Bennett v. Chicago City Railway Co.*, *supra*. We do not think that defendant in error and the operator of the elevator were, as a matter of law, fellow servants."

As to the other matter urged upon rehearing, the judgment should be reversed for the reasons stated in the original opinion.

The cause will be remanded, with directions to the court below to grant a new trial.

BURNETT, J. (dissenting). It is contended that the former opinion was erroneous in holding: First, that the relation of the defendant to the deceased was that of employer and employé; and, second, that the deceased and the operator of the elevator in which she lost her life were fellow servants.

Turning to the complaint, the foundation of plaintiff's action, we find in the words of that pleading that the "elevator was used by the general public and the employes of the defendant in going to and from said place of business, in passing from the first floor of said building to the fourth floor thereof, which fourth floor was occupied by said Pacific Monthly Company as aforesaid." This allegation fixes the elevator and its operation as an appliance or adjunct of the defendant's general business—a part of its plant. We next discover, quoting from the complaint: "That on the 2d day of September, 1910, Mabel Putnam was employed by the defendant in its office on the fourth floor of said building, and, in order to reach her work as such employé was compelled to take and use said elevator in going from the first floor of said building to the fourth floor thereof, and that on said day, while going to her work as such employé, she entered said elevator on the first floor of said building." These alle-

gations fix the character and capacity of the decedent at the time the accident happened. She was either employed or she was not employed by the defendant when the fatal accident occurred. The complaint says she was employed, and this is not traversed. This court has no right to deny it, or to consider it amended on appeal, so as to change the decedent from an employé to a passenger *nolens volens*. Then, too, as a matter of fact, what caused her to use the elevator? Manifestly, under the allegations of the complaint and the testimony as well, it was the compulsion of her employment, an incident of her service. Had it not been that she was an employé of the defendant, occupying that relation and none other, she would not have been in the elevator. Her going into the elevator on the defendant's premises was as much the act of an employé as entering the door of the office and taking her seat upon a chair provided for her use. All alike are conveniences and appliances helpful in the operation of the general business of the defendant. It is not meet that we should make a better case for those who would profit by the death of the unfortunate girl than they have made for themselves on the pleadings.

It is argued that because the accident happened 10 minutes before the usual time for beginning her active duties the decedent was not an employé. It is said that, until she actually began her daily round as stenographer, her time was her own, so that she was not until then in the service of the defendant. This statement is not entirely borne out by the bill of exceptions. That document says that the testimony tended to prove "that Mabel Putnam, on September 2, 1910, at the time of the accident resulting in her death, was a stenographer in the employ of the defendant and receiving a salary of \$35 per month." She was employed by the month and not by the hour. Her status as employé or passenger is not determined by the stroke of the clock. It cannot be said reasonably that she was a passenger or employé according to whether she was early or late in arriving at the office where she worked.

A single authority, that of *Thompson v. Northern Hotel Co.*, 256 Ill. 77, 99 N. E. 878, is quoted to sustain the contention that her time was her own at the moment of the accident, making her a passenger and not an employé. In that case the plaintiff was an employé of a hotel company in one of the ladies' toilet rooms. Her duties required her to make several daily trips in the elevator of the hotel. She was injured by the negligence of the elevator boy in starting the elevator before she had time to enter the same. Without a single precedent cited to sustain the opinion, with two justices dissenting, the court in that case finally adopted the "department" theory of fellow servant, and held that the plaintiff was not a fellow servant of the elevator boy, ignoring the much better reasoning of the case by the same court in *Walsh v.*

Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911. In the latter case the decedent was a waitress in a hotel, and after her work was done had gone for a walk. Returning to her room she took the elevator and was injured by the negligence of the operator. Upon mature deliberation, on a second appeal of the case, the Supreme Court of Illinois held that she was a fellow servant with the operator of the elevator, and on that account could not recover, although the injury occurred after the regular hours of her daily labor. The court said: "Her going out of the hotel for a walk was not inconsistent with the relation of master and servant existing between her and the defendant, and was in accordance with the ordinary and usual custom of house servants when not actually engaged in their duties. If a servant by going from her room to the street and returning again to her room creates a new and independent relation, an employer who would permit a servant to ride with him when not actually engaged in work would be transformed into a carrier of passengers, and a farmer who would carry his farm hand to town after the work of the day was done would be engaged in the same business as a railroad company. The plaintiff was returning to her room for the purpose of resuming her work in the morning, and there was no evidence under which she could be held to be a passenger by being in the elevator. We cannot approve the view of the trial court as to the law that if an employer permits a servant to go from her room to the street and back a new relation arises with new obligations and duties, and the servant becomes freed from assumption of risk and all other obligations of a servant." The opinion is well reasoned and well sustained by the authorities quoted. The circuit court erred when it imposed upon the defendant that high degree of care, amounting well-nigh to insurance, required of a common carrier for its passengers, but not due to its employés.

Turning again to the complaint, we learn that the elevator "was, at the time, being operated by the regular elevator operator in the employ of the defendant." We discover, also, by its language, that "while in the act of passing out of said elevator as aforesaid, the said elevator operator so unskillfully, negligently, and carelessly manipulated, handled, and operated said elevator that the same, suddenly and without warning to the said Mabel Putnam, began to descend very rapidly, and continued so to descend until it reached a point between the third and second floors of said building, and the said Mabel Putnam was thereby caught between said elevator and the floor of the third and the ceiling of the second floor, and greatly wounded, crushed, and mangled, from the effects of which she immediately died; that the death of the said Mabel Putnam was caused by the descent of said elevator, as aforesaid, and by reason of the careless, negligent, and unskillful manner

in which the same was run, operated, and manipulated by said elevator operator, and without any fault or negligence of the said Mabel Putnam."

It is not charged that the elevator was in any way out of repair or unfit for the purpose for which it was designed; neither is it intimated in the complaint or elsewhere that the defendant was negligent in the selection and employment of the operator. The sole cause of complaint is the individual negligence of the operator himself. Construing the pleadings more strongly against the pleader, and presuming, as we must, that the defendant performed its duty in providing a safe elevator and in selecting a competent operator, the rule announced in *Johnson v. Portland Stone Co.*, 40 Or. 436, 440, 67 Pac. 1013, 68 Pac. 425, applies to this case. There it is thus stated: "But when the master has provided for the servant a reasonably safe place in which to work he is not responsible because it is afterwards made dangerous by the carelessness or negligence of a coservant or employé, while in the discharge of duties pertaining to a mere operative, even though he be the superintendent or foreman in charge of the work."

Following *Mast v. Kern*, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, *Miller v. Southern Pac. Co.*, 20 Or. 285, 26 Pac. 70, and other precedents well established in this state, the decedent and the operator were clearly fellow servants, being employed, under the control of, and paid by the same person, and engaged in the work of their principal. True enough, as stated in the illustration made by Mr. Chief Justice McBride, a stenographer employed by the Southern Pacific Company in San Francisco is not a fellow servant engaged in the same common employment with the janitor of the office of the same company in Portland; but that is not this case. There the two employés have no opportunity to observe each other or to report or avoid each other's delinquencies. Neither their goings and comings, nor the discharge of their duties, bring them into contact with each other, and the possibility of either of them affecting the other in any way is so very remote that neither can be supposed to have contracted for employment with reference to it. It is a far cry from a great railway corporation whose operations span a continent to a little publishing house in an upper story whose employés are thrown together several times a day by the conditions of their service. Here, the decedent was employed in the same building, in the same enterprise, under a common employer, and came in daily contact with the operator in going to and from her work. Entering the building, using the elevator, and going thence into her office were incidents inseparable from her employment. She had almost constant opportunity to observe whether or not the operator was careless in the management of the elevator. It is not necessary to place her in the cate-

gory of fellow servant that she did not know the intricacies of the elevator's machinery. The condition of the machinery is not involved in the pleadings, and the testimony shows that it was in perfect order except a blown-out fuse, caused by the contact of the body of the deceased. It would require only common observation to determine whether the operator was in the habit of running the elevator too rapidly, or being unable to stop it at the proper place, or of starting it either up or down without giving a reasonable opportunity to persons to leave the elevator or enter it. Any intelligent woman using the elevator at all would know that she was liable to be injured by the negligence of the operator, and must be presumed to have contracted with reference to and assumed the risk involved.

As to what is common employment so as to make out the relation of fellow servant, the following precedents are cited in addition to those mentioned in the original opinion, 130 Pac. 986. The rule is thus stated in *Shearm. & Redfield on Negligence* (6th Ed.) § 236: "Under the generally prevailing rule fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to the risk of injury." This is quoted with approval in *Kniceley v. W. Va. M. R. Co.*, 64 W. Va. 278, 61 S. E. 811, 17 L. R. A. (N. S.) 370, a case where the plaintiff was injured while unloading lumber from a car, on account of the switching crew of the defendant running a train of cars against the one upon which the plaintiff was at work.

In *Brush Electric L. & P. Co. v. Wells*, 110 Ga. 192, 35 S. E. 365, a lineman in the employ of the defendant, in the performance of his duty, climbed one of the poles to repair or change the wires strung there. While he was thus engaged, an engineer in a distant power house turned on the current, causing the death of the lineman. It was held that they were fellow servants, although they were employed in different departments, and so far removed from each other that neither could in any degree control or influence the conduct of the other.

In *Zilver v. Robert Graves Co.*, 106 App. Div. 582, 94 N. Y. Supp. 714, the plaintiff was a clerk in the office of the defendant, employed in stamping and directing mail. According to the complaint there, he left the office at night, having extinguished the lights, as he had been directed by another employé, and approached the elevator, the door of which had been negligently left open by the operator. The plaintiff fell down the shaft and received the injuries complained of, but the court held that the negligence of the operator was the negligence of a fellow servant, entailing no liability upon the defendant.

In *Fouquet v. Railroad Co.*, 53 Misc. Rep. 121, 103 N. Y. Supp. 1105, the plaintiff was an employé in the architectural office of the defendant in the building occupied by the latter for depot and office purposes. The elevator operator was employed by the superintendent of the building. The plaintiff was injured by the management of the elevator due to the negligence of the operator. The court held that the plaintiff and operator were fellow servants, and this case was affirmed on appeal (s. c., 123 App. Div. 804, 108 N. Y. Supp. 525). The court said: "An elevator is now considered an essential in an office building, indeed, in any high structure; and defendant, in providing elevator service, was but facilitating and expediting its business in making the various offices in the building easy of access to those of the general public having business in any of its offices, as well as to the employés therein employed, all of which having more or less directly to do with its general purpose, its railroad. * * * It is true that the operation of the elevator here in question had in itself no bearing on or relation to the operation of trains or the work of the surveying and architectural offices of the defendant; but it had to do with making easy of access the various offices of the defendant by those having business relations with that 'complex organism,' the defendant's railroad, and plaintiff has made no claim that the operator of the elevator was incompetent for the performance of his employment. That the employés of a common master are working at different trades, at various kinds of work, in different branches and departments, and whether in skilled or unskilled labor, does not change the rule as to the master's nonliability to an employé for the negligence of coservants, if the master be himself free from concurring negligence" (citing numerous authorities). The court further says: "Here the elevator man, in operating the elevator at the time of the injury to plaintiff, was performing the detail of the work of an employé, and was not the alter ego of the common master. He was not doing the master's duty, and my conclusion is that he and the plaintiff were fellow servants, and that the defendant is not liable to the plaintiff for the negligence of the operator. There is nothing in the contention that plaintiff, not having reached the particular office and room in which he put in his service or time, was not in the employment of the defendant. The place of his employment was the building, the Grand Central Station, and he was in the employ of the master from the time he reached the place of employment. He was employed and paid by the month, and at the time on his way to his particular room or office."

To like effect is the case of *Spees v. Boggs*, 198 Pa. 112, 47 Atl. 875, 52 L. R. A. 933, 82 Am. St. Rep. 792. There the operator of the elevator in a dry goods establishment

was held to be a fellow servant to a tailorless in another department of the same business, who habitually used the elevator in going to and from her place of work.

Another elevator case is *Miller v. Centralia Pulp & Water Power Co.*, 134 Wis. 316, 113 N. W. 954, 13 L. R. A. (N. S.) 742, where the plaintiff fell down an elevator shaft which was not sufficiently lighted at that moment, owing to the fact that an electrician in charge of the electric lights, working in another department of the business, had turned them off. They were held to be fellow servants, exonerating the defendant from liability in the absence of any allegation showing that it had not used ordinary diligence in providing a safe place in which to work, safe appliances, and the like.

In *McAndrews v. Burns*, 39 N. J. Law, 117, 119, the rule is thus stated: "Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow servants it may probably expose them to injury. The ground on which rests the exemption of the master from liability to the servant for negligence of a fellow servant, engaged in a common employment, is that the servant is presumed to contract in reference to the risk incurred."

Again, in *Donnelly v. Cudahy Packing Co.*, 68 Kan. 653, 75 Pac. 1017, the rule is thus stated: "Whenever coemployés, under the control of one master, are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employé must know he is exposed to the risk of being injured by the negligence of another, they are fellow servants, and each assumes the risk to which he is thus exposed."

To the same effect is *Jock v. Columbia, etc., R. Co.*, 53 Wash. 437, 102 Pac. 405, where the relation of fellow servant was deduced by Mr. Justice Dunbar from the fact that the plaintiff had the opportunity to observe the manner in which the other employé of the defendant performed his duties.

Wilson v. Hudson River Water Power & Paper Co., 71 Hun, 292, 24 N. Y. Supp. 1072, is a case where a laborer for a paper manufacturing company was killed by machinery set in motion by a chemist in the employ of the company. The court held them to be fellow servants, and so exempted the employer from liability for the injury.

In *Pawling v. Hoskins*, 132 Pa. 617, 19 Atl. 301, 19 Am. St. Rep. 617, it was held that the engineer in charge of an engine which furnished the power for a stationery manufactory is a fellow servant of the foreman of the composing room of the same, and the latter cannot recover damages for an injury occasioned by the negligence of the engineer.

In *Kitchen Bros. Hotel Co. v. Dixon*, 71 Neb. 293, 98 N. W. 816, it was held that a bell boy in a hotel, a part of whose duties

consists in showing guests to their rooms, using the elevator for that purpose, and the elevator boy in charge of the elevator, both being employed and subject to the directions of the same master, are fellow servants.

In *Wolcott v. Studebaker (C. C.)* 34 Fed. 12, the plaintiff was on his way to his work in an upper story of the defendant's building, using the elevator installed in the building for that purpose. He was injured by the negligence of the engineer, furnishing the motive power for the elevator, and that of the elevator boy. It was held that they were fellow servants; and this doctrine is borne out by a note appended to the end of the case.

In the case of *Stringham v. Stewart*, 27 Hun, 562; *Id.*, 100 N. Y. 517, 3 N. E. 575; *Id.*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483, an engineer running an elevator in a farm warehouse was held to be a fellow servant with the laborer injured by the negligent operation of that contrivance by the engineer.

In *Mann v. O'Sullivan*, 128 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149, the elevator man and a carpenter engaged in inclosing the elevator shaft, who was injured by the negligence of the operator, were held to be fellow servants. Among other things, the court there says, after stating the rule given by *Shearman and Redfield, supra*, as being as favorable to the servant as can be found in any standard work: "Testing this case by the foregoing rule, the conclusion is irresistible that plaintiff, who was employed to repair the elevator shaft, and Carney, the man who was employed to operate the elevator, were servants of defendant, engaged in a common employment, or, as our statute has it, engaged 'in the same general business.'"

In *Schwind v. Floriston*, 5 Cal. App. 197, 89 Pac. 1066, the plaintiff's intestate was employed in a clerical department of a paper mill. The company defendant had a switch from the main line of a railroad running to its mill, and owned cars which it operated on that switch in the prosecution of its business. Owing to mismanagement of the cars by the man in charge of them, the decedent met his death while going on an errand for the defendant, and the court held that he was a fellow servant with the man in charge of the cars, and exonerated the defendant from liability on that account.

In *Ralley v. Garbutt*, 112 Ga. 288, 37 S. E. 360, the plaintiff was injured by mismanagement of a logging train on which he was riding to his work. It was held that he was the fellow servant of the engineer, and could not recover from the defendant.

In *Georgia Coal, etc., Co. v. Bradford*, 131 Ga. 289, 62 S. E. 193, 127 Am. St. Rep. 228, the plaintiff was a teamster engaged to assist in hauling a boiler from the defendant's furnace to its coal mines some miles distant. He was injured by the negligence of the train crew in charge of some cars belonging to the defendant in the yard where he was about to

engage in hauling the boiler. It was held that the plaintiff was a fellow servant with the train crew, and could not recover.

In *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 44 N. W. 270, 18 Am. St. Rep. 441, the plaintiff was an inside founder in a blast furnace belonging to the defendant. The court there held that the plaintiff was not out of the employ of the defendant so long as he remained on its premises, and that he was a fellow servant with the engineer running cars to and from the furnace of the defendant, thus assuming the risk of the engineer's negligence by which he was injured.

In *Roland v. Tift*, 131 Ga. 683, 63 S. E. 133, 20 L. R. A. (N. S.) 354, the woodcutter in the employ of a sawmill owner who operated a logging railroad was hurt by the negligence of the train crew while being carried to his work. Held, that he was a fellow servant with the crew, and could not recover from the defendant.

In *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 384, 13 Sup. Ct. 914, 920 (37 L. Ed. 772), the court, speaking by Mr. Justice Brewer, says: "Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment. * * * 'Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or, in law is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.' But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply coworkers with him in it. Each is, equally with the other, an ordinary risk of the employment."

In *Beutler v. Grand Trunk, etc., Co.*, 224 U. S. 85, 32 Sup. Ct. 402, 58 L. Ed. 679, the plaintiff was an employe of a railroad company engaged in work in the repair yard. A switching crew ran a car needing repair from the general tracks into the repair yard, and by their negligence killed the decedent. The court, speaking by Mr. Justice Holmes, said: "No testimony can shake the obvious fact that the character of their respective occupations brought the people engaged in them into necessary and frequent contact, although

they may have had no personal relations. Every time that a car was to be repaired it had to be switched into the repair yard. There is no room for the exception to the rule that exists where the negligence consists in the undisclosed failure to furnish a safe place to work in, an exception that perhaps has been pushed to an extreme in the effort to limit the rule."

In *McCarty v. Rood Hotel Co.*, 144 Mo. 397, 46 S. W. 172, an engineer in the employ of a hotel company was injured by the carelessness of the elevator boy in moving the elevator while the plaintiff was repairing the annunciator wires, and it was held that they were fellow servants, exempting the defendant from liability.

Again, in *N. P. R. R. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009, a laborer repairing a track was held to be a fellow servant with the engineer and conductor of a passenger train by which the plaintiff was injured. The court there said: "As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow servant should not apply."

In *Norfolk & Western R. R. Co. v. Nuckols*, 91 Va. 193, 21 S. E. 342, it is laid down that "a person entering the service of another assumes all risks naturally incident to that employment, including the danger of injury by the fault or negligence of a fellow servant." It is said there that "the liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer."

The exception to the general rule is made to depend upon the test of whether the departments are so far separated from each other as to exclude the probability of contact and of danger from the negligent performance of their duties by employes of the different departments. If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department. *Secombe v. Detroit Elec. Ry.*, 133 Mich. 177, 94 N. W. 747; *Kenefick-Hammond Co. v. Rohr*, 77 Ark. 290, 91 S. W. 179; *Bier v. R. R. Co.*, 132 Ind. 78, 31 N. E. 471; *R. R. Co. v. Triplett*, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; *Quincy Mining Co. v. Kitta*, 42 Mich.

34, 3 N. W. 240; *Valtes v. O. & M. Ry. Co.*, 85 Ill. 500; *C. & A. R. R. Co. v. Murphy*, 53 Ill. 336, 5 Am. Rep. 48; *Enright v. Oliver*, 69 N. J. Law, 357, 55 Atl. 277, 101 Am. St. Rep. 710; *Erjauscheck v. Kramer*, 141 App. Div. 545, 126 N. Y. Supp. 289; *Jackson v. Norfolk & W. R. Co.*, 48 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337.

In *Labatt's Master & Servant* (2d Ed.) §§ 1420-1422, we find the learned author, after an exhaustive examination of precedents, summing up on this question in this manner: "We are manifestly conducted to the conclusion that in determining whether or not there was a common employment, as between two servants, the necessary, and the only proper question to ask is whether or not their duties were so related that each of them must have known himself to be exposed to the risk of being injured in the event of the others committing a negligent act, and that this risk was so normal and so likely to eventuate in actual disaster that it was presumably considered by each of them in fixing the amount of the compensation which they were willing to receive for their services. It is important to note that, for the purposes of this rule, the nonanticipation of the servant is material only in so far as it may be resolved into an excusable incapacity to forecast the probability of injury from the particular servant who was guilty of the negligent act in question. The mere fact that the negligent act itself was one which could not have been reasonably foreseen does not take the case out of the operation of the general rule. The principle laid down in the preceding section is accepted as the test of common employment by a large majority of the courts. One of its corollaries is that the plaintiff is precluded from recovery wherever the functions which he and the negligent coemployee were discharging, although not identical or even similar in character were yet such that the two servants were 'contributing directly to the common object of their common employer' in that enterprise for which their services were engaged. Or, to employ a terminology which is frequently found in the books, the injured servant's right to recover does not depend upon the fact that he may have been in a different department of the service from the delinquent. * * * In numerous instances a servant's contemplation and inferential acceptance of the risk of his fellow servant's negligence are suggested by the fact that their duties, although diverse in kind, were obviously such that they might at any time be brought into close proximity to each other; and the authorities show that this circumstance is almost decisive against the plaintiff. But the essence of his disability to recover being his imputed comprehension of the likelihood of injury, it is evident that the remoteness of the place where the negligent servant habitually works is not necessarily a

circumstance which negatives an assumption of the risk of his negligence."

Worked out to its logical conclusion, the theory that the plaintiff can recover because her duties as stenographer had no immediate connection with the duties of the elevator man would lead us to hold that she could not be injured by any one in the defendant's service except a fellow stenographer without making the defendant liable. It would be only a step further to hold that if that fellow stenographer for the moment assumed the duties of janitor for the purpose of putting wood into the heating stove, and in so doing negligently dropped a stick upon the plaintiff's intestate and so injured her, a recovery could be had against the employer for the resulting damage. To charge the defendant with liability under the circumstances of this case is to establish the department theory contrary to the doctrine laid down in *Mast v. Kern*, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, in which Mr. Justice Bean, reviewing that doctrine, says: "In short, the master is liable for the negligence of an employe who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence. 'This,' as said by Judge Dillon, 'is a plain, sound, safe, and practical line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine, based upon the notion of "grades" in the service, or, what is much the same thing, distinct "departments" in the service (which departments frequently exist only in the imagination of the judges, and not in fact), will only breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges who made it seem to be able to "find no end in wandering mazes lost."'"

When the plaintiff's intestate went to obtain employment of the defendant she saw the situation. She knew that it involved the use of the elevator in question in going to and from her work. She knew that there was a possibility that the negligence of the elevator man would injure her while using the elevator. She must be held to have contracted with reference to those elements of danger so apparent to any adult observing them. In brief, the decedent was present at the time of the accident solely in her character as an employe of the defendant. She came within the scope of the defendant's duty to furnish her a reasonably safe place of employment, necessarily including the means of access to the place. Until it is shown to have violated some duty in that behalf, either in providing an insufficient or dangerous elevator, or negligently employing an incompetent man or retaining him in its employment after it knew of his negligence, or incompetency, it has violated no duty to her. She was not a minor

requiring quasi parental care from her employer, but was an intelligent adult, presumably possessed of ordinary powers of observation. She had as good opportunity as any officer of the company to observe the conduct of its other employé, the operator. She knew the situation and the means of going to her office as an incident of her employment, and she must be presumed to have contracted with reference to the risk necessarily involved in the possible negligence of the operator. This is a basic reason of the rule about the negligence of fellow servants as shown by all the authorities, and should control this case.

As said by Mr. Chief Justice Lord in *State v. Clark*, 9 Or. 466, 470: "Stare decisis is the policy of the courts, and the principle upon which rests the authority of judicial decisions as precedents in subsequent litigation, and this doctrine ought not to be departed from, except when subsequent examination shows the case to have been decided contrary to principle." See, also, *Multnomah Co. v. Sliker*, 10 Or. 65; *Despain v. Crow*, 14 Or. 404, 12 Pac. 806; *Everding v. McGinn*, 23 Or. 15, 35 Pac. 178.

Hence, however distressing the accident in the case at bar, we ought not to overturn the settled principles of the law and our own former opinions to favor the successors in interest of the deceased in this particular instance. For these reasons, I dissent from the conclusion reached by Mr. Chief Justice McBRIDE on the two points first mentioned.

MOORE, J., concurs in this dissenting opinion.

TOKSTAD v. DAWS.

(Supreme Court of Oregon. Dec. 9, 1913.)

1. DISMISSAL AND NONSUIT (§ 19*)—VOLUNTARY DISMISSAL—COUNTERCLAIM.

In a suit to restrain the maintenance of a partition fence on lands claimed by plaintiff, where defendant filed a counterclaim for damages done by surface waters collected by the digging of a ditch on defendant's land and the amount required to remove the obstruction to the natural water course, a motion by plaintiff to dismiss the complaint was properly denied, though the dismissal would have been proper if the answer had stated only defensive matters.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 33-36; Dec. Dig. § 19.*]

2. EQUITY (§ 42*)—DISMISSAL—GROUNDS—WANT OF JURISDICTION.

When facts necessary to confer jurisdiction in equity are stated in the pleading, but denied, the question of jurisdiction becomes one of fact, and, when the lack thereof appears, the court must dismiss the suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. § 42.*]

3. EQUITY (§ 39*)—RETENTION OF JURISDICTION ACQUIRED.

Where a court of equity obtains jurisdiction of the subject of litigation on grounds set

forth in the answer, it rightfully retains jurisdiction to administer complete relief as to the entire subject-matter.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 38.*]

4. EQUITY (§ 42*)—JURISDICTION—OBJECTIONS AND WAIVER.

Where a cause is entirely without the field of equitable jurisprudence, no act of the adverse party can confer jurisdiction; but, in a case within the field of equitable jurisprudence in which an element essential to complete jurisdiction is lacking, the objection must be raised at the proper time, or it is waived.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. § 42.*]

Department 2. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by Nels O. Tokstad against John F. Daws. From a decree for defendant, plaintiff appeals. Affirmed.

This is an equitable proceeding instituted originally to restrain defendant from maintaining a partition fence on lands claimed by plaintiff. The farms of the parties litigant adjoin, and are located in Marion county. The initial pleading was assailed by a demurrer for insufficiency of substance, but upheld by the court. Defendant, answering, denied the pleading in toto, and alleged affirmatively and by way of a counterclaim that plaintiff is the owner of a tract of land—specifically describing the same—contiguous to and lying to the westward of defendant's land; that from a time immemorial a natural water course has existed on the premises of plaintiff near the line of division between the lands of plaintiff and defendant; that during the fall of 1911 plaintiff wrongfully began the digging of a ditch close by the boundary line separating the farms, and did construct a ditch 14 chains long and 2 feet deep over defendant's land, and did synchronously obstruct the natural water course by the means of a dam; that defendant notified plaintiff he was trespassing upon defendant's land, and requested plaintiff to desist therefrom and cease digging the ditch, which supplication was heeded not by plaintiff who at that time began the construction of a worm fence along the boundary line, but wholly upon the premises of defendant; that the ditch constructed by plaintiff upon the lands of defendant collects and discharges the surface waters upon the premises of defendant greatly to his injury. Concluding, defendant asserts that the wrongful acts of plaintiff in moving the fence upon and digging the ditch over his premises and in obstructing the natural water course were done against the will and without the consent of defendant, and has damaged him in the sum of \$150, and that the expenditure of \$700 would be required to remove the obstructions to the natural water course, refill the ditches, and build a partition fence. A decree was prayed, asking for a dismissal of plaintiff's complaint and a dissolution of the injunction issued

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against the defendant, also, for an order restraining plaintiff from trespassing on the lands of defendant, and requiring plaintiff to remove the obstructions in the natural water course, fill the ditches, and for the sum of \$850 damages.

After the filing of the answer and service thereof, plaintiff interposed a motion to dismiss his complaint. Supporting the motion was an affidavit subscribed by plaintiff containing the admission that since the institution of the suit a resurvey showed the worm fence had been erected and the ditch constructed upon the premises of defendant, though done in good faith and upon the reliance of the former survey, which was acquiesced in by defendant. Upon objection of counsel for defendant and refusal of the court to allow the motion to dismiss, plaintiff replied to the answer, and, after admitting defendant's ownership of the land described in the answer, denied the remainder of the pleading, and alleged as new matter that plaintiff is the owner of a tract of land adjoining defendant's, being the same property described in plaintiff's complaint; that for many years there was an old fence situated near the supposed boundary line between the lands of plaintiff and defendant; that in the autumn of 1910 the parties contestant employed a surveyor to determine the true boundary line; that prior to the commencement of the suit both parties believed the line had been established; that in the fall of 1911 defendant began the construction of a worm fence on the line designated by the surveyor, the fence being so constructed that the larger portion was on the lands of plaintiff; that concurrently plaintiff began the construction of an open ditch on the same line, constructing about 20 rods, when plaintiff was notified by defendant to desist; that in January, 1912, the parties caused the premises to be resurveyed, with the result that the former survey was shown to be incorrect; that the acts done by defendant as set forth in the answer of defendant were performed by plaintiff upon reliance in the correctness of the original survey, and were not done with intent to trespass upon the lands of defendant or in any way interfere with defendant's use thereof; that on account of a mistake in the survey plaintiff has been greatly damaged, in that he has expended a large amount of time, labor, and materials; that the mistake was mutual; and that plaintiff at the time of the commencement of the suit believed that the original survey was correct.

A prayer terminated the pleadings, wherein a decree was asked dissolving the injunction, and dismissing the plaintiff's answer, and for any further relief agreeable to equity. In due time a decree was entered favorable to defendant, wherein he was declared to be the owner in fee simple of the premises described in his answer, and awarded judgment in the sum of \$500, provided

that plaintiff did not fill the ditches so dug on defendant's land, and remove the obstructions from the water course within a time herein specified.

C. E. Ross, of Silverton, for appellant.
John A. Carson, of Salem (Carson & Brown, of Salem, on the brief), for respondent.

McNARY, J. (after stating the facts as above). [1] Several errors are assembled to overthrow the decree of the trial court; the first being that the court erred in not dismissing plaintiff's complaint in response to a motion to that effect.

The motion to dismiss the complaint was properly denied by the court, as defendant had met the issues therein presented by an answer containing matters, correlated to the subject-matter of the litigation expressed in the complaint, sufficient upon which to predicate a prayer for affirmative relief. Had the court obeyed the purpose of the motion and dismissed the complaint, still the case would have remained in court, as the defendant had, by his pleading, made a case against the plaintiff which the latter was obliged to meet.

A different situation would have presented itself had the answer embraced matters wholly defensive, with no prayer for affirmative relief, as in that event the allowance of the motion would have been proper, and the case would have automatically terminated. The doctrine announced in the case of *Maffett v. Thompson*, 32 Or. 546, 52 Pac. 565, 53 Pac. 854, seems controlling on this point.

The adequacy of the statement of facts, constituting the counterclaim, was not drawn in question by plaintiff, and the trial proceeded upon the issues made by the counterclaim and the reply. A dissection of defendant's answer reveals these components: (1) That the parties are owners of bordering farms; (2) that for a time long distant a natural water course has run along plaintiff's land near the premises of defendant, affording each litigant drainage; (3) that in the autumn of 1911 plaintiff wrongfully commenced the digging of a ditch on defendant's land, and simultaneously therewith obstructed the flow of the water from its accustomed channel; (4) that upon the request of defendant plaintiff refused to desist from the obstruction of the ditch upon the defendant's premises; (5) that plaintiff began the erection of a division fence on the lands of defendant; (6) that the ditch constructed by plaintiff collected the surface waters upon his lands, and deposited the same upon the premises of defendant, to his damage in the sum of \$150; (7) that an additional \$700 would be required to remove the obstruction to the natural water course. Thus it clearly appears by defendant's answer that he had a legally subsisting cause of suit in his favor and against plaintiff, upon which defendant could have maintained an independent suit. Upon the consideration of the complaint, it will be ob-

served that the subject for determination there proposed is the location of the division fence, the construction of the ditch, and damages suffered by plaintiff incidental thereto, which constitute the same subject of litigation expressed in the defendant's counterclaim.

[2, 3] Counsel for plaintiff next asserts that the lower court had no jurisdiction of the subject-matter of the suit, and that the want thereof may be raised at any time. When facts necessary to confer jurisdiction on a court of equity are stated in the pleading of the moving party, but denied by the other, the question of jurisdiction becomes one of fact, and, when the lack thereof appears, it is incumbent upon the court to dismiss the suit. *Love v. Morrill*, 19 Or. 545, 24 Pac. 916. However, in the case in mind, plaintiff met the controversy suggested in defendant's answer by an admission of the acts charged, but attempted to avoid liability by alleging a mistake mutual to both litigants, a lack of intent to do defendant substantial injury, and concludes by seeking affirmative relief. The court, having obtained jurisdiction of the subject of litigation on the grounds set forth in defendant's answer, rightfully retained jurisdiction for the purpose of administering complete relief with respect to the entire subject-matter.

[4] If the matters set forth in defendant's answer were entirely without the fold of equitable jurisprudence, no act upon the part of plaintiff would confer jurisdiction; but a cursory inspection of the pleading will unfold that it contains controversial elements quite within the field of equitable jurisdiction. On this phase of the law, Mr. Justice Eakin, in *Maxwell v. Frazier*, 52 Or. 183, 96 Pac. 548, 18 L. R. A. (N. S.) 102, well said: "But a distinction must be made between an entire lack of matter of equitable cognizance and cases within the field of equitable jurisdiction, in which an element essential to complete jurisdiction is lacking. In the former the objection is not waived by failure to interpose it at the proper time, but it is available at any stage of the proceeding, while in the latter, if the objection is not seasonably interposed, it will be deemed to be waived. In such a case the subject of the controversy is equitable, and the relief sought such as equity alone can grant."

Counsel for defendant intimated in his brief that the question of the intent which prompted plaintiff to enter upon defendant's land and commit the acts alleged and admitted should be a guiding consideration in the disposition of this case. This element has no place when actual damages alone are sought to be recovered.

The decree is affirmed.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

KNAUFF v. HIGHLAND DEVELOPMENT CO.

(Supreme Court of Oregon. Dec. 9, 1913.)

1. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

An allegation that a miner's injury was received by reason of defendant's failure to timber a stope in the mine is not sustained where the rock which rolled over and hurt plaintiff had fallen from the hanging wall between two stopes long before the accident, and it was in changing the position of some of the rock which had so fallen that the injury occurred.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

2. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—PLEADING.

Where a mass of rock and ore had fallen from a hanging wall in a mine, an allegation that defendant's foreman directed the plaintiff and another workman to remove the ore and leave the waste, including the large rock which rolled over and injured plaintiff, was insufficient, in the absence of allegation and proof of the specific negligence, to charge defendant with liability for the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—PLEADING.

In an action for injuries to a miner, if it was negligence for defendant to leave waste rock which had fallen in a stope of the mine, the plaintiff must allege and prove it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—EVIDENCE.

In an action for injuries to a servant, evidence held insufficient to show negligence of the employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

In Banc. Appeal from Circuit Court, Baker County; Gustav Anderson, Judge.

Action by H. A. Knauff against the Highland Development Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

M. D. Clifford, of Baker (Clifford & Correll and H. H. Clifford, all of Baker, on the brief), for appellant. A. A. Smith, of Baker (John L. Rand and Wm. H. Packwood, both of Baker, on the brief), for respondent.

EAKIN, J. Plaintiff was an experienced miner, and had been stoping. Aside from breaking down ore, it was his duty to timber his work according to his best judgment. Another workman, Herr, had been stoping a little farther east from the plaintiff. When plaintiff quit work on the evening of the 25th of October, 1912, he had just broken through into the stope of Herr, and when he returned next morning he found that a large mass of earth, rock, ore, and ledge matter, about ten feet in length, had broken loose from the hanging wall, and settled down onto the foot wall, among which was a large rock

or chunk of ore extending above the fallen mass. Dunstan, the defendant's foreman, told Morello, another workman, to take out the best of the ore, and to leave as much of the waste as possible. As stated in plaintiff's brief: "After inspecting the rock, he [Dunstan] gave orders that it should not be removed, but should stay with the waste, and left in the position it then was." Thus it appears that the waste was to be left in the stope, and that the rock which caused the injury was classed as waste. Plaintiff says he "was picking out the ore on the foot wall when this rock rolled out of there * * * and tipped off. * * * Morello was standing behind me, * * * and I was picking in the foot wall to get this ore out, * * * and Morello * * * could see, and he says, 'Look out,' and I sprang back, and the next thing I knew I felt a pain in my foot. * * * The top of this big rock struck it as it came down." Morello says of the accident: "He [plaintiff] was picking, and I was behind him three or four feet shoveling this ore in the chute, and he found a chunk right in front where he was picking, a big chunk. He [it] was back two or three feet wide, three feet wide and about two feet high, * * * and not very much thick, and he tried to pick his rock underneath. * * * I saw the way he picked his rock it would have a chance to roll over, and I say, 'Knauff, you take much chance of that rock rolling on you;' and so I watch about five minutes. * * * This rock rolled over, and, after he rolled this rock, this rock fell down, and then he said, 'I got my foot hurt.'"

[1, 2] Plaintiff first alleges that the injury was received by reason of defendant's failure and neglect to timber the stope, by reason of which the injury was received. It is not necessary to notice this allegation further than to say that absence of the timbering was not the proximate cause of the injury, as the rock had fallen from the hanging wall long before the injury complained of. Again, it is alleged that Dunstan, as foreman, directed plaintiff and Morello not to remove said large rock from its then position, and to leave all waste matter, including the rock, in the stope, and that plaintiff followed the directions of Dunstan in taking out the milling ore from the stope and leaving the waste therein, in consequence of which the said rock fell and struck plaintiff, causing the injury.

[3] It is neither alleged in the complaint nor shown in the proof of what the specific negligence of the defendant of which plaintiff complains consisted. If plaintiff means to charge or prove that it was negligence for Dunstan to leave the waste matter in the stope, it is not so alleged nor proved. If it was defendant's duty to remove the waste matter from the stope, or if it was carelessness to leave it in the stope, it should be alleged and

proved. We may understand from the complaint and evidence that it was not necessary or proper to remove the waste, but that the vacant stope was the proper place for it. Dunstan was not present when the injury was received, he had given no specific instructions as to the manner of handling the waste or the rock in question, and there appears to have been no occasion for special instructions. In his work that day it seems that plaintiff thought he should have help. He says, "I didn't want a man to work in there alone, and he [Dunstan] called Charley [Morello] down, and gave him directions how to handle this ground." But the only directions he gave were, "He simply suggested taking out the best of the ore and leaving as much of the waste as we could." All plaintiff asked the foreman to do was to furnish an extra man, and this was all that appeared to be necessary or proper for defendant to do.

[4] There is nothing in the complaint or the evidence tending to show a neglect by the defendant of any duty it owed to the plaintiff, without which there could have been no recovery. The court erred in denying the motion of the defendant that the court instruct the jury to return a verdict in favor of the defendant, which should have been granted.

The judgment is reversed, and the cause remanded to the trial court for such further proceedings as may be proper and not inconsistent with this opinion.

LITSCHER v. ALEXANDER et al.†

(Supreme Court of Oregon. Dec. 9, 1918.)

1. EXCEPTIONS, BILL OF (§ 20*)—REQUISITES —CERTIFIED TRANSCRIPT.

A transcript certified to by the trial judge as containing all the testimony except certain exhibits, not styled a bill of exceptions, will not be considered for that purpose by the Supreme Court.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 21-28; Dec. Dig. § 20.*]

2. APPEAL AND ERROR (§ 671*) — RECORD — MATTERS PRESENTED FOR REVIEW.

In an action on a note, where the defense was that it was given for the price of land and was secured by a mortgage on the land which had been foreclosed, where the court made no findings as to that defense, and no motion for additional findings and no bill of exceptions appears in the record, the Supreme Court cannot consider the defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by L. H. Litscher against J. T. Alexander and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an action in the usual form upon a promissory note indorsed to the plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied December 30, 1913.

for value, in the regular course of business, before maturity. The answer admits the execution of the note, denies that there is anything due thereon, and traverses the allegation of indorsement. The substance of the affirmative matter in the answer is to the effect that the note was given to the indorser for part of the purchase price of real property and secured by mortgage on that realty. It alleges that the security was subordinate to another mortgage then on the land, and that, in a suit by the senior mortgagee to foreclose the paramount security, the plaintiff here was made a party defendant as a junior incumbrancer, and that a decree was made upon the stipulation of the parties to that suit to the effect that the property should be sold and the proceeds applied: First, to the payment of the senior mortgage; and, next, to the payment of the mortgage securing the note described in the complaint in this action. The reply denies the allegations of the answer on the subject of the note and mortgage having been given to secure part of the purchase price of the land mentioned. By consent of the parties the case was heard by the court without a jury. As a result of the trial the court made an entry in its journal, which, after reciting the appearance of the parties by their attorneys, proceeds thus: "The court finds that the facts set forth in the complaint are true, and that the plaintiff is entitled to a judgment as prayed for in the complaint. The court further finds that the said J. T. Alexander and Ada F. Alexander did on September 24, 1906, execute and deliver their certain promissory note for the sum of \$2,600, payable on or before five years after date to the order of George H. McKee, said note bearing interest at the rate of 8 per cent. per annum; that, to wit, April, 1909, said George H. McKee, for value, duly assigned, transferred, and set over said note to the plaintiff herein, and that plaintiff herein is the holder and owner of the said note; that no interest has been paid on said note since September 24, 1908, and there is now due and owing on said note four years' interest at the rate of 8 per cent. on the said \$2,600, or a total of \$832; that said note provides, in case suit or action is instituted to collect the same, a reasonable attorney's fee shall be allowed. The court finds that a reasonable attorney's fee for instituting and prosecuting this suit is \$200; and that said plaintiff is entitled to recover of and from the said defendants the said sum of \$2,600 principal, \$832 interest, and \$200 attorney's fee, and the costs of this suit, amounting to \$33.50. Therefore it is ordered, adjudged, and decreed that plaintiff do have and recover of and from the defendants, and each of them, the sum of \$3,632, and the costs of this suit, taxed at \$33.50, and that execution issue therefor."

Oglesby Young and George A. Pipes, both of Portland (J. H. Middleton, of Portland, on the brief), for appellants. F. S. Senn, of Portland (Rauch & Senn, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). It is provided in section 428, L. O. L., that "when judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same."

[1] No bill of exceptions appears in the record. It is true that the judge has certified a transcript of all the testimony presented at the trial, excepting only certain exhibits; but it is not even styled a bill of exceptions and cannot be considered for that purpose. *Keady v. United Rys. Co.*, 57 Or. 325, 100 Pac. 658, 108 Pac. 197; *Hahn v. Mackay*, 63 Or. 100, 126 Pac. 12, 991; *Portland Pub. Market, etc., Co. v. Woodworth*, 135 Pac. 629; *West v. McDonald*, 136 Pac. 650, decided November 25, 1913.

[2] No motion for findings in addition to those quoted from the judgment entry appears in the record. In *Freeman v. Trummer*, 50 Or. 287, 91 Pac. 1077, Mr. Justice Moore states the rule thus: "When a defendant controverts the allegations of a complaint by his answer and also sets up facts intended to constitute a complete defense to the cause of action stated, he thereby presents a theory of the case that is usually inconsistent with the plaintiff's hypothesis, and the adoption of either legal principle by the court, after a trial of the issue without a jury, necessarily implies a rejection of the theory of the adverse party. If the findings of fact in such a case conform to the proposition, as evidenced by the material controverted averments of either party, and are adequate to uphold the judgment based thereon, the conclusion reached, as the result of a judicial investigation, is sufficient in law, though no findings are made in respect to the theory of one of the parties. *Lewis v. First Nat. Bank*, 46 Or. 182, 78 Pac. 990; *Jennings v. Frazier*, 46 Or. 470, 80 Pac. 1011." Under this rule and the state of the record before us, there is nothing indicating that the note in question was in fact a purchase-money instrument and consequently nothing to which we can apply the contention of the appellants.

The judgment is affirmed.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

MOORE et ux. v. ELLIOTT et ux.

(Supreme Court of Washington. Dec. 4, 1913.)

1. VENDOR AND PURCHASER (§ 130*)—TITLE OF VENDOR—"MARKETABLE TITLE."

To be marketable within the specific performance rule, a title need not be free from every possible technical criticism but must be such that a reasonably well-informed and intelligent purchaser in the exercise of ordinary business caution would accept it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 247; Dec. Dig. § 130.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4388-4390; vol. 8, p. 7717.]

2. VENDOR AND PURCHASER (§ 130*)—TITLE OF VENDOR—"MARKETABLE TITLE."

A will provided that testator gave "to each of my children" \$25 and to his wife the residue of his real and personal estate "of which I may die possessed, to be under her full control without the intervention of the courts after the will is probated." When the will was executed testator had four minor children, and five months later, and seven months before his death, a fifth child was born. Rem. & Bal. Code, § 1326, provides that any testator who dies leaving a child not named or provided for in his will, though born after the will is made, shall be deemed, as to such child, to die intestate. Held, that a title depending on a conveyance by testator's widow of all the realty would not be a "marketable title," so that specific performance of such title would not be compelled.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 247; Dec. Dig. § 130.*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Fred C. Moore and wife against Geo. C. Elliott and wife. From a judgment for plaintiffs, defendants appeal. Reversed and remanded for judgment as indicated.

W. D. Lambuth, of Seattle, for appellants.
A. A. Booth, of Seattle, for respondents.

ELLIS, J. Action to compel specific performance of a contract for the sale of real property. The material facts are not disputed. On April 11, 1912, the plaintiff Moore, on behalf of the marital community consisting of himself and wife, entered into a written contract with the defendants for the purchase of certain real estate belonging to the defendants and paid \$100 on the purchase price. In payment of the remaining consideration, the plaintiffs were to convey to the defendants certain lots in the city of Seattle and furnish an abstract showing good title. The abstract furnished showed that the title offered depended on a conveyance to the plaintiffs from one Flora Ryder, the widow of Heman S. Ryder, deceased; that Heman S. Ryder, being then the owner of the lots in question and other property, made his last will and testament on April 11, 1910, which will contained the following material provisions:

"First, I give to each of my children (\$25) twenty-five dollars.

"Second. To my beloved wife, Flora Ryder,

I give, devise and bequeath the residue of my estate both real and personal of which I may die possessed, to be under her full control without the intervention of the courts after will is probated."

At the time this will was made, the Ryders had four minor children. About five months thereafter, and about seven months previous to the death of the testator, a fifth child was born. The defendants, after an examination of the abstract, notified the plaintiffs that the title to the property in question would not be accepted until the plaintiffs had perfected it by eliminating or quieting title against any claims of these children. The plaintiffs, refusing to take any action to perfect the title, brought this suit. From a judgment in favor of the plaintiffs, the defendants appeal.

The sole question presented for our consideration is whether the title tendered was free from reasonable doubt, hence a "marketable" title.

[1] A title, to be marketable, need not be perfect (that is to say, free from every possible technical criticism), but it must be reasonably safe (that is to say, such that a reasonably well-informed and intelligent purchaser, exercising ordinary business caution, would be willing to accept). "The authorities hold that to render a title marketable it is only necessary that it shall be free from reasonable doubt; in other words, that a purchaser is not entitled to demand a title absolutely free from every possible technical suspicion. He can only demand such title as a reasonably well-informed and intelligent purchaser acting upon business principles would be willing to accept." *Cummings v. Dolan*, 52 Wash. 496, 501, 100 Pac. 989, 991 (132 Am. St. Rep. 936); *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506; *Somers v. Pix*, 134 Pac. 932; *Milton v. Crawford*, 65 Wash. 145, 154, 118 Pac. 32.

[2] We are not called upon to decide whether the title offered was in fact good or whether we would so hold it were that question before us. Granting that it was, the question remains: Was that fact so free from doubt that a reasonably well-informed and intelligent purchaser of ordinary business caution would accept it? We will assume that such a purchaser would take legal advice and would be informed as to the provisions of our statute and the decisions of this court touching the naming or provision for children in wills. He would learn that the statute (Rem. & Bal. Code, § 1326) provides that: "If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as he shall regard such child or children, or their

descendants, not provided for, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." He would be advised that this court has declared that: "All of the authorities are agreed upon the proposition that the object of this and similar statutes is not to compel the testator to make any substantial provision for his children but is simply to provide against any such children being disinherited through inadvertence of the testator at the time he makes his will." *Bower v. Bower*, 5 Wash. 225, 227, 31 Pac. 598. He would probably be informed that in the same case, and in at least one other case, this court has held that the terms of a will, as affected by this statute, cannot be aided by extrinsic proof (*Hill v. Hill*, 7 Wash. 409, 35 Pac. 360), and that in the last-mentioned case this court said that, by the admission of such proof, "the sins of avarice and false swearing would receive an impetus not hitherto dreamed of in connection with decedents' estates." He would, of course, know that in the nature of the case the testator could not actually designate by name any child to be born after the will was made, but his common sense would suggest that if the testator knew of the imminent advent of such a child, or had in mind that contingency and desired to provide for it, he could easily and unequivocally do so by simply adding to the general designation "each of my children" the words "now living or hereafter born" or words of similar import. Suggesting this to his attorney, he might even be advised that since a will, in the absence of an expressed intention therein to the contrary, will be held to speak as of the date of the death of the testator, and that therefore the courts would probably hold that the designation "each of my children," when coupled with a provision for each, would include children born after the making of the will but prior to the death of the testator, but he would also be told that this court has never yet so held. He would doubtless be told that our statute, though similar in purpose to those of other states, is unlike nearly all of them in terms (*Bower v. Bower*, supra; *Hill v. Hill*, supra), and that until this identical question has been passed upon by this court, in a proper case, there will always be reasonable danger of a lawsuit to that end. We cannot say as a matter of law that a reasonably intelligent purchaser of ordinary business caution so informed would be willing to accept such a title, nor that he should be compelled to accept it.

If the youngest of these children had at-

tained the lawful age and the title had remained unquestioned since the child's majority for a period equal to the appropriate statute of limitations, a different question would be presented. *Milton v. Crawford*, supra.

With the facts as they are, we cannot say that the appellants' refusal to accept the title tendered was arbitrary, capricious, or unreasonable. They are entitled to retain the \$100 paid upon the contract, as liquidated damages, and to have their abstract returned as prayed in their answer.

The judgment is reversed, and the cause is remanded for judgment in accordance with this opinion.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

STATE ex rel. CITY OF SEATTLE v. PUBLIC SERVICE COMMISSION OF WASHINGTON et al.

(Supreme Court of Washington. Dec. 2, 1913.)

1. GAS (§ 14*)—CHANGE IN RATES—PUBLIC SERVICE COMMISSION.

Under Public Service Commission Law (Laws 1911, c. 117) §§ 26-28, providing that all charges made by a lighting or water company shall be just and reasonable, that every such company shall file with the Commission and keep open to public inspection schedules showing rates charged or to be charged, and that, unless the Commission otherwise orders, no change shall be made in such a rate, except after 30 days' notice to the commission, a proposed change in rates so noticed, the rates changed not having been established by any order of the Commission, so as to be governed by section 84, will automatically go into effect on expiration of such 30 days, unless suspended or adjudged unreasonable by the Commission, pursuant to its authority under sections 54, 80-82.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

2. GAS (§ 14*)—CHANGE IN RATE—INQUIRY BY COMMISSION—DISCRETION.

Under Public Service Commission Law (Laws 1911, c. 117) § 54, providing that when the Commission finds, after a hearing had on its own motion or the complaint of another filed with it, that rates charged by a lighting or water company are unjust or insufficient to yield a reasonable return, it shall determine the reasonable or sufficient rates and fix them by order, section 80 providing that complaint may be made by the Commission or another that such a company is doing or omitting to do a thing in violation of law or of an order of the Commission, section 81 providing, at the time fixed by it for hearing thereon, the complainant and the company shall be entitled to be heard and to introduce such evidence as he or it may desire, and at the conclusion of the hearing the Commission shall make findings and enter its order thereon, and section 82 providing that, when any such company shall file with the Commission any schedule or rule having the effect of increasing a rate, the Commission shall have power, on its own motion or on complaint, to enter on a hearing concerning such proposed increase and the reasonableness and justness thereof and, pending it and decision thereon, may suspend operation of the rate for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a certain period, from the time it otherwise would go into effect, and after a full hearing may make such order in reference thereto as would be provided in a hearing initiated after the rate had become effective, the question of the Commission entering on an inquiry on its own motion, as to the reasonableness and justness of a proposed increase in a rate, or of its own motion pursuing an inquiry thereon, instituted at the instance of another as complainant, beyond the evidence brought before the Commission by the complainant and the company, is one of discretion in the Commission, beyond the control of the courts.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

3. GAS (§ 14*)—CHANGE OF RATES—REASONABLENESS—INQUIRY BY COMMISSION—BURDEN OF PROOF.

The burden of proof, as to reasonableness and justness of a proposed increase of rate by a lighting or water company, on an inquiry instituted by the Public Service Commission, at instance of another, is not on the company; the proposed rate not being so clearly unreasonable and exorbitant that the Commission could judicially know that it was such, and the rate proposed to be increased not being one that had been fixed by the Commission, which Public Service Commission Law (Laws 1911, c. 117) § 84, provides shall not be changed without consent of the Commission first obtained.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

4. GAS (§ 14*)—REASONABLENESS OF RATES—DETERMINATION.

The reasonableness of a rate of a lighting or water company is not to be determined by a mere mathematical calculation but, while cost and revenue have no inconsiderable bearing thereon, is to an extent within the flexible limit of judgment.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10-11; Dec. Dig. § 14.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Inquiry instituted by the Public Service Commission, at the instance and on the complaint of the city of Seattle, as to reasonableness of a proposed increase in a charge by the Seattle Lighting Company. The Commission dismissed the complaint. A writ of error by the State, on relation of said City, removed the proceeding to the Superior Court, from the judgment of which, remanding the matter to the Commission for further inquiry, the Commission and the Company appeal. Reversed, and decision of Commission affirmed.

Clise & Poe, of Seattle, for appellants. Jas. E. Bradford, Ralph S. Pierce, and C. B. White, all of Seattle, for respondent.

PARKER, J. The Public Service Commission instituted an inquiry, at the instance of the city of Seattle, as to the reasonableness of the Seattle Lighting Company's proposed increase in its minimum monthly charge from 25 cents to 50 cents, made to its gas customers, of which proposed change it gave notice and filed a supplemental tariff sheet with the Public Service Commission, showing the same, in pursuance of the Public Service Commission Law. Hearing was had in due

course, at which evidence was introduced touching the question of the reasonableness of the proposed increase. Thereupon the Commission made findings and rendered its decision dismissing the proceeding upon the ground stated therein as follows: "In presenting its case to the Commission, the city authorities contended: * * * Secondly. That * * * a 50-cent minimum is excessive and a 25-cent minimum is sufficient. * * * At the hearing neither the complainant nor the defendant produced any convincing evidence tending to show either the reasonableness or unreasonableness of the 25-cent or the 50-cent minimum. The Commission delegated its own engineer, Mr. H. L. Gray, to make an independent investigation, and from the data obtained by him, in an examination into the details of the defendant company's business, it appears that a reasonable minimum charge to be applied uniformly to all consumers, whether on plain meters or on automatic prepaid meters, cannot be less than 42.9 cents per month. In calculating this minimum it was necessary for the engineer to make many assumptions of fact in the absence of a complete valuation of the defendant company's property. It is possible that a complete valuation of the plant and a thorough investigation into the revenues and operating expenses of the company might disclose facts sufficient to prove that the minimum could reasonably be somewhat higher or somewhat lower than the amount deduced by the Commission's engineer. From the evidence introduced the Commission is of the opinion that the complainant has failed to prove the unreasonableness of the minimum charge challenged, and that therefore, of necessity, this complaint must be dismissed."

The city, deeming itself and its citizens aggrieved thereby, caused the proceeding to be removed by a writ of review to the superior court for King county, seeking a reversal of the decision of the Commission and such disposition of the case as would result in adjudging the proposed increase to be unreasonable and the original charge reasonable. Hearing in that court was had upon the record made before the Commission, which, so far as we need here notice its language, reads as follows: "It is ordered, adjudged, and decreed that the said order of dismissal, in so far as the same relates to a minimum charge, be, and it is hereby, vacated, and said matter be, and it is hereby remanded to the Public Service Commission of Washington, with directions to proceed therein and require the Seattle Lighting Company to establish by a preponderance of evidence that any proposed increased minimum charge in excess of 25 cents per meter per month is just and reasonable, which just and reasonable rate shall continue in effect and not be exceeded until such time in the future

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as said Public Service Commission may of its own motion, or at the instance of said Seattle Lighting Company, or the city of Seattle or some third party in another proceeding, determine what is a fair, just, reasonable, and sufficient rate. In other respects the tariff of said Seattle Lighting Company, made effective by said Public Service Commission as of July 4, 1912, not being in question in these proceedings, is not disturbed." From this disposition of the case in the superior court, it is brought to this court by appeal, where reversal of the judgment of the superior court and affirmation of the decision of the Commission is sought.

The argument of learned counsel upon both sides of the controversy seems to be addressed largely to the question of burden of proof in the hearing before the Commission. Counsel for the city contend that the burden of proof as to the reasonableness of the proposed change in the minimum monthly rate was upon the lighting company at the hearing before the Commission, seeming to assume that its notice and filing of supplemental tariff sheet so showing is in substance an application to the Commission for permission to make such change, and that, when objection was made thereto by the city, such change would not become effective until it had been affirmatively proven that the same is reasonable and a decision rendered by the Commission affirmatively so determined. This, apparently, is the view adopted by the trial court. Counsel for appellants contend in substance that, the proposed change having been duly noticed and filed as provided by the Public Service Commission Law, the new rate automatically takes effect at the expiration of 30 days after the notice and filing thereof, subject only to temporary suspension thereof by the Commission pending an inquiry by the Commission as to its reasonableness and to a final decision upon such inquiry, affirmatively determining that the proposed new rate is unreasonable; that the burden of showing the reasonableness of the new rate is not upon the lighting company, but the burden of showing its unreasonableness is upon those attacking it; and that, while the inquiry may be instituted by the Commission upon its own motion, the Commission is not by law required to take the burden of proof from the complainant and cause proof to be brought before it upon its own motion to any greater extent than its discretion may dictate. As we understand the Commission, it assumed substantially this position. While it did delegate its own engineer to make an independent investigation touching the reasonableness of the new rate, and received his testimony upon the result of his investigation, and to that extent may be said to have treated its inquiry as being upon its own motion, it apparently concluded that further investigation upon its own motion was not called for, and was of the opinion that the evidence produced by

the city, which it treated as the complainant, together with that produced upon its own motion, did not show the new rate to be unreasonable. This, it concluded, called for a dismissal of the proceeding and allowing the new rate to automatically become effective.

The decision of the superior court is in substance that the Commission is by law required to affirmatively determine what reasonable rate the lighting company is entitled to charge, and that the Commission failed in its duty by merely determining negatively that the proposed new rate is not shown to be unreasonable, even though the evidence before it may not have been sufficient to call for an affirmative finding as to what rate is reasonable; the court's view apparently being that it was the duty of the Commission, upon its own motion, to cause such further evidence to be brought before it to enable it to affirmatively determine such reasonable rate as the lighting company was entitled to charge. The effect of the superior court's decision is to compel the Commission to carry on an inquiry upon its own motion to that point where it can, from the evidence produced before it, affirmatively find the amount of the reasonable rate chargeable by the lighting company. The questions presented in this branch of the case are somewhat involved and difficult of statement, but in their last analysis they amount to little else than this: Has the superior court the authority to compel the Public Service Commission to institute or carry on an inquiry upon its own motion? This, it seems to us, is the ultimate question involved, to which the question of burden of proof is really only incidental.

[1] The right of the lighting company to fix and change its rates is clearly recognized by the Public Service Commission Law, subject only to the limitations therein prescribed, as found in Laws 1911, at pages 558, 559, as follows:

"Sec. 26. All charges made, demanded or received by any gas company, electrical company or water company for gas, electricity or water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient."

"Sec. 27. Every gas company, electrical company and water company shall file with the Commission and shall print and keep open to public inspection schedules in such form as the Commission may prescribe, showing all rates and charges made, established or enforced, or to be charged or enforced."

"Sec. 28. Unless the Commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or in any rule or regulation relating to any rate, charge or service, or in any general privilege or facility which shall have been filed and published by a gas company, electrical company or water company in compliance with the requirements of the preced-

ing section, except after thirty days' notice to the Commission and publication for thirty days, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The Commission, for good cause shown, may allow changes without requiring the thirty days' notice by duly filing, in such manner as it may direct, an order specifying the changes so to be made and the time when it shall take effect."

It seems plain to us, from the reading of these provisions, that a proposed change in rates properly noticed and filed as provided in section 28 by a public service corporation, such as this lighting company, will automatically go into effect upon the expiration of the 30 days therein specified, unless suspended or adjudged unreasonable by the Public Service Commission, in the exercise of its authority, as provided by the following provisions of the Public Service Commission Laws of 1911, pp. 571, 592, 593, 594:

"Sec. 54. Whenever the Commission shall find, after a hearing had upon its own motion, or upon complaint as herein provided, that the rates or charges demanded, exacted, charged or collected by any gas company, electrical company or water company, for gas, electricity or water, or in connection therewith, or that the rules, regulations, practices or contracts affecting such rates or charges are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered, the Commission shall determine the just, reasonable, or sufficient rates, charges, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided."

"Sec. 80. Complaint may be made by the Commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission: * * * Provided, all grievances, to be inquired into, shall be plainly set forth in the complaint. * * * Upon the filing of a complaint, the Commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice

fixing the time when and place where a hearing will be had upon such complaint."

"Sec. 81. At the time fixed for the hearing mentioned in the preceding section, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or it may desire. The Commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the Commission shall make and render findings concerning the subject-matter and facts inquired into and enter its order based thereon."

"Sec. 82. Whenever any public service company shall file with the Commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the Commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justness thereof, and pending such hearing and the decision thereon the Commission may suspend the operation of such rate, fare, charge, rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the Commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the Commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days."

[2] These provisions, we think, lead to the conclusion that the question of the Commission entering upon an inquiry upon its own motion, or of the Commission of its own motion pursuing an inquiry beyond the evidence brought before it by the complaining and defending parties, where the inquiry is instituted at the instance of such complaining party, is one of discretion in the Commission, quite beyond the control of the courts. The logic of the assumption that the courts have power to compel the Commission to extend its inquiry beyond the evidence presented to it by contesting parties would also lead to the conclusion that the courts have power to compel the Commission to institute an inquiry as to the reasonableness of rates as upon its own motion, for whatever evidence is brought before the Commission, in addition to the evidence produced by the complaining and defending parties, must, of necessity, be such evidence as the Commission, upon its own motion, may cause to be brought before it. It seems to us to require but little argument to show that, while the Public Service Commission Law authorizes the Commission to institute and pursue an inquiry upon its own motion touching the

reasonableness of rates of a public service corporation, the Commission is the sole judge of when it will so institute and to what extent it will so pursue an inquiry. In determining this question, the Commission is not acting in any sense judicially, though it may be said to so act in weighing the evidence and reaching its final decision upon an inquiry. This apparently dual nature of its duties was noticed by us in *State ex rel. G. N. R. Co. v. Railway Commission*, 60 Wash. 218, 223, 110 Pac. 1075. Manifestly it is wholly impractical and beyond the proper sphere of the courts to assume to control in any degree this purely nonjudicial duty of the Commission. Any attempt on the part of the courts to do so would, it seems clear to us, be to enter the field of executive and administrative duties. Such would be clearly subversive of our theory of government. We are of the opinion that the superior court was in error in remanding the proceeding to the Commission and directing it to proceed in effect as upon its own motion. It is worthy of note here that no evidence offered by the city was excluded by the Commission.

[3] The question of burden of proof is, after all, not so very vital in this controversy. From what we have said so far, there does seem to be a sense in which the burden of proof is not upon the lighting company to show the reasonableness of its new rate. We apprehend, however, that the lighting company might have made a rate so clearly unreasonable and exorbitant that the Commission, or possibly even the courts, could judicially know that it was such. For instance, had the lighting company fixed its proposed new minimum monthly rate at, say, \$20, the Commission doubtless would have been warranted in requiring it to assume the burden of proving the reasonableness of such a rate, since facts within its judicial knowledge would doubtless lead it to decide such a rate to be unreasonable, in the absence of proof to the contrary. Another instance in which the burden of proof would probably be upon the lighting company is that contemplated by section 84 of the Public Service Commission Law, found on page 595, Laws 1911, reading as follows: "Sec. 84. Whenever the Commission shall find, after hearing had upon its own motion or upon complaint as herein provided, that any rate, toll, rental or charge which has been the subject of complaint and inquiry is sufficiently remunerative to the public service company affected thereby, it may order that such rate, toll, rental or charge shall not be changed, altered, abrogated or discontinued, nor shall there be any change in the classification which will change or alter such rate, toll, rental or charge without first obtaining the consent of the Commission authorizing such change to be made."

But we have no such extreme case before us as the former, nor does the present case fall

within the provisions of section 84, since it is apparent from the record before us that the original rate of the lighting company sought to be changed by it was not established by any order of the Commission but was manifestly the original rate made by that company, without any act on the part of the Commission other than to receive the filing of the schedule thereof. So it is apparent that the affirmative consent of the Commission to change that rate in the manner provided by section 28 was not required, though the Commission had the power to suspend and adjudge such new rate unreasonable and in that manner only prevent it becoming effective. The provisions of section 84 lend additional support to the view that the proposed new rate of the lighting company, which was properly noticed and filed, becomes automatically effective, subject to be defeated by the Commission only in the manner already indicated. We are of the opinion that the Commission did not err in proceeding upon the theory, if it did so proceed as counsel contend, that the burden of proof was not upon the lighting company to show reasonableness of its proposed new rate, though we think this question is not of very serious practical moment here.

[4] Some contention is made by counsel for appellants that, regardless of where the burden of proof lay in this controversy, the weight of the evidence establishes the reasonableness of the new rate proposed by the lighting company. A reading of the entire record furnishes plausible ground for this argument, in view of the recognized fact that such reasonableness cannot be measured with any great degree of exactness. The rule of such reasonableness is well stated by Commissioner Lane in *Advances in Rates Investigation—Western Case*, 20 Interst. Com. Com'n Rep. 307, 315, as follows: "The reasonableness of a rate is to be determined by no mere mathematical calculation, though figures of cost and revenue must play a not inconsiderable part in arriving at a final judgment. Wise men may differ as to what a 'just and reasonable rate' is under given conditions. The courts recognize that there is abundant play for what the present Chief Justice so admirably described as 'the flexible limit of judgment which belongs to the power to make rates.'" [*Atlantic Coast Line v. N. Car. Corp.* Com'n] 206 U. S. 26 [27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398]."

In view, however, of the language of our Commission's decision above quoted, which we have noticed is in form a negative finding that the evidence did not convince it that the proposed new rate is unreasonable, we will not review the evidence with a view to determining what it affirmatively shows as to the reasonableness of the new rate but will follow the contention of counsel for the city, which brushes aside this contention of counsel for appellants and asserts that "that ques-

tion is not involved in this appeal," arguing, as we have already noticed, that it was the duty of the Commission to pursue the inquiry upon its own initiative beyond the evidence produced before it by the city and the lighting company as the contending parties, which, as we have already noticed, it might do or not, as its discretion dictated, without control of the courts, regardless of what it might determine to do in that regard. But a further pursuing of counsel's contentions would only lead us back to the questions we have already discussed and reached a conclusion upon.

We do not find it seriously contended in the brief of counsel for the city that the evidence produced before the Commission was such as to call for an affirmative finding by the Commission that the proposed new rate is unreasonable or that the original rate is reasonable, but only that the Commission should have proceeded upon the theory either that the burden of proof was upon the lighting company to show the reasonableness of its proposed new rate, and, upon that theory, should have decided the original rate to be reasonable, or should have proceeded with the inquiry upon its own initiative and brought other evidence before it and made an affirmative finding of what rate is reasonable, based upon such evidence. Since, however, the contention here made by counsel for the city only looks to the affirming of the superior court's decision, which would result in remanding the proceeding to the Commission with directions to proceed with the inquiry as upon its own initiative, we need notice no other phase of this contention, and this, we think, has been disposed of by what we have already said.

We are of the opinion that the Commission was not by law required to pursue the inquiry beyond the evidence produced before it by the contesting parties, to wit, the city and the lighting company, to any greater extent than in its own judgment would be necessary or proper; that the courts cannot control the Commission's discretion exercised in deciding such a question; that the finding, negative in form, resulted in such new rate becoming automatically effective; and that the proposed new rate, noticed and filed by the lighting company, could not be impaired or rendered ineffectual except by temporary suspension thereof, pending a hearing as to its reasonableness, or by a final decision of the Commission determining the same to be unreasonable.

The judgment of the superior court is reversed, and the decision of the Commission is affirmed.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

LONGFELLOW et al. v. CITY OF SEATTLE.

(Supreme Court of Washington. Dec. 4, 1913.)

1. DEATH (§ 9*)—STATUTES—IMPLIED REPEAL. Laws 1909, c. 50, § 8, in effect ordering a monthly pension equal to half of the salary of a fireman dying in the service and leaving a widow and children under 16 years of age, to be paid to the widow for life, did not impliedly repeal the general statute giving a right of action for wrongful death.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 11; Dec. Dig. § 9.*]

2. ELECTION OF REMEDIES (§ 3*)—RIGHTS OF ACTION—ACTION FOR DEATH.

While Laws 1909, c. 50, § 8, providing for a monthly pension equal to half of the salary of a fireman dying in the service and leaving a widow and children under 16 years of age, to be paid to the widow for life, is not so broad as the general wrongful death statute, in a case in which recovery could be had under either statute, the respective remedies are separate and not cumulative, so that recovery under one in such case would prevent recovery under the other.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

3. DAMAGES (§ 87*)—EXEMPLARY DAMAGES—STATUTORY ACTION.

Exemplary damages are not recoverable in a statutory action for damages unless the statute expressly authorizes them.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 188-192; Dec. Dig. § 87.*]

4. MUNICIPAL CORPORATIONS (§ 200*)—CITY OFFICERS—FIREMEN—PENSIONS FOR DEATH—ADEQUACY OF COMPENSATION.

Where the amount of a pension paid monthly to a fireman's widow under the Firemen's Pension Act, Laws 1909, c. 50, § 8, is equal to interest at the statutory rate on a sum three times as great as that claimed by the widow in the complaint in an action against the city for the fireman's wrongful death, under the general death statute, it cannot be said that the compensation recoverable by her under the pension act is inadequate.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 547; Dec. Dig. § 200.*]

5. ELECTION OF REMEDIES (§ 14*)—EFFECT OF ELECTION.

The adoption of one remedy by one having the choice of several remedies bars his right to invoke another remedy.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 16; Dec. Dig. § 14.*]

6. ELECTION OF REMEDIES (§ 7*)—VALIDITY OF ELECTION.

Under the direct provisions of the Firemen's Pension Act, Laws 1909, c. 50, § 8, the daughter of a fireman losing his life in the performance of his duty is only entitled to a pension until she is 16 years of age, and loses her right thereto thereafter, so that the bringing of an action for a pension on behalf of a fireman's daughter older than 16 years was not an election to pursue that remedy so as to bar her from maintaining an action against the city under the general death act.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. § 7.*]

7. PLEADING (§ 214*)—ADMISSIONS.

The allegations of an answer, which was demurred to, in an action against a city for a fireman's death, that the fireman's widow had applied for a fireman's pension on behalf of her-

self and her daughter, and that both are estopped by accepting the benefits of the firemen's pension statute, are conclusions of the pleader, and the demurrer would not operate as an admission that the daughter accepted the benefits of the pension statute; since, being over 16 years of age, she could not receive a pension.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

8. PLEADING (§ 214*)—DEMURRER.

A demurrer admits only allegations of fact which are well pleaded, and, where the pleader attempts to set forth compliance with a statute, in passing on the demurrer the court will consider the allegations as intended to meet its provisions, though the facts demurred to may warrant another conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Florella Longfellow and others against the City of Seattle. From a judgment for defendant, plaintiffs appeal. Reversed in part, and remanded for further proceedings.

Dan Landon, Gay & Olson, and Milo A. Root, all of Seattle, for appellants. Jas. E. Bradford, R. S. Pierce, and Geo. A. Meagher, all of Seattle, for respondent.

FULLERTON, J. The Legislature of the state of Washington at its session of 1909 enacted a statute empowering incorporated cities and towns, having a paid fire department, to compensate firemen injured while in the performance of their duty, superannuated firemen, and the widow, children, and dependents of a fireman killed while in the performance of his duty, by a monthly payment in the form of a pension. The act provided that the fund from which the payments were to be made should be created in part by taxation and in part by a deduction of a "sum equal to one and one-half per centum of the monthly compensation paid each such member" of the fire department. The provisions of the statute specially to be considered here are found in the eighth section thereof, which section reads as follows: "Whenever any member of the fire department of such city or town shall lose his life while in the performance of his duty, leaving a widow, or child or children under the age of sixteen (16) years, then upon satisfactory proof of such facts made to it, such board shall order and direct that a monthly pension equal to one-half ($\frac{1}{2}$) the amount of the salary attached to the rank which such member held in said fire department at the time of his death, shall be paid to such widow during her life, or if no widow, then to his child or children until they shall be sixteen (16) years of age: Provided, if such widow or child or children shall marry, then such person so marrying shall thereafter receive no further pension from such funds: Provided, however, should there be no wid-

ow or children, then said pension may be paid to his parents or unmarried sister or sisters, or minor brother or brothers dependent upon him." Laws 1909, p. 91, § 8. The city of Seattle by ordinance duly enacted made the act operative within that city. The ordinance follows in substantial detail the provisions of the legislative act, and provides for the payment to the beneficiaries named therein the maximum compensation permitted thereby.

On November 26, 1910, one J. N. Longfellow, a member of the fire department of the city of Seattle, while returning from a fire riding in a fire wagon belonging to the city, was thrown from the wagon to the ground, and received injuries from which he subsequently died. The fall was caused by the wagon running into an excavation which had been made in the street over which the wagon was passing; the same having been left uncovered and unguarded in any manner. The appellant Florella Longfellow is the widow of J. N. Longfellow, and the appellant Myrtle Longfellow is his daughter. At the time of her father's death the daughter was between her sixteenth and seventeenth year. Shortly after her husband's death Florella Longfellow applied to the city of Seattle for the pension provided for by the act and ordinance above cited. Her application was granted, and she has been paid and has received out of the fund created in pursuance of the provision of the act and ordinance, since the month of January, 1911, a monthly payment of \$62.50 per month; the same being equal to one-half the salary attached to the rank her husband held in the fire department at the time of his death. The appellant conceived also that the death of her husband was caused by the wrongful and negligent act of the city, and on December 21, 1910, filed a claim in damages with the city council of the city of Seattle in the sum of \$10,000 on behalf of herself and her minor children, of whom she named three; the appellant Myrtle being one of such children. The claim was rejected by the city, and in September, 1911, the present action was commenced to recover under the statute relating to the recovery of damages for death by wrongful act. Two causes of action are stated in the complaint. The widow sues in her own right for the sum of \$8,500, and as guardian ad litem of her daughter Myrtle for the sum of \$1,500. The city in answer to the complaint put in issue certain of its allegations, and as an affirmative defense set up the statute and ordinance before mentioned and the fact that the appellant had applied for, obtained and accepted the compensation for which they provided; averring that such application was made for and on behalf of herself and her minor daughter Myrtle, and that such compensation was made with the understanding

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and agreement of all the parties thereto that it was in lieu of all actions, causes of actions, or claims that the appellants or either of them might have against the city of Seattle because of the accident causing the death of J. N. Longfellow. A demurrer was interposed to the answer which the trial court overruled. The appellants elected to stand on the demurrer and refused to plead further, whereupon the court entered a judgment dismissing the action. From such judgment this appeal is prosecuted.

[1] The parties have filed in the record a written stipulation reciting that the only question presented to the trial court, and to be presented on this appeal, is whether or not the acceptance by the widowed appellant of the pension money under the statute ordinance above referred to estops the appellants, or either of them, from maintaining an action in damages under the general statute relating to deaths caused by wrongful acts. The record, however, does not further disclose the grounds upon which the trial court rested its decision, except as the same may be gathered from the briefs of counsel. The appellants have assumed in their brief that the sole question is whether or not the pension statute superseded the general statute, and their entire brief is devoted to a combat with that idea.

With the contention that the pension act does not supersede or repeal the general statutes, either in whole or in part, we think we may safely agree with the appellant. There is no express repeal of the one by the other, and the later act is clearly not so far inconsistent with the earlier one that a repeal must necessarily be implied.

[2] But, in so far as the right of the widowed appellant to maintain the present action is concerned, we think there is a ground upon which the judgment can rest. An examination of the statutes will show that there are deaths from wrongful acts cognizable under the general statutes that are not provided for under the pension act, and that the pension act authorizes the payment of pensions for deaths for which no recovery can be had under the general statute. But in so far as they do coincide, we think they were intended to afford separate and coexistent remedies, permitting but one recovery for the one death rather than cumulative recoveries. It will be remembered that no action lay to recover for the death of another at the common law, but that the right is wholly statutory.

[3] It will be remembered, also, that in this state exemplary or punitive damages are not recoverable unless expressly so provided by statute, and that neither of these statutes provide for exemplary or punitive damages. The purpose of the statutes, then, is compensation for the wrong suffered. They are wholly remedial, and since it is not the policy of the law to compensate twice for the same wrong, we think it must follow

that the acceptance of the benefits provided by the one is a bar to the pursuit of the other.

We are aware that the appellant argues that the pension fund does not afford adequate compensation for the wrong suffered which is sued for in the instant case; that it is but a "half loaf"; and that it could not have been the intention of the Legislature for this reason, if for no other, to confine the injured person to a choice of remedies. But if we were to accept the premise here laid down as controlling, we could not adopt the conclusion drawn therefrom. The right of recovery being dependent upon the statute, it is within the power of the Legislature to limit the amount of the recovery to any sum it sees fit. The power to deny a recovery altogether includes the power to deny it in part—the power to limit the recovery—and the courts are bound to presume that any amount of recovery fixed by the Legislature is adequate for the wrong suffered.

[4] We cannot, however, accept the premise here assumed. In our judgment the pension awarded is compensatory. The amount paid monthly is equal to interest at the statutory rate on a sum of money practically three times as great as the widowed appellant herself lays in her complaint as the measure of her loss, and, if she lives through the period of her expectancy of life as shown by the mortality tables and complies with the terms of the statute, she will be paid a sum equal to practically double the sum she lays therein. This is a substantial award, and, if the question is one of law at all, it cannot be said to be legally inadequate.

[5] For authority on the proposition that the adoption of one remedy by a person having a choice of remedies bars the right to invoke another, we need not look beyond our own cases. It was so held in *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208; *Gaffney v. McGrath*, 23 Wash. 476, 63 Pac. 520; *Babcock, Cornish & Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713; *Gabrielson v. Hague Box & Lumber Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. Rep. 1032; and in *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

On the question whether the remedies here afforded are inconsistent rather than cumulative, our attention has been called to no case precisely in point. Cases which seem to us analogous in principle, however, are found in the cases construing the effect of the acceptance of so-called relief funds provided for the benefit of their employes by certain of the great transportation companies. The funds there under consideration were accumulated under the direction of the company from the employes desiring to participate therein, and by donations to the funds by the companies themselves whenever the contributions of the employes proved insufficient to meet the charges against them. They were paid out in definite amounts to sick and disabled employes during the time of their in-

capacity, and to such of their personal representatives as they might direct in the event of their death. In construing the effect of an acceptance of benefits from the fund by a beneficiary thereunder, the courts with substantial uniformity hold that it is in effect an election of remedies, and operates as a bar to an action against the transportation company for an injury caused by its negligent acts. See *Eckman v. C., B. & Q. R. Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750, and the cases there collected.

The case of *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 Pac. 843, is not in point on the principle here involved. In that case it was held that a policeman, who had been injured by the negligent act of a taxicab company, could maintain an action against the company notwithstanding he had received the benefits allowed him under the policeman's pension fund created by the city of Seattle. The distinction between the cases lies in the fact that the wrong there committed was by a person who had nothing to do with the creation of the benefit fund while here the injured person is seeking compensation from the very person who has already reimbursed her for the wrong suffered. While the funds from which the payments are made were contributed to by the deceased fireman in this instance, as they were by the injured policeman in that, the city is also a contributor to the fund; indeed, the city contributes all but an inconsiderable part of the fund, and to allow a recovery is to allow two recoveries from the wrongdoer for the same wrong. As we have heretofore said, such is not the policy of the law. We conclude therefore that the judgment in question is free from error in so far as it affects the right of the widowed appellant to recover.

[6] We think, however, the judgment is erroneous in so far as it denies the right of recovery on the part of the daughter. By an examination of the eighth section of the pension act before quoted, it will be observed that the daughter is not a participant of the pension fund, and can in no manner become a participant thereof. Incongruous as it may seem, the right of a deceased fireman's children to the benefit of the fund ceases at the age of 16 years, whether dependent or not, while dependent parents, a dependent sister of any age, and even dependent brothers until they reach the age of majority, may have the benefit of the fund. Since therefore the statute in no way affects the daughter, and since she is given a right of action under the general statute for a wrong causing the death of her father, we see no reason for depriving her of her right in the present case.

[7] We have not overlooked the fact that it is alleged in the answer to which the demurrer was interposed that the application of the mother for the pension was made on behalf of herself and her daughter, and that

both are estopped by an acceptance of the benefits of the statute; but these are but the conclusions of the pleader. They are not to be taken as literally true from the fact that the daughter demurred to the answer.

[8] A demurrer admits only the allegations of fact that are well pleaded; and, where the pleader attempts to set forth a compliance with a statute, the court will look to the statute and take the allegations of the complaint as intended to meet its provisions, and measure the rights of the parties as they are affected by the statute, notwithstanding the statements set forth in the pleading concerning such rights may warrant another conclusion. Here, as we say, the daughter could not participate in the pension fund. Anything that was paid thereunder inured to the benefit of the mother. The daughter therefore has an action in her own right which may be prosecuted by her mother as her guardian ad litem.

The judgment is reversed in so far as it affects the cause of action on behalf of the minor appellant, and remanded for further proceedings in accordance with this opinion.

CROW, C. J., and MORRIS, MAIN, and ELLIS, JJ., concur.

LORETTO LITERARY & BENEVOLENT SOCIETY v. GARCIA et al.

(Supreme Court of New Mexico. June 7, 1913.
On Rehearing, Dec. 3, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 249*)—AMENDMENTS DURING TRIAL—EJECTMENT.

In permitting amendments, upon the trial, the court is limited by Comp. Laws 1897, § 2685 (subsection 82, Code of Civil Procedure) to such amendments as do not change "substantially the claim or defense." Held, that the trial court was without authority, in an action in ejectment, to permit the filing of a trial amendment for specific performance of a contract to convey real estate, as such amendment introduced a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 707, 708, 710-729; Dec. Dig. § 249.*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 835*)—REHEARING—SCOPE.

Appellee's contention that appellants waived their objections to the amended complaint in ejectment by filing an answer thereto could not be considered on rehearing, when not raised up on the first hearing of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3243; Dec. Dig. § 835.*]

3. PLEADING (§ 237*)—AMENDMENT—CONFORMITY TO PROOF—"CLAIM."

The word "claim" as used in Comp. Laws 1897, § 2685 (Code Civ. Proc. subsec. 82), providing that a court may, before final judgment, amend any pleading or proceeding to conform to the facts proved if it does not substantially

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

change the claim or defense, is synonymous with "cause of action."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*

For other definitions, see Words and Phrases, vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

Appeal from District Court, Sandoval County; before Justice H. F. Reynolds.

Action by the Loretto Literary & Benevolent Society against Meliton Garcia and others. From judgment for plaintiff, defendants appeal. Reversed.

Felix H. Lester and N. B. Field, both of Albuquerque, for appellants. F. W. Clancy, of Santa Fé, and Marcos C. de Baca, of Bernalillo, for appellee.

ROBERTS, C. J. [1] The original complaint in this case contained the ordinary allegations of a suit in ejectment; plaintiff alleging, among other things, that it was the owner and seised in fee of the property therein described. After the evidence was all adduced, appellee filed a trial amendment, by leave of court, over appellant's objection, retaining all the original complaint, and adding thereto paragraphs 3, 4, and 5, in which it alleged, in substance, that the deed from Barbara Leal de Garcia to Barbara Aragon de Montoya, upon which it relied to prove its title, was void because the husband failed to sign it, but claiming that plaintiff was entitled to a deed for the premises in question from the appellants by virtue of a contract made between them and Mrs. Montoya, by which they agreed to deed her the property for \$600, which she had paid them, and praying that appellants be compelled to execute a deed to appellee for the premises, and that it be given a judgment for the possession of the same. By the trial amendment filed, it appears that appellee sought to set up facts entitling it to specific performance of an oral contract to convey real estate, and to secure such relief, by trial amendment to a complaint in an ejectment suit. The question presented is as to the power of the trial court to permit such an amendment upon the trial of the case, over objection timely interposed. The solution of the question depends upon the proper construction of subsection 82, § 2635, C. L. 1897, which reads as follows: "The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations, material to the case, or, when the amendment does not change substantially the claim or defense, by confirming the pleading or proceeding to the facts proved."

[3] It will be observed that the section quoted limits the power of the court to permit a trial amendment to such an amend-

ment as "does not change substantially the claim or defense." In the case of *Ellis v. Flaherty*, 65 Kan. 621, 70 Pac. 585, the Supreme Court of Kansas construed the word "claim" in a code provisions, apparently identical with subsection 82 supra, and held that "the word 'claim,' as therein used, was synonymous with 'cause of action.'" This being accepted as a correct interpretation of the meaning of the word, it necessarily follows that the trial court is only authorized to permit such an amendment upon the trial of the cause, "by conforming the pleadings or proceedings to the facts proved," as does not introduce a new cause of action or substantially change the cause of action upon trial. This being true, it would follow that if the facts herein alleged, in the amendment offered, constituted a new cause of action, the court erred in permitting it to be filed, for it is uniformly held that no amendment of a complaint can be allowed upon the trial which introduces into the case a new cause of action. *Patrick v. Whitley*, 75 Ark. 465, 87 S. W. 1179, and see note to case in 5 Ann. Cas. 672, where the authorities are collected.

In support of the right to file the trial amendment, the appellee relies upon the case of *Pfister v. Dascey*, 65 Cal. 403, 4 Pac. 393, and similar cases, holding that: "All the matters complained of related to the same property, were parts of one design to defraud, and affected all the parties who defended the action. Under these circumstances, we see no reason why an action to set aside the conveyances averred to be fraudulent, and to recover possession of the land to which such conveyances related, should not be prosecuted in the same action. This is certainly permissible under our system. Resort has been frequently had to such procedure in cases of mines where an action to enjoin the working of the mines and to recover possession of them, have been joined." Other cases upon which it relies are: *Bidwell v. Insurance Co.*, 16 N. Y. 283; *Water Co. v. Flume Co.*, 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839; *Tottle v. Kent*, 12 Okl. 674, 73 Pac. 310. We have examined all these cases, and find that they deal with joinder of causes of action in the same complaint, and not with the power of the court to permit the introduction of a new and different cause of action upon the trial by amendment. They are all based upon code provisions, similar to subsection 33 of the New Mexico Code of Civil Procedure, which is as follows: "The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: First. The same transaction or transactions connected with the same subject of action." By this provision it will be observed that the lawmaking power recognized

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that several causes of action might arise out of the "same transaction or transaction connected with the same subject of action," and that such causes of action could all be joined in the same complaint. Under this provision of the Code, undoubtedly the facts set forth in the amendment in this case could have been joined with the possessory action originally, for the subject of the action in the possessory action was the land and the plaintiff's title, taken together, and any transaction connected with either the land or the title would be connected with the subject of action. *McArthur v. Moffett*, 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (N. S.) 264.

In the case last cited, which is perhaps the best-reasoned case that can be found on the proper construction of the code provision last quoted, the court held that a statutory action to quiet title and a common-law action to recover damages for trespass upon the property involved could be joined under the statute permitting the joinder of causes of action which arose out of transactions connected with the same subject of action. In that case, however, the court recognizes that two causes of action exist, for it says: "We have before us two causes of action, one by the owner of certain lands to prevent the further assertion of a wrongful claim of title to those lands, and another to recover for a wrongful entry on the same lands by the same persons." Upon the same reasoning, in the case now under consideration, the amended complaint would present two causes of action—one to recover possession of lands, with damages, and the other to secure specific performance of an oral contract to convey, by warranty deed, the same lands. This being true, the amended complaint would necessarily introduce into the cause, upon the trial, a "new cause of action," not permissible as a trial amendment.

As was said in the case of *Louisville & N. R. Co. v. Pointer's Adm'r*, 113 Ky. 952, 69 S. W. 1108, "A plaintiff will not be allowed to amend his cause of action by changing it. The office of the amendment is to perfect or complete that which is begun that is incomplete."

In the case of *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852, the court say: "An amended bill must not introduce another and different cause of suit from that of the original bill. But an amended bill is no departure from the original if it tend to promote a fair hearing of the matter of controversy on which the suit was originally really based, provided it do not introduce a new substantive cause of suit different from that stated, and different from that intended to be stated, in the original bill. An amended bill cannot be allowed containing statements inconsistent with the nature of the original bill or changing the cause of suit. By its allegations may be changed or modified, and others add-

ed, provided the identity of the cause of suit be preserved." See, also, *Edgell v. Smith*, 50 W. Va. 349, 40 S. E. 402; *Snead v. McCoull et al.*, 12 How. 407, 13 L. Ed. 1043; 31 Cyc. 409; 1 Ency. Pl. & Pr. 548; *Zoller v. Kellogg*, 66 Hun, 194, 21 N. Y. Supp. 226; *Ellis v. Flaherty*, *supra*.

Various tests have been applied, by the courts for the purpose of determining whether a new cause of action is presented by way of amendment. The following will be found stated in 31 Cyc. 417: "(1) If the cause of action in the suit is regarded as the act or thing done or omitted to be done, whether the amendment sets out a new act or thing as the cause of action, or whether it states in a different form the original act or thing as the cause; (2) whether the intention of the plaintiff at the time of instituting the suit and filing the amendment is the same; (3) whether a recovery on the original pleading would be a bar to a recovery on the amended one, or vice versa; (4) whether both the original and amended pleadings are subject to the same plea; (5) whether the same measure of damages is applicable to both pleadings; and (6) whether it would require substantially the same evidence to support the action after the amendment as before."

Tested by these rules it would be manifest that the amendment herein permitted introduced a new cause of action; for the reason stated the trial court erred in permitting the filing of the trial amendment, and the cause will therefore be reversed, with instruction to the district court to sustain the appellant's motion to strike the trial amendment from the files, and it is so ordered.

HANNA and PARKER, JJ., concur.

On Rehearing.

ROBERTS, C. J. A rehearing was granted in this cause, because of appellee's insistence, supported by a well-prepared brief, that the court had erred, in its former opinion, in holding that the amendment was not permissible, as a trial amendment, because it introduced a new cause of action, and a desire on the part of the court to reinvestigate the question. By subsection 96 of section 2685, C. L. 1897, the court is enjoined "so to construe the provisions of law relating to pleading and amending the same, and so to adapt the practice thereunder * * * and to afford known, fixed and certain requirements in place of the discretion of the court or the judge thereof"; and, mindful of this injunction, in the construction of subsection 82, it is apparent we should not adopt appellee's construction, unless clearly warranted by the adjudications of other courts, or upon reason such construction appeared to be warranted by the language of the section. If the construction contended for were adopted, the only limitation upon the power of the trial court to permit the amendment to be made would be that it

must not introduce a new cause of action, not related or connected with the subjection of action. In other words, a party by amendment might introduce any cause of action, which he might have originally united in the same complaint with that upon which the trial was proceeding, where they arose out of the same transaction, or transactions connected with the subject of action, subject, of course, to the discretion of the trial court to permit the amendment. In support of his contention, counsel for appellee has cited many authorities, which he contends support his contention, but a review of the cases will, we think, show that in the main they do not conflict with the former opinion in this case, but many of them tend rather to support the reasoning of the court.

The first case relied upon is *Steele v. Brazier*, decided by the Springfield Circuit Court of Appeals, and reported in 139 Mo. App. 319, 123 S. W. 477. In that case, however, the amendment was not made during the trial, but prior to the trial, and the statute there discussed was section 593, Rev. St. 1899 (Ann. St. 1906, p. 619), which is substantially the same as subsection 33 of our Code of Civil Procedure, and relates solely to causes of action that may be united in the same petition. The court uses the following language, which is quoted by appellee: "The plaintiff cannot be allowed to introduce an entirely new cause of action, but may, by amendment, introduce such additional causes of action as under the provision of the statute could be united in the same petition. Such is the general rule in those states that have adopted the modern codes of pleading and practice." The language of the court is not entirely clear, but what it evidently intended to hold was that the plaintiff could not introduce an entirely new subject of action, but so long as the causes of action arose out of "the same transaction or transactions connected with the same subject of action" there was no objection to their being brought in by amendment necessarily, prior to trial; for that was the question under consideration, and not a trial amendment. The distinction between amendments made prior to trial and those made upon the trial and after the evidence has been heard, or a portion of the evidence, is clearly pointed out by St. Louis Court of Appeals, in the case of *Robertson v. Springfield Ry. Co.*, 21 Mo. App. 633. There an amendment had been filed after a reversal of the cause on appeal and remand, which the trial court, upon motion, struck from the files, for the reason that the plaintiff thereby sought to change the cause of action. The action of the lower court was based upon a code provision identical, apparently, with subsection 82 of our Code, which the Court of Appeals held had no application to an amendment made prior to trial. The court say: "It is easily perceived that the limita-

tion, 'when the amendment does not change substantially the claim or defense,' applies exclusively to a case of 'conforming the pleadings or proceeding to the facts proved.' Such a case can only exist after the evidence has been heard. * * * The cases cited for the defendant have no application to an amendment made upon leave, before or pending the trial. In *Parker v. Rodes*, 79 Mo. 88, the evidence had been submitted and closed, when the amendment introduced a new and different cause of action. This was of course improper under the statute, and was so held."

The case of *Courtney v. Blackwell*, 150 Mo. 245, 51 S. W. 668, is also cited and relied upon, but that was an amendment made prior to trial, and the distinction pointed out by the Circuit Court of Appeals in the last case applies.

The case of *Erskine v. Markham*, 84 S. C. 267, 66 S. E. 286, supports appellee's contention. There the amendment was made after considerable testimony had been taken, and while the cause was still under reference, and complaint was made that the amendment entirely changed the original cause of action and substituted a new one. The court say: "As we cannot say the amendments were not in furtherance of justice, we must affirm the judgment of the circuit court. Since the case of *Taylor v. Railroad Co.*, 81 S. C. 574, 62 S. E. 1113, it must be regarded as settled that even a new cause of action may be inserted by way of amendment, if it be done in furtherance of justice." The above-quoted excerpt contains all that is said in the case on the subject, and it is evident that the court based its decision entirely on the case cited. A study of the case referred to will disclose that no such doctrine was announced, but, on the contrary, it was distinctly stated: "The limitation of the power of amendment to conform the pleadings to the facts proved that the amendment shall not change substantially the claim or defense is by its terms applicable only to amendments proposed while the court is hearing the evidence, or after it has heard it, and not before the trial." The amendment there was made after the cause had been reversed on appeal and remanded for a new trial, and prior to the trial, and was not a trial amendment.

Another South Carolina case is also relied upon (*Booth v. Langley Co.*, 51 S. C. 412, 29 S. E. 204), but the court in that case upheld the amendment upon the ground that it did not substantially change the claim of plaintiff. The court say: "The only question is, Did the circuit judge have the power to grant the amendment during the progress of the trial? He seems to have supposed that the amendment would substantially change the claim of plaintiff, or, to use his own language, would make 'an entirely new case and a new answer.' If that were so,

then he would have been right, as he could not, during the progress of the trial, grant an amendment which would substantially change the plaintiff's claim." The court then reviews the South Carolina cases, citing many which support the views of this court in the former opinion, all of which it approves.

In another South Carolina case (*Birt v. Southern Railway Co.*, 87 S. C. 239, 69 S. E. 233), an action was brought against a railroad company for damage to property caused by fire communicated from a railroad engine with an allegation of negligence, and it was held that it would be proper to amend the complaint during trial, after evidence had been taken, by striking out the allegation of negligence so as to make the action one under section 2135 of the Code of 1902 which made railroad corporations liable for damage by fire communicated by its engines without regard to the question of negligence. The decision is based entirely upon *Brown v. Railroad*, 83 S. C. 557, 65 S. E. 1102. In *Brown v. Railway*, the opinion was written by Justice Woods, who held that the amendment could not be made, under the Code, as it "substantially changed the claim," and many cases are cited supporting his conclusion. Two justices dissented, which made the dissenting opinion the law of the case, holding that the amendment was properly permitted, but no reason is given further than a statement that "such amendments are within the discretion of the circuit judge, and where, as here, there has been no abuse of discretion, this court should not interfere," and no authority is cited in support of the holding. Indeed, many decisions of South Carolina are to the contrary.

The case of *Gannon v. Moore*, 83 Ark. 196, 104 S. W. 139, is not in point, as the question there involved was not the power of the court to permit a trial amendment. There is nothing to show when the amendment was made, and the only question considered was the "tolling of the statute of limitations till the filing of the amendment."

Four Kentucky cases are cited (*Insurance Co. v. Strain* [Ky.] 70 S. W. 274; *Duckwall v. Brooke* [Ky.] 65 S. W. 357; *Adams Oil Co. v. Christmas*, 101 Ky. 564, 41 S. W. 545; *Young v. McIlhenny* [Ky.] 116 S. W. 728), but in each of these cases the amendment was made before the trial. In the first case cited, the amendment was upheld on the ground "that it did not state a new cause of action, as the relief sought by both involves the same question, depends upon the same evidence, and to which the same defense would generally arise." And the Kentucky Code contains a provision, not found in our Code, which would seemingly imply that it was not the intention to limit amendments to the same cause of action. The provision reads as follows: "Courts may permit amendments authorized by this chapter to

be made without being verified, as prescribed in section 142, unless a new and distinct cause of action of defense is thereby introduced." [Civ. Code Prac. § 139.]

The following Iowa cases are cited and relied upon by appellee: *Newman v. Insurance Association*, 76 Iowa, 56, 40 N. W. 87, 1 L. R. A. 659, 14 Am. St. Rep. 196; *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Hanson v. Cline*, 142 Iowa, 187, 118 N. W. 754; *Barnes v. Hekla Ins. Co.*, 75 Iowa, 11, 39 N. W. 122, 9 Am. St. Rep. 450. In these cases, however, the amendments were made prior to trial. It is true, however, that the court, in passing upon the question uses language which might reasonably be held to apply to amendments offered during trial. That court has given a very liberal construction to the statute, but our attention has been called to no case where upon the trial it has permitted an amendment to be made which "substantially changed the claim or defense." The distinction between amendments before trial and during or after trial is clearly pointed out by that court in the case of *Taylor v. Taylor*, 110 Iowa, 207, 81 N. W. 472, and with this distinction in view it can hardly be said that the cases relied upon by appellee apply to the question involved in this case. The court, after setting out the Code provisions, which is apparently identical with subsection 82, say: "The clause 'when amendment does not change substantially the claim or defense' has reference solely to 'conforming the pleadings or proceedings to the facts proved,' and does not limit the portion of the section proceeding." From this it will be seen that the court draws a distinction between amendments which may be made prior to trial and those which may be introduced upon the trial.

Some few states hold that an amendment introductive of a new cause of action is allowable at any stage of the trial, but such holding is in direct conflict with the decisions of a great majority of the states. 31 Cyc. 411.

Appellee further contends that no new cause of action was introduced, and cites several cases which, it is claimed, supports this theory. The one most directly in point is the cause of *Pavlovski v. Klasing*, 134 Ga. 704, 68 S. E. 511. It must be admitted that there is a great deal of confusion, in the decided cases, as to what is a "new cause of action," due largely, we think, to a failure to differentiate between "subjects of action" and "cause of action." The distinction is clearly pointed out in the case of *McArthur v. Moffett* (cited in the former opinion) by the Wisconsin court, and, in our opinion, disposed of this contention.

[2] Appellee next urges that appellants waived their objection to the amended complaint by filing an answer to it. This point, however, not having been raised upon the

first hearing of the case, will not be considered upon rehearing.

For reasons stated, we adhere to our former opinion.

HANNA and PARKER, JJ., concur.

**IOWA STATE SAVINGS BANK v.
HENRY et al.**

(Supreme Court of Wyoming. Dec. 9, 1913.)

1. BILLS AND NOTES (§ 452*)—ACTIONS—DEFENSES.

It was a defense to an action on notes that they were given in payment for a stallion sold upon false representations and guaranty, that had failed, where plaintiff was not an innocent holder, but took the notes with knowledge of the transaction, fraud, and false representation by which they were obtained.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1303, 1352-1364, 1367-1376; Dec. Dig. § 452.*]

2. PLEADING (§ 354*)—MOTIONS TO STRIKE—PLEADING GOOD IN PART.

Where an answer contained both an answer and a counterclaim, and stated facts sufficient to constitute a defense, a motion to strike it out, directed to the answer as a whole and not to the different parts thereof, was properly denied.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 354.*]

3. NEW TRIAL (§ 128*)—MOTION—SPECIFICATION OF ERRORS.

A motion for a new trial on the grounds of errors of law occurring at the trial and excepted to by plaintiff, and other manifest errors apparent upon the face of the record, does not definitely direct the court's attention to the cause of complaint, and is insufficient.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

4. APPEAL AND ERROR (§ 706*)—RECORD—MATTERS TO BE INCLUDED.

Under Comp. St. 1910, § 4598, providing that, when an exception is taken to the opinion of the court on a motion for a new trial because the verdict or finding is against the law or the evidence, the party excepting must reduce his exception to writing and present it to the court or judge for allowance, the denial of a motion for a new trial on the ground that the evidence is insufficient to support the verdict and that the verdict is contrary to law cannot be considered unless all the evidence given upon the trial is incorporated in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. § 706.*]

5. APPEAL AND ERROR (§ 938*)—RECORD—PRESUMPTIONS.

Where neither the bill of exceptions nor the trial judge's certificate thereto recited that all the evidence was incorporated therein, the certificate merely reciting that it contained all the material evidence, it could not be presumed, as against the presumption of regularity in the proceedings leading up to the judgment, that all the evidence was incorporated in the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795-3803; Dec. Dig. § 938.*]

6. APPEAL AND ERROR (§§ 900, 1032*)—BURDEN OF SHOWING ERROR.

The proceedings in the trial court are presumed regular, until the contrary is shown, and the plaintiff in error must make an affirmative

showing of prejudicial error to entitle him to a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3867-3869, 4047-4051; Dec. Dig. §§ 900, 1032.*]

7. APPEAL AND ERROR (§ 301*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL.

Under Supreme Court rule 13 (104 Pac. xiii), providing that nothing which could have been properly assigned as a ground for a new trial in the court below will be considered by the Supreme Court unless it shall appear that it was properly presented to the court below by such a motion which was overruled and an exception reserved, alleged errors in giving and refusing instructions could not be reviewed where such rulings were not made grounds in the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.*]

Error to District Court, Uinta County; David H. Craig, Judge.

Action by the Iowa State Savings Bank against Joseph Henry and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. S. Spence, of Evanston, and T. L. Glenn, of Montpeller, Idaho, for plaintiff in error. P. W. Spaulding, of Evanston, for defendants in error.

SCOTT, C. J. This action was brought in the district court of Uinta county by the plaintiff in error, as plaintiff, against Joseph Henry and others, as defendants, to recover as indorsee on two several promissory notes and interest thereon. The case was tried to a jury, which found for and returned a verdict in favor of the defendants, and the plaintiff brings the case here on error.

The answer consisted of an answer and counterclaim, to which plaintiff filed a demurrer upon the grounds: "First, that the answer does not state facts sufficient to constitute a defense"; and, "second, that the alleged counterclaim does not state facts sufficient to constitute a cause of action." The court overruled this demurrer, and such ruling is here assigned as error.

[1] The petition contains two causes of action upon separate promissory notes each dated April 18, 1908, signed, executed, and delivered by the defendants to C. H. Hurd, whereby for value received they promised to pay \$875 on or before April 18, 1909, and \$875 on or before April 18, 1910, respectively, with interest at 8 per cent. per annum until paid, payable at the First National Bank of Evanston, Wyo., and it is alleged for a valuable consideration before maturity both notes were indorsed to plaintiff. The answer alleged that the notes were executed and delivered in payment for a stallion sold to defendants upon false representations and guaranty that had failed as to said stallion, and denied that plaintiff was an innocent holder, but took the notes with knowledge of the transaction,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fraud, and false representation by which they were obtained. We think the answer stated facts sufficient to constitute a defense and that the demurrer was properly overruled.

[2] A motion to strike out the answer and counterclaim was made which the court overruled. This ruling is assigned as error. It will be observed that this motion is not directed to different parts of the answer, but to the answer as a whole. We have already held that the answer did state facts sufficient to constitute a defense and to strike out the answer in its entirety would manifestly be unjust. This motion was properly denied.

It is assigned as error that the court erred in overruling the motion for a new trial. Omitting the caption and signatures, the motion is in words and figures as follows: "Comes now the plaintiff in the above-entitled action and moves the court to set aside the verdict of the jury, for the following reasons, to wit: For the following irregularities: (1) Insufficiency of the evidence to justify the verdict of the jury. (2) That said verdict of the jury is contrary to law. (3) Errors of law occurring at the trial and excepted to by the plaintiff. (4) And for other manifest errors apparent upon the face of the record."

[3] The third and fourth grounds of this motion are each insufficiently stated, and for that reason did not definitely direct the court's attention to the cause of complaint. *C. B. & Q. R. Co. v. Morris*, 16 Wyo. 308, 93 Pac. 664; *Wilson v. O'Brien*, 1 Wyo. 42; *Boburg v. Prah* et al., 3 Wyo. 325, 23 Pac. 70. It was said by this court, in *Dickerson v. State*, 18 Wyo. 440, 111 Pac. 863, 116 Pac. 451, that "it has been uniformly held by this court that such a specification is too general and indefinite to show that the question was brought directly to the attention of the court below."

[4-6] The first and second grounds of the motion, to wit, that the evidence is insufficient to support the verdict and that the verdict is contrary to law, can only be considered upon all the evidence given upon the trial and which evidence should be incorporated in the bill of exceptions. Section 4598, Comp. Stat. 1910. Such has been the uniform holding of this court. The certificate of the trial judge to the bill in this case recites that it "contains all of the material evidence offered, given, and introduced in said cause," and it does not appear anywhere in the bill, by recital or otherwise, that it contains all the evidence given upon the trial. It was incumbent upon the plaintiff in error to make an affirmative showing of prejudicial error in order to entitle it to a reversal of the judgment. The presumption of the regularity of the proceedings in the trial court is indulged until the contrary is shown. It is apparent that to entitle one to a review upon

an assignment of insufficiency of the evidence to support the verdict it is essential that all the evidence be incorporated in the bill. In the absence of a certificate of the trial judge so reciting, or a recital in the bill to that effect, there is no presumption that it does as against the presumption which obtains in favor of the regularity of the proceedings leading up to such judgment. The bill being incomplete in this respect, the first and second assignments contained in the motion for a new trial cannot be here considered.

[7] It is here urged that the court erred in refusing to give certain instructions requested by plaintiff and in giving certain instructions requested by the defendants. None of these rulings was made a ground in the motion for a new trial and for that reason, under rule 13 (104 Pac. xiii), cannot be considered.

It follows that the judgment must be affirmed.

Affirmed.

BEARD, J., concurs. POTTER, J., being ill, did not sit.

LOSANO v. STATE.

(Supreme Court of Arizona. Dec. 9, 1913.)

1. HOMICIDE (§ 268*)—TRIAL—JURY QUESTION.

In a prosecution for homicide, evidence held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 562; Dec. Dig. § 268.*]

2. HOMICIDE (§ 332*)—APPEAL—REVIEW.

In a prosecution for homicide, where a conviction was had on sharply conflicting evidence, the verdict will not be disturbed on appeal, especially where the trial court refused a new trial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 699-704; Dec. Dig. § 332.*]

3. HOMICIDE (§ 18*)—MURDER IN THE FIRST DEGREE—ESSENTIALS.

Where accused was present, participating in an unprovoked and unnecessary killing of two officers of the law, premeditated design and criminal intent, from which malice might be inferred by the jury, were present.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 18; Dec. Dig. § 13.*]

Appeal from Superior Court, Greenlee County; F. B. Laine, Judge.

Celso Losano was convicted of murder in the first degree, and he appeals. Affirmed.

E. E. Wall, of Clifton, for appellant. G. P. Bullard, Atty. Gen., and Lealie C. Hardy, Asst. Atty. Gen., for the State.

ROSS, J. This is an appeal from a judgment of conviction of murder in the first degree, with punishment fixed at life imprisonment, and from an order overruling a motion for a new trial. There are a number of complaints of the admission of evidence over the objection of appellant and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the rejection of evidence offered by him. We have carefully examined these suggested errors and have concluded that no prejudicial error was committed.

The appellant in his brief makes this statement: "The grounds for this appeal are that the verdict of the jury was contrary to the law and the evidence, in that there was no evidence to prove any premeditated design, no fact upon which to base criminal intent, nor from which malice might be inferred, and no evidence to show that defendant was even armed, or that he was guilty of any overt act at the scene of the homicide, or that he in any manner directly or indirectly contributed to the death of the deceased." This is a direct challenge of the sufficiency of the evidence to sustain the verdict and judgment. Counsel for appellant has urged this ground with great earnestness and ability, both in brief and in his oral argument to the court.

The facts, succinctly stated, are: One Aviso, who was charged with a crime in Gila county, had gone to Eagle creek, Greenlee county. Jack Campbell, a deputy sheriff of Gila county, had gone to Greenlee county in search of Aviso. At Morenci he procured Alberto Mangula and H. D. Keppler, deputy sheriffs of Greenlee county, to go with him to Eagle creek to arrest Aviso. The appellant Losano lived on Eagle creek, and the officers had information that Aviso was stopping at his house. This information was obtained on September 23, 1912, and the officers left that night for Losano's place on Eagle creek, and arrived on the creek about daylight September 24th. Before reaching Eagle creek, the officers caused one Romulo Sanchez (a brother of appellant) to join them. The four of them were proceeding down Eagle creek, and when within about one mile of Losano's home, some 300 yards ahead of them, they saw coming on the same trail in their direction some parties. Nearing the point where the advancing parties were seen, as witness Keppler says: "I saw one man coming along the trail in the brush." This man was known by Keppler, who engaged him in conversation; Mangula and Campbell proceeding the while down the trail. When Keppler looked in the direction Mangula, Campbell, and Sanchez were going, he observed the former on the ground pointing his rifle towards some brush on the west side of the creek, and Sanchez was holding his horse. Campbell had remained on his horse and was shooting in the same general course as Mangula. Keppler's horse became frightened and ran away with him, passing, as he says, within 15 or 20 steps from where Campbell and Mangula "were lying both dead." Keppler testified: "The only way I got out was by taking chances of these parties hitting me, and I started out and got close to where Albert (Mangula) and Jack (Campbell) was, and as I got below I

saw some fellow stick his head up from behind the rock, which was probably 15 or 20 feet higher than where these boys were lying, and I noticed Celso Losano. I didn't get to see him long, as I was going pretty fast, and didn't have to go over 15 or 20 steps until he was out of my sight. He was the one up on the hillside behind a rock." This witness says that some 20 or 30 shots were fired at him all told, and 6 or 7 after he had passed the dead men. He described the shots as sounding "like a bunch of fire crackers you would set off." There was evidence that Aviso had been stopping with Losano and that Losano possessed a 30-30 rifle. Sanchez, who was holding Mangula's horse, testified that Aviso killed both Campbell and Mangula and then took from him the latter's horse and rode away; and that Losano was not present at the shooting. A number of 30-30 cartridge shells were found at the point and behind the rock where Keppler said he saw Losano. The wounds inflicted on the dead were by a 30-30. Appellant denied being present at the shooting and claimed that he was looking for his burros at the time. Evidence of other witnesses tended to establish an alibi. Keppler, who recognized appellant as one of the parties shooting at the officers, testified that he had known appellant 15 or 20 years.

[1, 2] Appellant suggests that Keppler, in his wild and hurried effort to escape the fate of his fellow officers, at best could have had only a momentary glance at the person whom he recognized as appellant, and that his identification was very improbable and not worthy of belief. That, however, was a question for the jury. The reasonableness, the weight, and effect of statements of witnesses are peculiarly within the province of the jury, and they having resolved the matter against the appellant, and their decision, having the approval of the trial court in his refusal to grant a new trial, ought not to be disturbed by us, but ratified in all cases of a conflict of evidence. The jury may have made a mistake, but they are more apt to be right in their deductions and conclusions than an appellate court. They see and hear the witnesses and have the advantage of observing their conduct and demeanor—psychological aids of inestimable worth never found in the cold records submitted to an appellate tribunal. The verdict of a jury upon conflicting evidence ordinarily will not be set aside by an appellate court, the presumption being in favor of the verdict, and this seems to be the general rule in the courts of this country. 12 Cyc. 908, note 69.

[3] The jury must have believed witness Keppler and must have been satisfied that appellant was present participating in the unprovoked and unnecessary killing of the two officers, and, that being true, "premeditated design," "criminal intent," "from which malice

might be inferred," were manifest from appellant's very actions and conduct.

Judgment affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

CARO v. WOLLENBERG.†

(Supreme Court of Oregon. Dec. 9, 1913.)

1. MORTGAGES (§ 139*)—RIGHTS OF PARTIES—POSSESSION BY MORTGAGEE—NATURE OF POSSESSION.

Under the maxim, "Once a mortgage, always a mortgage," where a mortgagee entered into possession under a deed which was in equity a mortgage, he held possession as mortgagee, and the relation of the parties was analogous to that of trustee and cestui que trust.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 278; Dec. Dig. § 139.*]

2. MORTGAGES (§ 32*) — ABSOLUTE DEED AS MORTGAGE—TEST.

To determine whether a deed absolute on its face is in equity a mortgage, the test is whether a debt was created or continued for which the deed was designed as security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.*]

3. LIMITATION OF ACTIONS (§ 103*)—COMPUTATION OF PERIOD—EXISTENCE OF TRUST.

The statute of limitations, being an affirmative defense, begins to run in favor of a trustee, against the cestui que trust, only after the trustee repudiates the trust and asserts an adverse claim, and these facts are known to the cestui que trust, and then only where the cestui que trust is sui juris, and is not under the undue influence of the trustee, in which latter case the statute will begin to run only when such influence ceases.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. § 103.*]

4. MORTGAGES (§ 191*)—RIGHTS OF PARTIES—POSSESSION OF PROPERTY.

When a mortgagee obtains possession of the premises after condition broken, either by the consent of the mortgagor or otherwise, he has the right to retain such possession as against the mortgagor till the debt is paid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 469, 476, 477, 479-481; Dec. Dig. § 191.*]

5. MORTGAGES (§ 143*)—RIGHTS OF PARTIES—LIMITATIONS.

The relation of mortgagor and mortgagee must in some way be terminated before either party in possession can interpose the statute of limitations as a defense against the other.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 281-284; Dec. Dig. § 143.*]

6. MORTGAGES (§ 143*)—RIGHTS OF PARTIES—POSSESSION OF PROPERTY.

When by the terms of a mortgage, or under a subsequent agreement, the mortgagee is to hold possession till he shall satisfy his claim from the rents and profits, his possession does not become adverse till his demand has been satisfied or he asserts an absolute title and gives distinct notice thereof to the mortgagor, and this rule applies in case of an absolute deed given as a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 281-284; Dec. Dig. § 143.*]

7. LIMITATION OF ACTIONS (§ 103*)—RIGHTS OF PARTIES—POSSESSION OF PROPERTY BY MORTGAGEE—NOTICE OF CLAIM.

When a mortgagee enters into possession under a void foreclosure, limitation does not run in favor of him or his grantees against a suit for redemption and accounting till actual notice to the mortgagee that they claim to hold in some other right adverse to the mortgage.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. § 103.*]

8. MORTGAGES (§ 294*)—TRANSFER TO MORTGAGEE—VALIDITY.

Though there is no legal restraint on the mortgagor's selling the property to the mortgagee in satisfaction of his debt, the burden of proof is on the mortgagee to show that the sale of the mortgagor's equity was voluntarily made, that his conduct was in all things fair, and that he paid for the property what it was reasonably worth.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 806-814; Dec. Dig. § 294.*]

9. MORTGAGES (§ 591*)—REDEMPTION—NATURE OF RIGHT.

Both at common law, and under L. O. L. § 335, providing that a mortgage of real property shall not entitle the owner of the mortgage to recover possession of the property without a foreclosure and sale according to law, and section 422, making the remedy by foreclosure exclusive, the right to redeem is favored by a court of equity, and will not be taken away except on strict compliance with the necessary steps.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1693, 1694-1708; Dec. Dig. § 591.*]

10. MORTGAGES (§ 608½*)—REDEMPTION—SUIT TO REDEEM—EVIDENCE.

In a suit to have a deed declared a mortgage and to redeem, evidence held to show that the mortgagee went into possession under an agreement to collect the rents and apply them to the debt, and insufficient to sustain a defense of adverse possession by the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

11. MORTGAGES (§ 608½*)—REDEMPTION—SUIT TO REDEEM—PARTIES.

The heirs of a deceased grantor, as well as the surviving grantor, should be made parties to a suit to declare the deed a mortgage and to redeem.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

Department 2. Appeal from Circuit Court, Douglas County; L. T. Harris, Judge.

Suit by Simon Caro against H. Wollenberg. From a decree for defendant, plaintiff appeals. Reversed and remanded, with directions.

This is a suit brought by plaintiff to have a deed absolute in form declared to be a mortgage, for an accounting, and to redeem upon any balance being found due. Defendant denies that the deed was intended as a mortgage, and claims that the same was an absolute conveyance; that in 1899 he entered into possession of the premises under said deed and ever since and for more than ten years has been in the adverse possession of the same, claiming to be the owner thereof. Upon the testimony taken by a referee to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 6, 1914.

whom the case was referred, the circuit court found that the deed in question was intended as a mortgage, but that the defendant has had the adverse possession of the properties for a continuous period of more than ten years.

W. W. Cardwell, of Roseburg (Cardwell & Watson, of Roseburg, on the brief), for appellant. O. P. Coshaw and Dexter Rice, both of Roseburg, for respondent.

BEAN, J. (after stating the facts as above). The facts out of which the controversy arose are as follows: On November 24, 1890, plaintiff, Simon Caro, and Isadore Caro, his brother, who were partners engaged in the mercantile business in Roseburg, Or., borrowed \$12,000 from Samuel Marks and H. Wollenberg, for the purpose of constructing a store building on the lots involved, and executed their promissory note therefor with interest at the rate of 8 per cent. per annum. This note was secured by a mortgage on the store property, which consisted of a two-story brick building with a storeroom occupied by Caro Bros. on the ground floor, and a hall upstairs, and a one-story building adjacent thereto divided into two storerooms which were rented. Later this note and mortgage were assigned to defendant H. Wollenberg. On June 1, 1892, Caro Bros. borrowed the sum of \$4,500 from H. Wollenberg and executed their promissory note bearing interest at 8 per cent. per annum, payable monthly, and due January 1, 1896. This was secured by a second mortgage on the store property and a first mortgage on residence property occupied by plaintiff, Simon Caro, and owned by him and his brother. By the terms of the note, Caro Bros. agreed to pay the taxes and insurance on the property. On July 22, 1895, a few months before the notes became due, Simon Caro and his brother Isadore executed to the defendant a deed absolute in form, conveying to the latter the store and residence property. The plaintiff contends that the deed was given in lieu of the two mortgages, in order to avoid double taxation, to wit, the tax on the property, and the tax on the amount of the loan which plaintiff and Isadore Caro had obligated themselves to pay. The defendant claims and alleges that on July 22, 1895, he demanded the payment of the indebtedness, which Caro Bros. failed to make; that he notified them that he would proceed to foreclose his mortgage lien; that, for the purpose of avoiding additional expense and trouble of foreclosure, it was mutually agreed by him and Caro Bros. that, in consideration of the latter executing to him a warranty deed to the premises, thereby saving the costs and expenses of a foreclosure suit, he would extend the time for redemption on said mortgaged premises for a period of four years from that date; that it was mutually agreed that if Caro Bros. would pay him the full sum of \$16,610, that being the amount of the two mortgages, with

\$110 interest added, with interest thereon at the rate of 8 per cent., together with all taxes assessed against the premises within four years from July 22, 1895, he would reconvey the premises to Caro Bros., and that they might occupy the same during said period, and collect the rents; that if they failed to pay the interest when due, or the entire sum of principal, interest, and taxes, within four years from the said date, then they should surrender the possession thereof to the defendant, and the contract executed to that effect should be void. Defendant claims that Caro Bros. failed to pay the principal sum and about \$400 of the interest and taxes within the specified time; that after the expiration of the four years, to wit, July 22, 1899, Caro Bros. surrendered possession of the premises to defendant and released him from any and all claims and demands. Wollenberg states that the agreement or article of defeasance permitting Caro Bros. to redeem the property was placed in a bank in Roseburg, and that whenever they paid the money the same was to be destroyed; that after possession was taken by him he must have destroyed the agreement, as he is unable to find the same. The plaintiff testifies that he had no knowledge of any such agreement having been executed in writing. The two mortgages were canceled of record August 29, 1895. Defendant testifies that he surrendered the notes to Caro Bros. This is denied by the plaintiff, and the circumstances taken in connection with the fact that the mortgage was not canceled of record for more than a month after the deed of July 22, 1895, was executed, strongly indicate that nothing was done with the notes at the time of the execution of the deed, and that they were allowed to slumber for some time. Whatever disposition was made of these notes, they were simply evidence of the debt. Whether or not the agreement was expressed in writing, according to the testimony of Mr. Wollenberg, when the Caro Bros. asked for further time for payment, he gave them four years; that "It (the written agreement) contained that, if they paid me the amount what they was owing me, I agreed to give them back the property." This clearly shows that there was a debt existing, and that the purpose of the deed was security therefor. Wollenberg further states that at the end of the four years he called for his money, and that Caro Bros. claimed that they were unable to pay, but were willing to give up the property, which they did. The plaintiff swears that the possession of the property was surrendered to defendant with the understanding that he would collect the rents and apply the same upon the mortgage. This is the pivotal question in this case. There is but little question but that the deed, absolute upon its face, was intended as a mortgage to secure the payment of the \$16,610, interest, taxes, etc. The circuit court so found.

Wollenberg alleges that he entered into possession under that deed. It appears that Caro Bros. collected the rents and remained in possession of the premises until they contemplated leaving Roseburg to engage in business in Oakland, about 14 miles distant, since which time Wollenberg has collected the same. It appears that Wollenberg collected the rents for a month or two before Caro Bros. left for Oakland. The possession of the storeroom occupied by them was not surrendered to defendant until about October 9, 1899. When Caro Bros. went to Oakland, they took the key to the storeroom with them. Upon the defendant writing a sharp letter demanding the key, or an arrest would follow, Isadore Caro returned to Roseburg and delivered the key to defendant. At this time a controversy arose as to some counters and shelving in the storeroom which Caro Bros. desired to remove to Oakland. Defendant then complained that Caro Bros. had failed to pay about \$400 in interest and taxes during the time they had been in possession, after the execution of the deed. Isadore Caro adjusted this matter by allowing the counters and shelving to remain in the storeroom as the property of H. Wollenberg. He executed a receipt to that effect, in the name of Caro Bros., stating that "possession of said premises and also those premises occupied by Simon Caro as a residence is hereby surrendered to said H. Wollenberg." Defendant places great reliance upon this instrument in support of his title. It appears that the receipt was prepared by Hon. Frank W. Benson, a careful lawyer, who was afterwards Secretary of State and Governor of Oregon. If it had been intended that the instrument should have any effect upon the title to the real property, it is difficult to understand why the same was not in the form of a deed.

Isadore Caro died July 16, 1900. He was unmarried. Two brothers, plaintiff, Simon Caro, and Morris Caro, and a sister, Mrs. Monheim, survived him. Since that time Morris Caro has died, leaving one daughter, Hazel. Mrs. Monheim has also died leaving two children, namely, Amelia Beckman, and Bell Joseph.

It will be noticed that the interest upon the indebtedness mentioned in the deed which Caro Bros. paid monthly for about four years after the deed was executed was \$110.73. It appears from the evidence that, at the time Caro Bros. left for Oakland, the rents, not including the storeroom occupied by them, were \$140 per month, and that the storeroom was worth \$60 per month; that the rents have since increased to about \$275 per month. According to the estimate of W. H. Fisher, a banker of Roseburg, the value of the premises at the time possession was surrendered was about \$28,000. Plaintiff claims that the rents averaged \$225 per month. Defendant claims, however, that no more than the amount of the indebtedness

could have been obtained for the property. He also states that he made them a present of the \$400, the amount which they were behind in interest and taxes; that they could not pay; and that he took possession and informed the tenants. Mr. Wollenberg does not remember whether or not the writing or defeasance was executed at the same time as the deed, to wit, in 1895. He thinks it was. He further states that Caro Bros. gave the deed of the property providing that he would give them four years' time, and that he did so. Judge J. W. Hamilton, who was then a practicing attorney, testified that it appeared that he prepared the deed and was a witness thereto; that it was his impression that the deed was given as security; and that he informed Mr. Wollenberg that if Caro Bros. remained in possession it would be necessary for him to foreclose.

[1] "Once a mortgage, always a mortgage," is an ancient equity maxim of approved policy and wisdom, the effect of which is to protect borrowers from being forced by their necessities into unequal and cruel bargains. *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Grover v. Hawthorne*, 62 Or. 95, 114 Pac. 472, 121 Pac. 808. Therefore, when Wollenberg entered into possession of the premises under his deed which was in equity a mortgage, he held possession as mortgagee. The relation of the parties was analogous to that of trustee and cestui que trust. *Green v. Turner*, 38 Iowa, 112, 118.

[2] In order to determine whether or not a deed absolute upon its face is in effect a mortgage, the test is: Was there a debt created, or was there a pre-existing debt continued for which the instrument was designed as security? If the pre-existing debt was not extinguished, or if a new debt was intended to be created and the conveyance was given as security, then in equity it should be declared to be in effect a mortgage. *Bickel v. Wessinger*, 58 Or. 98, 113 Pac. 34; *Kinney v. Smith*, 58 Or. 158, 113 Pac. 854; *Miles v. Hemenway*, 59 Or. 318, 111 Pac. 696, 117 Pac. 273.

[3] The statute of limitations is an affirmative defense to be alleged and proved. It is therefore incumbent upon a trustee to show that there was a direct repudiation of the trust, and that the cestui que trust had knowledge thereof. If the trustee repudiates the trust and asserts an adverse claim to the trust property, these facts being known to the cestui que trust, the statute then begins to run in the trustee's favor, except where the cestui que trust is not sui juris, or is under undue influence proceeding from the trustee, in which latter case the statute will begin to run only when such influence ceases. 25 Cyc. p. 1169.

[4] Under our law, when a mortgagee obtains possession of the mortgaged premises after condition broken, either by consent of the mortgagor or otherwise, he has the right to retain such possession as against the mort-

gagor until the mortgage debt has been paid. *Lambert v. Howard*, 49 Or. 342, 345, 90 Pac. 150. Hence Caro could not recover possession of the real property from Wollenberg without his debt being first satisfied.

[5] As long as the relation of mortgagor and mortgagee existed between Caro and Wollenberg, the statute did not commence to run in favor of either of them. That relation must be terminated in some way before either party in possession can interpose the statute as a defense against the other.

[6] When, by the terms of the mortgage, or by subsequent agreement, the mortgagee is to take and hold possession of the property until he shall satisfy his claim from the rents and profits, his possession does not become adverse until his demand has been satisfied from this source, or he asserts an absolute title in himself, and gives distinct notice thereof to the mortgagor. This rule applies in case of a deed absolute upon its face, given as security for the payment of a debt, and in effect a mortgage. *Green v. Turner*, supra; 2 *Jones on Mortgages* (6th Ed.) § 1152.

[7] When a mortgagee enters into possession of the mortgaged property under a void foreclosure, he is presumed to hold as mortgagee in possession, and limitation does not run in his favor or in favor of his grantees, against a suit for redemption and for an accounting by the mortgagor, which is a continuing right, unless there is an actual notice to the mortgagor that they claim to hold in some other right adverse to the mortgage. *Id.* § 1152; *Cooke v. Cooper*, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709; *Frink v. Le Roy*, 49 Cal. 314; *Warder v. Enslen*, 73 Cal. 291, 14 Pac. 874; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164. In 1 Cyc. p. 1071, it is stated that: "So long as the relation of mortgagor and mortgagee exists, the possession of the mortgagee is not adverse to the mortgagor, and the statute of limitations does not run in his favor. Possession in the mortgagee must, from its commencement, have been taken under the engagement, which equity always implies, to account as a bailiff of the rents and profits to the mortgagor and to apply them to the discharge of the mortgage debt." After a mortgagee has received payment of his debt, he really holds the property in trust for the mortgagor. 2 *Jones*, § 1159.

[8] There is no legal restraint on a mortgagor's selling the mortgaged property to the mortgagee in satisfaction of his debt; but where the validity of such a sale is in issue, as in the case at bar, the burden of proof is upon Wollenberg, the mortgagee, to show that the sale of the mortgagor's equity was voluntarily made, that his conduct in making the purchase was in all things fair, and that he paid for the property what it was reasonably worth. 1 *Wiltse on Mortgage Foreclosure* (3d Ed.) § 305.

[9] The right to redeem is favored by a court of equity, and will not be allowed to be

taken away except upon a strict compliance with the steps necessary to divest it. *Id.*, vol. 2, § 1033. It is stated that: "The doctrine of common law, as approved and modified by the principles of the civil law, was that an equity of redemption could not be cut off except by a foreclosure, and that is the general rule in this country to-day, in the absence of any statute controlling. Thus, it has recently been held by the United States Circuit Court of Appeals, sitting in the eighth circuit, that an election by the grantee in an absolute deed constituting a mortgage in equity, to avail himself of an option therein to retain the property in satisfaction of the loan, will not operate to bar the equity of redemption, but such equity can be barred only by a proper foreclosure." *Id.*, vol. 2, § 1038. A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law. L. O. L. § 335. A lien upon real or personal property, other than that of a judgment or decree, whether it be created by mortgage or otherwise, shall be foreclosed, and the property be adjudged to be sold to satisfy the debt, and this remedy is exclusive, and all other methods must be disregarded. L. O. L. § 422; *Thompson v. Marshall*, 21 Or. 171, 178, 27 Pac. 957; *Hall v. O'Connell*, 52 Or. 164, 95 Pac. 717, 96 Pac. 1070.

[10] The evidence shows that the defendant went into possession of the property in question under an agreement with plaintiff that he would collect the rents and apply the same upon the mortgage indebtedness. Simon Caro testifies positively to this fact, and, while the defendant denies the same, he appears to base his denial upon his deed which he claims was absolute. His statement is rather a conclusion than a detail of what was said. Granting that plaintiff and defendant are both honest in their convictions as to the effect of the transaction, it appears that, while both were business men, the defendant had about 20 parcels of real property in the vicinity of that in controversy, and transacted a large amount of business. We think defendant is undoubtedly in error as to his claim that the deed was given in the first instance as an absolute deed and was not intended as a mortgage. The plaintiff was dealing in respect to nearly all his property and ought at least to remember what the agreement was. It would seem that plaintiff did the best he could under the circumstances, and that when he was in arrears to the amount of about \$400, for interest and taxes, which he had agreed to pay, he consented that Wollenberg should take possession and collect the rents, as he was going away. It hardly appears reasonable that plaintiff would have given up all claim to the property in 1890, which was then paying about \$200 in rents, a sum sufficient to pay the taxes and a fair rate of interest upon a

valuation much larger than the amount of his indebtedness. The retention of the key to the store by Caro Bros., after moving to Oakland, a circumstance which terminated the friendly relation between the parties, indicates that the mortgagor did not surrender any more of his rights than he was compelled to. After he took possession of the real property, defendant seems to have relied upon what he erroneously believed to be his legal rights under the deed. He failed to give plaintiff any notice whatsoever that he claimed or intended to claim anything more than the amount of his mortgage. Defendant undertook to prove a presumptive title as a defense. This burden he has failed to maintain.

[11] As we understand the record, the heirs of Isadore Caro, deceased, succeeded to his interest in the property, and, in order for a complete settlement of the controversy, they should be made parties to this suit. It follows that the decree of the lower court must be reversed, and the cause remanded, with directions to enter a decree declaring the deed to be in effect a mortgage; to ascertain by an accounting the amount, if any, due defendant upon the mortgage indebtedness; and for such further proceedings as may seem necessary, not inconsistent herewith.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

BAKER v. SEAWARD.

(Supreme Court of Oregon. Dec. 2, 1913.)

PARTNERSHIP (§ 136*)—AGENCY OF PARTNER FOR FIRM—SCOPE AND EXTENT.

Each partner is the agent of the firm and may sign the firm name to any paper for purposes apparently within the scope of the partnership, but a partner has no right to sign another partner's individual name, except by express authority.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 203, 204, 240; Dec. Dig. § 136.*]

In Banc. Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by R. E. Baker against E. F. Seaward. From a judgment for plaintiff, defendant appeals. Affirmed.

This case was previously before this court, and is reported in 63 Or. 350, 127 Pac. 961. The issues involved are sufficiently stated in the opinion then delivered. Upon retrial of the case the circuit court, among others, gave the following instructions: "In a suit for money had and received, as in this case, it is essential that plaintiff should establish that defendant received money from plaintiff which he was not entitled to under the law and which he should, in good conscience and equity, return to plaintiff; and plaintiff would be entitled to recover in this case unless it appears to you that one of the

defenses set up in the answer is valid, and there are really two defenses, gentlemen, set up in the answer upon which proof has been offered in this case. * * *

One is the defense of partnership; that is, that E. P. Mickey, and the plaintiff, were engaged in conducting the sheep business as partners, and that as such partners E. P. Mickey purchased the horses in question in this case and paid for the same in the check of the partnership. And the other is an agreement between the plaintiff and E. P. Mickey, entered into prior to the time that the plaintiff left the state in the fall for the South, whereby said Mickey was given the direct authority to purchase horses for that business. Those are the two defenses alleged or set up in the answer in this case, on which any proof has been offered you. * * *

A partnership exists where two or more persons contribute their labor, skill, or money in a joint enterprise where each is to receive either a part of the profits or is to bear proportionate part of the losses. * * * However, a partnership depends largely on the intention of the parties at the time to enter into a partnership agreement. Neither the sharing of both profits and losses or the sharing of one is absolutely essential. I will change that instruction. The sharing of one would be necessary, but the sharing of both profit and losses is not essential, provided the intention of the parties was to form a partnership to conduct a joint business as partners. * * * Therefore if you find in this case that the said E. P. Mickey had entered into an agreement with the plaintiff whereby he was to purchase a one-third interest in the property and was to receive a proportionate part of the profits and stand a proportionate part of the expenses, I instruct you that in such an event a partnership would exist between the said E. P. Mickey and the plaintiff in this case; but if you find under the evidence that said E. P. Mickey was to receive \$50 a month as wages and one-third of the profits out of said sheep business over and above all expenses in running the same, but was not to share in a proportion of the losses, and purchased no interest in the sheep, that is, owned no interest in the joint property, then I instruct you that a partnership would not exist between these two. * * * If you find that a partnership existed between the said E. P. Mickey and the plaintiff, and that said E. P. Mickey bought the horses mentioned in the answer from defendant, and that the use of such horses was necessary in the partnership business, and paid the same by check drawn by himself on R. E. Baker, then the plaintiff would not be entitled to recover in this case. * * * If you find, however, that there was a partnership existing between E. P. Mickey and the plaintiff, R. E. Baker, but fail to find by a preponderance of the evidence that the horses were purchased

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the said E. P. Mickey from the defendant, then that would not constitute a defense in this case, for a partner has not authority to use partnership funds in paying a private debt of one of the partners; and if you find in this case that the said E. P. Mickey gave the check in question in payment of a debt which the said E. P. Mickey owed to defendant, then the plaintiff would be entitled to recover from defendant in this case the money so paid out by E. P. Mickey in the payment of his private debt. * * * If you find, however, that there was not a partnership existing between the said E. P. Mickey and plaintiff in this case at the time of the payment of this money, but further find that there was an agreement made between the plaintiff and said E. P. Mickey, whereby the said E. P. Mickey was authorized to buy horses for the plaintiff's business, and you further find that in accordance with this agreement the said E. P. Mickey purchased the horses from defendant, then such agreement and purchase would constitute a defense to this action, and your verdict should be for the defendant."

The following instructions were requested by defendant and refused except so far as included in the general charge above quoted: "(1) I instruct you to find for the defendant. (2) It is immaterial in this case whether plaintiff instructed E. P. Mickey not to buy horses for use in the business, if you find that Baker and Mickey were partners, unless defendant knew of such instruction. (3) I instruct you that, under the testimony of plaintiff introduced in this case, plaintiff and E. P. Mickey were partners. (4) I instruct you that there is no evidence in this case that the First National Bank of Ontario, Or., paid any sum whatsoever to defendant. (5) I instruct you that where one party is in possession of a written instrument as it is shown plaintiff was in this case, and fails to produce same at the trial, that the contents are presumed to be prejudicial to him. (6) I instruct you that in order to constitute a partnership it is not an essential element of the partnership that both parties to such partnership shall agree to share in the losses as well as the profits. (7) I instruct you that a partnership may be effectuated where one party invests capital or property in the business and the other party invests his time and labor. (8) I instruct you that you may take into consideration the lapse of time between the time of issuance of the check and the payment thereof and the knowledge thereof by plaintiff and the time of the commencement of suit herein. (9) I instruct you that the payment of the check in question by the bank raises a presumption that the check was lawfully given and that the bank had authority to honor the same. (10) I instruct you that in this case it is not necessary for you to find the authority to buy the horses under the partnership agreement, if you should find

such agreement, if you find that plaintiff authorized or instructed E. P. Mickey to buy horses. (11) I instruct you that, if you find that defendant actually turned over the horses claimed to have been turned over to E. P. Mickey, then your verdict should be for defendant. (12) I instruct you that under the evidence introduced in this case E. P. Mickey was authorized to buy the horses claimed by defendant to have been purchased."

The plaintiff had a verdict, and defendant appeals.

R. W. Swagler, of Ontario (W. H. Brooke, of Ontario, on the brief), for appellant. A. A. Smith, of Baker (John L. Rand and Wm. H. Packwood, both of Baker, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). Much of the argument presented by the defendant's counsel is upon the proposition as to what constitutes a partnership, and for the purposes of this case the propositions therein advanced may be assumed to be the abstract law. It is sufficient for the purposes of this case to say that, taking plaintiff's testimony to be true, no partnership existed between himself and Mickey; and that, taking the testimony of Mickey and other witnesses to be true, a partnership existed. It was not a case in which the court could instruct as a matter of law that there was or was not a partnership. This was a question of fact for the jury. Where the evidence is undisputed, the question as to whether or not it discloses the existence of a partnership is usually for the court; but that was not this case. There was nothing in the evidence tending to show such a state of facts as would justify the court in holding that the plaintiff might as to the defendant be held as a partner by reason of having held himself out as such.

There was no evidence that plaintiff ever represented to defendant that he was a partner of Mickey or that any such representation was the moving cause of his parting with the property. In *Morback v. Young*, 51 Or. 128, 94 Pac. 35, this court stated the rule as follows: "But as there was no partnership, and plaintiff had no contract with Young, it was necessary for her, in order to charge him with liability for the contract of Morback, to show, not only that Young was, by his consent, held out as a partner, but that she knew of such holding out at the time she rendered the services, and that she performed such work on the faith thereof." See, also, *Gettins v. Hennessey*, 60 Or. 566, 120 Pac. 369. The matter of partnership is involved only indirectly in this case. In case of a partnership, each partner is the agent of the firm and is entitled to sign the firm name to any paper given for purposes apparently within the scope of the partnership business; but we have been cited to no case, and we believe

none exists, that goes so far as to hold that one partner has a right to sign the individual name of the other partner to checks for the payment of money, and thus make that partner primarily liable for the debt. Paper executed in that way must be by express authority of the person whose name is used, and such authority must be proved by the preponderance of evidence. It is true that if it appears that the purchase was for the benefit of the firm and apparently within the scope of its business, and that the money obtained was for property actually purchased for the firm, the person to whom it was paid would probably be entitled to retain it; and such, in effect, was the charge given by the court. While some technical objections may be found to the instructions given, we do not think that there was anything in them which misled the jury.

We have carefully examined the evidence and are satisfied that the verdict rendered was such as should have been given; and therefore, in accordance with subdivision 3 of article 7 of the Constitution, as amended, the judgment will be affirmed.

DUNN v. ORCHARD LAND & TIMBER CO.

(Supreme Court of Oregon. Dec. 9, 1913.)

1. MASTER AND SERVANT (§ 87*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—SCOPE.

In Employers' Liability Law (Laws 1911, p. 16; L. O. L. p. xxxvi) § 1, imposing certain duties on all owners or persons engaged in the erection or operation of any machinery, the provision of the latter part of the section requiring generally all owners, contractors, subcontractors, and other persons having charge of or responsible for any work involving risk or danger to the employes or to the public to use every precaution practicable, does not restrict the requirements of the law to the particular persons mentioned in the first part of the section, but rather extends its scope.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.*]

2. MASTER AND SERVANT (§ 108*) — INJURIES TO SERVANT—"MACHINERY."

A slab haul, consisting of a staging, incorporated with which was a system of dead rolls for conveying slabs from a sawmill to be burned at the end of the structure, is "machinery" within Employers' Liability Law (Laws 1911, p. 16; L. O. L. p. xxxvi) § 1, imposing certain duties on all owners or persons engaged in the erection or operation of any machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 203, 212, 255; Dec. Dig. § 108.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4267-4269.]

3. MASTER AND SERVANT (§ 116*) — INJURIES TO SERVANT—EMPLOYERS' LIABILITY LAW—"INVOLVING RISK OR DANGER."

Hauling slabs along a slab haul 50 feet high on dead rolls from a sawmill to the outer end of the structure to be burned is work "involving risk or danger" to the employe within Employers' Liability Law (Laws 1911, p. 16; L. O. L. p. xxxvi) § 1, imposing certain duties

on persons having charge of or responsible for work involving risk or danger to the employes or to the public.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Refusal of an instruction that, if the injury was caused by an inevitable accident, plaintiff cannot recover is not error where no situation of that kind is disclosed by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Department 1. Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by O. W. Dunn against the Orchard Land & Timber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint in this action alleges in substance that, in connection with its sawmill in Lane county, among other machinery thereof, the defendant controlled and operated a structure, scaffolding, and staging known as a slab haul, extending out from the mill for a distance of about 50 feet, incorporated with which was a system of dead rolls used for conveying from the mill the slabs resulting from the manufacture of lumber, to be burned at the end of the structure. It was the duty of the plaintiff as the employe of the defendant to pass along a board walk adjacent to the line of rolls, and, with a tool called a pickaroon, to drag the slabs along the rolls, and thus conduct them into the fire. The staging supporting the slab haul was upwards of 27 feet above the ground where the accident complained of occurred. There was a guard rail most of the way along this walk; but there was none for quite a distance at the end of the haul next to the fire. The plaintiff states in substance that while in the discharge of his duties mentioned he fell from the staging at the point where there was no guard rail, and suffered the injuries of which he complains. The language of the answer "admits that the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, and is the owner of and had control of a sawmill in Lane county, Oregon, and, among other machinery in said sawmill, owned, controlled, and operated, from said sawmill, structure or scaffolding extending out from said mill a distance of about 50 feet and about 5 feet wide, on which were dead rolls, and which structure, scaffolding, and dead rolls were operated as a slab haul, and were used and operated for conveying from said mill slabs and other refuse, so that the said slabs and refuse would fall from the end of said dead rolls to the ground and enter a fire at the end of said rolls, and the end of said slab roll was about 24 feet from the ground, and that on the day of the accident mentioned in the said complaint, to wit, the 8th day of June, 1912, the said plaintiff fell from the end of said scaffolding to

the ground, and was jarred and bruised." As an affirmative defense the defendant alleges contributory negligence of the plaintiff and assumption of risk. The affirmative matter of the answer is denied by the reply. From a verdict and judgment in favor of the plaintiff, the defendant appeals.

Howard Bennett, of Portland (Wilbur & Spencer, of Portland, on the brief), for appellant. C. A. Hardy, of Eugene (Thompson & Hardy, of Eugene, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). The vital question urged by the defendant is whether or not the action is governed by what is known as the "Employers' Liability Law," a measure adopted by the initiative process at the general election held in November, 1910. Laws 1911, c. 3. It is provided by section 1 of that act that "all owners, contractors, subcontractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal, or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery," are required to thoroughly inspect all materials used, and to construct all scaffolding, staging, false work, or other temporary structure with a safety factor of four times the maximum weight to be sustained by the structure. The act prescribes that all scaffolding, staging, or other structure more than 20 feet from the ground or floor shall, among other things, be provided with a strong safety rail or other contrivance to prevent any one from falling therefrom. The section under consideration, after providing various duties incumbent upon persons in charge of electrical transmission, closes with this language: "And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." L. 1911, c. 3; L. O. L. p. xxxvi. The act provides a criminal penalty for any one responsible for its observance who shall violate its terms. By section 6 it is provided that "the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damages." The question of the applicability of this act was presented to the trial court by various requests to instruct on the subject of contributory negligence and assumed risk and exceptions to the charge of the court, indicating to the jury that those questions were not properly involved in the action.

In considering what is known as the "Factory Act" (L. O. L. § 5040 et seq.), this court, speaking by Mr. Chief Justice Bean, in *Hill v. Saugested*, 53 Or. 178, 98 Pac. 524, 22 L. R. A. (N. S.) 634, held that the defense of assumption of risk was not admissible under that statute, on the ground that, inasmuch as a criminal penalty was provided for an employer who disobeyed the act, the employe could not be considered as having entered into a contract which involved a violation of the law on that point by the other contracting parties. In other words, the statute, having made it a criminal offense on the part of the employer to create or maintain an avoidable risk, the contract of the workman for employment will not be construed to include such a hazard, because that would be to contract for a violation of law by at least one of the parties, and hence void as against public policy. This ruling was followed by Mr. Chief Justice McBride in construing the same statute in *Love v. Chambers Lumber Co.*, 64 Or. 129, 129 Pac. 492. In the later case of *Dorn v. Clarke-Woodward Drug Co.*, 133 Pac. 351, the same principle was applied to the act now under consideration.

[1] Having in mind these precedents, excluding the defense of assumed risk, and remembering that the statute itself expressly eliminates contributory negligence except in mitigation of damages, it remains to determine whether the complaint states a case within the purview of the "Employers' Liability Law" so called. The statute exerts its authority against "all owners * * * or persons whatsoever engaged * * * in the erection or operation of any machinery." It thus takes cognizance not only of those who engage in building but also those who operate machinery, and, where it declares that "generally all owners, contractors, or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public," it does not in good reason restrict the benefits and requirements of the law to particular persons mentioned in the beginning of the section, but, rather, enlarges and expands the scope of the act. The statute lays its commands not only upon those engaged in building or in the transmission and use of electricity but also upon those other persons included in larger category set out in the last clause of the first section.

[2] That the slab haul was machinery is substantially admitted by the language of the answer already quoted. The *Encyclopædic Dictionary*, under the title "machine," gives this definition: "An instrument of a lower grade than an engine, its motor being distinct from the operating part, whereas, the engine is automatic as to both. It is also distinct from a tool, as it contains within itself its own guide for operation. A contrivance by means of which a moving power is made to act upon any body and communicate motion

to it. Machines are simple and compound, complex or complicated. The simple machines are the six mechanical powers, viz., the lever, the wheel and axle, the pulley, the inclined plane, the wedge, and the screw. In compound machines two or more of these powers are combined for the production of motion or the application or transmission of force." It is stated in the Standard Dictionary that a machine is "any combination of inanimate mechanism for utilizing or applying power." The slab haul in question consisted of a combination of several numbers of the wheel and axle. It comes clearly within the definition of "machine" already given. Its operation depended upon the motion of its several parts in connection with each other. It was not a tool which is commonly handled by an operator, but, on the other hand, was a stationary appliance which responded to the application of power, and produced certain results growing out of its operation. Both by the pleadings and the evidence it is shown to be within the definition of "machinery."

[3] The complaint clearly discloses a work involving risk or danger to the employé engaged therein, so that under the concluding words of the section, as well as under the first part mentioned, the plaintiff has disclosed a case within the purview of the statute. Concluding that the statute does apply to the case made in the complaint, it follows that the court was correct in excluding from the jury the defense of contributory negligence and assumed risk. In respect to contributory negligence the court correctly instructed the jury, under section 6 of the law, that it could be considered in this action only in mitigation of damages.

[4] Error is also predicated on the refusal of the court to give an instruction to the effect that, if the injury was caused by an inevitable accident, the plaintiff could not recover. No situation of that kind is disclosed by the pleadings or the testimony. An instruction on that point, therefore, would have been merely academic and hence improper. We find no error in the record.

The judgment of the circuit court is affirmed.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

JOHNSON v. JACKSON COUNTY et al.
(Supreme Court of Oregon. Dec. 9, 1913.)

1. HIGHWAYS (§ 126*) — TAXES — EXEMPTION OF CITY PROPERTY.

City Charter of Ashland, art. 17, § 1 (Sp. Laws 1898, p. 100), providing that the territory within the city is excepted out of the jurisdiction of the county court for road purposes, and the inhabitants of the city shall be exempt from road taxes and assessments on property in the city except such as may be levied by the city council, applies not only to that portion of

a road tax levied pursuant to L. O. L. § 6320, which is to be apportioned to the road districts of the county, but also to the part which the county court may expend in any part of the county.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 383; Dec. Dig. § 126.*]

2. TAXATION (§ 44*) — EQUALITY AND UNIFORMITY.

A tax that is equal and uniform throughout the taxing district is not violative of Const. art. 1, § 32, and article 9, § 1, requiring equality and uniformity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 93-95; Dec. Dig. § 44.*]

3. HIGHWAYS (§ 122*) — TAXATION (§ 44*) — EQUALITY AND UNIFORMITY.

City Charter of Ashland, art. 17, § 1 (Sp. Laws 1898, p. 100), exempting property in the city from road taxes and assessments except those levied by the city council, is not violative of Const. art. 1, § 32, and article 9, § 1, requiring equality and uniformity.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.* Taxation, Cent. Dig. §§ 93-95; Dec. Dig. § 44.*]

Department No. 2. Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Writ of review on petition of O. H. Johnson against Jackson County and others to review proceedings of the County Court. From a judgment for plaintiff, defendants appeal. Affirmed.

This is an appeal by defendants from the judgment on a writ of review issued on petition of plaintiff to review the proceedings of the county court of Jackson county, Or., in January, 1913, levying a three-mill tax on all the taxable property of the county, including the property of plaintiff situated within the limits of the city of Ashland in said county, for a road fund, pursuant to section 6320, L. O. L. The circuit court adjudged that plaintiff's property is exempt from this tax by virtue of section 1, art. 17, of the Charter of Ashland (Sp. L. 1898, p. 100), which section reads thus: "The territory within the limits of the city of Ashland as now existing or as may be hereafter extended is hereby excepted out of the jurisdiction of the county court of Jackson county for licensing purposes and road purposes, and the city council shall have full and exclusive jurisdiction over the same. The inhabitants of the city shall be exempt from the payment of road taxes and assessment of the property within the city for road work except such taxes as may be levied and assessed by the city council, and all such taxes shall be placed in the separate fund and used for street purposes within the limits of the city and not otherwise."

Porter J. Neff and E. E. Kelly, both of Medford (Neff & Mealey, of Medford, on the brief), for appellants. W. J. Moore, of Ashland, and A. E. Reames, of Medford, for respondent.

BEAN, J. (after stating the facts as above).

[1] It is contended by counsel for defendants that the foregoing section of the Ashland

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 6, 1914.

charter must be construed as exempting property within the city of Ashland from the payment only of one-half of the tax levied pursuant to section 6320, L. O. L., apportionable to the road districts of the county, and not from the one-half of the tax which is placed in a county fund for general road purposes, to be expended by the county court on the roads and bridges in any part of the county. It is their contention that section 6320, L. O. L., provides for a composite tax; one-half thereof constituting a local district road tax, and the remaining one-half a general county tax equivalent to that formerly levied as a part of the general county fund for highway purposes. A glance at that section of the charter reveals that the area within the limits of the city of Ashland is excepted out of the jurisdiction of the county court of Jackson county for road purposes, and further that the inhabitants of that city are exempt from the payment of road taxes, and the property within the city is exempt from assessment for road work outside the city boundaries. Similar provisions in municipal charters have been upheld by this court in the following cases: *East Portland v. Multnomah County*, 6 Or. 62; *Multnomah County v. Sliker*, 10 Or. 65; *Oregon City v. Moore*, 30 Or. 215, 46 Pac. 1017, 47 Pac. 851; *Eugene v. Lane County*, 50 Or. 468, 93 Pac. 255; *City of Nyssa v. Malheur County*, 54 Or. 286, 103 Pac. 61; *Tillamook City v. Tillamook County*, 56 Or. 112, 107 Pac. 482. In the latter case Mr. Chief Justice McBride, speaking for the court, said: "It is also suggested that the county court had no right to levy any tax for road purposes within the city limits, and in this view we concur. It has been the usual custom to exempt incorporated cities from the payment of general county road taxes, and at the session at which the charter in question was passed several municipal corporations were thus exempted, and it does not seem probable that the Legislature intended to make an exception of Tillamook City." The Legislature, as a general rule, has constituted that part of the counties outside the limits of the municipalities tax districts for the purpose of providing funds for the improvement of the rural highways, and has exempted most of the municipalities from such taxes. This was undoubtedly for the reason that the inhabitants of the cities and towns are subjected to taxes for the purpose of improving the streets and sidewalks within such municipalities. Evidently the legislative intent was based upon the principle that such a system of taxation for roads and highways would be approximately equal. *Gray on Limitations of Taxing Power*, etc., § 528.

[2] A tax that is equal and uniform throughout the taxing district is not violative of the provisions of section 32, art. 1, and section 1, art. 9, of the Constitution as to equality and

uniformity. *East Portland v. Multnomah County*, 6 Or. 66; *Cook v. Port of Portland*, 20 Or. 580, 589, 27 Pac. 263, 13 L. R. A. 533. It is said in *Cooley on Taxation*, pp. 257, 258, that: "Under any system of taxation, however wisely and carefully framed, a disproportionate share of the public burdens will be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interpose and arrest the course of legislation by declaring such enactments void." While our system of taxation in this respect cannot be claimed to be perfect, we are not prepared to say that it does not provide for equality as far as it can consistently with practicability.

[3] This section of the charter of the city of Ashland is not in violation of sections of the Constitution referred to. To hold that the county court of Jackson county has the right to levy one-half of the county tax for road purposes upon taxable property within the limits of the city of Ashland would be in direct conflict with the section of the charter to which reference is made. By this section it clearly appears that the jurisdiction or authority of the county court of Jackson county to levy taxes for county road purposes is entirely wanting. Authority is vested in the municipality to levy taxes on property within the city limits for street purposes therein.

It follows that the judgment of the lower court must be affirmed, and it is so ordered.

MCBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

ABERCROMBIE v. HECKARD et al.

(Supreme Court of Oregon. Dec. 9, 1913.)

1. APPEAL AND ERROR (§ 110*)—DECISIONS REVIEWABLE—REFUSAL OF NEW TRIAL.

No appeal lies from the refusal to grant a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 740-748; Dec. Dig. § 110.*]

2. APPEAL AND ERROR (§ 548*)—RECORD—SCOPE AND CONTENTS.

Where the only issue raised by appellants is the admissibility of a receipt offered to prove payment of plaintiff's claim, which receipt is incorporated in a motion for new trial, from the refusal of which the appeal is taken, but which is not presented in a bill of exceptions, appellants have no standing in the Supreme Court; the receipt not being a part of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

3. APPEAL AND ERROR (§ 671*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Under L. O. L. § 171, relating to exceptions, and providing that the objection shall be stated with so much of the evidence or other matter as shall be necessary to explain it, and no more, and Const. art. 7, § 3, providing that, till otherwise provided by law, upon appeal to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the reporter's transcript and other papers purporting to be parts of the testimony which are not authenticated as a bill of exceptions are not properly before the Supreme Court, and will not be considered to ascertain the relevancy of papers offered in evidence and rejected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

In Banc. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by Mary Abercrombie against Jasper Newton Heckard and another. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

C. J. Curtis, of Astoria, for appellants.
G. C. Fulton, of Astoria, for respondent.

PER CURIAM. This is a motion to dismiss an appeal. There is no bill of exceptions, and the case comes up on the transcript, which is accompanied by the reporter's copy of the testimony. In the transcript it appears that a motion for a new trial was filed and overruled by the court. The principal ground for the motion was the alleged refusal of the court to admit in evidence a certain alleged receipt in full for the amount of plaintiff's bill, signed by L. R. Abercrombie.

[1] No appeal lies from the refusal of the court to grant a new trial. *State v. Gardner*, 33 Or. 149, 54 Pac. 809; *McCormick Machine Co. v. Hovey*, 36 Or. 259, 59 Pac. 189; *Crosen v. Oliver*, 41 Or. 505, 69 Pac. 308.

[2, 3] The appellants state the issue in their brief as follows: "The only question at issue in this cause is the admissibility of the receipt offered to be introduced in evidence of the payment of the claim of plaintiff. This was incorporated in the motion for a new trial, which appears of record. The motion for new trial was overruled, and from that decision the defendant appeals." Upon that theory, they have no standing in the court upon appeal. The alleged receipt did not become a part of the record because an alleged copy of it was incorporated in the motion for a new trial. There is only one way to bring before this court any evidence offered and rejected in the court below, and that is by incorporating it in a bill of exceptions, either by a copy included therein or by making it an exhibit thereto. Section 171, L. O. L., provides: "The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more." Section 3, art. 7, of the Constitution, as amended, provides: "Until

otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony," etc. While the reporter's transcript and other papers purporting to be parts of the testimony accompany the transcript, they are not properly here, nor do they bear that authentication by the court which a properly prepared and signed bill of exceptions would give them. Therefore we cannot look into the purported testimony to ascertain the relevancy of the papers offered and rejected.

No objection was made to the sufficiency of the pleadings or to the jurisdiction of the court, and the appeal will be dismissed.

FUDGE v. BILGER et al.

(Supreme Court of Oregon. Dec. 16, 1913.)

MECHANICS' LIENS (§ 132*)—PROCEEDINGS TO PERFECT—COMPLETION OF WORK.

Where one employed as a carpenter by the day to erect a building quit work on September 12th, and on September 26th filed a statement to preserve priority of claim as against attaching creditors, and on the 23d of January following did additional work on the building, and furnished materials at the request of the occupant without the knowledge of the owner, no rights accrued under the statute for the relief of mechanics by reason of a notice of lien filed January 24th.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. § 132.*]

Appeal from Circuit Court, Yamhill County; Wm. Galloway, Judge.

Suit by Jacob Fudge against John Bilger and others. From a decree for plaintiff, defendant Lester Potter appeals. Reversed, and suit dismissed.

This is a suit to foreclose an alleged mechanic's lien. The facts, as far as thought to be material herein, are that in May, 1912, the defendants C. T. Myers and Bertha M., his wife, being the owners of a tract of land in Sheridan, Or., commenced the erection thereon of a dwelling in the construction of which they engaged the plaintiff, Jacob Fudge, and the defendant John Bilger as carpenters, agreeing to pay each \$4 a day for his services. Myers and his wife executed to the defendant Lester Potter a mortgage of such land to secure the payment of \$1,550 and interest at 10 per cent. from August 19, 1912, which mortgage was duly recorded July 21st of that year. Fudge and Bilger on September 26, 1912, pursuant to the provisions of section 7435, L. O. L., but evidently without occasion therefor, as prescribed in the statute, filed in the office of the county clerk of Yamhill county separate sworn statements, showing the labor theretofore performed by each on such building, the value of which services, after deducting all payments made on account thereof, amounted to \$84.50 and \$128, respectively. Notices

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of liens for material furnished to be used in such building were duly filed by claimants, at the dates and for sums as follows: C. O. Shumway, September 28, 1912, \$614.79; Chas. K. Spaulding Logging Company, a corporation, October 3, 1912, \$79.15; and the Yamhill Milling, Power & Light Company, a corporation, October 3, 1912, \$86.29—which liens, after having been perfected, were severally assigned to the defendant Potter. The plaintiff, after filing such sworn statement, performed further labor on the building, and also furnished material to be used in the construction thereof; the last service having been rendered January 23, 1913. The following day he filed a notice of lien, wherein he claimed to be due him \$90.10, after deducting all just offsets and counterclaims, and thereafter commenced this suit for the purpose above named; the complaint being in the usual form. The answer of the defendants C. T. Myers, Bertha M. Myers, and Lester Potter admits most of the averments of the complaint, and for a further defense alleges inter alia that the dwelling in question was completed September 12, 1912, and on the 26th of that month the plaintiff filed a pretended notice of lien, a copy of which was attached to the answer, that the services performed by the plaintiff January 23, 1913, were rendered without the order or direction of Myers or his wife, or of any person acting for them, and that the work was done and the material furnished in an attempt to create a lien after the time therefor had expired. The reply put in issue the allegations of new matter in the answer, and, the cause having been tried, resulted in a decree as prayed for in the complaint, and the defendant Potter alone appeals.

W. O. Sims, of Sheridan for appellant.
Simpson & Lewis, of Sheridan, for respondent.

MOORE, J. (after stating the facts as above). A copy of the sworn statement filed by the plaintiff September 28, 1912, shows that between June 10, 1912, and September 12th of that year, he labored on the building 39 days, which service, at the stipulated price, amounted to \$156, on account of which he received only \$67.50, thereby leaving due \$84.50. A comparison of this statement with plaintiff's sworn itemized account, which is made a part of the complaint, shows that, in order to make the former specification coincide with the latter computation, the services so rendered must necessarily include a charge of \$3.60 for 9 hours of labor performed September 13, 1912, so that the sworn statement should have been to the effect that the claim for services was for labor performed on the building from June 10, 1912, to September 13th of that year, both days included. The other charges for labor appearing in the itemized account after September 13, 1912, are as follows: "Oct. 24, five hours, \$2.00;

Jan. 23, 1913, two and one-half hours, \$1.00; material furnished \$.60." No evidence was offered tending to show that plaintiff performed any labor October 24, 1912, for which a charge of \$2 was made in the itemized account. The only testimony received of services rendered after September 13, 1912, related to the labor performed and the material furnished January 23, 1913, for which charges of \$1 and of 60 cents were respectively made.

John Bilger, as plaintiff's witness, in answer to the inquiry: "Along in September some time, was there any arrangement or agreement made with Mr. and Mrs. Myers in regard to stopping the labor on this house?" replied, "Was before that. We worked off and on there, whenever we had time. When we left there to go to Mr. Tripp's the understanding was that we were to come back to build a woodhouse. Q. It was the agreement that you were to come back and complete that work? A. That was my understanding." This testimony was corroborated by that of plaintiff.

Orville Yocom, who was living in the building in question when the last work thereon was performed by plaintiff, in referring to the time when such services were rendered, testified as defendant's witness as follows: "I don't know exactly about the date of that, but we had him come down there and do some plumbing work, and he remarked that there were some thin places that would probably be leaking as soon as it started to rain, and he said if it did, if I would just tell him about it, he would come down and fix them. It started to rain, and I met him and told him that it was leaking. He came down and fixed that and put these few weather boarding on, took a frame down from around the chimney."

Jennie Yocom, the wife of the preceding witness, in answer to the question: "Were you present in the house at the time Mr. Fudge came there to do some repair work?"—referring to the last work the plaintiff did on the building, replied: I was present at the time he came to the back door and spoke about doing that work. He asked if he might see where the leak was, and I asked who had sent him to do the work, and he didn't answer. He said Mr. Yocom had told him it was leaking. I told him we were authorized to have no work done on the house, and that was all of the conversation we had."

The testimony shows that the plaintiff had no contract to erect the dwelling, but was employed as a laborer at a stated daily compensation. When he filed his sworn statement September 26, 1912, he evidently thought he thereby secured a lien on the premises for the labor he had performed on the building, and for which services he had not been remunerated, but, probably learning later that such notice did not perfect the

lien, he concluded that by doing more work on the building his lien might attach. He had never furnished any material for the dwelling, but on January 23, 1913, he supplied lumber and tin of the value of 60 cents and performed labor for which a charge of \$1 was made. This service was not performed at the request of either Myers or his wife, but at the suggestion of Yocom, who told the plaintiff the roof was leaking. When Fudge went to the house to repair the leak, Mrs. Yocom notified the plaintiff that neither she nor her husband was authorized to employ him to do any work on the building.

It is believed that no lien for plaintiff's labor ever attached to the premises; that the house was substantially completed September 26, 1912, when his sworn statement was filed; that he was not thereafter employed by the owners of the building, nor by any agent of theirs to make repairs to the structure, and that for plaintiff's compensation for the work done and the materials furnished he must look to Yocom at whose suggestion the services were rendered and the material supplied.

Under the facts detailed the plaintiff is not entitled to enforce the provisions of the statute enacted for the relief of mechanics. *Coffey v. Smith*, 52 Or. 538, 97 Pac. 1079; *Crane & Co. v. Ellis*, 58 Or. 299, 114 Pac. 475; *Sarchet v. Legg*, 60 Or. 213, 118 Pac. 203; *Schade v. Alton*, 61 Or. 187, 121 Pac. 898.

It follows that the decree should be reversed, and the suit dismissed; and it is so ordered.

SANDSTROM v. OREGON-WASHINGTON R. & NAV. CO.

(Supreme Court of Oregon. Dec. 16, 1913.)

1. TRIAL (§ 305*)—MISCONDUCT OF OR AFFECTING JURY.

It is the duty of counsel to keep away from jurors when out of the courtroom during trials, and not to converse with them beyond the usual salutations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 728-730; Dec. Dig. § 305.*]

2. TRIAL (§ 305*)—MISCONDUCT OF OR AFFECTING JURY.

Where, as the jury was returning from viewing the premises, at the suggestion of some of the jurors, all of them were taken to a place of refreshment and given ice cream by one of the attorneys, the jury should have been discharged, and a new one impaneled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 728-730; Dec. Dig. § 305.*]

Department 1. Appeal from Circuit Court, Multnomah County; F. M. Calkins, Judge.

Action by A. H. Sandstrom in the nature of trespass on the case for damages to real property against the Oregon-Washington Railroad & Navigation Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

L. E. Schmitt, of Portland (Schmitt & Schmitt, of Portland, on the brief), for appellant. W. A. Robbins, of Portland (W. W. Cotton and A. C. Spencer, both of Portland, on the brief), for respondent.

RAMSEY, J. This is an action by the plaintiff to recover damages from the defendant for alleged consequential injuries to real property.

The plaintiff is the owner and in possession of lots 37, 38, 39, and 40, in block 177, of University Park in the city of Portland. These four lots are 100 feet long, and each of them is 25 feet wide, and they, together, comprise a tract 100 feet square in the north-west corner of said block. Block 177 is bounded on the north by Newark street, on the south by Trenton street, and on the west by Woolsey street. An alley 15 feet wide runs through the center of said block from north to south, and the plaintiff's four lots are bounded on the east by said alley. Woolsey and Trenton streets appear not to have been improved in any manner, and they are not traveled. Newark and Dana streets were opened and traveled. The plaintiff has a six-room dwelling house on his lots, which has been occupied by tenants most of the time while the plaintiff has owned said lots.

This action was commenced in February, 1912, or prior to that date. The plaintiff's second amended complaint was filed on February 17, 1912.

The plaintiff's house was erected on said premises prior to the time that the defendant constructed the tunnel and the excavation referred to below.

During the years 1909, 1910, and 1911 the defendant constructed a steam railroad along Dana street, a short distance east of the plaintiff's said lots and house, and said railroad has been in operation ever since it was so built, and many trains pass along said street and through said tunnel every day, conveying passengers and freight. The defendant, in constructing said railroad along said Dana street, made a large excavation in said street, and said excavation is the mouth or opening of the north end of a large tunnel constructed by the defendant for the use of its railroad; said tunnel being more than a mile long. The trains of the defendant pass through said excavation and said tunnel in carrying on the defendant's business as a common carrier.

The defendant owns lands on each side of said Dana street, and it has constructed a large excavation along the east side of said block 177, and north of said block, and said excavation at the bottom thereof is about 75 feet wide, and at the top it is much wider. It is more than 50 feet deep, and covers the whole of said Dana street on the east side of said block 177, and for some distance north of said block.

Newark street runs east and west on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

north side of said block 177, and to the east thereof, crossing said Dana street at the northeast corner of said block. Said excavation on Dana street completely blockades said Newark street where said Newark street crosses said Dana street, making it impossible for the plaintiff or any other person to pass on horseback, or with any kind of vehicle, or on foot, from said Newark street across or along said Dana street, thereby preventing all travel from said Newark street across or along said Dana street.

The plaintiff's said lots abut on said Newark street, and prior to the making of said excavation in said Dana street the plaintiff and his tenants, when they had occasion to go to the business part of the city of Portland, or elsewhere, went from his said dwelling house and lots east on Newark street to Dana street, and thence north on Dana street, about 1,000 feet, to Columbia Boulevard, an improved public highway; but, since the defendant made said excavation in said Dana street, it is impracticable for any one to pass from the plaintiff's premises along said Newark street via Dana street to said boulevard. Since the making of said excavation, the plaintiff and his tenants have been compelled to pass from his said house and premises west along Newark street to Fiske street, and thence north on Fiske street to said Columbia Boulevard, and the distance to said boulevard by that route is much greater than via Newark and Dana streets.

The second amended complaint contains two counts—one for damages for blockading said Dana street, and preventing the plaintiff and his tenants from passing to said Columbia Boulevard via Newark and Dana streets, and the other for damages caused to the plaintiff's premises, and the use thereof by the smoke, soot, dust, vapors, and obnoxious gases escaping from the mouth of said tunnel and from said excavation, and drifting over and upon the plaintiff's said premises, rendering them practically uninhabitable, etc. The mouth of the tunnel is 210 feet from the plaintiff's dwelling house. Damages in the sum of \$1,500 were claimed in each of said two counts. The court below granted a nonsuit as to the first count, and the jury found a verdict for the defendant on the second count. The plaintiff appeals, and claims that various errors were committed by the court below; but we find it necessary to pass on only one point.

After counsel for respective parties had made their opening statements to the jury, the attorney for the plaintiff requested that the jury be permitted to view the premises in controversy, and, this being agreed to by the attorney for the defendant, the court made an order that the jury visit and view the locus in quo in charge of the bailiff. The court then instructed the jury, *inter alia*, not to converse with any of the attorneys, and, in case they should desire anything pointed out

in any particular place, they were directed to ask the bailiff concerning it, and the bailiff was authorized to ask the attorneys concerning such matters, so that the bailiff could point out all points which the jury desired to see, and they were directed by the court not to talk with any one but the bailiff concerning the premises. The court charged them to do nothing that would prejudice their minds. They went to the premises, and viewed them, and one of the attorneys for each party went also.

When the jury returned, and the court reconvened, the attorney for the plaintiff moved the court for an order discharging the jury, for the reason that, when the jury had viewed the locus in quo as directed, and before they returned, one of the attorneys for the defendant requested the jury to go into a place where refreshments, etc., were sold, and to partake of refreshments, etc., claiming that said jury were, by the attorney for defendant, then and there treated to ice cream, etc., and that said attorney paid for said ice cream, etc., and that he also paid the car fare of the jury going to and returning from said premises. Counsel for the plaintiff claimed that the attorney for the defendant, in doing the things stated, *supra*, was guilty of misconduct, and asserted that the plaintiff could not consent to continue the trial before said jury under the circumstances.

The attorney for the defendant then stated to the court, *inter alia*, that the attorney for plaintiff instead of seeing that the bailiff was provided with funds to pay the car fare of the jury, failed to provide the funds, and said that he went to the attorney for the plaintiff, and asked him if anybody had provided funds for the jury's transportation, and the attorney for the plaintiff said, "No," and that he (the attorney for the defendant) then said that he would gladly do it. The attorney for the defendant said that he paid their fare with the understanding that he was doing it "for one of these gentlemen." The attorney for the defendant said, also, that, after the jury had walked half a mile through brush and sun, and had walked back to the corner, they all sat down at a store, and while they were sitting there two or three men (of the jury) spoke, and said, "You attorneys ought to set up the ice cream," and that he waited, and "this man" (the attorney for the plaintiff) did not say a word, and that finally the attorney for the defendant said, "I will, if that is the way you feel about it, after that walk," and he says that they went into the store, and he bought ice cream, and paid for it, and that he paid for the transportation of the jury back, and "did it simply because this man [the attorney for plaintiff] didn't."

Mr. Stewart, the bailiff in charge of the jury, says that some of the jury said that they thought some of the counsel should provide ice cream, and that the attorney for the defendant said, "Well, see here, I will go in,

and see what they have got." He says that this attorney went into the store, and found that they had what was desired, and then the attorney asked everybody in to partake of it, and that not one of them refused. He says that not a word was said concerning the case. He says, also, that this act of kindness on the part of the attorney for the defendant in treating them to ice cream "was appreciated by all."

There was no dispute as to the facts. Some of the jurors suggested that the attorney should treat to the ice cream. The attorney for the plaintiff did not accede to the request; but the attorney for the defendant did, and invited them into the store, and treated them to ice cream. These facts are set forth in the bill of exceptions. Statements were made by the attorneys for the parties who were present, and by the bailiff in charge of the jury, and these statements do not materially differ. The court below overruled the motion to discharge the jury, and instructed the jury to disregard the whole matter in trying the case and in agreeing upon a verdict. The plaintiff excepted to the refusal of the court to discharge the jury, and, after the verdict for the defendant was rendered, he moved for a new trial, and his motion was based, partly, on the said misconduct of the plaintiff and its attorney, etc. Every party to litigation is entitled to a fair and impartial trial.

[1, 2] It is the duty of counsel to keep away from jurors when out of the courtroom during trials, and not to converse with them beyond the usual salutations. 38 Cyc. 1828.

29 Cyc. pp. 803, 804, says: "It is generally a ground for a new trial that members of the jury were entertained or treated during the trial by the successful party, or by his attorney, or agent, especially that a juror or jurors were furnished with intoxicating liquors by or on account of such party."

In *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344, the facts were that two jurors applied to one of the defendant's attorneys for his horse and buggy to convey them home and return, and the attorney complied with the request. A verdict having been rendered for the defendant, a motion for a new trial was made, based in part on said facts, and the Supreme Court of Nebraska, passing on said point, says: "Unless fair-minded, unbiased jurors can be selected, a trial becomes a mere farce, dependent not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice, or interest of the jury. * * * Where a juror is accepted as being impartial, he must remain so during the trial. To permit him to accept favors from either party is to put him under obligations to such party, the tendency of which is to bias his judgment. Nor is it material that such favors were not intended to influence the juror, as it cannot be determined how far they may

have had that affect, and such misconduct will vitiate the verdict."

In *Springer v. State*, 34 Ga. 379, the facts were that one of the attorneys for the state, pending the trial, at the request of two jurors, fed their horses overnight, without charge, and, a verdict of guilty having been found, a motion for a new trial was made, based on said facts, and the Supreme Court granted a new trial, saying, *inter alia*: "The honor of the bar and the perfect purity of a jury alike demand their entire separation, in their personal and social intercourse, whilst trials are progressing. However harmless in themselves, as was the conduct of our respected brethren in these cases, we feel ourselves called upon, in this and every case where this separation is not preserved with the utmost care, to evince, in the most decisive manner, our purpose to shut up every avenue through which corruption or the influence of friendship could possibly make an approach to the jury box."

In *Redmond v. Royal Ins. Company*, 7 Phila. (Pa.) 107, the facts were that during a recess in the trial several jurors went to a restaurant, kept by a person interested in the verdict, and there partook of refreshments for which they did not pay, and the court, passing on a motion for a new trial, says: "But we look upon the conduct of the jurors as calling upon us for marked condemnation, and we think it should be dealt with in such a way as most likely to deter and prevent a similar occurrence. We therefore set the verdict aside, and grant a new trial."

In *Walker v. Walker*, 11 Ga. 206, the court says: "When a juror has been impaneled to try a cause, and during the trial, and before he has rendered his verdict, he shall be entertained by either of the parties, at their expense, and the verdict be in favor of the party so entertaining the juror, the verdict will be set aside."

In the *S. & M. M. Company v. Showers*, 6 Nev. 291, the syllabus of the court is: "The rule that a verdict in favor of a party who treats or entertains the jury will be set aside applies to any treating after they are sworn and before they agreed upon their verdict, whether once or several times, by design or inadvertently, in the presence of the officer or in the absence, and whether it might be called for or uncalled for by the proprieties of life."

In *Steenburgh v. McRorie*, 60 Misc. Rep. 516, 113 N. Y. Supp. 1122, the court, speaking of the treating of jurors to cigars by an attorney, says: "The act of treating the jury gives rise to a suspicion of attempted improper influence. If the court can be satisfied, in considering any irregularity or misconduct on the part of jurors, or of the parties, or of their attorneys, or of the court, that the party complaining has not or could not have sustained any injury from it, the verdict will not be set aside. In this case it

cannot be seen that the plaintiff could not have been, nor that he was not, injured by the treating of the jury. It is impossible to measure or estimate the effect upon the minds of the jury of the act complained of, or its possible or probable effect upon their verdict."

In 1 Hayne on New Trial (3d Ed.) § 48, the author says: "So when a juror, during the trial, spent the night at the house of one of the parties, and was entertained free of charge, a verdict in favor of such party was set aside. So when, during the trial, two jurors spend the night at the house of counsel for the successful party, the verdict was set aside. So when, during a trial for robbery, one of the counsel for the prosecution, at the request of two of the jurors, kept their horses overnight for them, without charge therefor, a verdict against the person was set aside. So when, during a trial, several of the jurors went to a restaurant, kept by a person who was chiefly interested in the verdict, and there partook of refreshments for which neither was made nor was asked to make compensation, the verdict was set aside."

In this case the attorney for the defendant, at the suggestion of some of the jurors, invited all of the jurors into a place of refreshments, and there treated them to ice cream. It was misconduct in the jurors to suggest that the attorneys should treat them, and it was gross misconduct on the part of the attorney for the defendant to accede to such suggestion, and treat them to refreshments.

It is impossible for any one to know what effect, if any, such treating had with the jury; but it is certain that it was misconduct that should not be passed by lightly, and the only effectual way to put a stop to such conduct is to set aside the verdict. While the attorney may have acted in good faith, and the jury may not have been influenced by his and their misconduct, yet it is not possible to know that it had no effect in the decision of the case. The bailiff says that his kindness "was appreciated by all."

The attorney himself evidently believed that he made a mistake, for, when the motion to discharge the jury was made, he expressed his willingness to consent thereto.

The trial court should have discharged the jury, and impaneled a new one, and, in refusing to do so, it erred.

The judgment of the court below is reversed, and a new trial is ordered.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

CARTWRIGHT v. MOFFETT et al.

(Supreme Court of Oregon. Dec. 16, 1913.)

1. TRUSTS (§ 21*)—NATURE OF INSTRUMENT.

In a suit to cancel a deed to plaintiff's son on the ground of fraud in misrepresenting

its legal effect, the fact that the parties characterized the instrument as a trust deed, when in fact it declared no trust, is not controlling; the effect of the deed being to intrust the property to the son.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 29, 30; Dec. Dig. § 21.*]

2. DEEDS (§ 211*)—VALIDITY—SUFFICIENCY OF EVIDENCE.

In a suit to cancel a deed on the ground of fraud, the weight of evidence held to sustain the validity of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. § 211.*]

3. ATTORNEY AND CLIENT (§ 93*)—AUTHORITY OF ATTORNEY—CONTROL OF SUIT.

Where plaintiff, in a suit to set aside a deed to her son, stated that a decree giving the son the legal title, one-half in his own right and one-half in trust for his brother, all subject to a life estate in her own favor, would be satisfactory to her, the entry of a decree to that effect was not an infringement of the authority of her attorney.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 175-179; Dec. Dig. § 93.*]

4. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

Any error in a suit to cancel a deed to plaintiff's son in ingrafting on the deed a trust to which the parties had agreed by parol was favorable to plaintiff, and not ground for reversal on her appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

Department No. 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Suit by Charlotte Moffett Cartwright against James Peter Moffett and another. From a decree for defendants, plaintiff appeals. Affirmed.

This is a suit to set aside a deed made by the plaintiff mother to her son, the defendant James P. Moffett, on the ground of fraud on his part in concealing from her the true legal effect of the document, and in stating to her that it was an instrument connected with a will prepared for her by her confidential attorney, which instrument the latter desired her to sign. The defendant traverses all the allegations of the complaint which impute to him any misconduct or fraud, and alleges affirmatively, in substance, that the plaintiff signed the deed knowingly and understandingly; that the matter had been discussed fully between the plaintiff and her son, the defendant Moffett, and, further answering, alleges that in pursuance of a written authority given to him by the plaintiff on February 7, 1910, empowering him to lease part of the property in contention for a period of 90 years, at not less than certain rates prescribed therein, he had entered into a preliminary contract with the defendant Henry, and had received \$1,000 earnest money from him to lease the property for 90 years at more advantageous terms than the minimum limited in his authority. The defendant Henry answered, in substance, that in pursu-

ance of the authority given by plaintiff to the defendant Moffett, her son, he had entered into the preliminary agreement mentioned, without any notice whatever of the alleged infirmity of the deed from the plaintiff; had paid \$1,000 as earnest money, which had never been returned to him; had submitted to the plaintiff a lease embodying the terms of the preliminary agreement in detail; and that neither his earnest money nor the lease had been returned to him, nor had the plaintiff made any objections to the terms of the proffered lease. He prayed that the plaintiff be compelled to specifically perform the agreement to lease the premises. The new matter in both answers was traversed by the reply. The circuit court, after hearing the parties at length, rendered a decree upholding the deed attacked by the complaint, requiring the plaintiff to specifically perform the agreement to make a lease for 90 years to the defendant Henry, and declaring that the defendant Moffett holds the legal title to the property in dispute, one half in his own right in fee simple, and the other half in trust for his brother, another son of the plaintiff, all subject to the life estate of the plaintiff therein. The plaintiff appeals.

Martin L. Pipes of Portland, for appellant. A. E. Clark and John F. Logan, both of Portland, for respondent Moffett. Thos. G. Greene, of Portland (Bauer & Greene, of Portland, on the brief), for respondent Henry.

BURNETT, J. (after stating the facts as above). The deed in question was executed December 22, 1909. It purports to convey to the defendant Moffett sundry tracts of land in and about the city of Portland, of the probable value of \$150,000, reserving to the plaintiff a life estate therein, subject to a mortgage of \$7,500. The plaintiff has resided in that vicinity since early childhood with the exception of about seven years spent in Eastern Oregon. She says that she was born December 21, 1842, and consequently was 67 years of age the day before the execution of the deed. Her only living children are James Peter Moffett, defendant, aged 50 years at the hearing of the case, and William H. Moffett, about 10 years younger. Owing to a prenatal accident, the latter was weak both in body and in mind, and had always been an object of particular care and solicitude on the part of his mother. The defendant was married in 1885. Up to that time he had lived with his mother, and was engaged in business for himself, and at the time of the hearing was occupying a responsible position with the Board of Fire Underwriters in the city of Portland. It is admitted that up to the time of the execution of the deed the mother and son were on terms of intimacy and affection, and that the mother had great confidence in the son. These are the principal characters in the events culminating in this litigation.

The property in question consisted in part of 100 feet square at the corner of Seventh and Salmon streets in the city of Portland, occupied by the plaintiff as a residence, and which otherwise produced no revenue or benefit to her. She also had in the southern part of the city some wild land acreage of about 70 acres, descending to her from her father's estate. In other parts of the city she had some buildings leased, but the total income from all the property from all sources amounted to only about \$150 per month. The taxes and various municipal improvements constituted charges upon the property far in excess of the revenue derived therefrom. The matter of leasing the property for a long term had been under discussion in the family for many months. The defendant son had been active in keeping down assessments and in otherwise looking after the property in general, although he did not collect any of the rents for his mother. The plaintiff is characterized by several witnesses as notional, and the testimony and history of the case justify the appellation. She was naturally very much attached to her home, where she had resided for almost half a century. The question of the disposition of her property was frequently discussed between herself and her defendant son. By turns she talked of making her will and making a deed. She consulted her confidential adviser, an attorney, about making a will, and under her direction he drew up a testamentary document by which she devised to the defendant son an undivided half of her property absolutely, and provided that the remaining moiety of her holdings should be managed and expended by a trustee for the benefit of her other son during his life, with remainder in fee to the defendant. The latter was present at her home when the attorney came to take her execution of the will, and some discussion arose about it. Her then counsel, testifying, says that the defendant opposed the execution of the will in the form mentioned, contending that his mother wanted a deed drawn. It appears that the discussion grew somewhat heated between the three, and finally the attorney withdrew, leaving the will with the plaintiff. The defendant testifies that the suggestion of a deed on that occasion came from his mother, and that after the attorney had departed, his mother requested him to have a deed drawn up, conveying to him the property in the form described in the deed, which she afterwards executed; that he complied with her request and presented the deed for her signature, but that she said was not ready to execute it. On the following day she and her son, the defendant, traveled together to Seaside, in Clatsop county, where she had a cottage. She remained there several days, but he returned to Portland the next day. After her return to the city of Portland, she executed the will on the 18th of December, 1909. On the 20th she executed a deed, conveying to the city of

Portland a part of the acreage already mentioned, to be used as a boulevard through the property. On the 22d she executed the deed in question to set aside which this suit is instituted.

[1] She is described by the attorney who drew the will as a person well qualified to manage her own affairs, and capable of executing the will. The plaintiff says that her son on various occasions had come to her home and cursed and swore at her and called her many vile names, which were resented by his brother, and demanded that she execute the deed in question. Although there were other parties present in the house at the time of these visits, they do not corroborate the plaintiff as to the language imputed to the son, although they testify for her to the extent that he insisted upon the deed. The allegation of her complaint is, in substance, that the son represented to her that the deed was an instrument which her attorney desired her to sign in connection with the will, but the testimony utterly fails to support that allegation. The deed was executed in the presence of two well-known citizens of Portland in no wise interested in the subject-matter. One of them, the notary who took the acknowledgment, testifies that he had taken the acknowledgment of the boulevard deed two days before, and that when he came to take the acknowledgment of the deed in question, he carefully read it to the plaintiff, and, the question of the boulevard deed having come up, an exception was interlined in the deed excluding the boulevard from the effect of the latter deed. Special comment was made, and a discussion had about her reservation of a life estate, so that no reasonable question can remain but that the deed was read to her and explained with greater detail than ordinarily observed on such occasions. It is true that it was spoken of at the time as being a trust deed. From a strictly legal point of view, this is an inapt expression, for on the face of the deed no trust is declared. Contemporaneously with the execution of the deed, before the same witnesses the son executed an instrument reciting the conveyance, reservation of the life estate, the relationship of the mother and two sons, and the desire to provide for the maintenance of the brother, and agreeing that from and after the death of the mother, the defendant would pay towards the support of the brother the sum of \$75 per month during the life of the latter, the payment to be made to James B. Cartwright as trustee for the brother. The circumstance that the parties called it a trust deed is not necessarily controlling. In fact, the mother did intrust all her property to her son. She had the right to do this if she understood what she intended. The son testifies that these matters had been frequently discussed between him and his mother, and that she desired him to take charge of the property and manage it so as to get a greater income from

it, with the ultimate design that the revenue after her death should be divided equally between him and his brother; that she had talked about having an instrument prepared, leaving a pension of \$50 per month for the brother, and some years prior thereto had actually had such an instrument drawn up, but had not signed the same. It appears in evidence that in conversation with the brother of her first husband she had suggested \$50 a month for the support of the defective son, but that the brother-in-law had finally prevailed upon her to make it \$75. The defendant testifies that all these things were discussed between him and his mother, and that it was understood between them that, although the whole estate was conveyed to him, subject to his mother's life estate, yet the understanding was that, while he collected one-half of the revenue, he was not to enjoy any of the same, but was to apply it to the expenses of the estate, and the other part he was to give directly to his mother. None of this is denied by the plaintiff in rebuttal. Almost immediately after the execution of the deed other parties began to ply the plaintiff with suggestions that the defendant son had succeeded in getting the whole title to all her property and could turn her out of doors, leaving not a cent for herself or the other son. No mention seems to have been made to her of her reservation of the life estate, but particular stress was laid on the fact that she had given a warranty deed.

It appears that she employed counsel during the month of January, 1910, with a view of instituting a suit of the kind now under consideration; yet as late as February 7, 1910, plaintiff executed the authority to her defendant son to lease the residence property for the period of 90 years. This writing was executed in duplicate in the presence of a disinterested witness, to whom the plaintiff committed the custody of her copy of the same. After reciting the minimum rent to be reserved, that instrument contains the following provision: "And the revenue received shall be divided monthly, share and share alike between us so long as Charlotte Moffett Cartwright shall live. And after her death the one-half of the monthly revenue received shall be paid to the legal representative of William Henry Moffett, so long as the said William Henry Moffett shall live." The brother was very much opposed to this agreement and at the time of its execution seized one copy of it and attempted to destroy it; but, according to the testimony of the witness, the mother rebuked him, made him leave the room, and locked the door to prevent his return.

As an indication of the mental caliber of the brother, it may be here noted that he expressed but two objections to the instrument last referred to; one was that the defendant had signed the same above the name of the mother, and the other was that the

lease, after it was negotiated by the defendant, recited a rental in excess of the minimum expressed by the agreement between the mother and son. The least amounts prescribed by the authority to lease were \$200 per month for the first year, \$300 per month for the second year, \$400 per month for the third year and the remainder of the term. In the agreement with Henry the corresponding amounts were fixed at \$250, \$350, and \$500, and, besides this, the lessee was required to pay all taxes and assessments against the property. Armed with this authority the defendant son negotiated with the defendant Henry concerning a lease on the residence property, and a preliminary agreement was drawn up reciting the receipt from the defendant Henry of the sum of \$1,000, as earnest money, the reservation of the rent at the advanced rate, the permission to the plaintiff to remain in possession of the residence until June 1, 1910, or until such time as the lessee should commence actual construction, reserving to her all the mantels, furnace, contents of the house, and shrubbery in the yard, agreeing to erect a "Class A" building at a cost of not less than \$50,000, and prescribing generally that the lease should be in the usual form of long-time leases customarily made in the city of Portland. Having collected the earnest money, the defendant took it to his mother, informing her that he had leased the residence property. She says that she refused to receive it, and it appears in evidence that she afterwards wrote to the bank, where the son had deposited one-half of it to her account, that she declined to receive the deposit. The son says that he offered her the one-half of the earnest money, and she told him to deposit it to her account. They differed diametrically on that point. Later on, the defendant Henry tendered a lease, apparently in the usual form of such leases, executed by himself, and sent it to the plaintiff for her signature. She has not made any objection to the terms of the lease, and has not returned it. The \$1,000 has not been returned to him.

[2] The sum and substance of the testimony is that the plaintiff desired to arrange her property so that after her death the two sons would enjoy the same, and the issues thereof, share and share alike, the defendant in his own right, and the other son through a trustee, with the remainder to the defendant son. The defendant agrees that that was the understanding, and the only difference between the parties is as to the manner in which the result was to be accomplished.

[3] A careful reading of every line of more than 900 pages of typewritten testimony, besides the exhibits, convinces us that the weight of the testimony is in favor of the validity of the deed. The plaintiff, while on the stand, expressed her satisfaction with the lease a number of times. In answer to

queries by the court, she stated that a decree embodying what both say was the ultimate intention of the parties would be satisfactory to her. The court accordingly made a decree as hereinbefore mentioned. Counsel for the plaintiff here contend that this was an infringement of his authority as attorney for his client, and that the court had no right to make such disposition of the case without the consent of counsel. The principal case relied upon by the plaintiff in support of that theory is *Bonifield v. Thorp* (D. C.) 71 Fed. 924. In that case, after time for answering had expired, and counsel for plaintiff had refused to grant leave to file an answer, the defendant secured a stipulation from the plaintiff himself extending the time. Afterwards, on motion of the plaintiff by counsel, the court struck out the stipulation and refused to take off the default. In deciding the case, the court used this language: "The court has no doubt whatever that this stipulation must be disregarded. The line of demarcation between the respective rights and powers of an attorney and client is clearly defined. The cause of action, the claim or demand sued upon, the subject-matter of the litigation, are within the exclusive control of the client; and the attorney may not impair, compromise, settle, surrender, or destroy them without the client's consent (citing numerous authorities). But all the proceedings in court to enforce the remedy, to bring the claim, demand, cause of action, or subject-matter of the suit to hearing, trial, determination, judgment, and execution, are within the exclusive control of the attorney. 'All acts, in and out of court, necessary or incidental to the prosecution or management of the suit, and which affect the remedy only, and not the cause of action,' are to be performed by the attorney." The action of the court comes within the first clause of the excerpt here quoted and is on the side of the line within the domain of the client. The logical result of the position contended for by plaintiff's counsel would be that no court could make a decree without the consent of the counsel on both sides.

[4] It may be, indeed, that the court technically erred in ingrafting upon the deed the conditions of the trust which had been agreed upon between the parties by parol, for it was within the scope of the pleadings and evidence to have dismissed the complaint. But the error, if any, is favorable to the plaintiff, and binds the other party because he has not appealed. The decree substantially declares the rights of the parties as the plaintiff has always contended that they should be, and to which the defendant has always consented, so far as the testimony shows. In good conscience the decree amounts to further assurances and declarations of the terms of the trust which was in fact reposed by the mother in her son. There is no

evidence that he has ever attempted to repudiate this trust, however inartificially declared by the mere words of the parties. It would be sacrificing substance to form for us to decline to uphold the decree of the court. The judge who heard the testimony, saw the parties, and their manner upon the stand is better qualified to judge of the ultimate facts of the case than we who are confined to a mere perusal of papers.

The decree of the court below is affirmed, and the cause remanded for such further proceedings as may be necessary in closing up the transaction of leasing, and other matters connected with the suit, the details of which can be better left to the supervision of the circuit court.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

CHAMBERS v. EVERDING & FARRELL CO. et al.

(Supreme Court of Oregon. Dec. 16, 1913.)

1. APPEAL AND ERROR (§ 391*)—PROCEEDINGS TO TRANSFER CAUSE—UNDERTAKING.

Under L. O. L. § 550, subds. 2-4, requiring an undertaking on appeal, and, on exception, the justification of sureties, and providing that when a party in good faith gives notice of appeal and thereafter omits, through mistake, to do any other act (including the filing of an undertaking), the court may permit performance on such terms as may be just, the trial court may, with or without hearing, permit appellant to substitute a new undertaking when the sureties on the original, after exception, fail to justify, provided no bad faith can be charged against appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077-2084, 2087-2088; Dec. Dig. § 391.*]

2. APPEAL AND ERROR (§ 391*)—PROCEEDINGS TO TRANSFER CAUSE—UNDERTAKING.

Permitting an appellant to substitute a new bond when the sureties on the original bond fail to justify does not infringe respondent's right to except to the sufficiency of the new bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2077-2084, 2087-2088; Dec. Dig. § 391.*]

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by George Chambers against the Everding & Farrell Company and others. From a judgment for defendants, plaintiff appeals. Motion to dismiss appeal disallowed.

Arthur I. Moulton, of Portland, for appellant. C. A. Bell and C. W. Fulton, both of Portland, for respondents.

McNARY, J. This is a motion to dismiss an appeal for alleged nonconformity with certain rules of practice and statutory requirements in respect to the filing of an undertaking. On July 8, 1913, appellant served upon respondents an undertaking on appeal.

Four days later, respondents filed exceptions to the sufficiency of the sureties on the undertaking. On the same day, the court made an order setting July 20th as the time in which the sureties should appear and justify. On the 18th day of the month, appellant filed with the clerk and served upon respondents a motion for an order permitting substitution of a new undertaking with the American Surety Company as surety, together with a copy of the undertaking. Supporting the motion was an affidavit of appellant to the effect that the sureties on the original undertaking were residents of an adjoining county engaged in the duties of their employment and for that reason refused to appear before the court and submit to an examination touching their qualifications as sureties; that great diligence had been exercised to procure the attendance of the sureties; and that no means were available to coerce the sureties to present themselves for examination. The day following, the court upon an ex parte hearing entered an order permitting appellant to file the substitute undertaking.

[1] Respondents' counsel urge with great zest that appellant has quite disregarded the provisions of subdivisions 2 and 3 of section 550, L. O. L.:

"Within ten days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking as hereinafter provided, and within said ten days shall file the original of said undertaking, with proof of service indorsed thereon, with said clerk. Within five days after service of said undertaking, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto.

"The qualifications of sureties in the undertaking on appeal shall be the same as in bail on arrest, and, if excepted to, they shall justify in like manner."

Counsel for appellant suggest a consideration of subdivision 4 of section 550, L. O. L.: " * * * When a party in good faith gives due notice as hereinabove provided of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just." Giving equal effect to the three subdivisions compels us to announce the rule that, upon a proper showing, the trial court may, with or without a hearing from either side, permit a party appellant to substitute a new undertaking when the original is rendered nugatory by the failure or refusal of the sureties to justify, after exception by respondent, provided no bad

faith or misconduct can be charged against appellant. This liberal doctrine is entrenched in the jurisprudence of this state by force of *Matlock v. Wheeler*, 29 Or. 64, 40 Pac. 5, 43 Pac. 867; *Newberg Orchard Association v. Osborn*, 39 Or. 370, 65 Pac. 81.

[2] The enforcement of this legal precept does not infringe upon the right of a respondent to except to the sufficiency of a subsequent undertaking, as that is a statutory right that cannot be abridged or withheld and is open to respondent any time within five days after the service of the substitute undertaking. In the case under consideration, the circuit court did not attempt to curtail respondents' right to except to the sufficiency of the new undertaking, but did make simply an order granting appellant permission to file a new bond on account of the circumstances detailed in appellant's affidavit. In the case of *Simison v. Simison*, 9 Or. 335, which counsel for respondents cite, this court held that a party appellant did not possess an inherent right to file a new undertaking in the absence of an order of the circuit court permitting the same. The rule there enunciated in no way runs counter to the law of this case, as appellant herein obtained the order from the court, the lack of which was the pitfall in the *Simison* Case. Respondents failed to attack the sufficiency of the substitute undertaking, nor were they deprived of an opportunity thereof, and for that reason cannot now be heard to question the regularity of this appeal merely because appellant obtained an order of the lower court granting permission to file the second undertaking, without a hearing being offered counsel for respondents.

Motion to dismiss is disallowed.

MCBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

SCHANEN-BLAIR CO. v. SOUTHERN PAC. CO.

(Supreme Court of Oregon. Dec. 9, 1913.)

1. CARRIERS (§ 62*)—EXISTENCE OF RELATION—EFFECT OF CONTRACT.

A carrier cannot, by contract, avoid the performance of its duties as such, if the service in question is one required of it as a common carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 195-206½; Dec. Dig. § 62.*]

2. RAILROADS (§ 218*)—CARRIAGE OF GOODS—STOPPING PLACES.

A carrier cannot be required, in the absence of statute, to stop trains to unload freight or passengers at places other than such as it may choose and hold out as regular stopping places.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 715; Dec. Dig. § 218.*]

3. RAILROADS (§ 58*)—CARRIAGE OF GOODS—STOPPING PLACES.

Though L. O. L. § 6897, requires a railroad to provide and maintain adequate passenger

and freight depots, the Legislature has not determined where a common carrier must establish stations, section 6888 providing that the schedule of rates shall plainly state the places between which passengers and property will be carried, thus leaving it optional with the carrier to determine its stations.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. § 58.*]

4. CARRIERS (§ 12*)—SCHEDULES—"POINT"—"DIRECTLY INTERMEDIATE POINT."

A provision in a carrier's schedule of rates, under the heading, "Intermediate Application," that the rates will apply to directly intermediate points does not mean that the rates apply to localities between stations; the word "points" referring to stations, and "directly intermediate points" to parts of the schedule in which only a part of the stations are named.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5419, 5420.]

5. CARRIERS (§ 20*)—REGULATION—RATES.

A carrier, having no siding or stopping place at a point where a patron desired to have stone hauled for a building in the course of erection, was entitled to demand extra compensation before undertaking the service, and is not subject to a penalty though the rate charged is greater than that fixed in its schedule for the station next beyond the point of delivery.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.*]

Department No. 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by the Schanen-Blair Company against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to sustain a motion for nonsuit.

This is an action to recover \$94.71, alleged to be an excessive freight charge, together with treble the amount thereof as damages, under section 6934, L. O. L. It appears that plaintiff was erecting the county courthouse building on Fourth street, between Salmon and Main streets, in the city of Portland, and had transported by the defendant's cars from its Park Street Station to said building 946.4 tons of stone, or 35 car loads, for which defendant charged and was paid by plaintiff 50 cents per ton, amounting in the aggregate to \$473.20, which it is alleged was \$94.71 in excess of the rate therefor, as the published tariff governing charges for transportation to the next nearest station fixed the rate at 40 cents per ton. Defendant by its amended answer, after certain denials alleges that the defendant, at the times mentioned, was operating a line of railroad from Park Street Station, running thence southerly along Fourth street to the south boundary of the city, and elsewhere; that its first station south of Park Street Station is known as South Portland Station, and that defendant did not maintain, nor have, a station between said Park Street Station and South Portland

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Station; that it was not, as a common carrier, required to receive or deliver freight at any point between Salmon and Main streets in said city; that it did not then have any tariff rates in effect, and was not required to publish or put into effect any rate to said building on Fourth street, between Salmon and Main streets. Subdivision 2 of the answer, among other things alleges: "That during the period of time mentioned in plaintiff's complaint, plaintiff was and had been engaged in the construction of that certain building located on Fourth street between Salmon and Main streets, in the city of Portland, county of Multnomah, state of Oregon, and that said building was being constructed for and on account of the county of Multnomah, under the supervision and direction of the county judge and county commissioners of said county. That at or about the time mentioned in said complaint, this plaintiff needed various amounts of stone material to be used in the construction of said building, and that at or about the time mentioned in said complaint the aforesaid county officials, together with this plaintiff, requested defendant to transport the stone mentioned in said complaint, from its Park Street Station in said city, along Fourth street up to said building. That at the times mentioned in plaintiff's complaint, and for some time prior thereto, this defendant did not have, nor has it since had, any station or facilities, at said Salmon and Main streets, to unload and deliver stone or other freight, and that at all the times mentioned in said complaint, and for some time prior thereto, said county officials and said plaintiff were fully aware of the fact, and knew that the defendant did not maintain any station between said Salmon and said Main streets, on said Fourth street, and did not receive and discharge freight at said point, and did not perform any services as a common carrier from said Park Street Station to said place, and was not required so to do, and then and there well knew and understood that the delivery of the stone mentioned in plaintiff's complaint, or any other article of freight, if undertaken by the defendant, would be undertaken as a private carrier, and would necessitate and require that the defendant should perform a special switching service between said Park Street Station and said point on Fourth street between Salmon and Main streets, and would require this defendant to place in said service extra men to handle the same. That thereupon and thereafter, pursuant to said request, the plaintiff and the defendant made and entered into an agreement for the accommodation of the plaintiff, whereby the defendant agreed to transport, during the nighttime, said stone from said Park Street Station to said courthouse building on said Fourth street, between said Salmon and Main streets, in said city, at the rate of 50 cents per ton for all the stone so to be transported

and carried, as aforesaid, and that the plaintiff then and there undertook and agreed to pay said charge to the defendant, and that pursuant thereto the defendant thereafter so carried and transported said stone and materials. * * * That the aforesaid service in so transporting and delivering said stone was at said time, ever since has been, and now is, a special switching service, agreed to be performed by the defendant for the plaintiff, as a private carrier. * * *

A demurrer to the new matter of the answer was sustained. It was conceded at the hearing in this court that the defendant did not have nor maintain a station at or near the said courthouse, or at any place between Park Street Station and South Portland Station; and the court instructed the jury that the county courthouse was a "directly intermediate point" between Park Street Station and South Portland Station within the meaning of the schedule of the tariff freight rates of the defendant, and that the freight rate for stone to South Portland Station was controlling on stone shipped to the courthouse. Defendant offered proof at the trial to establish the facts alleged in the new matter of the answer, which was excluded by the court, and the jury was instructed to disregard it. A verdict was rendered for plaintiff in the sum of \$94.71, and the court gave judgment thereon in the sum of \$284.13, to include treble damages as provided by section 6934, supra. The defendant appeals.

Wm. D. Fenton, of Portland (Ben C. Dey and Kenneth L. Fenton, both of Portland, on the brief), for appellant. L. C. Mackay, of Portland, for respondent.

EAKIN, J. (after stating the facts as above). [1] The contention of the defendant is that in the service rendered to plaintiff it was not acting as a common carrier; that the service rendered was not one required of it as a common carrier, but was properly the subject of contract. It is admitted that the service was rendered under a contract with plaintiff; but plaintiff contends that defendant cannot, by contract, avoid the performance of its duties as a common carrier, which is true if the service was one required of it as a common carrier.

[2] That raises the question whether a common carrier can be required to stop trains to unload freight or passengers at places other than such as it may choose and hold out as stopping places. This was the only question involved in *Northern Pacific Railroad Company v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092, a case where the railroad company laid out a town called North Yakima on its own ground, a little north of Yakima City, the county seat of the county in which it is situated, in the state of Washington. It is held by that case that mandamus will not lie to compel a railroad company to build a station or to maintain a stopping place, unless there is a specific stat-

utory duty to do so, and a breach of that duty. "To hold that the directors of this corporation, in determining the number, place, and size of its stations, * * * can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority. * * * Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other." And this principle is conceded by a dissenting opinion in that case, where it is said: "The question is not whether a railroad company can be compelled to build a depot and stop its trains at any place where are gathered two or three houses or families." But the dissent is based upon the ground that for private interests the company built up a new town at the expense of the old, and for this subservience of its public duty to its private interest the court may give redress. See, to the same effect, *Atchison, etc., R. Co. v. Interstate Commerce Commission* (Com. C.) 188 Fed. 229, Id., 200 U. S. 536, 26 Sup. Ct. 330, 50 L. Ed. 585. In *Hutchinson on Common Carriers*, §§ 48, 62, it is stated that to constitute one a common carrier in a particular case "the party must be under such a legal obligation to carry that an action will lie against him for refusal without sufficient excuse." And in *Elliott on Railroads*, § 1396, provides: "While a railroad company cannot, by contract or otherwise, change the nature of its public duties or obligations, it may, where it is not under a duty or obligation to the public, contract to perform services in the character of a private carrier of goods or passengers. In other words, where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier." This is also held in *Santa Fé Ry. Co. v. Grant Bros.*, 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787, in which the case of *Santa Fé, etc., Ry. Co. v. Grant Bros. Co.*, 13 Ariz. 186, 108 Pac. 467, is reversed on another point. In the former case, in speaking of the rule that a common carrier is not permitted to drop its character and fix its liability by contract, Mr. Justice Hughes says: "Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations, even against liability for its own neglect, are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the ac-

tual transportation of persons and things, whose carriage in other circumstances might be within its public obligation." *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 440, 9 Sup. Ct. 469, 32 L. Ed. 788. And where the railroad company is sued in the capacity of a common carrier, the plaintiff will fail if the evidence shows that the undertaking to carry was as a private carrier. *Chicago, etc., R. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161. The reasoning of the rule stated in *Liverpool Steam Co. v. Phenix Ins. Co.*, supra, as to carrying some commodities which it is not its business to carry, is just as applicable to delivery of freight at a place at which it is not its business to deliver.

[3] The Legislature of this state has not determined where a common carrier must establish stations. By section 6897, L. O. L., the company is required to provide and maintain adequate passenger and freight depots. Thus if the services given by the company's depots are not adequate for the accommodation of the public, the commission may require that a new depot be established at a place where such necessity requires; but by section 6888, L. O. L., the schedule of rates provided for "shall plainly state the places upon its line * * * between which passengers and property will be carried"—leaving it optional with defendant to determine its stations. This is the extent of the duty in that regard until changed by law. Unless a station is required by the Railroad Commission at a place where none is named in the tariff schedule, the company is under no obligation to discharge freight at a point between the stations designated in the schedule.

[4] The only other question necessary for consideration is whether the rate schedule of the defendant company requires defendant to discharge freight at localities not mentioned in the schedule, or whether the railroad may, as a private carrier, contract for the delivery of freight between stations without violating the statute or rate schedule. Plaintiff's counsel, as well as the court, rested the case on the construction of the language: "Rates named herein * * * will apply to directly intermediate points," contained in "(b) intermediate application," under the general heading, "Application of Rates," on page 13 of the schedule, as meaning that the rates shall apply to all localities between stations. We think that language will not bear such construction. In the first place the schedule was prepared by the railroad company as a compliance with the statute, and was not prepared by the Legislature or the Railroad Commission, and the defendant would not include anything in it that would appear as a consent to receive freight for delivery anywhere except at its designated stations; secondly, the station index in the freight schedule bears the heading: "Points on Southern Pacific Co. (Oregon lines) (except as shown)

from which rates apply"—followed by the names and index numbers of the stations. Thus the schedule refers to the stations as points on the road, and therefore the words "points" in "(b) intermediate application" must be understood to refer to the stations; and the term "directly intermediate points" above quoted, as explained by J. H. Mulchay, the assistant general freight agent of the defendant, has reference to the special commodity rates contained in section 2 of the schedule, beginning at page 24 and covering about 7 pages, and possibly to some other rates in which only certain points or stations are named; there being many intermediate stations to which the rate to the point named will apply. The circumstances of this case show the reasonableness of the contention that defendant rendered the service as a private carrier.

[§] There was no siding at the county courthouse building, and therefore the cars containing the stone blocked the main track during the unloading, and the engine and train crew were required to remain with the loaded cars and to promptly remove them. The defendant had the right and did refuse to deliver the stone at the points desired by plaintiff until the contract was made for the payment of extra compensation. It was an unusual and extraordinary service not contemplated by the statute nor by the rate schedule, and was not a violation of the defendant's duties as a common carrier. To make a special contract for the delivery of the stone, it included, not only the haul, but the extraordinary and unusual service.

The court erred in sustaining the demurrer to the amended answer, and also in denying the motion for a judgment of nonsuit.

The judgment is reversed, and the case is remanded to the lower court, with directions to sustain the motion for a nonsuit.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

STATE v. NAYLOR.

(Supreme Court of Oregon. Dec. 16, 1913.)

1. LEWDNESS (§ 9*)—EVIDENCE—COMMENT AND CRITICISM.

In a prosecution for lewd and lascivious cohabitation, the admission of evidence that the conduct of defendant and the woman with whom he associated was the subject of comment and criticism in the community was error.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 14; Dec. Dig. § 9.*]

2. LEWDNESS (§ 1*)—ELEMENTS OF OFFENSE—SEXUAL INTERCOURSE.

Sexual intercourse is essential to complete the crime of lewd and lascivious cohabitation between a man and woman not married to each other, prohibited by L. O. L. § 2075.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

3. INDICTMENT AND INFORMATION (§ 124*)—JOINDER OF PARTIES—LEWD AND LASCIVIOUS COHABITATION.

The parties to the offense of lewd and lascivious cohabitation may be indicted separately.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 327-333; Dec. Dig. § 124.*]

4. LEWDNESS (§ 5*)—INDICTMENT—SUFFICIENCY.

Under L. O. L. § 2075, making it an offense for any man and woman, not being married to each other, to lewdly or lasciviously cohabit or associate together, an indictment charging that defendant, not being married with a named female person, did lewdly and lasciviously cohabit with her, is sufficient as against the objection that it does not show that she cohabited with him.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 7-12; Dec. Dig. § 5.*]

5. LEWDNESS (§ 1*)—"COHABITATION."

"Cohabitation," as used in L. O. L. § 2075, prohibiting lewd and lascivious cohabitation, means a living together in the same manner as husband and wife.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1243-1245.]

6. LEWDNESS (§ 1*)—"LEWD AND LASCIVIOUS COHABITATION."

"Lewd and lascivious cohabitation" means a living together in a state of fornication or adultery.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, p. 4109.]

7. LEWDNESS (§ 6*)—BURDEN OF PROOF—MARRIAGE OF PARTIES.

In a prosecution for lewd and lascivious cohabitation, the state is not required to prove that the parties to the offense were not married.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 13; Dec. Dig. § 6.*]

8. LEWDNESS (§ 10*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

In a prosecution for lewd and lascivious cohabitation, evidence held to sustain a conviction.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 15; Dec. Dig. § 10.*]

Department No. 1. Appeal from Circuit Court, Washington County; J. U. Campbell, Judge.

Edward L. Naylor was convicted of lewd and lascivious cohabitation, and appeals. Reversed and remanded for new trial.

The defendant was indicted for the crime of lewd and lascivious cohabitation. The charging part of the indictment is as follows: "That the said defendant, Edward L. Naylor, on the 20th day of November, A. D. 1912, in the county of Washington, state of Oregon, then and there being, and not being then and there intermarried with one Martha Traver, a female person, did then and there willfully and unlawfully, lewdly and lasciviously cohabit and associate with her, the said Martha Traver, contrary to the statutes in such cases made and provided and against the peace and dignity of the state of Oregon."

Section 2075, L. O. L., is as follows: "If any man and woman, not being married to each other, shall lewdly or lasciviously cohabit or associate together, such man or woman, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one nor more than six months, or by fine not less than \$50 nor more than \$300."

There was no demurrer to the indictment. The trial court admitted, over the objection of plaintiff, evidence to the effect that the conduct and manner of living of the defendant and Martha Traver caused comment and criticism in the community.

The defendant's counsel requested the following instructions which were given striking out the words "and of course implies sexual intercourse." The defendant excepted to the modification of the instruction. The court gave the following instruction to which defendant's counsel excepted:

"A 'cohabitation,' within the meaning of the statute upon which this indictment is based, means the living together of a man and woman as husband and wife; the living together in one house; a boarding or tabling together at a fixed residence or abode, followed by the conduct which naturally arises between man and wife by reason of the marriage relation, and of course implies sexual intercourse."

"Cohabitation does not necessarily imply actual sexual intercourse. So far as this case is concerned, it is such conduct upon the part of the individuals as would naturally lead people to believe that they were having sexual intercourse; that is, would make people believe that they were living together as man and wife, with everything that the marriage relation implies."

The jury returned a verdict of guilty, and from a judgment on that verdict the defendant appeals.

George R. Bagley, of Hillsboro (Bagley & Hare, of Hillsboro, on the brief), for appellant. E. B. Tongue, of Hillsboro (Thos. H. Tongue, Jr., of Hillsboro, on the brief), for the State.

MCBRIDE, C. J. (after stating the facts as above). [1] The first error assigned in the appellant's brief was the admission by the court of evidence tending to show that the conduct of defendant and Miss Travers was the subject of comment and criticism in the community. The learned district attorney has cited to us no case, and we have been unable to find one, which holds evidence of this character to be admissible. It is plausibly argued that, as the gist of the offense is its tendency to cause scandal and corrupt public morals, the fact that scandal was caused may be proved as a substantive fact in the case. This would be a dangerous doctrine to ingraft upon the law. The question is not whether defendant's conduct was commented upon by a few or even many peo-

ple, but was it such as in the mind of a reasonable man would tend to cause scandal and tend to induce the belief in the minds of reasonable people that the relations between the parties were meretricious. Any other rule would substitute hearsay and the opinion of some members of the community for that testimony as to the facts which the law always requires. The authorities support this view. 2 McClain, Crim. Law, § 1135; Belcher & Fox v. State, 27 Tenn. (8 Humph.) 63; Buttram v. State, 44 Tenn. (4 Cold.) 171. The admission of this testimony was error.

[2] We are of the opinion that the modification of the instruction requested by the defendant was error. The great weight of authority is to the effect that there must be evidence of sexual intercourse between the parties in order to complete the offense. Luster v. State, 23 Fla. 339, 2 South. 690; State v. Marvin, 12 Iowa, 499; Commonwealth v. Calef, 10 Mass. 153; Jones v. Commonwealth, 80 Va. 18; Pruner v. Commonwealth, 82 Va. 115; State v. Miller, 42 W. Va. 215, 24 S. E. 882; Pinson v. State, 28 Fla. 785, 9 South. 706; Searls v. People, 13 Ill. 597; Sullivan v. State, 32 Ark. 187; Lyerly v. State, 36 Ark. 39; Kinard v. State, 57 Miss. 132.

The cases cited by the district attorney in opposition to this view arise under different statutes and are therefore not in point. Thus in the case of Cannon v. U. S., 116 U. S. 67, 6 Sup. Ct. 278, 29 L. Ed. 561, the statute provided that a man should not "cohabit with more than one woman"; the object of the statute being to prevent polygamous households in the territory of Utah. The words "lewd and lascivious" found in our statute do not occur in that act. It was sufficient that a man should dwell and abide with more than one woman, and what was said by the court in that case must be considered with reference to the statute there discussed.

In the case of State v. Chandler, 96 Ind. 591, the statute made it criminal for persons not married to each other to cohabit with each other in a state of adultery or fornication. The indictment charged that the persons named "not being married to each other did then and there unlawfully live and cohabit together as man and wife." The objection to the indictment was that there was no allegation that the defendants cohabited together in a state of adultery and fornication and that therefore the indictment was not within the statute. The court held that the allegation that they lived and cohabited together as man and wife necessarily included a charge that they cohabited together in a state of fornication or adultery and that the indictment was sufficient. In Cox v. State, 136 Ala. 94, 34 South. 168, 41 L. R. A. 760, the defendant was indicted upon a statute similar to that in Cannon v. U. S., supra, which made cohabitation with a sec-

and wife a crime, but which did not contain the words "lewd and lascivious." The holding was the same as in the Cannon Case and upon the same reasoning. The case *In re Watson*, 19 R. I. 342, 63 Atl. 873, arose upon a similar statute to the ones cited in the cases of Cannon v. U. S. and Cox v. State, supra, and therefore has no application to the statute of this state now under consideration. The same may be said of *Taylor v. State*, 36 Ark. 84, and of *U. S. v. Higginson*, (C. C.) 46 Fed. 750, which was another prosecution under the Edmund's Act, discussed in Cannon v. State, supra. These cases, unless closely examined with reference to the particular statutes under which they occurred, are liable to be misleading and, no doubt, in the hurry incident to the trial, did mislead the learned circuit judge at this trial in the court below.

[3] The objection that the indictment does not state facts sufficient to constitute a crime is not well taken. Waiving for the purposes of this trial the question as to whether the crime is a joint or several offense and that both must concur in the act and in the intent in order to consummate it, the authorities are clear that the parties may be indicted separately. McClain, Crim. Law, § 1131.

[4-6] The indictment charges that the defendant unlawfully, lewdly, and lasciviously cohabitated and associated with Martha Traver and that he and Martha were not married. "Cohabitation," as used in the statute, means a living together in the same manner as husband and wife. "Lewd and lascivious cohabitation" means a living together in a state of fornication or adultery, and, while it would have been better perhaps to have followed the words of the statute, we think the language used is sufficient where no objection to the form of the indictment was raised by demurrer or upon the trial. It is difficult to see how defendant could cohabit with Martha without Martha cohabiting with him. But there is good ground for holding, and there is authority to the effect, that in a statute like ours a joint immoral intent is not necessary if there is a joint concurrence in the physical acts necessary to constitute it. *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599. This question, however, does not necessarily arise in the case at bar.

[7] It is also urged that it was necessary for the state to prove that defendant and Miss Traver were not married, but such is not the law in cases of this character. McClain, Crim. Law, § 1132; *State v. McDuffie*, 107 N. C. 885, 12 S. E. 83; *U. S. v. Higgerson* (C. C.) 46 Fed. 751; *People v. Colton*, 2 Utah, 457.

[8] It is argued that there is not sufficient evidence to justify the verdict, but in our judgment it was sufficient to indicate an open meretricious association between the parties,

and to have upheld the verdict had the case been in other respects free from error. When an unmarried man and girl are so infatuated with each other's society that they are willing to defy public opinion and the natural comment that would arise from such conduct and live for a year and a half alone with each other in a small house of three rooms, eat there, sleep there, and generally conduct themselves, so far as outside appearances go, as husband and wife, when the man is found in bed and the woman in the same room in her night clothes, with her corset and clothes hanging on a chair near the bed, when the girl tags around and camps with him at state fairs and is constantly in his society, the average normal man who knows human nature and the normal strength of human passion will naturally come to the conclusion that these open demonstrations are accompanied by secret and continuous fornication unless one or the other of the parties is incapable of the sexual act. The jury had the parties before them and were fully able to judge whether they were physically capable of following the natural impulses of natures, so callous to public opinion as theirs seemed to be, or whether the man was a Saint Anthony and the woman a walking iceberg which passion was incapable of thawing. There need not be direct evidence of sexual intercourse between the parties, if circumstances satisfy the jury beyond a reasonable doubt that it habitually occurred. It is seldom that fornication, which is a crime of secrecy, can be proved by direct evidence, and if the state can satisfy the jury beyond a reasonable doubt that in the natural and normal course of things it must have occurred in this instance, that is all that is required.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

MOORE and REMSEY, JJ., concur. BURNETT, J., concurs in the result.

LEBANON LUMBER CO. v. LEONARD et al.

(Supreme Court of Oregon. Dec. 16, 1913.)

1. NAVIGABLE WATERS (§ 1*)—WHAT CONSTITUTE—CAPACITY FOR FLOATING LOGS—"NAVIGABLE."

The test whether a stream is "navigable" for the purpose of floating sawlogs is whether it is inherently and in its nature capable of being used for the purposes of commerce, and it is sufficient if it has that character at different periods, recurring with reasonable certainty, and continuing long enough to render it beneficial to the general public; but it is not sufficient that the stream can be made to float logs for a few hours during a freshet.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 4681-4683; vol. 8, p. 7728.]

2. NAVIGABLE WATERS (§ 18*)—RIGHTS OF PUBLIC—RIGHTS ON ADJOINING LAND.

Where the bed and banks of a stream are owned by the riparian proprietors, its navigability does not give the navigator a right of way over the land, as that can be acquired only by exercise of the power of eminent domain.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 1, 54-58; Dec. Dig. § 18.*]

3. NAVIGABLE WATERS (§ 1*)—WHAT CONSTITUTE—MCDOWELL CREEK.

McDowell creek, $1\frac{1}{2}$ to 3 feet deep, and 20 to 30 feet wide in ordinary freshets, very tortuous, and claimed to be floatable 3 or 4 times a winter during freshets lasting from 1 to 5 days, but not recurring at regular periods, and it being necessary to have men on the banks to float the logs, is not navigable for saw-logs.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

4. LOGS AND LOGGING (§ 19*)—USE OF STREAMS—OBSTRUCTION—DAMAGES.

Where there is no evidence of specific damage from the floating of logs in a nonnavigable stream across defendant's land other than the taking away of a few feet or inches from the bank much of the way across the place, the court will allow only nominal damages in the sum of \$50, and enjoin the plaintiff from further placing logs in the stream for floating.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 50-52; Dec. Dig. § 19.*]

Department 2. Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

Suit by the Lebanon Lumber Company against Arabel D. Leonard and others to enjoin plaintiff's floating sawlogs down McDowell Creek to the Santiam River. From a decree for plaintiff, defendants appeal. Reversed and rendered.

J. K. Weatherford, of Albany (Weatherford & Weatherford, of Albany, on the brief), for appellants. H. H. Hewitt, of Albany (Samuel M. Garland, of Lebanon, and Hewitt & Sox, of Albany, on the brief), for respondent.

EAKIN, J. [1] The only question involved here is whether McDowell creek is a navigable stream for the purpose of floating sawlogs. The question of what constitutes a stream a floatable one has been before this court frequently. One of the first cases in which the question is thoroughly considered is *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609, in which it is held: "It is enough if it has floatable capacity at certain periods [of the year], recurring with regularity, and continuing a sufficient length of time to make it useful as a highway for floating logs. * * * But a stream to be navigable in this sense must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade, or, as has been said, 'to float the products of the mines, the forests, or the tillage of the country through which it flows to market.'" This definition emphasizes the fact that the use of the stream must be practical to the public. It is not sufficient if one man or corporation

may be able to make use of it. The land under the water is private property, and only the right to use the water as a means of transportation and the stream as a highway for that purpose is involved here. The right of navigation of streams unaffected by the tide was at first based upon the theory of prescription; but that theory has been abandoned as not applicable to the streams in this country. Large streams are considered nature's highways without the aid of legislation. This is especially recognized as true where they have been reserved from private ownership by the national government or by the state. In the admission of Oregon as a state Congress provided that all navigable waters therein should be common highways and forever free to the inhabitants of the state, and later this right in the public was recognized by the courts as extending to small streams the beds and banks of which are claimed by riparian owners. Gould on *Water Courses*, § 107, in discussing this matter, says: "The authorities agree that the streams which in their natural condition are only useful for rafting purposes during the whole or a part of each year are highways for that purpose, and the title of the riparian owners to the beds of such streams is subject to this right of passage." And at section 109 it is said that to be floatable the stream must be capable of floatage, as the result of natural causes, at periods ordinarily recurring from year to year and continuing for a sufficient length of time in each year to make it a useful highway. The mere possibility of occasional use during a brief or occasional freshet does not give it a public character; but, as said in *Kamm v. Normand*, 50 Or. 9, 91 Pac. 448, 11 L. R. A. (N. S.) 290, 128 Am. St. Rep. 698, streams which are not of sufficient size and capacity to be profitably so used are wholly and absolutely private. The true test, therefore, to be applied in such cases is whether a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs. It is sufficient if it has that character at different periods, recurring with reasonable certainty, and continuing for a sufficient length of time to make it commercially profitable and beneficial to the general public. But every small creek or rivulet in which logs can be made to float for a few hours during a freshet is not a public highway. It must at least be navigable or floatable in its natural state, at ordinary recurring winter freshets long enough to make it useful for some purposes of trade or agriculture. The law in regard to floating sawlogs is fully reviewed by Mr. Chief Justice Bean in the case last cited, resulting in the conclusions we have adopted above.

[2] Where the bed and banks of the stream are owned by the riparian proprietor, the navigability of the stream does not give to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the navigator a right of way on the land. That can be acquired only by the exercise of the right of eminent domain. In case of the navigation of such a stream, the navigator may find it necessary at times to enter upon the land of a riparian owner by reason of danger, or to reclaim stranded property which has washed ashore without the fault of the owner, but he must pay all damages occasioned thereby; otherwise he is limited to the stream. Gould on Waters, § 99, says: "The right of navigation ceases * * * at the water's edge. * * * The public have, therefore, as against the riparian owners, and as incident to the right of navigation, no common-law right to use the land adjoining a river above high-water mark. * * * Those who travel upon the banks of streams for the purpose of propelling their logs are liable in trespass to the owner of the banks." And at section 108 it is said: "If the stream is so small and shallow that logs cannot be driven in them without traveling upon the banks, it is not open to the public for passage."

[3] In view of the law as thus stated, it is clear that McDowell creek is not navigable for sawlogs. It is a small stream having a depth of 1½ to 3 feet during ordinary freshets, is 20 to 30 feet wide, is very tortuous, having 8 or 10 very abrupt bends in its course across defendants' land, which is about 30 chains wide. It is claimed to be floatable for probably not more than 3 miles above its mouth, and flows about 44 cubic feet of water per second. Plaintiff's principal witness says that the freshets last from 1 to 5 days. Other witnesses say from 1 to 2½ days. These freshets occur 3 or 4 times during a winter, but not at regular periods. Twelve hours of warm rain will bring such a freshet. Plaintiff has to depend on his men in the logging camp to float the logs, for the reason that it has no warning of the flood in time to send men from the mill. If the stream were otherwise sufficient to float sawlogs, the highwater is not of sufficient regularity or duration to be of practical public utility. As plaintiff put its logs into the stream in January, no other person could have had access to it up to the time of the trial in May, for the reason that it left a jam of logs in the creek at the upper side of defendants' land and on the banks all along the creek, to the number of about 500, which obstructed the creek. The right to use a stream for floating does not include the use of it for storage from one freshet to another or during the summer months. Therefore this creek certainly is not of public utility as a floating stream. Plaintiff also claims the right to have men upon the banks to float the logs, practically conceding that it is not possible to float a large quantity of logs without the use of men on the banks to keep the logs in the stream and moving.

We find that the stream is not a navigable stream for floating logs, that plaintiff was not entitled to an injunction against the defendants, and that the injunction should be dissolved, and the complaint dismissed.

[4] Defendants by their answer contend that the acts of plaintiff were trespasses upon their land, and aver that it is threatening to continue floating logs in the creek, and that in its attempt to float the logs it has caused them irreparable damage, asking judgment for damages in the sum of \$1,000, and that plaintiff be perpetually enjoined from attempting to float logs in the creek over their premises. It appears that the acts of plaintiff were causing the destruction of the banks of the creek and the carrying away of the soil; but there is no evidence of specific damage other than the taking of a few feet or inches thereof from the banks of the creek much of the way across the place. We have no data by which to compute the amount removed. Therefore we will allow only nominal damages in the sum of \$50 and adjudge that the plaintiff be perpetually enjoined from further placing logs in McDowell creek for the purpose of floating, and from attempting to so use said stream across defendants' premises.

The decree is reversed, and one is entered here for defendants.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

KNOLHOFF v. MARK.†

(Supreme Court of Oregon. Dec. 16, 1913.)

1. ACKNOWLEDGMENT (§ 57*) — AUTHENTICATION—EXECUTION IN OTHER STATE.

L. O. L. § 7109, requires deeds of realty to be attested by two witnesses. Section 7110 authorizes deeds to be executed and acknowledged in another state in accordance with the laws of such state. Section 7111 requires the certificate of the clerk of court to a deed acknowledged in another state, other than before a commissioner of deeds of this state or a notary public, to the effect, among other things, that the deed is executed and acknowledged according to the laws of such state. A deed executed in New Jersey was attested by only one witness and acknowledged before a commissioner of deeds of that state. The clerk of court certified to the official character and signature of the commissioner but failed to state that the deed was executed according to the laws of New Jersey. Held, that it was not a sufficient deed, would not be recorded, and was not such as a vendee was entitled to receive.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 264; Dec. Dig. § 57.*]

2. EVIDENCE (§ 370*)—DEEDS — AUTHENTICATION.

Under the express provisions of L. O. L. § 7125, deeds executed and acknowledged as provided by statute may be read in evidence without further proof, and they are entitled to record.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1538, 1559, 1560, 1562-1578, 1592; Dec. Dig. § 370.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 6, 1914.

3. VENDOR AND PURCHASER (§ 150*)—PERFORMANCE BY VENDOR—CONVEYANCE.

A vendee is entitled to a deed that has been in all respects so subscribed, sealed, witnessed, acknowledged, and certified as to be entitled to public record.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 296, 297; Dec. Dig. § 150.*]

4. SPECIFIC PERFORMANCE (§ 96*)—PERFORMANCE BY PLAINTIFF — AUTHENTICATION OF CONVEYANCE.

A deed executed in another state, with only one witness, acknowledged before a commissioner of deeds of that state, and not certified to have been executed and acknowledged according to the laws of that state, is not admissible as evidence of performance by plaintiff in a suit for specific performance of a contract to purchase land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 278-285; Dec. Dig. § 96.*]

5. SPECIFIC PERFORMANCE (§ 96*)—CONDITIONS PRECEDENT—PERFORMANCE BY PLAINTIFF.

A vendor cannot enforce specific performance where the contract calls for a deed before, or concurrent with, further payments, unless he has executed a sufficient deed and tendered it to the vendee or brought it into court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 278-285; Dec. Dig. § 96.*]

Department 1. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Suit by Ferdinand William Knolhoff against Henry A. Mark. From a decree for plaintiff, defendant appeals. Reversed, and suit dismissed.

This is a suit in equity in the nature of a cross-bill for reformation and for specific performance of a contract for the sale of real property.

George R. Wilbur, of Hood River, for appellant. A. P. Reed, of Hood River (L. A. & A. P. Reed, of Hood River, on the brief), for respondent.

RAMSEY, J. On November 19, 1910, the defendant herein commenced, in the circuit court of Hood River county, an action at law against the plaintiff herein for the recovery of \$500 paid by the former to the latter on the purchase price of a 20-acre tract of land in Hood River county. The plaintiff in this suit filed an answer in said action at law and at the same time filed a complaint in equity in the nature of a cross-bill, praying for the reformation of the contract for the sale of the real property and for a decree for the specific performance of said contract, when so reformed.

The contract forming the basis of this suit, and which the plaintiff desires to have reformed and specifically enforced, is in writing and in the following words, to wit: "Memorandum of agreement made this 18th day of July, 1910, between Ferdinand William Knolhoff, party of the first part, and Henry A. Mark, party of the second part,

witnesseth: That the party of the first part agrees to sell and convey by good and marketable title a tract of twenty (20) acres of land situate on Upper Hood river, Hood River county, Oregon, being the same land which has been the subject of discussion between the parties, for the sum of fifty-five hundred (\$5,500) dollars payable as follows: Two hundred and fifty dollars, on the execution of this instrument; two thousand two hundred and fifty dollars on the closing of title as hereinafter provided; three thousand dollars by the party of the second part executing a purchase money bond and mortgage for that amount, bearing interest at the rate of eight per cent. per annum payable semiannually, from September 1, 1910, said mortgage to be due in six years from the date thereof, and to contain the privilege of prepayment at any time before maturity, on thirty days' notice. The title is to close on the 15th day of August, in the year 1910, at the office of H. A. Mark, 135 Broadway, New York City. Ferdinand William Knolhoff. [L. S.] Henry A. Mark. [L. S.]"

The plaintiff asks that said contract be so reformed that the 20 acres of land referred to in said contract will be described therein as follows: "The south half of the northwest quarter of the northwest quarter of section 8 in township 1 south, range 10 east of the Willamette meridian, containing 20 acres, according to the United States government survey thereof, and containing 20 acres, more or less."

The complaint alleges that, by inadvertence, oversight, and mistake, the scrivener who prepared and wrote said agreement neglected to more fully and particularly describe said land in said agreement.

The defendant paid the plaintiff the sum of \$250 at the time that said contract was executed, and on July 20, 1910, he paid \$250 more on the purchase price of said land.

The plaintiff alleges that he was at the time of the making and completion of said contract and now is ready, able, and willing to convey said land to the defendant by a good and sufficient conveyance thereof, and to receive the balance unpaid of the purchase price, and receive and accept a good and sufficient money bond and a mortgage to secure the deferred payments of the purchase price, pursuant to the terms and conditions of said agreement, and that, upon the performance of said agreement on the part of said defendant, the plaintiff is ready, able, and willing to give the defendant possession of said land. The plaintiff alleges also that on the 15th day of August, 1910, at the office of H. A. Mark, 135 Broadway street, New York City, N. Y., as mentioned in said agreement, the plaintiff duly tendered and offered to deliver to the defendant a good and sufficient deed to said land, and offered to accept the sum of \$2,000, the bal-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ance of said purchase price, then due and payable, and also offered to accept the said purchase money bond and mortgage to secure the sum of \$3,000, the balance of the said purchase price, and bearing interest at the rate of 8 per cent. per annum, payable semiannually, from September 1, 1910, and due in six years from the date thereof, and containing the privilege of prepayment at any time before maturity, on 30 days' notice, and then and there demanded that the defendant pay the balance of said purchase price and execute said bond and mortgage to secure the balance thereof, pursuant to said agreement, but that the defendant then and there and ever since has refused and neglected to accept the said deed, or to pay the balance of said purchase price, or to execute said bond and mortgage according to said agreement. The complaint alleges also that the plaintiff now and hereby brings into this court a good and sufficient deed of conveyance to said lands to the said defendant, executed by the plaintiff and his wife duly joining with him therein, and tenders the same to the defendant, and offers to deposit the same in this court, to be delivered to the defendant upon the payment of the balance unpaid on the purchase price of said land and upon the execution and delivery to the plaintiff of a good and sufficient purchase-money bond and mortgage to secure the purchase price of said land, to wit, the sum of \$3,000 agreeable to the terms and conditions of said agreement and purchase price; the balance of said purchase price, to be paid, as aforesaid, in cash, being the sum of \$2,000.

The defendant answered said complaint, denying parts thereof, and setting up facts as to the execution of said contract, and inter alia the answer alleges that, when the plaintiff and the defendant were negotiating for the sale and purchase of said land, the defendant informed the plaintiff that he wanted to purchase only lands already supplied with water for irrigation, and that the plaintiff, well knowing defendant's said desire, represented to the defendant that he owned just such land as the defendant desired and, for the purpose of inducing him to purchase his said land, did falsely and fraudulently state and represent to the defendant that his said land, which he proposed to sell to the defendant was "Irrigated land," and that the purchase of the same by the defendant would carry with it and would thereby convey to the defendant the right to the use of sufficient water to irrigate the same, to wit, 11 inches (miner's measure) of water, at an annual cost to the defendant of not to exceed \$1.75 per inch, which said representations were false, when so made, and were well known to the plaintiff to be false, and were made for the purpose and with the intent of deceiving, defrauding, and inducing him to enter into said contract and paying the money as

aforesaid. The answer further alleges that these negotiations were carried on at a great distance from said land, to wit, in the states of New York and New Jersey, and that the defendant had no knowledge, nor the means of obtaining knowledge, of said land, nor water rights, of which the plaintiff well knew, and the defendant was therefore obliged to and did rely exclusively upon the plaintiff's said representation concerning said land and the irrigation rights connected therewith, and so relying thereon and believing the same to be true, and being deceived thereby, the defendant did enter into the execution of said contract and paid the said portion of the purchase price hereafter mentioned. The answer then alleges the payment of the \$500 on the purchase price of said land, and that the defendant had the title to said land examined and from said examination discovered and learned for the first time, and now alleges the fact to be, that there was no water or water rights, nor rights in water for irrigation purposes, appurtenant or belonging to or connected with said land, nor would the plaintiff's deed of conveyance for said land carry with it, or convey to, or in any wise entitle or invest the plaintiff (defendant) with any water, water rights, or rights in water for the purpose of irrigating said land, all of which the plaintiff well knew when he made such representations concerning said land, as aforesaid, whereby the defendant was deprived of all benefit and advantage which he otherwise would have derived from the purchase of said land. The answer alleges also that said land lies in a semi-arid region; that the surface soil consists of a fine volcanic dust which is practically worthless for cultivation unless irrigated; that the defendant desired to purchase only irrigated land, and so informed the plaintiff, for the purpose of growing apples and other fruits and agricultural products, and that said land, without water for irrigation, will not grow any fruit, crops, or agricultural products, and that the chief value of said land consists in the water rights connected with or appurtenant thereto, all of which the plaintiff well knew; and that, if the defendant had known that his purchase of said land included no irrigation water for use upon said land, he would not have entered into said contract nor have paid either of said sums of money to the plaintiff, etc., etc.

The reply denied part of the new matter of the answer and set up new matter. The pleadings are lengthy, and it is impracticable to set them out more fully.

This is a suit by the vendor to enforce specific performance of a contract for the sale of real property. There are several questions presented for decision.

The defendant claims that the contract which the plaintiff asks to have enforced is not sufficiently certain, as to the descrip-

tion of the property to be conveyed, to enable the court to decree a specific performance, and he contends strenuously also that the plaintiff prevailed on him to execute the contract sued on by fraudulently representing to him, when the contract was executed, and in the negotiations leading up to its execution, that the 20-acre tract was irrigated land, and that there was plenty of water appurtenant and belonging to said land, which would be conveyed to him by the plaintiff's deed, to irrigate said lands, and that said representation was false, etc.

The plaintiff's Exhibit B, which was offered in evidence before the referee at Hood river, purports to be a warranty deed, made by the plaintiff and his wife to the defendant, in Essex county, N. J., on July 30, 1910, purporting to convey to the defendant the 20 acres of land in dispute, located in Hood River county, Or. This instrument is in proper form and appears to have been subscribed by the plaintiff and his wife, but it appears to have been attested by only one subscribing witness.

[1] When it was offered in evidence, its admission was objected to by counsel for the defendant because it had not been sufficiently identified, because the same is not sufficient as a deed of conveyance, and because it does not comply with the laws of the state of Oregon, relating to conveyances of real estate by deed, in that the same is not properly witnessed, nor is it in such form as to entitle it to the dignity of a deed of real property in this state, nor would it be entitled to be recorded as a deed of conveyance, etc. This presents a serious question. The land described in this instrument is located in this state, and this instrument purports to have been executed in the state of New Jersey.

Deeds of conveyance of real property, executed in this state, are required to be attested by two subscribing witnesses. L. O. L. § 7109. This instrument, if it had been executed in this state, would be invalid as a deed of conveyance because it is attested by only one witness.

Section 7110, L. O. L., provides that, if a deed of conveyance shall be executed in any other state of the United States, such deed may be executed according to the laws of such state, and the execution thereof may be acknowledged according to the laws of such other state, before any judge of a court of record, justice of the peace, notary public, or other officer authorized by the laws of such state to take acknowledgments of deeds therein or before any commissioner appointed by the Governor of this state for such purpose.

Section 7111, L. O. L., is as follows: "In the cases provided for in the last section, unless the acknowledgment be taken for a commissioner appointed by the Governor of this state for that purpose, or before a notary public certified under his notarial seal,

or before the clerk of a court of record certified under the seal of the court, such deed shall have attached thereto a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which such acknowledgment was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was at the date thereof such officer as he is therein represented to be, that he believes the signature of such person subscribed thereto to be genuine, and that the deed is executed and acknowledged according to the laws of such state, territory or district."

Exhibit B was acknowledged before Charles S. Andrews, a commissioner of deeds of the state of New Jersey. He was an officer of that state and not of the state of Oregon. Attached to his certificate of acknowledgment is a certificate under seal in the following words: "State of New Jersey, County of Essex—ss.: I, John B. Woodston, clerk of the county of Essex (and also clerk of the circuit court and court of common pleas, the same being a court of record, having a seal), do hereby certify: That Charles S. Andrews, Esquire, whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a commissioner of deeds, an officer of said state, duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said state, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting and verily believe the signature to the attached certificate is his genuine signature. In witness whereof, I have hereunto set my hand and affixed my official seal this 30th day of August, 1910. [Signed] J. B. Woodston, Clerk."

The seal of the court is impressed on said certificate. The foregoing certificate is a printed form, and it was not drawn according to our statute, and it omits a material statement required by section 7111, *supra*.

In *Knighton v. Smith*, 1 Or. pp. 277, 278, the Supreme Court of this state, passing on the sufficiency of the certificate of acknowledgment of a release made in California, under like circumstances says: "As to the first ground of error alleged, that the certificate of the acknowledgment to the release was insufficient, we are satisfied that all acknowledgments taken without this state, unless before a commissioner" of deeds "appointed by the Governor of this state for that purpose, must be supported by a certificate of a clerk or other proper certifying officer of a court of record, as provided in section 12, p. 520, of the statutes of this state, for, when the statutes make an express pro-

vision affecting the authentication of deeds, it must be strictly complied with."

In *Fleschner v. Sumpter*, 12 Or. 167, 6 Pac. 510, the court says: "The mortgage from Alexander Sumpter to the appellant was properly acknowledged and entitled to record; but the deed from Sumpter and wife to the respondents Hibbard and Brazee was not entitled to record, as there was no certificate from the proper officer to the effect that the clerk of the district court of Idaho Territory, before whom the acknowledgment was taken, was such clerk, or that the deed was executed in accordance with the laws of that territory."

[2] Deeds executed and acknowledged in the manner provided by our statute may be read in evidence without further proof, and they are entitled to be recorded. Section 7125, L. O. L. The certificate of the clerk of the court of common pleas of Essex County, attached to the certificate of acknowledgment of said deed, failed to state "that said deed was executed and acknowledged according to the laws of the state" of New Jersey. This is a material and fatal defect. The courts of this state do not take judicial notice of the laws of another state, and the provision of section 7111, *supra*, requiring the certificate of the clerk of a court of record to state that the deed referred to was executed and acknowledged according to the laws of the state where it was executed and acknowledged was enacted to require that fact to be shown by such certificate, so that, when deeds made in other states are recorded, with the certificates required to accompany them, the record will show that such deeds were executed and acknowledged according to the laws of such state.

The plaintiff's said Exhibit B, not having been certified in accordance with the requirements of section 7111, *supra*, was not a good and sufficient deed of conveyance, and, if it were accepted by the defendant, it would not be entitled to be recorded in the public records of Hood River county. It is not such a deed as a purchaser is entitled to receive, and no vendee can be compelled to accept such an instrument.

[3] A vendee is entitled to a deed of conveyance that has been in all respects so subscribed, sealed, witnessed, acknowledged, and certified as to be entitled to be recorded in the public records of deeds, and he can be required to accept only such a deed.

[4] Said Exhibit B was not admissible in evidence, and the objection made to its admission by counsel for the defendant is sustained. As Exhibit B is the only deed of conveyance from the plaintiff to the defendant that has been offered in evidence, and as it was not a good and sufficient deed for the reasons stated, *supra*, a material and necessary link in the plaintiff's chain of evidence has not been offered.

[5] Under the contract for the sale of the

20-acre tract in dispute, the defendant was to pay the plaintiff in the aggregate \$5,500. He paid \$500 on the purchase price, and he was to pay \$2,000 more on the execution of the deed and then execute a bond for \$3,000 and a mortgage on the land to secure the payment of the latter sum. By the terms of the contract, the payment of the \$2,000 and the execution of the deed and the bond for \$3,000 and the mortgage to secure the latter sum were to be concurrent acts.

In a case of this kind a vendor cannot maintain a suit for the specific enforcement of a contract of sale and properly obtain a decree for that purpose unless he has executed a good and sufficient deed of conveyance and tendered it to the vendee or brought it into court. No more money was to be due until the deed should be made, and the defendant could not execute the mortgage for the \$3,000 until the title to the land should vest in him.

The plaintiff having failed to execute and tender to the defendant, or to produce in court, a good and sufficient deed of conveyance for the land in controversy, he did not make out a *prima facie* case. *Soper v. Gabe*, 55 Kan. 649, 41 Pac. 969; *Lanyon v. Chesney*, 186 Mo. 551, 85 S. W. 568; *Klyce v. Broyles*, 37 Miss. 524; *Kimbrough v. Curtis*, 50 Miss. 120; *Kirkman v. Kenyon*, 17 Ind. 607; *Counce v. Studley*, 81 Me. 431, 18 Atl. 288; *Martindale v. Waas* (C. C.) 8 Fed. 854; 26 Am. & Eng. Ency. Law (2d Ed.) 133; *Johnston v. Wadsworth*, 24 Or. 496, 34 Pac. 13.

It has been held in some cases, where time is not of the essence of the contract, that the vendor may tender the deed in court at any time before the decree is entered. *Mullens v. Big Creek Gap Co.* (Tenn. Ch.) 35 S. W. 441. As the plaintiff has not tendered to the defendant or produced in court a good and sufficient deed of conveyance, he has not made out a *prima facie* case, and his complaint will have to be dismissed.

It is unnecessary to examine the question whether the contract for the sale of the land is sufficiently certain as to the description of the land to form the basis for a suit for specific performance, or whether the plaintiff was guilty of making false representations as to water for irrigation of the lands, as alleged in the answer. The plaintiff still owns the land and has not parted with its possession, and he has been paid \$500 on the purchase price. There is an action pending between the parties concerning said contract, and we have no doubt that a court of law has jurisdiction to grant the parties adequate relief.

The decree of the court below is reversed, and this suit is dismissed, but neither is allowed costs or disbursements in this court or in the court below.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

MEYN v. KANSAS CITY et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 781*)—DENIAL OF INJUNCTION—PERFORMANCE OF ACTS—DISMISSAL.**

Where a temporary injunction is denied in an action brought solely to restrain the erection of a viaduct by authority of a city, and the trial court renders judgment for the defendant upon his pleadings, an appeal therefrom will be dismissed if it appears that in the meantime the structure has been completed, at a cost of \$70,000.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 68–80, 3122; Dec. Dig. § 781.*]

2. JUDGMENT (§ 589*)—RES JUDICATA—INJUNCTION—ACTION FOR DAMAGES.

In such case the judgment will not be a bar to a subsequent action by the plaintiff for damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1065, 1100, 1101; Dec. Dig. § 589.*]

Appeal from District Court, Wyandotte County.

Action by Fred Meyn against the city of Kansas City and others. From judgment for defendants, plaintiff appeals. Affirmed.

Keplinger & Trickett, of Kansas City, for appellant. R. J. Higgins, of Kansas City, R. W. Blair, of Topeka, and A. L. Berger and O. L. Miller, both of Kansas City, for appellees.

MASON, J. Fred Meyn brought an action to restrain the city of Kansas City from entering into a contract with two railroads for the construction of a viaduct, and to enjoin proceedings under such contract, including the building of the viaduct. A preliminary injunction was refused, and judgment on the pleadings was rendered in favor of the defendants. The plaintiff appeals.

[1] The defendants have made a showing that the acts sought to be enjoined have already been fully performed, and a dismissal is asked on that ground. The ordinary rule is that in that situation the decision of the trial court will not be reviewed. See title, Appeal and Error, Cent. Dig. § 75; 1 Dec. Dig. § 19. The plaintiff contends that he is entitled to a hearing because of the judgment for costs rendered against him, and cites *Cheesebrough v. Parker*, 25 Kan. 566, in support of the contention. It was there said that the plaintiff in ejectment could have a

review of the judgment for costs against him, notwithstanding he had conveyed the property to the defendant pending the appeal. The action, however, was not merely for possession, but for rents and profits as well. The rule is settled that in this court "appeals are not heard for the determination of matters of cost only." *Anderson v. Cloud County*, 90 Kan. 15, 132 Pac. 996.

A judgment denying an injunction is sometimes reversed, notwithstanding the act sought to be enjoined has been performed. where, as in tax proceedings, the court has power to restore the original status. *Bonnewell v. Lowe*, 80 Kan. 769, 104 Pac. 853. This principle seems to have been applied where minor alterations in partitions in rented property were the subject of controversy. *Moses v. Salomon*, 150 App. Div. 563, 135 N. Y. Supp. 408. Assuming that the court would have jurisdiction to command the removal of the viaduct here involved, which cost over \$70,000, such an order is not to be thought of, and is not asked.

If the judgment in this case were of such a character that its affirmance would constitute an adjudication of any of the plaintiff's rights other than with respect to an injunction, his appeal might be determined upon its merits on that account. *Bitulithic Paving Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912A, 719. But he sought only injunctive relief. True, in some circumstances the action might have been converted into one for damages, upon the principle that jurisdiction assumed by a court of equity for one purpose will be retained for all. Note, Ann. Cas. 1912A, 808. But the question whether an injunction should issue was not the same as whether the conduct of the defendants was an invasion of the plaintiff's rights. So far as the record discloses, the court may have rendered judgment upon the pleadings upon the theory that the petition showed that the plaintiff had an adequate remedy in an action for damages.

[2] For the reason that nothing is involved in this proceeding except relief by injunction, which cannot now be granted, the appeal is dismissed. As a result, the judgment of the district court will remain undisturbed. but it is now interpreted as having to do only with injunctive relief, and it will not be a bar to an action to recover any damages he may have suffered, if the defendants' acts shall be found to have been wrongful. All the Justices concurring.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

McDANIEL v. CITY OF CHERRYVALE
et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

**1. WATERS AND WATER COURSES (§ 74*)—
POLLUTION OF STREAM—JOINT LIABILITY.**

When two or more persons, by their concurrent action, pollute a stream, to the injury of another through whose land the stream flows, they are jointly and severally liable for the wrongdoing, and the injured party may, at his option, institute an action, and recover against one or all of those contributing to his injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 62, 63; Dec. Dig. § 74.*]

2. LIMITATION OF ACTIONS (§ 55*)—ACTIONS FOR TORT—POLLUTION OF STREAM—PERMANENT STRUCTURE.

A city built a sewer system, and discharged sewage into a creek, and about the same time another party built an oil refinery, and drained waste water, acids, oils, and other impurities into the same stream. The impurities deposited in the stream from these sources polluted the water to some extent at the beginning, and injuriously affected an owner's land through which the stream flowed. There was little injury to the land when the rains were abundant and the volume of water in the stream was large; but when the rains diminished and there was little water in the stream the injurious effect of the sewage and impurities cast into the stream was greatly increased. More than two years after the sewer system and refinery were built and in operation the landowner brought an action for permanent damages resulting from the pollution of the stream. *Held* that, as the sewer system and refinery were, in their nature, design, and use, permanent structures, and their operation was necessarily a constant and continuous injury to the owner's land, his cause of action for permanent damages accrued when the sewage and impurities were first deposited in the stream, and, not having been brought within two years from that time, his action was barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 299-306; Dec. Dig. § 55.*]

Appeal from District Court, Montgomery County.

Action by James McDaniel against the City of Cherryvale and others. From judgment for plaintiff, defendants appeal. Reversed and remanded.

Albert L. Wilson, of Kansas City, and James A. Brady, of Cherryvale, for appellants. Sullivan Lomax, of Cherryvale, for appellee.

JOHNSTON, C. J. This was an action to recover for permanent injuries to the plaintiff's land caused by the pollution of Drum creek, which ran through the land. Drum creek, in its natural state, it was alleged, was a stream of good, wholesome water suitable for live stock and also for culinary and domestic purposes, and was used for such purposes by the plaintiff, James McDaniel, until it became polluted. It was alleged that in 1905 the city of Cherryvale constructed a system of sewers through

which sewage was discharged into Drum creek, thus polluting the water, and rendering plaintiff's home unhealthful and an unfit place in which to live. It was also alleged that in the same year the Uncle Sam Oil Company constructed an oil refinery near the creek, and discharged into it waste water, refuse, oils, acids, and other impurities, which contributed to pollute the stream. It was further alleged that the defendants concurrently discharged sewage, refuse, and filth, and that by the concurrent and chemical action of the impurities the creek was polluted, and its usefulness to plaintiff destroyed, that it contaminated his premises, and damaged and depreciated the market value of his land to the extent of \$6,000. It was also averred that because of rains the stream was swollen a great part of the time from the construction of the sewer system and the erection of the refinery until 1909, and that so long as the volume of water was large the impurities thrown by the defendants in the stream did not settle or accumulate on his land, but that in 1909 there was a period of dry weather, which diminished the flow of the stream, and that the sewage, refuse, and other impurities poisoned the stream, and made it a cesspool and a nuisance, and greatly injured his property. He avers that on December 1, 1909, he presented a claim against the city for the injuries sustained in the sum of \$6,000, but that the city refused to recognize or pay it. He therefore asked for permanent damages measured by the depreciation in the value of his land, which he fixed at \$6,000. In answer to special questions, the jury found that the defendant city had been continuously discharging sewage into the creek since May, 1905, and that the Uncle Sam Oil Company had been continuously discharging waste water, refuse, oils, acids, and other impurities from the refinery into it since July, 1905, that the plaintiff knew and understood from the beginning that these discharges would, to a certain extent, pollute the stream. The jury also found that the market value of the land prior to the injury was \$5,000, but that after the injury its market value was only \$4,400, and damages were awarded the plaintiff in the sum of \$600.

[1] It is first contended that there was an improper joinder of causes of action against the defendants, and that the plaintiff failed to set forth a joint liability against both defendants. The petition charged both defendants with wrongfully polluting the stream, and that it was done by their concurrent action. This averment brings the case within the rule which has been applied in this state, that, if two or more persons, by their concurrent wrongdoing, cause injury to a third, they are jointly and severally liable, and the injured party may, at his option, institute an action, and recover

against one or all of those contributing to the injury. *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Arnold v. Milling Co.*, 86 Kan. 12, 119 Pac. 373; *Luengene v. Power Co.*, 86 Kan. 866, 122 Pac. 1032.

[2] The principal question presented in this appeal is whether or not the cause of action on which a recovery was had was barred by the statute of limitations. The plaintiff, as we have seen, did not sue for a temporary injury, or for any special damage or loss which he had sustained immediately before the bringing of the action; but he treated the injury as a permanent one, and as a sort of an appropriation of an interest in his property, and asked for all damages already sustained and which he might sustain in the future. He could have elected to have sued for temporary damages sustained within the statutory period preceding the bringing of the action, and for any subsequent injury or loss an additional action might have been brought. He chose, however, to treat the injury as permanent in character, and brought a single action to recover for all present and prospective damages to his land. As the sewer system constructed by the city and the refinery constructed by the oil company were permanent in their nature, and as the flow of the sewage and refuse from them was designed to continue indefinitely in the future, a cause of action for permanent damages arose when the sewage and other impurities were first emptied into the stream. As the effect of the discharge of the sewage and the refuse in the stream could have been ascertained with reasonable certainty, and as the stream was polluted to a certain extent when the discharges were thrown into the stream, plaintiff could have brought an action for permanent damages at the beginning, and it is settled that, "whenever one person may sue another, a cause of action has accrued, and the statute begins to run." 25 Cyc. 1066. The plaintiff chose a remedy for permanent injury, and is bound by the limitations which the law places upon the enforcement of such remedy. As was said in *C. B. U. P. Rld. Co. v. Andrews*, 28 Kan. 702: "The plaintiff has chosen to consider the obstruction of the alley as a permanent injury to his lots, as a quasi condemnation, and permanent taking and appropriation of a certain interest in his property, and he can therefore recover merely for the consequent depreciation in value of his property by reason of such permanent injury, by reason of such permanent taking and appropriation, by reason of such quasi condemnation. He had the privilege to consider the obstruction of the alley as only a temporary injury, and to have sued for any special or temporary damage which might have occurred at any time by reason of the obstruction." 28 Kan. 710.

So here the plaintiff elected to ask for damages for a permanent injury, or an ap-

propriation of a certain interest in his land, and such an action he was entitled to bring when the impurities were thrown into the stream in 1905. In *W. & W. Rld. Co. v. Fechheimer*, 36 Kan. 45, 12 Pac. 362, the railroad company trespassed upon the lands and rights of an owner by building thereon a structure of a permanent character without the consent of the owner or the making of compensation, and it was held that the owner was at liberty to pursue any one of several remedies, and that, when the structure was permanent in its nature, as in that case, he might elect to bring an action for a permanent appropriation and injury. In *Hubbard v. Power Co.*, 89 Kan. 446, 131 Pac. 1182, the land of an owner was flooded and injured by the erection of a dam, which was permanent in its character, and it was held that the owner who had not been compensated for the injury might, if he saw fit, maintain an action to recover all damages, present and prospective, and that such a cause of action accrued when the appropriation was first made. See, also, *L. N. & S. Ry. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297; *Brock v. Francis*, 89 Kan. 463, 131 Pac. 1179.

It is argued that the averment in plaintiff's petition, and certain testimony which tended to sustain it, to the effect that, when the rains were abundant, and the stream swollen, the sewage and impurities discharged into it caused but little injury, were sufficient to take the case out of the statute of limitations until 1909, when the lack of rain caused a diminution in the flow of the stream and a more serious injury. Plaintiff argues that the impurities thrown into the stream were greatly diluted by the large volume of water, that he could not sue until he was injured, and that, if he had sued when the impurities were first thrown into the creek, he could have shown but little, if any, damages. On the other hand, it appears that the plaintiff knew of the character of the sewer system and refinery, and he also knew that there would be a constant and continuous flow of impurities into the stream, which would necessarily pollute the water flowing through his premises. He must have known the course of the seasons, and that the stream would be higher and lower as the rainfall would vary. It does not appear that there was any change in the character or quantity of sewage and refuse deposited in the creek after 1905. Plaintiff himself testified that the impurities always affected and polluted the water, and also that, when the sewer was established, and the refinery built, his rights were then invaded. He admitted that he knew in 1905 that there were times when the water in the creek did not run, and hence he must have anticipated that the deposits of sewage and filth would not be carried away, and that he would necessarily sustain the injury subsequently suffered. Other witnesses of the plaintiff testified that there was some damage resulting from the impuri-

ties even when there was a full flow of water in the stream, and that there was a constant damage to the land from this cause from the time the sewer and refinery began to be operated in 1905. The jury specifically found that in 1905 plaintiff knew that the drainage through the sewers and from the refinery into the creek would pollute the water to a certain extent so long as the refinery and sewer system were in operation. If plaintiff had brought a suit in 1905, he could have recovered for permanent injury to his land, and could have shown without much difficulty the effect of discharging sewage and refuse of the quality and quantity which the defendants were throwing into the creek. He could have shown that at times there would be a full flow of water in the creek, and, again, that there would be no running water in it, and that the discharges into the creek would necessarily pollute the water, and create a nuisance on his premises. It would have been no defense to such an action to have shown that little or no damage would occur when the rains were heavy and the flow in the stream was strong. In *Smith v. Sedalia*, 244 Mo. 107, 149 S. W. 597, where injuries resulting from the construction of a city sewer were under consideration, it was held that such a system must be regarded as a permanent one, and the fact that the system might thereafter be extended, and the injury enhanced by the increase of sewage, did not affect the permanent character of the injury nor the right of the plaintiff to recover therefor. The difficulty in ascertaining the extent of the future use and the exact amount of the damage which would result did not deprive the city of the right to condemn nor prevent the ascertainment of the final permanent damages as of the time the sewer was built. Here, as we have seen, the sewer system and refinery are, in their nature, design, and use, permanent structures, the operation of which will necessarily be injurious to plaintiff's land, and must continue permanently to affect and deprecate the value of his land. He elected to treat this invasion of his property rights as a permanent injury and, in effect, an appropriation of an interest in his land. The court tried the case upon the theory that a permanent injury had been sustained, and the jury measured the damages upon that basis, and awarded the plaintiff the diminished value of his property. The plaintiff had a cause of action for these damages in 1905, when these permanent structures were built, and the polluting discharges were turned into the stream. *Va. Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465, 10 Ann. Cas. 179. The injury to the property was susceptible of ascertainment at that time, and the statute of limitations then began to run on an action for permanent damages. Not having been brought within two years from that time, the action was effect-

ally barred. *Parker v. City of Atchison*, 58 Kan. 29, 48 Pac. 681.

It follows that the judgment must be reversed, and the cause remanded, with directions to enter judgment in favor of the appellants. All the Justices concurring.

STATE v. SEXTON.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 611*)—CONTINUANCE—EVIDENCE.

A denial of applications for continuance, based upon a consideration of evidence, abundant and conflicting, is not erroneous.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1370; Dec. Dig. § 611.*]

2. CRIMINAL LAW (§ 125*)—CHANGE OF VENUE—PREJUDICE OF JUDGE.

When a trial judge is conscious that he has no prejudice against a defendant, he is justified in refusing a change of venue asked for on the ground that he is prejudiced.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 242; Dec. Dig. § 125.*]

3. CRIMINAL LAW (§ 918*)—PRESENCE OF DEFENDANT—WAIVER—NEW TRIAL.

In a misdemeanor case (a continuance applied for on the ground of the defendant's physical condition having been rightfully refused), his counsel refused to plead for him, whereupon the court entered a plea of not guilty, and the trial proceeded; defendant's counsel remaining and cross-examining the state's witnesses. After a verdict of guilty had been returned, the defendant personally received sentence. *Held*, that his absence and failure to plead do not entitle him to a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2163-2192, 2195, 2196, 2219-2224; Dec. Dig. § 918.*]

4. WITNESSES (§ 388*)—IMPEACHMENT—FOUNDATION.

The rule that a foundation for impeachment cannot be laid by questions on cross-examination, which involve collateral issues, followed.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.*]

5. INTOXICATING LIQUORS (§ 233*)—PROSECUTION—EVIDENCE.

In a prosecution for unlawfully selling intoxicating liquor and maintaining a nuisance, the state was permitted to introduce certain exhibits showing shipments of liquor by the consignors to themselves, with directions to notify one of their clerks. It was shown that such clerks gave directions to the carrier to deliver the packages to a drayman, who delivered them to the defendant, who expressed satisfaction with the arrangement. *Held*, that such exhibits were competent.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 293-297, 298½; Dec. Dig. § 233.*]

Appeal from District Court, Cloud County.

A. G. Sexton was convicted of the unlawful sale of intoxicating liquors, and appeals. Affirmed.

A. L. Wilmoth, of Concordia, for appellant. Jno. S. Dawson, Atty. Gen., and M. V. B. Van De Mark, of Clyde, for the State.

WEST, J. The defendant was charged in four counts with the unlawful sale of intoxicating liquors, and in the fifth with maintaining a nuisance, and was found guilty on all. A warrant was issued February 15, 1913, and on that day the defendant gave bond. On April 8th he filed a motion for continuance on the ground of physical inability to attend trial; testimony being received for and against such motion, which was overruled, and the trial postponed until April 10th. On the date last mentioned a change of venue was asked for on the ground of prejudice of the trial judge and refused, whereupon application for continuance over the term was made on the ground of the defendant's physical condition and for the further reason that the court, in passing upon the motion and the showing made for continuance, used language prejudicial to the interest of the defendant and which would tend to prejudice the minds of the jurors against him. This was also denied, and the defendant was ordered to be arraigned. Objection was made by his counsel on the grounds already referred to and upon the ground that the defendant was unable to be present and plead and that the law did not authorize his attorneys to plead for him. The clerk was directed to read the information, and the counsel were asked whether they would plead for the defendant, to which it was replied that they had no right so to do, whereupon the court entered a plea of not guilty as to each count. Counsel also objected to the jurymen then in the box being sworn to try the case, and objected to going to trial upon the ground of the defendant's inability to be present and plead or advise with his attorneys during the trial, and that all of the jurors then in box, except three, had been present in the courtroom when the applications for continuance were presented and had heard the affidavits and arguments and the remarks of the court. The objection was overruled, and the trial proceeded. The defendant's counsel cross-examined the state's witness but introduced no evidence after the state rested. On May 13th the defendant appeared in person and was sentenced by the court. He appeals and assigns as error the denial of the three continuances asked for, the denial of his motion for change of venue, entering the plea of not guilty in his absence, overruling his objections to proceedings before incompetent jurors, and excluding and admitting certain evidence.

[1] Whether the three applications for continuance be considered separately or together, the record shows abundant ground both for granting and for refusing. The evidence was very conflicting. A large number of physicians spoke from personal acquaintance with and examination of the defendant. Taking the testimony on his behalf alone, the court was justified in concluding that he was a physical wreck whose immediate collapse and dissolution might likely result from the

excitement of a trial. Considering only the evidence on behalf of the state, there was equally strong ground for holding that the defendant's claim of critical illness was recent in fact and fictitious in character. The court, having weighed all of the evidence, found and said that the application was not made in good faith, and it is impossible to find any error in this conclusion.

[2] The fact that the trial judge in denying the continuance stated its finding that the application was not made in good faith but for the purpose of delay, after a charge by the county attorney that the defendant was trying to perpetrate a fraud, the defendant deems sufficient to require the change of venue applied for. It would seem from the record that much feeling was aroused over the case, and the statement had been published, and that an order had been made to bring the defendant to court, if necessary, in an ambulance. To deny this the trial judge made and filed his own affidavit. He said from the bench that he had no personal acquaintance with the defendant and felt that he would not know him if he should walk into the courtroom; that he had no knowledge of the facts in the case or of the case in any way and had no prejudice of any kind against the defendant. Certainly no one could know the state of his own mind better than the trial judge himself, and, feeling that he was free from prejudice, he did not err in refusing to grant the change on a ground which his own conscience told him was not true. *State v. Tawney*, 81 Kan. 162, 105 Pac. 218, 135 Am. St. Rep. 355, and cases cited.

[3] Counsel cite certain decisions from other states to support the contention that it was error to try the defendant in his absence. However, our statute provides for that fully. "No person indicted or informed against for a felony can be tried unless he be personally present during the trial; nor can any person indicted or informed against for any other offense be tried unless he be present, either personally or by counsel. Crim. Code, § 207 (Gen. St. 1909, § 6783). While in a literal sense the defendant was present by counsel, still it was by counsel who were objecting and protesting against proceeding in his absence. There is something so repellant to the sense of justice in trying a man in his absence that the books offer few, if any, instances of a trial involving heavy fines and long imprisonment with the defendant not only absent but with his counsel strenuously attempting to prevent such proceedings. In *Kenworthy v. El Dorado*, 7 Kan. App. 643, 63 Pac. 486, the defendant in a misdemeanor case was absent, and it was held error to take a forfeiture over the objections of his attorneys who were present demanding a trial, which was not the case here. In *State v. Gomes*, 9 Kan. App. 63, 57 Pac. 262, the defendant in a misdemeanor case, with his counsel, willfully absented himself from the

justice court during the progress of the trial and, after the verdict of guilty had been received, returned and urged that such absence was a ground for arresting the judgment, and it was held that the justice did right in overruling the motion and in sentencing the defendant. It was held in *State v. Way*, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 608, that the right of a defendant to be present when the verdict is returned in a felony case is one which may be waived, and if he voluntarily absents himself the verdict of guilty may be lawfully received in his absence. Some authorities hold that the court may decline to recognize the withdrawal of the defendant's attorneys for the purpose of preventing a trial, the defendant being absent, but if such withdrawal be permitted the trial cannot proceed. *State v. Young*, 86 Iowa, 406, 58 N. W. 272; 12 Cyc. 527; 14 C. D. 2215.

We have, then, this situation: The defendant was absent, which absence the court on conflicting testimony found to be voluntary and unnecessary; he was in fact present by counsel, who, while protesting and objecting, nevertheless remained and cross-examined the state's witnesses and did not withdraw or request permission to withdraw from the case. Presumably they were present when the verdict came in, and, as the defendant himself was present when the sentence was pronounced, we fail to see any prejudice caused other than by the fault of the defendant himself.

While it is stated in the plaintiff's brief that there is no evidence that any of the jurors who were impaneled to try the case were present when the statements were made by the court touching the character of the application for continuances, the record does show, however, that the language was accepted to for the express reason that it was made in the presence of a large number of the jurors, which would prevent the defendant from having a fair and impartial trial before the jurors then in attendance upon the term; also after arraignment had been ordered the same objection was repeated; also after the plea had been entered by the court the defendant, "by his counsel, objects and protests to the present jurymen now in the box being sworn to try the issues in this case, for the reason that they are disqualified to try the issues involved in this suit," and "for the reason that said jurors, or a large portion of them, all except three, now in the box were present in the courtroom at the time and times when the applications were made to this court for a continuance of this case, and said jurors heard the affidavits now on file and a part of the record in this case; that the said jurors were present and heard the argument in behalf of the state in which said argument the action of the defendant was criticized, and in which argument the county attorney stated that the defendant was trying to impose and perpetrate a fraud upon the court, and that the applications for

continuance were not made in good faith; that said jurors were in the courtroom and heard the decision of the judge of this court upon the last application for a continuance and heard the remarks made by the court with reference to the postponement and continuance of the trial." From this recital from the record and what was said upon the argument, we think it must be assumed that a part of the jurors did hear the evidence or arguments and remarks of the court and were impaneled to try the case after stating that they had not been disqualified by these matters. Just how this evidence and discussion of the question, taken together with the remark of the prosecutor and the expression of the court, could fail to affect the minds of any jurors present and affect them unfavorably respecting the defendant is difficult to see. It would seem that the situation was somewhat similar to that found in *State v. Hammon*, 84 Kan. 137, at page 140, 118 Pac. 418, at page 419. It was there said: "Answers by these jurors to categorical questions, though doubtless intended to be truthful, are less convincing than the known nature and tendency of the human mind." But as the examination of the jurors was not brought up, and we are not advised as to what challenges were made or to what extent the defendant's counsel sought to protect his rights in this matter, we are not able to say that any prejudicial error affirmatively appears.

[4] One witness who testified for the state was upon cross-examination asked concerning alleged sales of liquor made by him within the two years next preceding the trial, and his attention was called to alleged sales to certain named persons. Objections to these questions were sustained, and the defendant offered to discredit and impeach the witness and lay the foundation therefor by asking whether he had not within the last two years, in Cloud county, sold and delivered whisky to certain named persons and received and delivered shipments of liquors, which offer was refused. The theory of the defense was that if the witness denied such sales he could be impeached by proving them and showing his personal interest as a witness for the state, and that he was giving evidence upon the theory that it might cover up his own transactions. In answer to this the plaintiff asserts that the questions were not relevant to the issues and therefore could not be used in laying the foundation for impeachment. The trouble is that they tend to bring into the case outside issues. It was the province of the jury to determine whether the defendant, not the witnesses, had sold intoxicating liquors. *State v. Ray*, 54 Kan. 160, 37 Pac. 996.

[5] Complaint is made that the court admitted evidence of Exhibits 9 and 14, freight receipts for whisky consigned to Glasner and Barzen. No. 9 contained a direction to notify "Glasner and Barzen, A. Kemp," and had

indorsed on the back an order from A. Kemp for the shipment to be delivered to a drayman. No. 14 shows a consignment to Glasner and Barzen, "notify L. Berger," with an indorsement signed L. Berger to deliver to the drayman, who would pay all charges before it should leave the depot. The railway agent testified that these packages were delivered to the drayman, and the latter testified that he delivered them to the defendant, who gave him orders for various shipments to be delivered to him (the drayman) by the railroad company. It appears that the defendant had told the railway agent that Kemp was a clerk, and had about the same conversation with him regarding Berger; that both these men were clerking for Glasner and Barzen in Kansas City; and that the defendant stated he had received these shipments, or rather said in respect thereto, "You need not worry about that; that is all right." It seems, therefore, that the consignments were addressed to the consignors, with directions to notify one of their clerks, who gave the order for delivery to the drayman, who turned the shipment over to the defendant, who received it and appeared to be satisfied with this method of doing business. We think these exhibits were competent.

It is urged that the court erred in proceeding without the personal arraignment of the defendant, and that his counsel had no right to plead for him. Decisions are cited to the effect that, unless the right to be personally present is expressly or impliedly waived, a conviction cannot stand, and that counsel cannot consent to an arraignment and plea in the absence of the defendant. Our statutes and decisions, however, settle this matter adversely to these contentions. Section 161 of the Criminal Code provides that, in all cases when the defendant does not confess the indictment or information to be true, a plea of not guilty shall be entered, and the same proceeding shall be had in all respects as if he had formally pleaded not guilty. In *State v. Cassady*, 12 Kan. 550, a failure to arraign and have a formal plea of not guilty entered, the defendant being present, was held insufficient to entitle him to a new trial in a felony case; and in *State v. Forner*, 75 Kan. 423, 89 Pac. 674, it was decided that the defendant need not be personally present in a trial for misdemeanor, provided he appear by counsel, and that the failure to arraign is not a sufficient ground for a new trial. Technically a plea of not guilty is a joinder of issue with the state, but the language of the statute referred to indicates that such issue is joined as effectually when entered by the court as when made by the defendant; and it would certainly be inconsistent to hold that one could be tried in his absence and, if convicted, have such conviction set aside, not because thereof, but because such absence was not interrupted or preceded by his personal plea of not guilty.

On the assumption that the defendant's physical condition was as claimed by him, he has suffered a great wrong. However, assuming and holding that the trial court's decision of that matter was fully justified by the evidence and therefore correct, it inevitably follows that the defendant has brought his trouble upon himself. The law cannot be defeated and the orderly administration of justice thwarted by the willful and needless absence from court of one who is charged with a misdemeanor.

A careful examination of the record with all the points urged fails to disclose any material error, and the judgment is therefore affirmed. All the Justices concurring.

BUSALT v. DOIDGE et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 191*)—NEW TRIAL (§ 39*)—REMARKS OF COURT—EXPRESSION OF OPINION.

In an action for assault by an officer in making an arrest, a chief item of dispute was whether the plaintiff had first assaulted the officer. In the only instruction touching this matter it was referred to as "the assault made or attempted to be made on him by the plaintiff." After a verdict for the defendants, the court granted a new trial on account of this expression in the charge, which was complained of as assuming that such assault had been made or attempted. *Held* not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; *Dec. Dig.* § 191.* *New Trial*, Cent. Dig. §§ 57-61; *Dec. Dig.* § 39.*]

2. ASSAULT AND BATTERY (§ 26*)—ANTICIPATED DEFENSE—BURDEN OF PROOF.

It is not necessary or proper ordinarily for a plaintiff to plead regarding an anticipated defense, and an averment in effect that he did not resist an officer in making an arrest states merely what the law would in the absence of proof presume.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 55-73; *Dec. Dig.* § 26.*]

3. APPEAL AND ERROR (§ 933*)—GROUNDS.

The rule that a stronger showing is essential to establish error in granting than in refusing a new trial, followed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3425, 3426, 3772-3776; *Dec. Dig.* § 933.*]

Appeal from District Court, Leavenworth County.

Action by Andrew Busalt against William Doidge and another. From an order granting a new trial, defendants appeal. *Affirmed*.

Lee Bond and F. P. Fitzwilliam, both of Leavenworth, and John S. Dawson, Atty. Gen., for appellants. T. W. Bell and John T. O'Keefe, both of Leavenworth, for appellees.

WEST, J. The defendants appeal from an order granting a new trial. The action was for damages alleged to have been sustained by the plaintiff in an assault committed by one of the defendants while in the act of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

serving a warrant. One of the principal contentions in the case was whether the plaintiff had first assaulted the officer, so that the latter acted in self-defense. In its charge the court stated the claim as set out in the petition that the officer "without right, provocation, or authority, and without resistance on the part of said Andrew Busalt, unlawfully, willfully, and wrongfully assaulted and beat the plaintiff," and instructed that the burden was upon him to prove every material allegation, and that a public officer in making an arrest should not use any force that is not necessary, and should he use any unnecessary force he is liable for any injury he may have inflicted while making the arrest. Then instruction No. 1 was given: "No. 1. I instruct you that if you believe from the evidence that the defendant William Doldge, while making the arrest of the plaintiff, used only such force as to him, the said Wm. Doldge, appeared necessary to accomplish the same and to defend himself from the assault made or attempted to be made on him by the plaintiff, then your verdict should be for the defendant." This was followed by No. 2, which was in exactly the same language, except the words "and to defend himself from the assault made or attempted to be made on him by the plaintiff." The jury returned a verdict for the defendants, and a motion for a new trial was granted for the reason "that the court erred in giving instruction No. 1 asked for by the defendant, and for that reason only."

The only question is whether the court erred in granting a new trial for the one reason assigned. Upon the argument the second instruction referred to was criticised; but the briefs both state that there is but one question in the case—the correctness of the quoted words—and this is correct. It may be proper to say however, that the true rule is that the defendant could use only such force as reasonably appeared necessary to him. *Sloan v. Pierce*, 74 Kan. 65, 85 Pac. 812.

[1, 2] The fault found with instruction No. 1 is that it assumed a fact and amounted to an assertion by the court that the plaintiff had assaulted or attempted to assault the officer. The answer did not allege an assault or self-defense, but was simply a general denial, and, while the petition averred that the assault was without provocation, authority, or resistance, it did not devolve on the plaintiff to prove nonresistance which the law would presume, nor the absence of a defense which the defendant might avail himself of. *Bliss on Code Pleading* (3d Ed.) §§ 200-205; 6 *Standard Enc. of Pro.* 681-685; *Frick v. Carson*, 3 Kan. App. 478, 43 Pac. 820; *Akin v. Davis*, 11 Kan. 580; *Bingman v. Walter*, 80 Kan. 617, 103 Pac. 120. Self-defense seems to have been tried regardless of the pleadings and to have been the vital point of the contention. This made it the

more necessary to cover the matter carefully and correctly in the instructions, and, considering the pleadings and the real nature of the controversy, it can hardly be said that the instruction complained of—the only one on that subject—was such as to afford the plaintiff a fair trial before a jury properly charged as to the law of the case. *Cronk v. Frazier*, 86 Kan. 879, 122 Pac. 893; *Murray v. Railway Co.*, 87 Kan. 750, 125 Pac. 45; *Putman v. King*, 87 Kan. 842, 126 Pac. 1093.

In criticising the instruction the plaintiff cannot be charged with singling out one of the many expressions in a charge regardless of the others, for this is the only one touching the matter of assault by the plaintiff. Situations in some degree similar were touched upon in *Baugh v. Fist*, 84 Kan. 740, 115 Pac. 551; *State v. Swartz*, 87 Kan. 852, 854, 126 Pac. 1091; and *Barker v. Railway Co.*, 88 Kan. 767, 772, 129 Pac. 1151, 43 L. R. A. (N. S.) 1121.

[3] Granting a new trial is attended with different circumstances from refusing one, and a much stronger showing is essential to establish error in such ruling. *City of Sedan v. Church*, 29 Kan. 190; *Brick Co. v. Silvers*, 79 Kan. 694, 100 Pac. 1134.

The trial court evidently concluded, after considering the effect of the charge given, that the plaintiff was entitled to a trial in which the jury could be more specifically and correctly advised as to the rights of the parties, and in this conclusion we find no error.

The order is affirmed. All the Justices concurring.

STATE v. MASSACHUSETTS BONDING & INS. CO.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 59*)—SURETY COMPANIES—CONSTRUCTION OF BOND.

In an action upon a bond written by a corporation engaged in the business of furnishing surety for compensation, the rules of strict construction which usually control in cases of accommodation sureties will not be applied, and if the bond is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that which is most favorable to the insured will be adopted. But where there is no ambiguity, the plain intention of the parties cannot be disregarded or nullified by construction.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

2. STATES (§ 101*)—PUBLIC BUILDING CONTRACT—CONSTRUCTION OF SURETY BOND—DEFENSES—"O. K."

A contract entered into between the state of Kansas and a construction company for the erection of a building provided that the state architect should make a certified estimate each month of the value of all labor and material used that month in the construction, and that the state would pay to the contractor 90

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

per cent. thereof; that no payments should be made except on his certificate that the work for which the payment was due had been properly done. A surety company guaranteed the faithful performance of the contract on the part of the construction company, and by reference the contract was made a part of the bond. The bond also contained the following provision: "If the payments are not made promptly in accordance to contract, this bond becomes null and void." During the progress of the work the construction company abandoned its contract and the state had the work completed by another contractor. In an action on the bond it is held:

(a) That the rights of the parties are not affected by the fact that the architect was a state officer. In making the estimates he was not acting as state architect but as an individual.

(b) The parties agreed upon the architect as the person upon whose judgment and decision with respect to the character, amount, and value of the work payments were to be made. In the absence of fraud or mistake, they are bound by his judgment and decision.

(c) Upon the facts stated in the opinion, if the architect in making the certificates acted in good faith in relying upon information from others as to the extent of the work and the amount of labor and material that had been used, the terms of the contract in this respect were satisfied.

(d) Some of the certificates were prepared by other persons and were indorsed by the architect, "O. K." The employment of the abbreviation or symbol of "O. K." in such a transaction is in accordance with common usage and was a sufficient certificate of the correctness of the estimate upon which it was endorsed.

(e) The state is not estopped from maintaining an action to recover upon the bond because before making the payments it failed to take the precaution to see that the estimates were true and correct, nor by the fact that the estimates certified by the architect included labor and material which had not in fact been used in the construction of the work, but which had been furnished when the estimates were made.

[Ed. Note.—For other cases, see *States, Cent. Dig.* § 98; *Dec. Dig.* § 101.*

For other definitions, see *Words and Phrases*, vol. 5, p. 4871; vol. 8, p. 7735.]

Appeal from District Court, Shawnee County.

Action by the State against the Massachusetts Bonding & Insurance Company, a corporation. Judgment for plaintiff, and defendant appeals. Modified.

The Massachusetts Bonding & Insurance Company, a corporation engaged in writing surety bonds for compensation, appeals from a judgment against it in favor of the state of Kansas upon a surety bond by the terms of which the insurance company guaranteed the performance of a certain contract entered into between the Board of Regents of the Kansas State Agricultural College and the Blanchard Construction Company. In the contract the construction company agreed to erect a mechanical engineering building and to furnish therefor all labor and material, for the sum of \$49,204. Among other provisions in the contract were the following: "The State Architect shall, on or before the last day of each month, make an estimate of the value of all labor and materials used in the construction of said work by

the party of the second part during the preceding month, and shall certify said estimate to the party of the first part, who will pay to the said party of the second part 90 per cent. of said value, and the balance remaining after deducting the several payments from the above-mentioned sum, when said work has been completely finished, delivered and accepted by the Regents of the Kansas State Agricultural College and the State Architect. Provided, however, that no payment shall be made except on the certificate of the State Architect, or his successors, that the work for which said payment is due has been properly done." The contract was dated July 1, 1908. The bond was executed immediately thereafter and guaranteed the faithful performance of the contract in accordance with the plans and specifications prepared by John F. Stanton, State Architect. By reference the contract was made a part of the bond. The construction company commenced work on the building, but in January, 1909, it abandoned the work and shortly thereafter was adjudged a bankrupt. The Board of Regents thereupon entered into a contract with one Henry Bennett for the completion of the building. The answer alleged that the Board of Regents violated the contract by paying to the construction company on five separate estimates 90 per cent. of the amount thereof without the estimates having been made by the State Architect, and that these payments were largely in excess of 90 per cent. of the value of the labor and material used in the construction of the work during each preceding month; that, at the time the construction company abandoned the work and became bankrupt, the amount paid by the Board of Regents to the construction company was more than \$5,500 in excess of the value of the labor and material used in the construction of the work; and that by reason of these acts of the Board of Regents the defendant was discharged from all liability on the bond. The case was tried to the court and separate findings of fact and conclusions of law were made.

Among the findings of fact are the following:

"During the progress of the work five estimates were allowed. The first two were made by the State Architect, John F. Stanton, personally. The first of these bears date of September 18, and the second, October 7, 1908. The remaining three estimates, which bear date of November 9 and December 9, 1908 and January 5, 1909, respectively, were made by the Blanchard Construction Company itself, at its office in Topeka, from data furnished by Mr. Sappington, its superintendent of construction, and from data originally in the possession of its officers at Topeka. These estimates were carefully reviewed by E. B. McCormick, a mechanical engineer, who was present at the work from day to day, and acting under the State Archi-

*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes*

tect, and whose duties were to see that the specifications were fulfilled and to assist the architect in preparing estimates and other work as carried on by him in connection with the building. These last three estimates were prepared and handled in the following manner: The Blanchard Construction Company prepared statements of the items which they claimed should be included in the estimates. These statements were delivered by Mr. Sappington, superintendent of construction for the Blanchard Construction Company, to the said E. B. McCormick, who was a member of the faculty of the Agricultural College, and who was also supervising the work for the regents. Mr. McCormick thereupon, upon the receipt of each of said statements, delivered the same to Mr. Seaton, his assistant. Mr. Seaton then took these statements, or estimates, and went over the work and checked the statements, or estimates, and returned them to Mr. McCormick. Mr. McCormick then approved them and sent them to the State Architect, John F. Stanton, at Topeka. Upon receipt of each estimate by the State Architect, John F. Stanton, at his office in Topeka, said Stanton verified the computations, and then wrote on the face of each estimate the words, 'O. K.,' and signed his name thereunto as State Architect. Thereupon said Stanton sent each estimate to the regents at Manhattan by mail. By indorsement 'O. K.' Mr. Stanton meant to certify that the estimate was a correct value of the labor and material used in the construction of the work, and that the work was properly done. The regents, upon the receipt of each estimate, paid the Blanchard Construction Company in accordance therewith. All of the estimates were made upon a sworn statement of Roy Sappington, the superintendent of construction of the Blanchard Construction Company, and contain an estimate of all items of material furnished and of labor done in the work, and were supported by Sappington's oath that the bill was just, correct, and remained due and unpaid, and that the amounts claimed were actually due according to law. They were also supported by the certificate of the president and secretary of the Board of Regents of the Agricultural College that the said statement was contracted for by the State Agricultural College under authority of law and that the amount therein claimed was correct according to such contract, and was unpaid. Written across each estimate so certified were the words, 'O. K.,' followed by the signature of John F. Stanton, State Architect. The regents made payment in all cases upon such certificates, and the officers of the Blanchard Construction Company and the Board of Regents understood that when the State Architect signed his O. K. to these estimates he meant to certify that they were the correct value of the labor and material used in the

construction of the work, and that the work was properly done.

"In the first estimate, which bears date of September 18, 1908, there was an allowance of \$5,321 for the following items: Excavating, \$591; cement, 750 barrels, \$1,812.50; 150 loads of sand, \$187.50; 300 yards of broken stone, \$300; 50 cords of rock, \$150; structural iron, \$25; dimension lumber, \$2,500; nails, \$30; carpenter labor, \$135; brick, \$90. Only a limited portion of the material in the above estimate was actually in its place in the structure of the building on September 18th; but all of said material that was paid for under said estimate was, on said date, delivered upon the ground at the building site, except, perhaps, a portion of the broken stone which might have been at the quarry."

"The second estimate, which bears date of October 7, 1908, was for \$3,037, and contained the following items: Concrete, \$1,811.50; 100 cords of stone, \$800; 150 yards of sand, \$188.50; 1 car of cement, \$262; 1 car of lumber, \$475. With the exception of the item of concrete, only a limited portion of said material was actually in its place in the structure of the building; but all material paid for was delivered on the ground. Part of the stone was at the quarry, and part of it on the ground at the building site. The sand, cement, and lumber were on the ground at the building site. The Board of Regents paid the Blanchard Construction Company on this estimate \$2,733.30."

In the third, fourth, and fifth estimates the court finds that allowances were made for stone to the extent of several thousand dollars, a large part of which had never been used in the construction of the building, the allowance being for stone on the ground, at the building site, or at the quarry; that the quarries from which all the stone was obtained were on the college grounds belonging to the state, and the only allowance for stone in any of the estimates was for the work of quarrying and preparing the stone for use in the building; that the allowance of \$3,900 for dimension lumber was for lumber which was stacked on the ground, and part of which had been used in making concrete forms and in building the tool house and in scaffolding. There is a further finding that the Blanchard Construction Company erected a gas producing plant and gas holder for the college under a separate and distinct contract at the price of \$2,241.80; that an item of \$50 for tile drains mentioned in the third estimate was for material used in the construction of the gas plant and holder; that this material was originally delivered on the ground to be used in the engineering building, but without the consent of the regents or the State Architect it was diverted by the willful act of an employé of the construction company; that from time to time sand that had been delivered for the engineering building was used in the construc-

tion of the gas producing plant; but that it was replaced by other sand for which no additional estimate was allowed. The court finds that the value of the labor and material used in the incompleting building at the time the contract was abandoned was about \$10,000; but that the value of such labor and material at the time they were furnished and when the estimates were made was \$16,618.53, which was the total amount of the five estimates. The consent of the bonding company was not obtained to any of the payments made, nor to the manner of making estimates.

In March, 1909, the Blanchard Construction Company was adjudged a bankrupt. The trustee in bankruptcy claimed and was awarded by the referee a large part of the material which had been included in the estimates, but which had not been used. This material, which consisted mostly of the dimension lumber on the grounds, was sold by the trustee for \$2,600. After the contract was abandoned, the regents entered into a contract with Henry Bennett, under which Bennett completed the building in accordance with the plans and specifications for \$44,319. The court found that the difference between the cost of construction under the original contract and the cost of completing the building under the Bennett contract, including interest, amounted to \$15,346.33, and rendered judgment in favor of the state against the bonding company for that sum.

McClintock & Quant, of Topeka, McCune, Harding, Brown & Murphy, of Kansas City, Mo., and Chas. Blood Smith, of Topeka, for appellant. J. S. Dawson, Atty. Gen., and S. N. Hawkes, Asst. Atty. Gen., for the State.

PORTER, J. (after stating the facts as above). [1] It is conceded at the outset that the rules of strict construction which control in cases of accommodation sureties are no longer applied in the case of a bond written by a corporation engaged in the business of furnishing surety for compensation. (Hull v. Bonding Co., 86 Kan. 342, 120 Pac. 544; Medical Co. v. Hamm, 89 Kan. 138, 130 Pac. 650; Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; 23 Ann. Cas. 1085, note; 33 L. R. A. [N. S.] 513, note; Y. M. C. A. v. Ritter, 90 Kan. 332, 133 Pac. 894), and that if a bond like the one sued on is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that which is most favorable to the insured will be adopted. But it is rightly contended that, where there is no ambiguity, the plain intention of the parties cannot be disregarded or nullified by construction.

[2] It is insisted by the defendant that none of the estimates were made in the manner provided by the contract; that the first two estimates violated the contract because they included material and labor that had

not in fact been used in the construction of the work at the time the estimates were certified; that none of the other estimates were sufficient to authorize payments, because they were not made by Stanton, personally; that he placed his "O. K." upon them without any personal knowledge or information as to their correctness; and, further, that they were insufficient for the reason that they likewise included many items for labor and material that had not been used in the construction of the work. Briefly summarized, the contention is that, the state having made these unauthorized payments in violation of the terms of the contract, the bonding company is discharged from any liability upon the bond.

It is said that "John F. Stanton was elected by the people to the important position of State Architect, and that the bonding company had a right to rely upon his ability and integrity to see that the construction company should not receive more than it was entitled to under the terms of the contract." The rights of the parties to the contract are not affected by the fact that Stanton was a state officer. The State Architect is appointed by the Governor, but it is no part of his duties to act as umpire between the state and a contractor. The parties merely chose him as a suitable person upon whose certified estimates the payments should be made. They might have selected any other person or agency for the purpose. In making the estimates he was not acting as State Architect, but merely as an individual.

Upon the findings of fact showing the manner in which the third, fourth, and fifth estimates were made, it seems to us clear that they were the estimates of John F. Stanton whether, in certifying to their correctness, he relied upon information obtained from other persons or acquired it in the first instance himself. The contract did not in terms require him to see personally that the work was done or the material used. The provision was that he should make an estimate of the labor and material. If he acted in good faith in relying upon information from others as to the extent of the work and the amount of labor and material that had been used, and the Board of Regents in good faith made the payments, the terms of the contract were satisfied.

It is not claimed that there was actual fraud in the manner in which the estimates were made. It is argued, however, that the including of items for labor and material that had not in fact been used in the construction when the estimates were certified amounted to a constructive fraud upon the bonding company.

The form in which the certificates were made was clearly sufficient. The employment of the abbreviation or symbol of "O. K." in such transaction is in accordance with common usage, and its meaning was not misunderstood by any of the parties.

In *Lumber Co. v. Peterson & Sampson*, 124 Iowa, 599, 100 N. W. 550, payments were to be made to the contractor upon written certificates of the architect based upon estimates made by him of the amount earned. The Supreme Court of Iowa upheld payments of bills which were indorsed by the architect, "O. K." In the opinion it was said: "Whether the architect's 'O. K.' indorsement of other bills for payments may fairly be held to be a compliance with the contract depends upon the meaning to be attached to that abbreviation or symbol. * * * As already remarked, the purpose of the certificate is to witness the fact that the sum named therein has been earned, and any form of written communication which conveys that information intelligibly and to the satisfaction of the parties should be held sufficient. Now, 'O. K.' may have no title to be classed as 'elegant English,' but in the business life of this country it has for many years been in common use, and has acquired a meaning which is not at all obscure or uncertain. Webster's International Dictionary defines it as 'all correct.' The Century Dictionary gives its meaning as 'all right; correct; now commonly used as an indorsement, as on a bill.' It is neither more nor less than a brief, but expressive, certificate of the correctness of the bill or claim on which it is indorsed." 124 Iowa, pages 610, 611, 100 N. W. 554.

The contract was made a part of the bond, and it is true the provision that no payment should be made except on the certificate of the architect that the work for which the payment was due had been properly done, like the provision for withholding 10 per cent. as a final payment, was for the benefit not only of the original parties but the bonding company as well. *Y. M. C. A. v. Ritter*, 90 Kan. 332, 133 Pac. 894, and cases cited in the opinion. But this brings us no nearer a solution of the real question as to the liability of the defendant upon the bond. The bonding company guaranteed the faithful performance of the contract on the part of the construction company. The latter did not faithfully perform. The bonding company therefore became liable for the damages sustained by the breach, unless, as defendant contends, the state is estopped from asserting the liability because it made payments for work and material that had not in fact been used in the construction of the work at the time. The contract, however, expressly provided that the state was to pay 90 per cent. of each estimate when made by the architect. Is the state estopped then from maintaining this action because before making the payments it failed to take the precaution to see that the estimates were true and correct? We think there can be but one answer. The state purchased the bond for its protection in order that the faithful performance of the contract might be guaranteed, and the state be relieved from all obligations except to pay

the 90 per cent. when the certificates were made, and the final payment when the work was completed.

All the parties to the contract agreed that when the estimates were made and certified the amounts due thereon should be paid to the contractor. The bond provided that: "If payments are not made promptly in accordance to contract, this bond becomes null and void." This clause was placed upon the face of the bond with a rubber stamp. The dispute as to whether it was stamped thereon at the instance of the state or the bonding company we regard as wholly immaterial. It was, however, to the interest of the surety that payments should be promptly made to the contractor to enable the latter to purchase labor and material and to carry out the contract; and the surety was obviously more interested in the ability of the construction company to perform its contract than was the state. Irrespective of these considerations, the state was obliged to make the payments promptly when the estimates were duly certified, unless it can be said that there was evidence or some finding of bad faith on its part in making the payments. Nothing in the evidence or in the court's findings indicate that the state acted otherwise than in good faith.

In *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669, the contract required the estimate of the required "monthly payments not to exceed 80 per cent. of the estimated value of the work performed on the building." In an action on the bond, one ground of defense was that the plaintiff had advanced to the contractors a larger portion of the contract price than he was required to by the contract, because he had paid upon estimates based upon work done upon the granite at the quarry and at the place where it was dressed before it was actually set in place in the building. The surety was a private person, and, under the rule of *strictissimi juris*, was not to be held beyond the precise stipulations of his contract. Nevertheless the Court of Appeals held that these payments did not constitute such a departure from the contract as to become available as to a defense to the surety, and that the meaning of the contract should not turn on the use of the words, "on the building"; that the work on the building necessarily involved the preparation and carriage of the material, which were shown to be the most expensive part of the contract; and that the contract necessarily contemplated that the contractor would use the monthly payments for meeting these expenses, and would be practically unable to perform the contract if these payments were not made before the stone was actually set in the building. It was said in the opinion: "The parties had the right to give to the expression, 'work performed on the building,' a broader meaning, which could very properly include the value of any work done or ma-

terials procured under the contract towards its erection, although the granite procured and prepared had not yet been placed." 148 N. Y. page 248, 42 N. E. 671. In construing the contract the court took into consideration the situation of the parties, the nature of the work, and other provisions of the instrument, and held that the intention was to make the advances as the work progressed. It was further said in the opinion: "To give to it the other construction would, in practice, disable the contractors at the very outset from performance, and impose upon the defendant a liability, inevitable from the beginning, and possibly in a much larger amount than has followed the construction adopted by the parties themselves." 148 N. Y. page 249, 42 N. E. 671.

By the terms of the contract in this case the certificate of the architect was binding upon the original parties, and, under the terms of the bond, it became binding upon the surety. In the absence of fraud or mistake, the state was obliged to pay 90 per cent. of the certified estimates. Neither fraud nor mistake is set up as a defense, and it is conclusively established by the evidence and findings that the plaintiff made the payments in good faith. The total amount of the five estimates was \$16,618.53, and this the court finds was the value of the labor and material at the time they were furnished and when the estimates were made. The architect was agreed upon by the parties to the contract as the person upon whose judgment and decision with respect to the character, amount, and value of the work payments were to be made. In the absence of fraud or mistake, they are bound by his judgment and decision. In *Board of Education v. Shaw*, 15 Kan. 33, it was ruled in the syllabus: "Where the parties to a building contract agree upon an architect, and stipulate and agree to rely upon his judgment, skill, and decision as to the character, amount and value of work to be done, they must abide by his judgment and decision, or impeach it upon the ground of fraud, mistake, undue influence, or some other good cause."

Our conclusion is that the plaintiff is not estopped from maintaining this action because it made the payments upon the certified estimates of the architect; but it is manifestly unjust that the state should recover for the value of any labor or material included in the estimates which was thereafter diverted to the use of the state. It seems to be practically conceded that material of considerable value which was included in the certified estimates was used in the construction of the gas producing plant and gas holder. Dimension lumber was used for concrete forms, and sand, cement, and other material purchased for the mechanical engineering building were used in the construction of the gas producing plant. There is a finding that the

sand was replaced." We are unable to discover from the evidence or from the findings the value of the amount of labor and material included in the estimates which was thus diverted to the use of the state.

The judgment will therefore be modified and the cause remanded, with directions to ascertain the aggregate value of all such items and to deduct the same from the amount of the judgment. All the Justices concurring.

ESTES v. EDGAR ZINC CO.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—VERDICT—FINDINGS.

In an action to recover for injuries alleged to have been received because a certain conveyor belt being out of gear started in gear and in motion without human agency, the jury, in answer to a special question whether such belt got into gear automatically, answered, "No evidence to show how it got back." Held, that a general verdict for the plaintiff should have been set aside.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

(Additional Syllabus by Editorial Staff.)

2. TRIAL (§ 365*)—SPECIAL INTERROGATORIES—CONSTRUCTION—"AUTOMATICALLY."

In construing a jury's answer to a special question whether a belt, the motion of which caused plaintiff's injury got into gear automatically, it will be presumed that the jury understood the word "automatically" to mean, as defined by Webster, "having inherent power of action or motion; self-acting or self-regulating; not voluntary; not depending on the will; mechanical."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 871-874; Dec. Dig. § 365.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 649, 650.]

Appeal from District Court, Montgomery County.

Action by William J. Estes against the Edgar Zinc Company. From judgment for plaintiff, defendant appeals. Reversed.

O. P. Ergenbright, of Independence, for appellant. Chester Stevens, of Independence, and Charles D. Welch, of Coffeyville, for appellee.

WEST, J. The plaintiff recovered a judgment for injuries received while working at an elevator box in the defendant's plant. The building was four stories high, and the power running the conveyor belt came from a horizontal shaft on the fourth floor, which was so arranged that, when the belt of the conveyor worked upon a pulley which revolved with the shaft, the power was thereby transmitted, and in order to throw the belt out of gear it was necessary for a workman on the first floor to pull a rope reaching down from the fourth floor, the effect of which was to change the belt over to a loose

pulley not revolving with the shaft. To put the belt in gear another rope was provided by which the belt could be drawn back so as to run over the fixed pulley. The petition alleged among other things that the apparatus for starting and stopping the conveyor belt was defective in that it would start in motion after having been thrown out of gear "without any one having pulled the rope provided for that purpose by reason of some defect in the machinery for throwing and keeping said belt out of gear"; that it was the plaintiff's duty when the conveyor belt became choked to throw the belt out of gear and clean out the elevator box; that in attempting so to do he pulled the rope in the usual and proper way and went to the elevator box and proceeded to remove with his hand the accumulated obstructions therein, and, while so engaged, without any warning the belt started up, pulling the plaintiff's hand forward and crushing it. The answer was a general denial and plea of contributory negligence and assumption of risk. The instructions were brief and clear and are not attacked by either party. The jury were told that, if the plaintiff knew, or in the exercise of common and ordinary sense and judgment could have known, that the instant the obstruction was removed the belt would start in motion, then he could not recover. That the plaintiff's claim as to defects was that the conveyor belt "would start in motion without any one having pulled the rope provided for that purpose."

[1] The jury returned a verdict for the plaintiff and in answer to special questions found that he pulled the rope in the usual and ordinary way for throwing the machinery out of gear before beginning work in the elevator box; that the belt started in motion, while he was engaged in cleaning out the box, without notice or warning. "Q. 14. Did plaintiff throw said drive belt out of gear before descending into said basement? A. Yes. Q. 15. Did said drive belt get into gear automatically after plaintiff went down into said basement? A. No evidence to show how it got back." It was also found that the plaintiff stated to witnesses that he might have pulled the wrong rope. The other questions were answered favorably to the plaintiff and were consistent with the verdict, with the possible exception of a finding to the effect that the plaintiff was informed or had notice of the dangers and hazards of the place "by observation" and another express finding that he assumed the risks and hazards and perils of the place at which he was injured, which would seem to be a matter rather for the court than for the jury. It was testified by experts that the belt could not automatically change from the loose to the rigid pulley, but other evidence like a finding of the jury was to the effect that the drive belt could move from the loose to the tight pulley of its own accord. The defendant moved for judgment on the special

findings, which being overruled, a new trial was asked for and denied. The defendant appeals and presses the point that the plaintiff did not testify unqualifiedly that he knew the belt was out of gear before he went to the basement, but a fair interpretation of his answers on direct and cross examination is that he pulled the proper rope which was provided for the purpose of taking the belt out of gear and which he assumed would have that effect, having no reason to think otherwise. He did say he had knowledge two weeks before that if he pulled it out of gear it might itself work back into gear. We think the candor of the plaintiff was not only commendable but that it did not weaken the force of his testimony or make it less convincing than a positive assertion of actual knowledge that the belt was out of gear. It is also emphasized that, before a recovery could be had, the jury must believe that a defect existed in the mechanism for shifting the belt, by reason whereof the latter would start in motion without any one having pulled the rope provided for that purpose (that is, of its own accord, automatically), and that the answer to question 15, "No evidence to show how it got back," leaves the matter in the situation of basing the verdict upon conjecture.

[2] While the use of the word "automatic" in the question is criticised by the plaintiff, we think the jury must have rightfully understood it to mean as Webster defines it: "Having an inherent power of action or motion; self-acting or self-regulating; not voluntary; not depending on the will; mechanical." Webster's New International Dictionary 1911. In other words, we think the jury understood the question and intended by the answer to say that there was no evidence to show whether the belt started in motion mechanically by reason of some defect in the shifting gear or by the application of human force. The minus quantity in this finding is represented by that portion of the allegation that the "conveyor belt, * * * by reason of said defect in said machinery hereinbefore set out, started up," etc. It is impossible to discover in the findings anything which shows that the belt started on account of this defect and not by reason of the rope being pulled by some one. The plaintiff testified that after he had pulled the rope and gone below to clean out the box, and had taken out about a bushel of the obstructions, he ran his hand in under the belt and found a nail or spike in the cup of the elevator; "so I took my hand and worked that loose, and when I got my obstruction loose the elevator started and caught my hand." This may have been one reason why the jury felt unable to state what started the belt in motion.

While the defendant is not entitled to a judgment on the special findings, and while but for the answer to question No. 15 the general verdict might be reconcilable with

the other special findings, the entire conclusions of the jury leave the case in the condition of having found in favor of the plaintiff while failing to find one of the essential elements of his right to a recovery. One ground of a motion for a new trial was that the verdict was contrary to the evidence, and in the respect indicated this ground was well taken, and the motion should have been granted.

It was alleged and found that the defendant had not furnished plaintiff a safe place in which to work, but it is clear that the controlling cause of such unsafety was the tendency of the belt to shift from the loose to the fixed pulley, and in this instance it was necessary to prove that such shifting occurred without human agency. This (the very crux of the matter) the jury failed to determine.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

STALKER v. DRAKE.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION (§ 47*) — ACTION FOR DAMAGES—PETITION—CONSTRUCTION.

The petition herein interpreted, and held to state a cause of action for willful and malicious oppression by the defendant acting through his agents in seeking to enforce usurious and unlawful claims against plaintiff, and should not be regarded as one asserting a liability on the ground of the conspiracy of the defendant with his agents as tort-feasors and co-conspirators.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 91, 92, 96; Dec. Dig. § 47.*]

2. MALICIOUS PROSECUTION (§ 10*) — UNFOUNDED SUITS—LIABILITY FOR DAMAGES.

Where a party makes an unlawful demand against another, and maliciously and oppressively uses the machinery of the courts and the process of the law as well as other measures in an endeavor to enforce the payment of such demand, the injured party is entitled to recover the loss and damage resulting from such wrongdoing.

[Ed. Note.—For other case, see Malicious Prosecution, Cent. Dig. §§ 11, 12; Dec. Dig. § 10.*]

3. DAMAGES (§ 87*)—MALICIOUS PROSECUTION (§ 68*)—EXEMPLARY DAMAGES—GROUNDS FOR ALLOWANCE.

Exemplary damages are not allowable because of any special merit in plaintiff's case, but are imposed by way of punishing the defendant for an invasion of the plaintiff's rights in cases characterized by malice, fraud, or a willful and wanton disregard of the rights of others, and it is held that the elements justifying the allowance of such damages are present in this case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 188-192; Dec. Dig. § 87.* Malicious Prosecution, Cent. Dig. § 157; Dec. Dig. § 68.*]

(Additional Syllabus by Editorial Staff.)

4. MALICIOUS PROSECUTION (§ 69*) — EXCESSIVE RECOVERY—MALICIOUS PROSECUTION.

Where plaintiff borrowed \$25 on usurious terms, so that the claim amounted to \$200 in a few months, though he had paid \$145.50 thereon, and where defendant maliciously brought proceedings to enforce his claim, and, by shifting same from state to state, and bringing actions in different places, and using dilatory tactics, caused plaintiff injury, an award of \$5,000 as punitive damages was not excessive.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 158; Dec. Dig. § 69.*]

Appeal from District Court, Wyandotte County.

Action by Joseph B. Stalker against D. D. Drake and another who died pending the action. From judgment for plaintiff, defendant appeals. Modified and affirmed.

R. J. Ingraham, Nathan Cree, and McAnany & Alden, all of Kansas City, for appellant. L. W. Keplinger, of Kansas City, Kan., and Madden & Scholer, of Kansas City, Mo., for appellee.

JOHNSTON, C. J. This was an action by Joseph B. Stalker against D. D. Drake to recover damages for alleged willful, wanton, and malicious oppression. The record discloses that the appellant was a money lender, and had a chain of offices over the country, with headquarters at Kansas City; the Kansas City office being managed by an agent named Van Zandt. Drake's residence appears to have been at Delaware Water Gap, Pa. The appellee was a railway employé, and had been employed by a number of railway companies in various capacities as freight brakeman, conductor, switchman, and yardmaster. In May, 1903, while employed by the St. Louis & San Francisco Railroad Company as conductor, the appellee applied to the office of Drake, managed by Van Zandt, for a loan of \$25. He signed two papers without reading either of them. One was a note, and the other an assignment of his wages. The loan was to run for a period of one month, and Stalker was to pay \$2.50 for the use of the money. He renewed the note the following month on the payment of an additional \$2.50. He endeavored to again renew it in July a day or two after it became due, and was informed that the matter had been placed in the hands of an attorney, and that it would cost him \$10 more to straighten the matter out. Under protest this amount was added to the amount of the note, and another \$2.50 paid by Stalker as interest. In September, when the loan again became due, Stalker had not received his pay check, and upon inquiry was told that an extension of a few days would be given, and when the pay check was received he was then informed that another \$10 from him would be necessary to get the matter out of the hands of another attorney with whom the

note had been placed, and after considerable controversy he signed a note for \$45, paid \$3.50 as interest, and agreed to pay \$4.50 for the next month. In October, on account of the derailment of a train, Stalker was a few days late in tendering payment of the interest, and he was then informed that the claim was in the hands of an attorney, and that suit had been brought upon it; but Van Zandt would not give him the name of the attorney or of the court. They insisted on adding \$10 for attorney's fees and \$5 for court costs, and the note was thereby increased to \$60. He continued to pay \$6 a month on this amount until February, 1905. In the meantime he had borrowed \$30 additional, and this amount was repaid at the end of the month, including interest thereon at 10 per cent. per month. In February, 1905, Van Zandt notified Stalker that the account would have to be finally settled the following month. Stalker, not being able to pay the claim, and thus protect his railroad record, resigned his position with the railroad company. Later, and about May or June, 1905, he secured employment from the Chicago & Alton Railroad Company as night yardmaster. The controversy with Van Zandt as to the payment of the loan still proceeded, and, being pressed for payment of all that was claimed, Stalker filed a voluntary petition in bankruptcy, which resulted in a discharge, and in the proceeding the debt to Drake was scheduled at \$66. In February, 1906, one of the blank assignments which Stalker had signed when the loans were renewed was filled out by Van Zandt, and filed with the Chicago & Alton Railroad Company at Chicago, and thereafter the payment of Stalker's wages was withheld. A suit was begun there by Drake to recover on his claim, which had suddenly grown to \$140, and Stalker, to protect his interest, made several trips to Chicago, and finally a nonsuit was taken. This, however, did not operate to release Stalker's wages because of the assignment which had been filed. He was reduced from the position of yardmaster to that of foreman, and from that of foreman to helper, and in November, 1909, he felt compelled to resign his position. Stalker, at that time, had received the original loan of \$25 and \$30 at another time, and had already paid Drake \$145.50; but only \$30 of the amount paid had been credited on the principal indebtedness, and Stalker had therefore paid \$115.50 for the use of \$25 from May, 1903, to February, 1905. On September 6, 1906, Drake brought a second action in Chicago, and this time he asked judgment for \$200 on what had been a \$25 loan. Several continuances were had at the instance of Drake, which necessitated several trips to Chicago by Stalker. A trial was finally had, and a judgment in favor of Stalker was rendered. No appeal was taken from this judgment by Drake, and, although judgment had been rendered against him for the costs of

the depositions taken by Stalker, a demand for the payment of this amount was refused. Another of the blank assignments had been given before the judgment against Drake was rendered, was filled out, and filed with the railroad company in Chicago. On its face it purported to have been given after the judgment, and constituted a new claim against Stalker's wages. Stalker then brought this action, in which Drake and Van Zandt were both named as defendants; but Van Zandt died, and an amended petition was filed against Drake alone, in which these and other facts were stated at length. It is alleged that the illegal and oppressive measures were used by Drake in and out of court through a spirit of malice and revenge with a view of coercing and making Stalker pay illegal demands, and that Stalker had thereby been deprived of his wages, had suffered for the necessities of life, and been compelled to pay sums of money for lawyer's fees, expenses of litigation, and other purposes, and he therefore asked for both actual and exemplary damages. The trial resulted in a verdict in favor of Stalker for \$1,000 as actual and \$5,000 as punitive damages.

[1] It is contended that no recovery can be had because of the lack of legal evidence of conspiracy. The appellant assumes that the action is one to recover damages for a conspiracy between appellant and his agents, and that, as there is a lack of proof to show combination, concert of action, a unity of design, and a common purpose of all to do the unlawful acts, no recovery can be had. There is nothing substantial in this contention. The action is not grounded on the conspiracy of Drake and his agents as tortfeasors, but is the ordinary one asserting a liability for the wrongs of appellant accomplished by himself directly and through his agents. The word "conspiracy" is used in the petition where it is alleged that, Drake knowing that appellee was dependent upon his salary, and that the filing of an assignment with the railroad company and the beginning of suits against appellee would stop the payment of his wages, prevent promotion in the railroad service, and jeopardize his position, and knowing, also, that the claim against appellee was illegal and extortionate, and could not be collected by legal means, he and his agent brought suits away from Kansas City and in Chicago, remote from appellee's residence, filing assignments, obtaining continuances, and resorting to other dilatory tactics, and, when a final adjudication was rendered against appellant, that he still continued to file assignments and to make threats of other litigation, and that all these acts were parts of one systematic scheme, plan, and conspiracy of oppression and fraud carried out by appellant and his agents to coerce appellee into paying a fraudulent claim. It was evidently the purpose of the pleader to state a liability of appellant for wrongs done by him through his agents as well as by himself,

and not to assert a liability against the agents as tort-feasors and co-conspirators. The word "conspiracy" was manifestly used in the sense of scheme or system of wrongdoing devised and carried out by appellant, and the recovery is only sought on the ground that he is responsible for acts done by himself and also by his agents within the scope of their agency.

[2] The argument that a cause of action is not stated in the petition can hardly be seriously made. It certainly states good ground for recovery for both actual and punitive damages, and it would be a reproach upon the law if it did not afford a remedy for the willful and malicious acts of oppression and coercion recited in the petition.

It is also contended that the award of \$1,000 as actual damages is not supported by the evidence nor yet by the special findings. The injuries about which testimony was given would have afforded a basis for a much larger award; but there are reasons for the contention that the findings do not warrant the amount awarded as actual damages. In answer to special questions, the jury found that appellee was entitled to recover \$75 for loss of time, \$20 for attorney's fees in the first suit brought before a justice of the peace in Chicago, \$18 for the expense of depositions, \$25 for attorney's fees in the second suit at Chicago, \$100 for attorney's fees in a suit at Kansas City, and \$10 for procuring surety bonds in the litigation with appellant. Then the question is asked, "If you allow any other sum as actual damages, state for what said actual damages are allowed?" and it is answered, "Railroad, hotel, and incidental expenses \$200." The items of damage, excluding the last one mentioned, amount to \$248, and the sum of all other actual damages is placed by the jury at \$200. This last sum, together with those first named, amounts to \$448, and under the language of the findings that must be the limit of recovery for actual damages. A much larger allowance might have been made for attorney's fees, as there was testimony that for certain litigation growing out of the wrongs of appellant \$200 would have been reasonable for the services rendered. However, it is not included in the findings of the jury, and the form of the findings is such as to negative an intention to include it in the general verdict. With the injury to the standing of appellee with his employer and coemployees, the humiliation, worry, and loss occasioned by the withholding of his wages, and the distress and loss resulting from the nagging coercive measures and litigation brought against him, which is disclosed by the evidence, if the witnesses had named the pecuniary loss sustained by appellee for these causes, a much larger award would have been warranted. There is abundant evidence, we think, to sustain the award of the items first mentioned as actual damages.

Some complaint is made, however, that the evidence does not sustain the finding of the award of \$200 for railroad, hotel, and incidental expenses. The term "incidental" as ordinarily used and applied to expenses includes a variety of things. No request was made to have the jury specify or definitely state the things included in the term, and in the absence of such request we are not disposed to place any narrow construction upon the finding.

[3] It is urged that there is no ground for the allowance of exemplary damages, and that, in any event, the award is so large as to indicate passion and prejudice on the part of the jury. The punitive damages were fixed at the sum of \$5,000. It is argued by appellant that this award was necessarily the result of unreasoning hostility of the jurors against usury and their resentment against appellant as a usurer. The charges made for the use of the money, although extortionate and unconscionable, are not the grounds upon which punitive damages were allowed. Appellee may not be entitled to much sympathy for the excessive rate of interest which he paid, because when the loan was effected he voluntarily undertook to pay a rate of 10 per cent per month. In his behalf it is said that he was a stranger in Kansas City, unacquainted with appellant's system, and in his ignorance found it necessary to pay what the appellant demanded. The interest, although 120 per cent per annum, is only a small part of the unlawful claim which appellee was pressed to pay. The loan was increased, as the testimony shows, by various devices, such as fabricated attorney's fees and pretended court costs, so that in a few months a loan of \$25 had become a claim for \$200, notwithstanding that the appellee in the meantime had paid appellant \$145.50 in an effort to discharge the debt. The means used to enforce the payment of the unconscionable demand betrayed wantonness and malice. Appellant knew of the straightened circumstances of appellee, and of the rule of the railway company that an assignment of an employee's wages was a ground for his discharge from service, and, having secured a number of blank assignments from appellee, held them over his head, driving him to the signing of notes for larger sums and the payment of \$6 per month for the use of the \$25 loan. These assignments, being executed in blank, were filled in by appellant for such times and amounts as he saw fit. When appellee's necessities were great, and he concluded to raise and pay the amount of the last note, although extortionate, in order to release his wages, which had been tied up by an assignment, his offer was met by demand of appellant for the payment of \$140, and Van Zandt, the agent of appellant, said to him that, if his baby was in a dangerous condition, as appellee had represented, he should pay the \$140, and obtain a re-

lease of his wages. When appellee protested against such an exorbitant demand, Van Zandt replied that appellee had caused appellant, who was a millionaire, and employed attorneys by the year, a great deal of trouble, and that appellant was going to make an example of appellee. When reminded that appellee had obtained a discharge in bankruptcy, and also that the claim of appellant was not enforceable because of usury, Van Zandt said he understood these points, but that they proposed to go ahead in the use of the methods they had been employing to compel payment. On another occasion he said to an attorney of appellee that they had appellee tied up, that a man of his means could not afford to fight, that continuances would be taken and costs made which appellee could not meet, and urged these reasons to the attorney why appellee should pay the demand. The shifting from state to state, the use of the machinery of the courts, and the abuse of its process in the effort to enforce the demand, the bringing of the actions in distant places, and the use of dilatory tactics in such litigation, all calculated to exhaust the resources of appellee, and force him to pay the unjust demand, afforded abundant grounds for the award of punitive damages. Such damages are allowable, not because of any special merit in the plaintiff's case, but are imposed by way of punishing the defendant for malicious, vindictive, or a willful and wanton invasion of the plaintiff's rights; the purpose being to restrain him and deter others from the commission of like wrongs. Such damages are only given where malice, fraud, or a willful and wanton disregard of the rights of others enter into the case.

[4] The elements justifying such an award are certainly present in this case, and, having in mind the purpose for which they are allowed, we cannot say that the award is excessive, or that it indicates passion and prejudice on the part of the jury.

We find no error in the instructions of the court nor any ground for reversal; but the judgment of the trial court will be modified, awarding actual damages in the sum of \$448, making the total award for both purposes \$5,448.

The judgment so modified is affirmed. All the justices concurring.

FIRST NAT. BANK OF WINFIELD v.
BANGS et al. (two cases).
(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD (§ 112*)—TENANTS IN COMMON—MORTGAGES—VALIDITY.

Where the same guardian represents several minor wards who are tenants in common of real estate, circumstances may exist which will justify the probate court in authorizing him

to borrow money for their common benefit and secure it by a mortgage upon the entire tract.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 401-404; Dec. Dig. § 112.*]

2. GUARDIAN AND WARD (§ 112*)—MORTGAGE—ORDER OF COURT—FORECLOSURE—SCOPE OF INQUIRY.

In an action to foreclose such a mortgage, the question whether circumstances actually existed which justified its execution in that form is not open to inquiry.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 401-404; Dec. Dig. § 112.*]

3. GUARDIAN AND WARD (§ 112*)—MORTGAGE—FORECLOSURE—SCOPE OF INQUIRY.

Circumstances may exist which justify the probate court in authorizing a guardian to borrow money by mortgage on the real estate of his ward for use in the purchase of personal property, to be used in connection therewith, in order to make it productive; and, in an action to foreclose such a mortgage, the question whether such circumstances existed is not open to inquiry.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 401-404; Dec. Dig. § 112.*]

4. EVIDENCE (§ 82*)—GUARDIAN AND WARD (§ 163*)—LIMITATION OF ACTIONS (§ 155*)—SUSPENSION—PAYMENT BY GUARDIAN—PRESUMPTION AS TO ACCOUNTING.

A payment properly made by a guardian from the funds of his ward upon a mortgage executed by himself on order of the probate court, will suspend the running of the statute of limitations. Such a payment will be deemed to have been properly made where the guardian's report, showing such expenditure, has been approved by the court. That such report has been made and approved will be presumed from the fact that the wards have been of age for some time and nothing appears to the contrary beyond a finding in general terms that the probate court did not authorize the payments.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. § 82; Guardian and Ward, Cent. Dig. §§ 407, 474, 540-544; Dec. Dig. § 163; Limitation of Actions, Cent. Dig. §§ 623-630; Dec. Dig. § 155.*]

5. GUARDIAN AND WARD (§ 112*)—EXECUTION OF MORTGAGE—AUTHORITY OF GUARDIAN.

Where an order of the probate court has been made authorizing a guardian to execute a mortgage on his ward's real property, and a change of guardians is effected before such order is carried out, the new guardian may act upon the authority given his predecessor.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 401-404; Dec. Dig. § 112.*]

Appeal from District Court, Cowley County.

Two actions by the First National Bank of Winfield against Milton A. Bangs and others. From judgment for plaintiff, certain defendants appeal. Affirmed.

F. C. Johnson and S. C. Bloss, both of Winfield, for appellants. Hackney & Lafferty, of Winfield, for appellee.

MASON, J. The First National Bank of Winfield brought an action to foreclose two mortgages executed by a guardian in behalf of a number of minor wards, upon order of the probate court. Judgment was rendered

for the plaintiff, and a separate appeal is prosecuted by each of two groups of defendants.

It is contended that one of the mortgages is void upon two principal grounds: (1) Because it undertook to cover the whole property owned by the minors as tenants in common, without providing for a separate redemption by each upon payment of his due proportion of the debt; and (2) because it was given in part for an indebtedness not owed by any of the minors.

[1] The question raised by the first of these objections was involved in a California case. In deciding it the Supreme Court said: "It is next claimed that the order to mortgage is void because it purports to create a joint indebtedness of these five minors for the entire sum, and a single blanket mortgage is given to secure that indebtedness. We have no doubt but that the court was wanting in power to make an order for a mortgage which would bind the interest of each minor for the entire loan, and, if the necessary construction of this order was to bind each minor to that end, it could not stand. But a fair and reasonable construction of the order may be made, which will make it valid, and that construction we are bound to make. Each minor owned an undivided one-twentieth of the real estate, and it will be held in support of the validity of the order that each minor's interest in the estate is only bound as security for one-fifth of the amount of the debt, and upon the payment of that amount his interest will be released from the effect of the mortgage." *Howard v. Bryan*, 62 Pac. 459, 460. Upon a rehearing the mortgage was held to be void; two justices dissenting. *Howard v. Bryan*, 133 Cal. 257, 65 Pac. 462. The decision appears to be based on the view that it is not safe to intrust a court with the power to authorize such a mortgage; the ground of the ruling being thus stated: "In this case the power of the court was exceeded, not only in attempting to mortgage the interest of the five minors to secure a sum in excess of their aggregate indebtedness, but also in the attempt to mortgage their separate interests for their aggregate debt. However advantageous it may have seemed in this instance to pursue that course, the proceeding cannot be sustained without establishing a dangerous precedent, from which serious abuses would be certain to flow." *Howard v. Bryan*, 133 Cal. 257, 264, 65 Pac. 462.

We cannot assent to the proposition that in this state the probate court has no jurisdiction to authorize a guardian to execute a mortgage upon real estate owned by several wards, giving a lien upon all the property for the whole debt secured. Obviously there ought not to be such a complication of interests if it can well be avoided. But in some circumstances it may be unavoidable. If the mortgage is given to take up an existing incumbrance covering the whole property, it is

manifest that no injury can result. In a particular case the making of a mortgage may be absolutely necessary to save the property to the minors, and at the same time it may be that no mortgage will be accepted except one in "blanket form"; the entire debt being made a lien on all the property. Such a condition might exist where a tax lien is about to ripen into a title. The probate court has jurisdiction to inquire and determine whether, in a given case, such a situation is presented, and, if a mistake of judgment is made, the mortgage is not thereby invalidated. Here the findings show that there was urgent need of a loan; the property had been sold at judicial sale upon a tax lien; the period within which redemption could be made was about to expire; and there was no other source from which the money to redeem it could be obtained. It must be presumed that the mortgage was procured upon as favorable terms as could be had under the circumstances. The Kansas statute, in addition to the specific authority for the execution by a guardian of a mortgage on his ward's property, contains this provision: "Guardians of the property of minors must prosecute and defend for their wards. They must also in other respects manage their interests, under the direction of the court; they may thus lease their lands or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards." Gen. Stat. 1909, § 3975. This does not confer an unlimited authority upon the court, but it justifies a liberal interpretation of the powers elsewhere granted. It is argued that the result of this view is to make each of the wards personally liable for the debt of the others. This question is not involved because no personal judgment was rendered against any of the defendants; the decree simply providing for collecting the indebtedness out of the property.

[2, 3] The basis of the second objection is that there was included in the amount for which one of the mortgages was given the sum of \$1,800, which was owed to the mortgagee by the father of a part of the minors. The findings disclose these facts: A life interest in the real estate involved was devised to a brother and sister, with a remainder to their respective children, the two sets of minors already mentioned. The property included a large hotel in process of construction when the testator died. It was completed and opened to the public, being managed for the benefit of the estate by the father of one set of devisees. Furniture and fixtures for the hotel had been procured and were held in his name, and he had executed a mortgage upon them for \$1,800. To save the property from deteriorating and becoming unproductive, the guardian took possession in behalf of the minors and undertook to borrow enough money upon it to put it in condition to

produce a revenue. In effecting a loan sufficient for this purpose, the item of \$1,800 (the lien on the furniture and fixtures) was included, and that amount of the mortgage debt is thus accounted for. The probate court directed this use of the borrowed money, as well as the other expenditures regarded as necessary to the preservation of the property in the interest of the minors. In effect the guardian took over the furniture and fixtures by the assumption of the mortgage against it, purchased it for the wards, for the amount of the lien. In order that the hotel might be kept up as a going concern, it was obviously necessary that some provision should be made for furniture and fixtures. Whether some better arrangement might have been made is not a matter for inquiry here. The plan pursued was reasonably adapted to the end in view, was approved by the probate court, and affords no sufficient basis for an attack upon the validity of the mortgage. Nor can this proceeding be affected by any question of accounting between the owners of the life estate and the remaindermen.

[4] It is contended that the mortgages sued on are barred by the statute of limitations. They were more than five years overdue when action was brought, and are outlawed unless the statute is tolled by payments made upon the indebtedness by the guardian from the funds of his wards. The findings recite that the probate court did not authorize such payments. The fair interpretation of this seems to be that no specific authority therefor was given in advance. There is no suggestion of anything clandestine in the matter. The wards have become of age, and presumably the guardian has made an accounting which has been approved by the court. The approval of payments applied upon the mortgage would have the same effect as an original authority. The ordinary rule is that a payment upon an indebtedness made by operation of law does not affect the running of the statute of limitations. 25 Cyc. 1381-1383. Thus a payment by an assignee for the benefit of creditors is effective only on the theory of an agency and consent. *Letson v. Kenyon*, 31 Kan. 301, 1 Pac. 562. But it is held that, while an administrator has no authority to revive barred claims against an estate, payments made by him before the statute has run will suspend its operation. Note, 98 Am. St. Rep. 700. A guardian stands upon a somewhat different footing from other representatives. He acts for his ward in all business matters. A payment properly made by him upon an indebtedness which he himself has created by authority of the court should obviously serve to prevent the running of the statute of limitations. We hold the mortgages sued on not to have been barred.

[5] One of the mortgages was executed by

a successor of the guardian upon whose application the order therefor had been made. The authority given to one guardian passed to his successor. Such is the rule in the case of executors and administrators (*Albright v. Bangs*, 72 Kan. 435, 438, 83 Pac. 1030, 115 Am. St. Rep. 219), and no reason is apparent why the same rule should not apply in the case of guardians.

Complaint is made that the decree undertakes to sell the right of possession of the property, whereas the owner of a life interest was not a party. If the language of the judgment was inaccurate in this regard, no injury resulted to the appellants. Complaint is also made that the amount of the judgment rendered upon one of the mortgages is somewhat in excess of the amount claimed in the petition. An appropriate amendment may be regarded as having been made. It is suggested that certain appearances by attorneys are not conclusively shown to have been authorized, and that this makes the title unmarketable. We think the objection not substantial.

The judgment is affirmed. All the Justices concurring.

TURNER et al. v. ELBING STATE BANK
OF ELBING.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

NEW TRIAL (§ 86*)—GROUNDS—DISCRETION.

A case was tried and judgment rendered in the absence of plaintiff and his counsel, and on an application, promptly made, a new trial was granted upon a showing that, just before the trial, one of the counsel for plaintiff was called to another state by the sickness of his wife, and that his partner, who was engaged in jury trials in another county, overlooked the assignment of this case. There was also testimony to the effect that there had been communications from counsel for defendant suggesting that additional time might be needed by them to take depositions and to prepare for trial. In view of the discretion vested in trial courts in the matter of granting new trials, it cannot be held that the court abused its discretion, nor that there was no basis for granting the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 172-174; Dec. Dig. § 86.*]

Appeal from District Court, Butler County.

Action by Charles F. Turner and others against the Elbing State Bank of Elbing. From judgment for plaintiffs, granting new trial, defendant appeals. Affirmed.

Hamilton & Leydig, of El Dorado, for appellant. Holmes & Yankey, of Wichita, for appellees.

JOHNSTON, C. J. On this appeal the question involved is whether or not there was error in an order granting a new trial. It appears that Charles F. Turner was the owner of 10 shares of the capital stock of the Elbing State Bank of Elbing, Kan., and that he entered into an agreement with C. A.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Stuckey, whereby Stuckey was to purchase the shares. The purchase price and the certificates of stock were placed in the custody of the Merchants' State Bank of Wichita under an agreement that the money was to become Turner's when the shares had been legally transferred on the books of the bank. The bank refused to transfer the shares of stock on its books. Turner then began an action to enforce the transfer, and also asked for \$500 damages resulting from the refusal to make the transfer, and he joined Stuckey, the purchaser, as a plaintiff. The bank answered, and in a cross-petition alleged that Turner had been the cashier of the bank for a considerable time, and while acting in that capacity had so conducted the business as to become liable to the bank in various sums of money amounting to \$2,152.97, and that the bank was entitled to a lien upon his shares of stock for that amount. Stuckey did not insist on the transfer of the stock, nor ask for any relief except the return to him of the money which, with the stock, had been placed in escrow in the Wichita bank. When the trial occurred neither Turner nor his attorneys were present, and in their absence a judgment was rendered against him for the sum of \$1,782. In due time Turner filed a motion for a new trial, alleging 10 grounds, one of which was accident and surprise which ordinary prudence could not have guarded against, and by reason of which he was not afforded an opportunity to present his evidence or be heard on the merits of the case, another that the decision was procured through a misunderstanding of attorneys as to the time the case would be ready for trial, and another because the case was not properly tried by the court, and that it was a case for a jury, and that a jury was not waived by Turner. At a hearing on the motion testimony was produced, and, based thereon, the court granted a new trial upon the ground that through unavoidable casualty and misfortune Turner had been prevented from prosecuting and defending in the action. As a condition to the granting of a new trial the court adjudged that Turner should pay all the costs which had accrued up to that time, taxed at \$75.59, and also pay to the attorneys of the bank an attorneys' fee of \$25. Testimony was offered to the effect that when certain motions which had been pending were disposed of in the district court in December, 1911, counsel for appellant advised counsel for appellee that they would desire to take depositions in the case, but that none had been taken. When the case was called on March 5, 1912, the court, upon consultation with counsel for appellant, decided that the case was triable by the court without a jury, and in a letter written by counsel for appellant to counsel for appellee the latter, who lived in a neighboring county, were informed that the action was regarded as a court case, and that all court cases had been set down for March

25th, and then added, "But after we know the case is for trial, like yourselves will have to have several days to get ready." It appears that the senior partner of the firm employed by appellee was called to Indiana on March 18th on account of the sickness of his wife. The hurried departure of counsel and the consequent loading of all the business of the firm, including jury trials in both the state and federal courts at Wichita, upon the junior partner led him, he testified, to overlook the fact that the case had been set for hearing on March 25th. This, he said, was due in part to the fact that counsel for appellant had indicated a desire to take depositions and that as no notices to take depositions had been served upon him, he assumed that the case would not be tried until they were in fact taken. The case was called on March 25th, and, after hearing some testimony in support of the answer and cross-petition of the appellant, a judgment for a large sum was awarded against appellee. The motion for a new trial was presented at the same term, and within three days from the rendition of the judgment. The court granted the motion, and it has been held that a much stronger case for reversal must be made where it is granted than where it is refused. *City of Sedan v. Church*, 29 Kan. 190.

The court is vested with considerable discretion in the granting of new trials, and doubtless in this case it determined from the showing made that the claims and contentions of appellee in the case were meritorious. It cannot be said that the appellee's attorney was wholly free from negligence, and ordinarily it is not a good ground for a new trial that an attorney did not know that a case was set down for trial on a particular day, or that he overlooked the fact that it had been assigned for trial at a particular time. However, the sickness of counsel's wife, his sudden departure to a distant place, the increased burden placed upon the other partner, the communications of the intention of counsel to take depositions, and that additional time to prepare for trial would be required by them, all together furnished some excuse for the delay and some ground for the ruling made. The reasons might not have been deemed so strong or to be sufficient if the trial court had denied the motion for a new trial. Having been granted upon a motion promptly made, and upon terms favorable to appellant, and as each party will now be afforded an opportunity to have a trial upon the merits, we think there is little ground to complain of the ruling. The trial court being vested with large discretion in the matter of new trials, and being in closer touch with the case and better able to measure the testimony and the good faith of the application for a new trial than a reviewing court can be, we cannot say that there was no basis for granting the motion, nor that the discretion of the court was

abused. The motion was allowed on the ground of unavoidable casualty and misfortune, and it is said that no such ground was alleged in the motion. One of the grounds alleged was accident and surprise, and there is little difference between unavoidable accident and unavoidable casualty or misfortune.

In view of all the circumstances we cannot say that the order granting the new trial should be reversed. What was said in *Investment Co. v. Hillyer*, 50 Kan. 446, 448, 31 Pac. 1064, 1065, where it was claimed that a motion for a new trial was allowed upon insufficient grounds has some application here: "We do not think the application for a new trial was very formal. It was made, however, immediately after the judgment was rendered, and while the plaintiff below was still in court and present, and while the whole proceeding was still fresh in the mind of the trial court; and, although it may properly be said that the showing was not sufficient to fully comply with any of the provisions of the statute, and not such as would justify this court in reversing the ruling of the court below in that respect if it had overruled said motion, yet we think the court had power to set aside the judgment it had just rendered and grant a new trial; and, having exercised that power, this court will not reverse its action unless satisfied that the court below had abused its discretion in so doing. Trial courts are permitted a good deal of latitude in the exercise of judicial discretion. Not being satisfied that the court below abused its discretion in this case, it is recommended that the judgment of the district court be affirmed." See, also, *Ragan v. James*, 7 Kan. 354; *Railway Co. v. Fields*, 73 Kan. 375, 85 Pac. 412; *Rowell v. Gas Co.*, 81 Kan. 392, 105 Pac. 691; *Humble v. Insurance Co.*, 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630; *Cronk v. Frazier*, 86 Kan. 879, 122 Pac. 893; *Murray v. Railway Co.*, 87 Kan. 750, 125 Pac. 45.

The judgment of the district court will be affirmed. All the Justices concurring.

HARVEY v. WASSON et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

JUDGMENT (§ 866*)—REVIVAL—LIMITATIONS.

The statute extending to two years the time within which a dormant judgment may be revived applies to the situation arising where a party dies after judgment and authorizes the administrator to be made a party at any time within that period.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1607; Dec. Dig. § 866.*]

Appeal from District Court, Shawnee County.

Action by W. W. Harvey, as receiver, etc., against L. C. Wasson and others. From the

judgment certain defendants appeal. Affirmed.

E. S. Quinton and Waters & Waters, all of Topeka, for appellants. Garver & Garver, of Topeka, for appellees.

MASON, J. John C. Postlethwaite died November 26, 1910, while owning a judgment against Willis Edison, who died May 11, 1911. On July 8, 1912, an order was made reviving the judgment in the names of the Postlethwaite administrator as plaintiff and the Edison administratrix as defendant. An appeal is taken, based principally on the contention that the law authorizes the making of such an order only within a year from the time it might first have been made.

The statute provides that, where a party to an action dies before judgment, a revivor in the name of his representative can only be had within a year, except by consent (Civ. Code, § 431; Gen. St. 1909, § 6026), and, where a party dies after judgment his representative may be made a party "in the same manner" (Civ. Code, § 436; Gen. St. 1909, § 6031). Prior to 1909 a further section read: "If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment." Gen. St. 1901, § 4890; Civ. Code 1888, § 440. The phrase "in the same manner" has been interpreted as implying that the limitation as to time applies in each case. *Reaves v. Long*, 68 Kan. 700, 66 Pac. 1080. In 1909 the section quoted was amended by adding the words "at any time within two years after it becomes dormant." Civ. Code, § 437; Gen. St. 1909, § 6082. No change was made in the other sections referred to.

The appellant argues with much force that, as the amendment extending the period of limitation to two years was attached to the section relating specifically to the revivor of a dormant judgment and not to the section relating to the substitution of a new party where a death has taken place after judgment, the Legislature must be deemed to have intended the extension of time to be effective only in case of a judgment which is dormant because no execution has been issued for five years. Upon the mere face of the statute this argument is very persuasive. But the question must be determined in view of interpretations made prior to the amendment.

In *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550, 1 Ann. Cas. 825, a judgment, upon which no execution had been issued for more than six years, was held to be still in force, because within that period one of the parties had died and a substitution of his representative had been made. The precise point decided does not directly control the present case. But to reach that decision it was necessary that the statute should be interpreted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

—should be given an effect beyond the literal meaning of the words employed. The statute reads: "If execution shall not be sued out within five years from the date of any judgment, * * * or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant." Civ. Code, § 442; Gen. St. 1909, § 6037.

In the case cited more than six years had elapsed without the issuance of an execution, and according to the letter of the statute the judgment had been dormant for over a year and was therefore absolutely dead. That is, a period of five years had elapsed without an execution issuing, and then a year had passed without revivor. But the court held that the judgment became "dormant" when a party died; that the substitution of an administrator was a revivor; and that this proceeding created a new starting point and made the judgment good for five years from that date, without execution. In the opinion it was said: "The subject of the dormancy and revivor of judgments has given rise to much discussion and disagreement. The decisions in this state have departed radically from the law as construed elsewhere, even under similar statutes. * * * The statute does not undertake to define dormancy and does not apply the term to the condition arising upon the death of a party to a judgment. But in Kansas (as perhaps in no other jurisdiction) such condition is constantly spoken of as dormancy, and a long line of decisions have assimilated this condition to that of a judgment dormant for want of the timely issuance of execution, until they must be regarded as practically identical. * * * The analogy between the situation arising upon the death of a party to a judgment and the condition ordinarily known as dormancy must be determined in the light of the construction already given these statutes by this court. It is not clear whether the word 'dormant,' as applied to judgments, had originally or has ordinarily a well-defined technical meaning, but here it has by repeated use been given a definition broad enough to cover judgments that have not wholly lost their vitality, but which cannot support an execution for want of necessary parties. * * * Whatever may be the rule elsewhere, in Kansas the death of a party renders a judgment dormant within the meaning of the statute." *Manley v. Mayer*, 68 Kan. 377, pp. 394, 395, 396, 75 Pac. 550, 556 (1 Ann. Cas. 825). This language, or the substance of it, was necessary to the decision and resulted in an interpretation of the statute. To sustain the judgment there under consideration it was necessary to hold that it had become "dormant," within the meaning of that word as used in the statute,

when the party died, and that making the administrator a party resulted in a revivor. We think the Legislature must be deemed to have intended by the amendment of 1909 to allow any "dormant" judgment to be revived within two years, whether the dormancy was occasioned by the failure to issue execution or by the death of a party.

An argument is also made, based upon language in the opinion in *Green, Adm'r, v. McMurtry*, 20 Kan. 189, that no revivor could be had against the administratrix of the deceased defendant until there had been a revivor in favor of the administrator of the deceased plaintiff; that no revivor could be asked against the defendant until there was a living plaintiff to ask it. The difficulty is purely verbal. The statute authorizes a substitution of a successor "if either or both parties die after judgment." Civ. Code, § 436. In that situation the judgment, though lacking a formal plaintiff and defendant, is still a judicial determination of the existence of a claim in favor of one representative against the property in the hands of another.

The judgment is affirmed. All the Justices concurring.

DOWDELL et al. v. SUNFLOWER GRAND LODGE, K. P. OF KANSAS, et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 907*)—JUDGMENT—PRESUMPTION OF REGULARITY—ADOPTION.

As sections 5064 and 5065 of the General Statutes of 1909, which prescribe the procedure in adoption proceedings, do not require that all the evidence produced in such a proceeding be incorporated in the record thereof, and the record involved in this case does not purport to contain all the evidence therein, we will not presume that it does, but will presume that evidence was produced, including that portion set forth in the record, sufficient to sustain the order made and judgment rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

Appeal from District Court, Crawford County.

Action by Willie Turner Dowdell and others against the Sunflower Grand Lodge, Knights of Pythias of Kansas, and others. From judgment for plaintiffs, defendants appeal. Affirmed.

D. C. Tillotson, J. H. Guy, and C. F. Spencer, all of Topeka, for appellants. George H. Stuessi, of Pittsburg, for appellees.

SMITH, J. The undisputed facts are that the Sunflower Grand Lodge is a beneficiary society duly organized under the laws of this state. Louis Dowdell became a member of the order in 1905, and received therefrom an endowment certificate, which entitled his wife, she having been duly named as the beneficiary therein, to the sum of \$300, if she

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

survived him, and he remained a member in good standing until his death. The beneficiary died about August 9, 1909, before her husband. He remained in good standing until his death, which occurred about December 6, 1909, after his wife's death; but he named no other beneficiary.

It is alleged in the petition that the constitution of the order in such case provides the priority which persons eligible to the fund shall take, in case the person named in the application shall fail, as follows: (1) Widow; (2) children; (3) mother; (4) father; (5) sisters and brothers of the whole blood; (6) affianced wife; (7) persons dependent upon the member; (8) sisters and brothers of the half blood; (9) other blood relations.

The appellee, by his guardian, commenced this action, alleging that he was the only legal heir of Louis Dowdell, the member, and that he performed all the conditions of the endowment certificate, and is entitled to the sum due thereon; also that he has had possession of such certificate since the death of Louis Dowdell, a copy of which is attached to the petition.

The Sunflower Grand Lodge admitted its liability upon the certificate of endowment, but alleged that there was a dispute as to whom the fund belonged, and upon its request the court ordered the fund to be paid into court, and discharged the Grand Lodge from further liability.

By leave of court Ella Mosely and Susie Winfrie filed an answer and cross-petition, admitting all the facts alleged in the petition which go to the liability of the Grand Lodge on the endowment certificate, and also admit the death of Louis Dowdell and Julia Dowdell. They denied, all and singular, the material allegations of the petition except as expressly admitted. By way of cross-petition they alleged that they were sisters of the whole blood of Louis Dowdell, and were the sole and only blood relations of Louis Dowdell surviving him; that by the constitution and laws of the order they were entitled to receive the \$300 due on the endowment policy. They also set forth a copy of section 1, art. 1, of the so-called new constitution. It reads:

"1. * * * Provided, further, that in any case where such person or lodge so named cannot for any cause take such fund, the same shall descend to the heirs of such person so named, if there be any. Should there be none, then to the heirs of the member, who, in either case, shall take in the following order: (1) Widow; (2) children of the whole blood; (3) mother; (4) father; (5) sisters and brothers of the whole blood; (6) affianced wife; (7) sisters and brothers of the half blood; (8) other blood relations in lineal order. Provided, further, that in no case can any but a person related by blood to the member become a beneficiary, except

the wife of such member or affianced wife; it being expressly declared that no person related to the member by marriage, except as aforesaid, or adoption can become eligible to take such beneficiary fund, and no person not related to the beneficiary named by blood can be eligible to take such fund or any part thereof. Provided, further, that should there be no person as herein provided eligible to such fund, the same shall revert to and become a part of the endowment funds of this order."

If this provision of the constitution is applicable, the fund would descend first to the heirs of Julia Dowdell, she being the person "so named," if there be any; if not, then to the heirs of Louis Dowdell, but, if it descended to the heirs of Louis Dowdell, the appellee, not being a child of the whole blood, could not inherit it, but it would go to the interpleaders. This last article is referred to in the brief of appellants as the new constitution, and it is tacitly admitted that the line of descent as alleged in the petition is correct according to the provisions of the old constitution. There is no allegation as to the time when the new section was adopted. The court, over the objection of the appellants, admitted the copy of section 1 of the old constitution and refused to admit new section 1 in evidence, which was offered by appellants, and objected to by appellee. The Grand Keeper of Records and Seals of the order testified that the new section was printed in the new constitution, and had been in force long prior to the July, 1910, meeting of the grand lodge. How long prior is not shown. The old section was under date of 1904, and there is no evidence that the new section was adopted prior to the issuance of the certificate of endowment.

If Willie Dowdell was therefore legally adopted by Louis Dowdell and his wife, he would be entitled to recover the fund, whichever of the two sections of the constitution be regarded as controlling. Under the old section and the provisions of our statute, he would inherit the fund as the child and heir of Louis Dowdell. Under the new section he would inherit the fund as the heir of Mrs. Dowdell, the beneficiary named, unless the adoption proceedings are void. Willie and Louis Dowdell being, so far as shown, the only heirs of Mrs. Dowdell, Louis could not, of course, inherit the fund, no right to which accrued in her lifetime but only upon his death.

The question to be determined, then, is whether the record of the adoption of Willie Dowdell by Louis Dowdell and wife is sufficient, aided by proper presumptions, to show a valid adoption, or whether, on the contrary, the adoption proceeding was absolutely void.

Where the record does not purport to contain all the testimony, a reviewing court cannot assume that it does. *O'Brien v. Creitz*, 10 Kan. 202. A reviewing court will never

presume error; but the error, if any, must be affirmatively shown. *Hall v. Jenness*, 6 Kan. 358.

The statute does not require that the record of the probate court should set forth all the evidence that is produced in an adoption proceeding; neither does the record in this case purport to do so, yet we are asked to presume there was no evidence of one or more facts necessary to support the judgment, and to declare the order or judgment absolutely void. We think the presumption should rather be in favor of the validity of the order. In the *O'Brien Case*, supra, it was necessary that *O'Brien's* title, to be good, should trace back to a conveyance from the United States. The record of the trial court did not show there was any evidence of this material, even essential, fact. The record did not purport to contain all the evidence, and this court declined to hold a judgment awarding him title erroneous. So in this case, as the record of the probate court does not purport to contain all the evidence in the adoption proceedings, we cannot assume that it does, and that no evidence of one or more essential facts was produced.

Section 5065 of the General Statutes of 1909, relating to the adoption of children, provides that, if either parent be dead, proof of the death shall be made by affidavit. If the parents be divorced, the consent of the parent to whom the custody of the child shall have been awarded shall be necessary; that the consent of the other parent, although desirable, is not necessary. The records of the probate court offered in evidence show that one *Susie Jackson* filed a statement in the probate court of Cherokee county alleging that she was the parent of *Willie Turner*, then about five years of age, and that she relinquished all right to the child to *Louis Dowdell* and *Julia Dowdell*, who were desirous of adopting him as their own; at the same time *Louis Dowdell* and *Julia Dowdell* filed a statement offering to adopt *Willie Turner*; that *Willie Turner* and his mother, *Susie Jackson*, appeared before the court, and consented to the adoption, and thereupon the court entered an order declaring *Willie Turner* the child and heir of *Louis Dowdell* and *Julia Dowdell* so adopting him, and further ordered that the child's name shall be and now is *Willie Dowdell*. As will be observed, the record is silent as to whether *Willie Turner's* father was living or dead, or whether he and *Willie's* mother had been divorced. It is contended by the appellants that the record is therefore fatally defective, and the order of adoption void.

The following extract from *Cubitt v. Cubitt*, 74 Kan. 353, 357, 86 Pac. 475, 476, seems

applicable to this case: "When parties voluntarily submit important interests to a court of competent jurisdiction for determination, and such interests are adjusted by such court, and its judgment thereon is entered upon its records, and the parties interested acquiesce in and act thereon for many years, such record should not be lightly set aside or ignored. On the contrary, such judicial proceedings should be construed, when reasonably possible, so as to preserve and protect the rights and interests conferred thereby."

The appellants, in their brief, say, although no such evidence appears in their abstract: "The evidence in this case is that the plaintiff's parents are both living, and were at the time of the death of *Dowdell*." Assuming this to be correct, no affidavit of the father's death could have been filed in the probate court. Moreover, the fact that *Willie Turner's* mother signed her consent to his adoption by the *Dowdells* as "*Susie Jackson*," and was accompanied by the five year old boy, suggests the presumption that she had been divorced from a husband named *Turner*, and had been awarded the custody of the child *Willie*.

No written evidence is required of the divorce of the parents or of the awarding of the custody of the child. That statute also provides that adoptions may be permitted where ample proof is made that the parents have disappeared for more than two years, and cannot be found by diligent search, and affidavit evidence is not made necessary of such fact.

In support of the judgment of the court, it should be presumed that the court had oral evidence that the parents of *Willie* had been divorced, and his custody awarded to his mother, or that his father had disappeared for more than two years, and could not be found by diligent search. The requirement that proof of the death of a parent should be made by affidavit implies that proof of the other facts may be otherwise made. It may be said that the proof of divorce should be made by the production of the record; but, while this may be the rule in a contested action, when objection is made to oral evidence as not the best evidence, the admission of oral evidence in such case would be simply error, and not a nullity.

We therefore conclude that the record is not insufficient to show the adoption of *Willie Turner* by *Dowdell* and wife, but, aided by proper presumptions, is sufficient.

It follows that the judgment of the court should be and it is affirmed. All the Justices concurring.

BERKLEY v. IDOL.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 165*)—EFFECT OF BAR—RIGHT OF ACTION—VENDOR AND PURCHASER.

The title of a vendee under a contract for the purchase of land will not be quieted against the vendor where the consideration has not been paid, although the vendor has failed to enforce payment within the statutory period allowed for that purpose.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 649; Dec. Dig. § 165.*]

Appeal from District Court, Brown County. Action by Elizabeth Berkley against Ed. Idol. From judgment for plaintiff, defendant appeals. Reversed and remanded.

W. F. Means and F. M. Pearl, both of Hiawatha, and S. M. Brewster and S. N. Hawkes, both of Topeka, for appellant. J. J. Baker, of Troy, and T. D. Smith, of Hiawatha, for appellee.

BENSON, J. The question upon this appeal is whether a person in possession of real estate under a contract to purchase it can maintain an action to quiet his title without paying the consideration, where an action for the unpaid balance would be barred by the statute of limitations. This question must be answered in the negative upon the authority of the uniform decisions of this court. Bowman et al. v. Cockrill, 6 Kan. 311, 338; Corlett v. Insurance Co., 60 Kan. 134, 55 Pac. 844; Burditt v. Burditt, 62 Kan. 576, 64 Pac. 77; Johnson v. Wynne, 64 Kan. 138, 141, 67 Pac. 549; Gibson v. Johnson, 73 Kan. 261, 84 Pac. 982.

The plaintiff alleged the contract and payment in full of the consideration. The defendant admitted the contract, admitted that several payments had been made upon it, and alleged that a balance of the consideration was still unpaid, but did not ask for affirmative relief. From the dates of the payments so admitted, it appeared that the last one was made more than five years before the suit was begun. The court sustained a motion of the plaintiff for judgment in her favor quieting title upon the ground that an action for any part of the purchase money remaining unpaid was barred by the statute of limitations.

A vendee of lands who has not paid the consideration cannot maintain an action for specific performance or to quiet his title against the vendor without paying the amount due. He who seeks equity must do equity. A recent statute (Laws 1911, c. 232) allowing a mortgagor to maintain an action to quiet title where the mortgage debt is barred by limitations was construed in Shepard v. Gibson, 88 Kan. 305, 128 Pac. 371. It was suggested in the opinion that it was not in the legislative mind to extinguish a

cause of action but merely to adjudicate a status, and that under that statute the mortgagor, without waiting for an action by the mortgagee, might take the affirmative to have the vitality of the mortgage determined. It was stated, however, that the judgment in such a case would go no further than would have been awarded in an action brought by the mortgagee. A statute designed to clear titles of old mortgages upon which the right to recover the debt had been barred, some of which have been paid and some abandoned, cannot be stretched sufficiently to authorize a judgment quieting the title of a vendee under a contract to purchase merely because the vendor has failed to enforce payment within the statutory period.

The limited application of the case of Hogaboom v. Flower, 67 Kan. 41, 72 Pac. 547, is pointed out in Gibson v. Johnson, 73 Kan. 261, 264, 84 Pac. 982, and in Kirk v. Andrew, 78 Kan. 612, 614, 97 Pac. 797. The decision in the Hogaboom Case must be carefully considered in the light of the facts there presented and will not be extended to the situation appearing here.

The judgment is reversed and the cause is remanded for further proceedings. All the Justices concurring.

CHAMBERS v. BANE.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

GARNISHMENT (§ 103*)—SERVICE BY PUBLICATION—MOTION TO SET ASIDE—PRACTICE.

An order made on motion of a defendant, setting aside service by publication, on the ground that the garnishee is not indebted to him, is erroneous where the question of such indebtedness is pending for trial upon an issue made between the plaintiff and the garnishee in proceedings relating to garnishment, as provided in sections 228 to 248 of the Code of Civil Procedure (Gen. St. 1909, §§ 5821-5841).

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 103.*]

Appeal from District Court, Marion County. Action by R. F. Chambers against D. H. Bane. From judgment for defendant, plaintiff appeals. Reversed and remanded.

W. P. Campbell, of Wichita, for appellant. Kramer & Benson, of El Dorado, for appellee.

BENSON, J. A question of practice only is presented. The plaintiff, Chambers, commenced an action by publication service against the defendant, Bane, a nonresident of Kansas, upon a judgment of a federal circuit court. H. F. Mott, an alleged debtor of the defendant, was personally summoned as garnishee. The garnishee answered, denying that he was indebted to the defendant. The plaintiff thereupon served notice upon the garnishee that he elected to take issue

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

upon the answer. Afterwards the defendant, Bane, upon special appearance moved to set aside the service by publication, on the grounds that the court had no jurisdiction of the subject-matter or person of the defendant, and that there was no property of or debts owing to the defendant in Marion county. The plaintiff objected to any hearing upon the motion because the issue between himself and the garnishee, wherein the question of indebtedness should be tried, was pending and undetermined, and for other reasons which need not be considered. The court overruled the objections and heard the motion, upon evidence relating to proceedings in foreclosure suits in Butler county, wherein Bane recovered judgments against Mott for about \$4,600, and an order for the sale of the mortgaged property to satisfy the amount. Other evidence was allowed, tending to show a sale of the mortgaged property, and an assignment of the judgments by Bane to the purchaser. The assignment was used, as it appears, in partial satisfaction of the purchaser's bid made at the sheriff's sale. The proceedings in the suits in Butler county were not completed when this hearing took place, and confirmation of the sale and distribution of the funds were stayed until the proceedings in this action should be determined. Upon this and other evidence relating to the proceedings in the Butler county suits, the district court found that there was no debt due from the garnishee to the defendant, and thereupon set aside the service. Afterwards the court dismissed the action.

All the proceedings incident to the service by publication, as well as the proceedings against the garnishee, are conceded to be regular, but the defendant contends that the court was without jurisdiction because the garnishee was not indebted to the defendant, and therefore there was nothing to support the constructive service. On the other hand, the plaintiff insists that the question whether the garnishee was indebted to the defendant was at issue between the plaintiff and the garnishee as the statute directs, and that this issue could not be forestalled upon a motion to set aside the service. The statute authorizing proceedings against garnishees provides that where a garnishee denies the indebtedness alleged in the plaintiff's affidavit, the plaintiff may take issue upon the answer, which issue shall stand for trial as a civil action. The trial of this issue is between the plaintiff and the garnishee, wherein the affidavit of the plaintiff upon which the garnishment is founded is deemed the petition, and the garnishee's affidavit of nonliability the answer thereto. Gen. Stat. 1909, §§ 5821-5841 (Code Civ. Proc. §§ 228-248). The rights given by the statute are substantial, and a plaintiff is entitled to the remedies which it prescribes. The question of indebtedness, upon which his right to

hold the garnishee liable depends, should be determined in the trial provided by the statute, and not upon a motion between the parties to the principal action. It should be observed that section 5831 of the statute, referred to in express terms, provides that a defendant in such an action may intervene and defend in the proceedings against the garnishee upon any ground available to the garnishee. If there was any sufficient reason why the defendant should seek to prove that the garnishee was not in fact indebted to him, this section afforded the opportunity where the issue could be tried in the regular way. Section 5832 (Code Civ. Proc. § 239) of the statute provides that there shall be no trial of the issue with the garnishee until the plaintiff shall have judgment in the main action. It appears that the defendant failed to answer, and judgment should have been rendered as he requested upon that default. If upon the trial of the issue with the garnishee his liability should not be established, the main action will fail.

There is considerable discussion in the briefs, concerning the fact of the alleged indebtedness of the garnishee. This question cannot be considered. It must be tried as the statute provides.

The order setting aside the service and the judgment dismissing the action are reversed, and the cause is remanded for further proceedings. All the Justices concurring.

EMPIRE DIST. ELECTRIC CO. v. EUREKA MINING CO.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

CORPORATIONS (§ 448*)—CONTRACT BY MANAGER—BINDING EFFECT—ELECTRICITY.

A., an owner of certain mining property in Cherokee county, agreed with an investment company of Chicago that the latter should build thereon and equip a mill, and when completed the improved property was to be transferred to a corporation; A. to have one-third of the stock. The corporation was organized. A. was placed in charge of the improvement with power to purchase material and employ and discharge workmen; the investment company, whose officers were officers of the corporation, furnishing the funds and giving some directions, leaving many things to the judgment of A., who was on the ground. Upon the completion and equipment of the mill the improved property was turned over to the corporation, whose officers and the officers of the investment company had consulted and advised with A. frequently touching the mill and the power to be used. Soon after the property was turned over A. was elected a director, made general manager at a monthly salary of \$200 and his duties prescribed as the superintendence of the mining property, and the payment of the same salary theretofore made was ratified and approved; one-third of the stock having already been delivered to him. Shortly before such action, but after the delivery of the stock, A., in the name of the corporation, contracted for electric power to be supplied the mill for a period of three years. He remained as general manager for several months, during which time and long thereafter such pow-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

er was furnished and used. *Held*, that the corporation is bound by such contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.*]

Appeal from District Court, Cherokee County.

Action by the Empire District Electric Company against the Eureka Mining Company. From judgment for plaintiff, defendant appeals. *Affirmed*.

Truman T. Burr and Jesse R. Long, both of Chicago, for appellant. Sapp & Wilson, of Galena, for appellee.

WEST, J. The defendant appeals from a judgment for electric power furnished by the plaintiff, who alleged a right to recover both on contract and on quantum meruit. The defendant denied that the contract was authorized, but the court expressly found that it was. While testimony was offered as to the value of the power furnished, no finding as to this was made. The plaintiff contends that the finding of authority was unsupported by and contrary to the evidence. The other side maintains that it was well sustained, and that in addition the testimony showed the plaintiff entitled to recover on the quantum meruit theory, and that the general conclusion of law in favor of the plaintiff must be presumed to have embraced this feature of the case.

If the finding in regard to the contract is in fact justified by the evidence, no further inquiry need be made. It was signed "the Eureka Mining Company, Consumer, by A. O. Ihlseng," and was executed January 18, 1910. The question turns upon the authority of Mr. Ihlseng. It appears that in January, 1910, an agreement was made between the Campbell Investment Company and Mr. Ihlseng, who had acquired leases to certain mining property in Cherokee county, that the Campbell Investment Company should furnish money to construct a mill upon the leased property, which property was to be turned over to a mining company to be organized; Ihlseng to have one-third of the \$150,000 capital stock. The company was organized under the laws of Maine in February, 1909. October 9, 1909, Ihlseng and wife and the Campbell Investment Company by joint instrument conveyed to the Eureka Mining Company their interests in the mining property; the acknowledgment not being completed until January 19, 1910. Early in 1909 Ihlseng took charge of the construction of the mill on the mining property pursuant to instructions from the Campbells, who furnished the funds as they were needed and kept up a correspondence with him during the progress of the work. At a meeting of the mining company at Portland, Me., February 8, 1910, Mr. Ihlseng was recorded as voting 5,000 shares by proxy, and at the same meeting he was elected one of the five directors. It was also

voted to ratify and indorse the transactions of the board for the past year. The minutes recited the contract for the purchase, development, and improvement of the Kansas mining property, the sinking of a shaft thereon, and the construction and equipment of a double mill thereon of the capacity of 300 tons per shift, also the transfer of the leases, the improvement and development thereof, and the issuing of 14,990 shares of stock in payment therefor. "And whereas, the said property has been developed and improved, and the said leases transferred to the company; and whereas, it is the opinion of the stockholders of this company that said deal was to the best interest of this company: Now therefore be it resolved that the said contract of purchase and for the development and improvement of said property, be, the same is hereby ratified, and the acts of the board of directors in entering into same and carrying the said contract (into) effect, and all of the acts of the board of directors of this company and of its officers, in and about the same be, and the same are, hereby approved, ratified and confirmed."

At a meeting of the directors held at Chicago March 19, 1910, salaries of the officers of the company for the ensuing year were discussed but not fixed, except that of Mr. Ihlseng as general manager or superintendent, which was fixed at \$200 a month, payable monthly, until the same might be changed. "The salary of Mr. Ihlseng at two hundred dollars (\$200) per month heretofore paid was approved and the officers' act in making such payment was duly ratified." The office of general manager was created and the duties of the same fixed as the superintendence of the company's mining property near Galena, Kan., and Mr. Ihlseng was elected to fill such place at the pleasure of the board, and accepted. January 15, 1910, the Campbell Investment Company, by D. C. Campbell, president, inclosed to Mr. Ihlseng 5,000 shares of stock in the Eureka Mining Company "according to the agreement made with you over a year ago, in reference to a company to be formed by myself." Mr. Ihlseng remained in charge of the mining property until in July, 1910. He testified: That at the date of the execution of the contract he was in charge of the Eureka Mining Company in Galena and had been for about a year prior thereto. That he was in charge of the building of the mill on the property pursuant to instructions by Mr. Campbell, one of the officers of the company. That he had charge of employing labor and purchasing supplies, Mr. Campbell having something to say about the property, he (Ihlseng) being on the ground in charge of the work. When funds were received from Mr. Campbell, Ihlseng deposited them and paid bills therefrom and notified Mr. Campbell when he needed more. D. C. Campbell was president, and C. P. Campbell treasurer. That he executed

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the contract on behalf of the company and was authorized to do any and all things in the operation of the company. That he was to turn over to the company the mining leases and to have one-third of the stock, and the Campbell Investment Company was to furnish \$30,000, the property to be turned over to the Eureka Mining Company as a developed property. That in January, 1910, he discussed with the Campbells in Chicago the proposed contract with the electric company and one of the directors, Mr. Payne, objected that the company ought not to pay for electricity not consumed. That the matter was finally decided in a general conversation with Mr. Campbell. That the kind of motive power that should be used was the subject of discussion every time he met Mr. Campbell. That he consulted with Mr. Campbell about purchasing the electric machinery and generally kept him advised as to the operations of the Eureka mines. "Sometimes I advised him before and sometimes after, because, as Mr. Campbell said, I was on the ground and was the best judge of conditions."

In a letter from C. P. Campbell January 7, 1910, in which a desire to see production begin at the earliest possible moment was expressed, reference was made to Ihlseng's supposed decision to buy a Miller gas engine: "I would not delay this matter any length of time. We at this end cannot decide the question for we do not know all the conditions and circumstances that enter into it, hence we will have to depend upon you to decide it and I would do it at once." In a letter written in December previous, preference for a motor instead of a gas engine had been expressed by Mr. Campbell, and the letter closed with the statement that the writer would keep the power contract, which seemed to be a fair one, "even adding the \$150 per month maintenance charges, and shall await hearing from you further in reference to the whole subject before writing you definitely." January 20, 1910, two days after the contract was signed, C. P. Campbell wrote: "In reference to the motor which you say will be ready the first of February: Was this the 100 H. P. motor you spoke of in your letter of November 6th which the General Electric promised to deliver to you f. o. b. Kansas City, \$1,080? I know we have been rather up in the air on this motor question and I trust that we will have this motor delivered promptly so as to have no hitch there."

The plaintiff's general manager testified that, when the bill sued on was discussed with Mr. Campbell after the action was begun, no objections were made on the ground of any lack of authority on the part of Ihlseng to sign the contract. The witness knew that Mr. Ihlseng employed and discharged men and purchased material and "was the sole representative of the Eureka Mining Company in that district." It was shown

that employer's liability and fire insurance was taken out by Ihlseng in behalf of the company. Hardware was purchased by him and lumber and were paid for by the Chicago office or by Mr. Campbell.

Mr. C. P. Campbell testified, among other things: "All the time this mill was being built and operated, while Mr. Ihlseng was there, he purchased all the supplies that were used. He was the man on the ground there and made all the contracts that were made." On redirect examination he said that he meant by this that Ihlseng was acting under the old Campbell Investment Company and not on behalf of the Eureka Mining Company, but that: "While he was connected with the Eureka Mining Company, and before he became an officer of the company, Mr. Ihlseng's duties were as a sort of superintendent on the ground and hired and discharged the men."

Much more could be quoted in support of the finding made by the trial court; and, while there was considerable evidence to the contrary, a fair deduction from it all is that Ihlseng was to put in the leases and the Campbells to put the property in shape to be productive when it was all to be turned over to the Eureka Mining Company, Ihlseng to have one-third of the stock. While the work was going on, the corporation had been organized and was holding meetings, and among other things done by Ihlseng to get the property in shape to be productive was the signing of the contract sued on, which had been subjected to considerable discussion with other members of the mining company, and the results of which were received and accepted for a long time after actual possession was taken by it. The bill for the service involved in this action, so far as the maintenance charge of \$150 a month is concerned, covers the time from July, 1910, to April 15, 1911, inclusive. This fixed maintenance charge is the matter over which all the contention arises. The present officers of the company must have known that the plant was being operated by electric power furnished by the plaintiff, and they certainly knew that the former superintendent in charge had dealt with the electric company in respect thereto. But, aside from the knowledge of the situation, actual and presumptive, possessed by the defendant's other officers, Ihlseng was not the mere agent of the Campbell Investment Company, as now claimed. He was also a third contributor to and owner of the property and stock of the mining company, as well as its superintendent, and in fact its general manager. For while the office of general manager was not expressly created and a monthly salary of \$200 fixed until March 19th, still on that date the previous payment of the same salary was approved, and his future duties were prescribed as the superintendence of the property, precisely what they had been before. So that he is shown to

have been acting in the capacity of general manager, whatever word be used to define his position. He had been placed in charge to hasten the day when the property could become productive. Locally he was the company's sole exponent and representative. The will of the other owners had united with his in placing him in this situation for their common advantage. He was one-third of the body corporate, and the other two-thirds could not say, "We have no need of thee." While the formality of actually transferring the title to the developed property over to the company was not observed until February 8th, still on January 18th previous, when the contract was executed, the Eureka Mining Company was substantially and essentially its owner, possessor, and operator.

A careful consideration of the entire record leaves us so convinced that the trial court's finding was correct that it is not deemed necessary to discuss any of the numerous authorities cited in the briefs. Were it a question of ratification only, such discussion might be necessary, but the case is one of original authority, followed by abundant knowledge, recognition, and acceptance.

The judgment is affirmed. All the Justices concurring.

SELL et al. v. COMPTON.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. CANCELLATION OF INSTRUMENTS (§ 24*) — CONDITIONS PRECEDENT — DISAFFIRMANCE AND RESTORATION.

A man who trades his farm for a stock of merchandise and fixtures, gives a deed to the farm, a note for the difference in price between the farm and the goods, and agrees to pay a percentage of the proceeds of the sales of the goods on the note, has no standing in equity to ask for cancellation of the deed and note on the ground that the goods were fraudulently misrepresented, unless he disaffirm promptly on discovery of the fraud and restore, or is able to restore, the other party to the trade substantially to his original status.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. § 24.*]

2. SALES (§ 121*)—AFFIRMANCE OF FRAUDULENT CONTRACT.

If, after knowledge of the fraud, the purchaser of the goods continue to sell them in regular course of retail trade, conduct a ten-day special sale, otherwise dispose of considerable quantities of the goods, make payments on the note, and submit to a foreclosure of a chattel mortgage given to secure the note, all without any expression of dissatisfaction, the contract is affirmed in fact and in law, and his only remedy is by an action for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 296-301; Dec. Dig. § 121.*]

Appeal from District Court, Wilson County.
Action by A. K. Sell and another against I. N. Compton. From judgment for plaintiffs, defendant appeals. Reversed.

E. D. Mikesell, of Fredonia, and A. E. Crane, of Holton, for appellant. P. C. Young and J. T. Cooper, both of Fredonia, for appellees.

BURCH, J. Sell traded his farm to Compton for a stock of goods. The goods were priced higher than the farm, and Sell gave Compton a note secured by a chattel mortgage on the goods for the difference. The goods were in a store conducted by Compton at Lehigh. Sell undertook to continue the business and contracted to keep an accurate account of the goods sold and to deposit 65 per cent. of the proceeds in the bank at Lehigh to be credited on the note until it should be paid. Sell took possession of the store on January 29, 1912, and continued in possession until March 20, 1912, when Compton took possession under the chattel mortgage and proceeded to foreclose it. Afterwards Sell brought an action to set aside the deed of the farm, alleging that it had been procured through misrepresentation as to the character, quality, and value of the stock of goods. Compton answered and set up a claim to affirmative relief. After the pleadings on both sides had been substantially recast and issues had been joined, the case came on for trial. A jury was called which returned answers to special questions. The court approved these answers and rendered judgment, canceling the deed and canceling the note given by Sell, a portion of which remained unpaid after the proceeds of the chattel mortgage sale had been credited on it. Compton appeals.

One of the issues upon which the court instructed the jury was whether or not the plaintiff had full opportunity to examine the goods before purchasing them. The jury returned the following findings relating to this issue:

"(5) Did Compton, before the signing of the contract and delivery of the deed, tell Sell that if he (Sell) did not think that the stock would invoice \$12,000.00, they would invoice it? Answer: No.

"(6) Did Compton do anything to prevent Sell, or Case, or any one else acting for Sell, from making any examination of the stock of goods they cared to make? Answer: Yes.

"(7) If you answer the last preceding question in the affirmative, state what was done. Answer: The trade rushed through, and they did not have time to investigate the stock."

There is no testimony in the record to support these findings, and all the testimony given on the subjects to which they relate is contrary to them.

The court instructed the jury that if the defendant was guilty of fraud, it was the duty of the plaintiff to act promptly on discovery of the fraud, to return, or offer to return, the goods, and to demand restoration of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

title to his land, and that if he said nothing and continued to sell the goods, he waived the fraud and could not complain of it. The evidence was that the plaintiff doubted the representation of the defendant as to the quantity of goods in the store when the trade was concluded. About February 12th one of the plaintiff's witnesses looked through the stock and told the plaintiff what he had. The plaintiff then employed a man to invoice the stock, and a complete invoice was taken; the plaintiff himself assisting part of the time. In taking the invoice the character and quality of the goods were revealed. In this invoice the goods and fixtures were priced at \$7,757.59. The goods amounted to \$6,243.39, and were worth 40 cents on the dollar, or less than \$2,500. The fixtures were of small value. The alleged representation of the defendant was that the goods and fixtures were of the value of \$12,000. With complete and detailed knowledge of just what he had received for his farm the plaintiff, instead of rescinding, put on a 10-day "Fearless Price Cutting Sale," beginning February 28th. The station agent at Lehigh testified that the plaintiff made the following shipments of goods to other points: February 5th one box shoes, weight 100 pounds, one box shoes, weight 50 pounds; February 21st, two boxes dry goods, weight 70 pounds; March 6th, five boxes dry goods, weight 550 pounds, four boxes canned goods, weight 275 pounds; March 9th, two zinc trunks, checked as baggage, weight 200 pounds, two zinc trunks, checked as baggage, weight 250 pounds. The plaintiff did not make deposits of the proceeds of sales as he had agreed to do. On March 8th the defendant called on him in reference to the matter, and instead of rescinding the trade he made a payment on his note of \$193.20. On March 19th he made another payment. On March 20th he yielded possession to the defendant without protest or complaint. The chattel mortgage sale occurred on April 19th and still no indication was given to the defendant that the trade was unsatisfactory. The action was commenced on May 23d.

[1, 2] The plaintiff said he did not think he was defrauded very much until the day the defendant demanded possession under the chattel mortgage, when the defendant said he did not think there were goods enough in the store to pay the mortgage. The plaintiff had full opportunity to know the facts, and had the means of acquiring knowledge of the facts, at least from the day he took possession of the store. Allowing time to improve them, such means and opportunity were equivalent to knowledge. But the plaintiff had actual knowledge of the essential facts probably on February 12th, and certainly by February 28th, and he cannot be heard to say that he postponed the mental act of drawing the inference of fraud from the

known facts. It was then his duty to repudiate the contract if he ever intended to do so. The law did not permit him to select his own time and consult his own convenience in rescinding. *Bell v. Keepers*, 39 Kan. 105, 108, 17 Pac. 785. He could not speculate on the probability of deriving some advantage from the trade (*Neal v. Reynolds*, 38 Kan. 432, 435, 16 Pac. 785), and the law implied affirmance from his unequivocal conduct in selling and shipping goods and making payments on his note (*Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac. 498).

The plaintiff testified that he ordered new goods for the store to the amount of \$618 while he was in possession. The amount was not corroborated by any bills or receipts or checks or other memoranda. Neither full nor accurate accounts were kept of the goods which went out of the store. But, granting that all the new goods were in the store when the defendant foreclosed the chattel mortgage, and crediting the plaintiff with the payments made on the note, the evidence shows there was still a deficiency. If it had been possible to determine the amount of the shortage with accuracy, compensation might have been made. *Basye v. Refining Co.*, 79 Kan. 755, 101 Pac. 658, 25 L. R. A. (N. S.) 1302, 131 Am. St. Rep. 348. But it was not, and because of lapse of time and the conduct of the plaintiff, the defendant completely changed his situation. *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; *Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac. 498, and authorities there cited.

From what has been said it is manifest that the plaintiff has no standing in equity to obtain relief by way of rescission and cancellation. His pleadings are in such form that they might be amended to ask for damages if he should see fit to make the request and the court, in its discretion, should permit.

The judgment of the district court is reversed, and the cause is remanded. All the Justices concurring.

BEATY et al. v. SHINKLE, County Treasurer, et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 30*)—VACATION OF TOWN SITES—APPLICATION OF STATUTE.

Chapter 261, Laws of 1889, vacating parts of certain town sites, was purely a vacation act, and portions of town sites which had never been platted, although mentioned and described in the act, were not affected by its provisions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 77; Dec. Dig. § 30.*]

Appeal from District Court, Kearny County.

Action by James W. Beaty and others

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against J. E. Shinkle, County Treasurer of Kearny County, and others. From judgment for plaintiffs, one defendant appeals. Reversed and remanded, with directions.

Wm. E. Hutchison and O. E. Vance, both of Garden City, and E. R. Thorpe, of Lakin, for appellant. H. O. Trinkle, of Garden City, for appellees.

PORTER, J. The action in the district court was to enjoin the collection of taxes levied by the city of Lakin on lands which were originally within the limits of the city. The court granted part of the relief asked and denied a part. The city has appealed from the judgment.

The land is a part of the south half of section 27, township 24, range 36, in Kearny county, and contains 200 acres, divided into two tracts, one of 80 and one of 120 acres. The court held that by certain acts of the plaintiffs they were estopped to claim that the 80-acre tract is not within the city and therefore that the tax levied against that tract is legal and valid. This part of the judgment is satisfactory to the city. The appeal is from that portion of the judgment holding that the 120-acre tract is not within the city, and that the city taxes levied thereon are illegal and void.

The plaintiffs claim that, by the provisions of chapter 261 of the Laws of 1889, the 120-acre tract in question was vacated, and that it was thereafter excluded from the limits of the city by chapter 68 of the Laws of 1893, which provided that, where any town site or portion of a town site containing more than five acres had been theretofore vacated by act of the Legislature and was included within the corporate limits of a city of the first, second, or third class, it should no longer be a part of such city nor be included in the corporate limits thereof. The court held that the act of 1889 and the act of 1893 are valid, and that they have the effect to exclude from the city of Lakin the 120-acre tract. Section 22 of the act of 1889, or so much of it as refers to the tract in question, reads: "That all that part of the town of Lakin, Kearny county, Kansas, lying west of the westerly line of Hamilton street * * * is hereby vacated."

The trial court, however, expressly finds that no part of this 120-acre tract was ever platted. The act of 1889 is a vacation act. It was not intended for any other purpose. It did not assume or purport to exclude any territory from within the corporate limits of any city. It merely vacated portions of certain town sites. It could only operate upon platted lands. Therefore it had no effect upon that part of the town of Lakin lying west of the westerly line of Hamilton street, for none of that land was ever platted, and the act of 1893, which provided for the change of boundaries of cities, expressly

limits its provisions to town sites or portions thereof that had been previously vacated either by the board of county commissioners or by some act of the Legislature. The constitutionality of neither act is involved in this appeal, because neither act affected the 120-acre tract of land. The judgment holding these lands to be outside the limits of the city was therefore erroneous.

The plaintiffs have served notice of an appeal from that part of the judgment in favor of the city and ask the court to review the judgment so far as it affects the 80-acre tract. The judgment respecting this tract of land rests not only upon conclusions of law but upon findings of fact, and the city contends that a motion for a new trial was necessary in order to entitle the appellees to question the correctness of the judgment. Ordinarily this is the rule. No motion for a new trial was filed by the plaintiffs. In any event, however, we think that part of the judgment should be affirmed. The only portion of the 80-acre tract that was ever platted was six blocks along the north boundary thereof, numbered from 43 to 48, inclusive. Therefore neither act of the Legislature relied upon by the plaintiffs could affect any portion of this tract except these six blocks; and the court finds that certain acts of the appellees are sufficient to constitute an estoppel against them and to prevent them from now claiming that the platted portion is not within the city. It is said, however, that the acts of estoppel were not specifically pleaded. Conceding this, nothing would be gained by reversing the cause in order to have the pleadings made more definite. We cannot concede that the matters on which the court found the estoppel are wholly matters of law. Moreover, the facts respecting both tracts of land are practically the reverse of those in the case of *Bull v. Kelley*, 83 Kan. 597, 112 Pac. 133, and the equities in favor of holding the land to be within the city here are, as suggested, quite as strong and urgent as those in that case were for holding the land to be outside the city. Each year since 1889 the city has levied taxes which have been extended by the county board and collected over all the lands in controversy. The court finds that the plaintiffs have regularly paid the city taxes each year since 1895, when they became the owners, until 1910, shortly before the suit was begun, although on one or two occasions the city tax was paid under protest. Under all the facts found by the trial court, we think the situation is one which calls for a quite liberal construction of the doctrine of estoppel.

It follows that the judgment will be reversed, and the cause remanded, with directions to render judgment in favor of the city. All the Justices concurring.

STATE ex rel. TAGGART, County Atty., v.
MASON'S AND ODD FELLOWS' JOINT
STOCK ASS'N et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

1. QUO WARRANTO (§ 17*)—EXERCISE OF CORPORATE POWERS—STATUTE.

Gen. St. 1909, § 6276 (Code Civ. Proc. § 680), authorizing quo warranto against an association or number of persons acting as a corporation without being legally incorporated, against a corporation whose acts amount to a forfeiture of its corporate rights, or which exercises powers not conferred by law, authorizes an action in the nature of quo warranto against a corporation for procuring an extension of its charter by fraud and for abuse of its corporate powers by mismanagement and misappropriation to the detriment of stockholders.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 18; Dec. Dig. § 17.*]

2. QUO WARRANTO (§ 33*)—PROCEEDINGS—PARTIES PLAINTIFF.

Under the express provision of Gen. St. 1909, § 6277 (Code Civ. Proc. § 681), a county attorney may institute quo warranto in the name of the state against a corporation for the abuse of its corporate rights, mismanagement of its affairs, and the misappropriation of money to the detriment of its stockholders.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 40; Dec. Dig. § 33.*]

Appeal from District Court, Wyandotte County.

Quo warranto by the State of Kansas, on the relation of Joseph Taggart, as County Attorney of Wyandotte County, Kan., against the Masons' and Odd Fellows' Joint Stock Association and others. From an order overruling their demurrer, defendants appeal. Order affirmed.

James F. Getty, of Kansas City, for appellants. Jno. S. Dawson, Atty.-Gen., S. N. Hawkes, of Topeka, and I. F. Bradley and James M. Meek, both of Kansas City, for appellee.

PER CURIAM. In the petition it is alleged, among other things, that on August 4, 1890, a charter of incorporation was granted by the state of Kansas to the appellant the Masons' and Odd Fellows' Joint Stock Association, under which it exercised powers in the state; that the defendant corporation has perverted and abused its corporate powers in certain particulars, which are specifically set forth. Among the recitals it is alleged that the corporation permitted its president and treasurer to usurp the rights, privileges, and duties of the corporation, to mismanage its affairs, and to appropriate its money to their use and to the detriment of its minority stockholders; also that on August 4, 1910, the charter of the corporation having then expired, the defendants, Jennings and Berry, who had been respectively president and treasurer of the corporation, made a false and untrue certificate for the purpose of procuring an extension of such charter, and did procure such extension without any notice to the stockholders of any meeting of

the stockholders for such purpose, and that no such meeting was held at which the owners of two-thirds of the capital stock were present and signified their desire and intent to extend the charter; that by such false and fraudulent conduct the extension of such charter was procured. To the petition a general demurrer was filed and overruled. The defendants appeal on three grounds: First, that the plaintiff has no legal capacity to sue; second, that the county attorney of Wyandotte county has no authority to institute or maintain the action; and, third, that the petition does not state facts sufficient to constitute a cause of action.

[1, 2] The appellee contends that the action was brought under sections 6276 and 6277 of the General Statutes of 1909 (Code Civ. Proc. §§ 680, 681), relating to offices and franchises. The action seems to be fully authorized thereby to be brought by the county attorney in the name of the state, and, under the provisions of the article, the petition states facts sufficient to constitute a cause of action.

The order overruling the demurrer is affirmed.

SMITH v. JOPLIN & P. RY. CO.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 350*)—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Upon the undisputed evidence and the facts found by the jury, the question whether the plaintiff was guilty of contributory negligence is one of fact.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS—CURE BY VERDICT.

The consideration of error, in an instruction allowing the jury to find a verdict upon grounds of negligence which did not cause or contribute to the injury, is unnecessary, where the jury bases its verdict upon other grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.*]

Burch and Porter, JJ., dissenting.

Appeal from District Court, Crawford County.

Action by John E. Smith against the Joplin & Pittsburg Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Ed C. Wright, of Kansas City, Mo., and John P. Curran, of Pittsburg, for appellant. J. M. Wayne, of Pittsburg, and B. S. Galtskill, of Girard, for appellee.

BENSON, J. This appeal is from a judgment awarding damages for injuries suffered in a collision of an electric interurban car with an automobile.

The right of way of the railway adjoins

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and is parallel to a public road extending north and south. A hedgerow stood upon the line between the road and the right of way. A cross-road extended east and west across the north and south road, and through a gap in the hedge, and over the right of way and track of the defendant. At the time of the collision the hedge was about 15 feet in height, and its branches extended about 7 feet on each side. The gap was 50 feet in width. The east rail of the railway track is about 16 feet from the center line of the hedge. The track is 5 feet wide, measuring to the outer sides of the rails, and the car was 9 feet wide. The plaintiff, driving an automobile, in which his wife and daughter were seated, drove north upon the road first referred to, and turned west upon the cross-road. He stopped at the turn near or in the gap in the hedge to look and listen for a car. From his seat $5\frac{1}{2}$ feet from the front of the automobile he could see the track for a distance of only 50 feet north and south of the crossing because of the projecting branches of the hedge. Hearing no whistle, and not hearing or seeing any indication of an approaching car, he proceeded at low speed, running at the rate of 3 miles an hour, until the front of the automobile was at or very near the east rail, when he saw a car 50 feet away coming from the north. He immediately reversed his machine and started backward; but the car struck the radiator and hood, causing the injuries complained of. The car was running at the rate of 20 miles an hour. The obstruction of the view of the track continued until the plaintiff was within 7 feet of the east rail of the track. At that point he might have seen the approaching car 80 rods away.

[1] The principal contention of the defendant is that contributory negligence of the plaintiff is conclusively shown by the evidence, because he did not stop after passing through the hedge, and again look and listen. It is insisted that from the undisputed facts the court should declare, as matter of law, that the plaintiff was negligent, although the jury, in answering special questions, found that he was not.

If only one conclusion can be drawn from undisputed facts, the question of negligence is one of law. *Railway Co. v. Hanson*, 67 Kan. 256, 72 Pac. 773; *Johnson v. Railroad Co.*, 80 Kan. 456, 459, 103 Pac. 90. If reasonable minds might differ upon that question, the jury must decide. *Beaver v. A. T. & S. F. R. Co.*, 56 Kan. 514, 43 Pac. 1136; *Westine v. Railway Co.*, 84 Kan. 213, 219, 114 Pac. 219.

The plaintiff knew that he was approaching the track. He saw it in turning west, and stopped at the turn accordingly. If the whistle upon the car was sounded, he did not hear it. He could not see the car at that point, because the hedge obstructed his view. Passing by the obstruction, and, when

first within the zone of clear vision, the front of his automobile was within about 18 inches of the track. Taking into consideration the overhang of the car, he was right at the point of danger. It is true that a situation may be such that ordinary prudence will require a person seated in a vehicle approaching a crossing not only to stop but, if necessary, to alight, or leave his seat, or change his position in order to take observations, but ordinarily such a duty cannot be declared as a matter of law; it must be determined by the jury as a question of fact. In this case the nature of the vehicle, the place and duty of the driver in managing it, the location of the steering wheel directly in front of him, the space between his seat and the front of the car, the distance from the side of the hedge to the track, the speed at which he was driving, his duty to look in both directions, and every other circumstance revealed by the evidence must be considered in determining whether the driver acted with reasonable prudence. Upon a careful consideration of these matters, it cannot be held, as matter of law, that the plaintiff was negligent. The question of contributory negligence was one of fact for the jury.

[2] One of the instructions was objected to on the ground that it authorized a verdict based upon any one of the acts of negligence charged in the petition. One of these specifications was the failure of the defendant to construct the crossing in the manner required by the statute. A special finding, however, was returned, that the defendant's negligence consisted in handling the car in a careless manner. A more particular finding was not requested. It is true that no liability could be founded on the defective crossing alone, for it was not a cause of the injury; but this finding of the jury makes any discussion of the alleged error unnecessary.

The judgment is affirmed.

JOHNSTON, C. J., and MASON, SMITH, and WEST, JJ., concurring.

BURCH, J. (dissenting). The facts are undisputed, and the question is whether or not the plaintiff took those precautions for his safety which the law required him to take. It was his duty to use his faculties of sight and hearing, and to take the steps necessary to make those faculties available for efficient use. The statement made in *Railway Co. v. Jenkins*, 74 Kan. 487, 488, 87 Pac. 702, that a man warned of danger by the presence of a railway track "must be vigilant in trying to see" has not, to my knowledge, been overruled.

Everybody knows that an interurban car is wider than the track on which it runs. In this case the track lay behind a hedge wall, 15 feet high and 14 feet wide, which obstructed both sight and hearing. The

plaintiff stopped at the turn of the road, where it was impossible to see the on-coming car far enough away to avoid a collision. Then he simply drove on, taking his chances, and reaping the consequences. The result is that he was guilty of contributory negligence as a matter of law.

In my judgment the law applicable to persons in the situation of the plaintiff is well stated and discussed in the case of *New York Cent. & H. R. Co. v. Maidment*, 93 C. C. A. 413, 168 Fed. 21, 21 L. R. A. (N. S.) 794. The syllabus reads as follows: "Because of the fact that a collision between a railroad train and an automobile endangers not only those in the automobile but also those on board the train, and also because the car is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before driving upon a railroad crossing, where the view is obstructed, and to do so at a time and place where stopping and looking and listening will be effective." In the opinion it is said: "With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens not only the safety of its own occupants but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing, and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and, if he goes forward to the track to get an unobstructed view, and look for coming trains, he might have to lead his horse or team with him. These precautions the automobile driver can take carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety with less

inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized. In the case of trolleys crossing railroads at grade, the practice is general for the conductor to go ahead, and from the track signal the halted car to advance. This would, of course, be impracticable as a rule for automobiles; but it illustrates the trend of the law, as the size of crossing vehicles makes collision with them more serious, to enforce greater safety precautions." 93 C. C. A. 415, 168 Fed. 23, 21 L. R. A. (N. S.) 794.

I am authorized to say that PORTER, J., concurs in this dissent.

MILLER'S ESTATE v. EXECUTRIX OF MILLER'S ESTATE.

(Supreme Court of Kansas. Nov. 8, 1913.)

CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS—EXECUTORS AND ADMINISTRATORS.

A refusal to appoint an administrator and grant administration of the estate of an intestate who was a resident of another state at the time of his death was not a deprivation of property without due process of law, in violation of the federal Constitution, where the only property of decedent relied on as the basis of administration was capital stock in a Kansas corporation, even though the state in which intestate resided refused to grant such administration.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767-770, 772-777, 779-806, 808-810, 816-824, 907-924, 942; Dec. Dig. § 278.*]

On petition for rehearing. Rehearing denied.

For former opinion, see 136 Pac. 255.

PER CURIAM. In the petition for a rehearing it is insisted by appellee that the decision herein made operates to deprive him of his right to enforce his claim in any court against the estate of Alfred I. Miller. His contention is that, as the Supreme Court of Missouri has decided that administration may not be had in that state, the decision that it cannot be administered upon in this state, where the corporation was organized, deprived the appellee of any remedy and of his property without due process of law, contrary to the provisions of the Constitution of the United States. The question was argued when the case was originally submitted as well as in the application for a rehearing,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the decision is that the holding does not conflict with the constitutional provisions to which reference is made.

The rehearing will be denied.

BRADSHAW et al. v. GLASSCOCK.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. PAYMENT (§§ 85, 86*) — VOLUNTARY PAYMENT—RIGHT TO RECOVER.

The general rule that a voluntary payment made under a mistake or in ignorance of law cannot be recovered back has no application, where the payment was not made with full knowledge of all the facts, or where it was induced by the fraud or improper conduct of the payee.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272-282; Dec. Dig. §§ 85, 86.*]

2. PAYMENT (§ 86*)—RIGHT TO RECOVER—DEFENSE—ESTOPPEL.

Plaintiffs were indebted to a real estate agent for a commission. Upon the representations of defendant that he was a partner of the agent they paid him the commission. Subsequently the agent sued them and recovered judgment for the amount of the commission on the ground that defendant was not his partner and had no authority to receive the money. In an action by the plaintiffs against the defendant to recover back the money, it is held that a general verdict in their favor, which includes findings that he never was a partner of the agent; that he had no authority to receive the money; that it was paid to him upon the representation that he was a partner—overturns his defense that it was a voluntary payment, or that plaintiffs are estopped from maintaining the action because of their failure to pay the money into court and allow the question of partnership to be litigated between the agent and the defendant.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 282; Dec. Dig. § 86.*]

Appeal from District Court, Sedgwick County.

Action by Charles Bradshaw and others against J. A. Glasscock. From a judgment for plaintiffs, defendant appeals. Affirmed.

John W. Adams and George W. Adams, both of Wichita, for appellant. Stanley, Vermilion & Evans and S. B. Amidon, both of Wichita, for appellees.

PORTER, J. The only question in this case is whether the defendant is entitled to retain a sum of money which the plaintiffs paid to him by mistake. Briefly stated, his contention is that it was a voluntary payment, made by the plaintiffs with their eyes open, and that they are estopped to maintain the action. C. M. Brotton, a real estate agent in Wichita, effected a trade or exchange of properties for the plaintiffs, and they owed him a commission. The defendant represented to the plaintiffs that he was a full partner of Brotton, and entitled to share in all commissions in real estate transactions. They paid him the sum of \$512.50, to be in full for the commission, and took his receipt, signed "Brotton and Glass-

cock, by J. A. Glasscock." Subsequently Brotton sued them for the commission, alleging that the amount due was \$1,500. They set up as a defense that Glasscock was a partner, and that they had settled the account. In that action Brotton recovered the full amount for which he sued. The plaintiffs thereupon brought this action to recover from the defendant the money paid to him. The jury returned a general verdict in plaintiffs' favor, and from the judgment the defendant has appealed.

Not having been a party to the former action, the defendant was not concluded by the finding of the jury to the effect that when the commission was earned the defendant and Brotton were not partners. On the trial of this action the same question was litigated. The evidence was conflicting, and the defendant has abstracted it quite fully, but for what purpose we do not know. There is no claim that the verdict is not sustained by evidence.

While the defendant's contention is not so stated in the briefs, it necessarily amounts to this: "The general verdict is a finding of every controverted issue of fact against me. I did represent to the plaintiffs that I was a full partner of Brotton in the transaction. They paid me the money believing this representation. I never was a partner of Brotton in the transaction. Notwithstanding all this, I am entitled to retain the money because there was evidence tending to show that they knew when the money was paid that Brotton claimed there was no partnership, and claimed to be entitled to the money. The payment was voluntary, and their failure to protect themselves by paying the money into court and permitting Brotton and myself to litigate the question of partnership estops them now from maintaining this action."

[1] The doctrine of voluntary payments cannot aid the defendant in his efforts to retain the money. That doctrine has no application except where the payment has been made with full knowledge of all the facts, and where it was not induced by any fraud or improper conduct on the part of the payee. 30 Cyc. 1313.

[2] Doubtless the plaintiffs could have saved themselves much annoyance and considerable cost and expense by paying the money into court and permitting the question of partnership to be litigated between Brotton and Glasscock. But the defendant's position has not in any sense been altered to his injury by their failure to avail themselves of this remedy; and therefore one essential element of estoppel is lacking. According to the verdict of the jury he was paid by mistake money to which he was not entitled. It was paid upon a false representation of his; and neither the doctrine of voluntary payment nor estoppel is available as a defense in an action to recover money

paid under such circumstances. *Lowe v. Wells*, 78 Kan. 105, 112, 96 Pac. 74.

The instructions of the court stated the issues fairly. Practically all the objections to them are based upon the mistaken theory that if the plaintiffs knew that both Brotton and Glascock were claiming the money, that would make the payment voluntary and prevent a recovery.

The judgment is affirmed. All the Justices concurring.

SEXTON v. HOLT et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. EASEMENTS (§ 8*)—TITLE BY PRESCRIPTION—USE BY PERMISSION—"ADVERSE USER."

Use under a license will not ripen into an easement by prescription, however long continued. Use according to permission to use is not adverse. To be adverse the use must be under a claim of right, with the knowledge of the owner of the estate but without his consent.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. § 8.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 236.]

2. EASEMENTS (§ 8*)—PRESCRIPTION—PERMISSIVE USE.

The foregoing rules applied in an action to prevent the obstruction of a driveway between the lands of two brothers, created by oral agreement for their mutual convenience and used in common for a period of more than 15 years.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. § 8.*]

Appeal from District Court, Dickinson County.

Action by Arnold Sexton against Hugh Holt and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Hurd & Hurd, of Abilene, for appellants. C. S. Crawford, of Abilene, for appellee.

BURCH, J. In a division of land among the heirs of James Sexton, a tract containing 96 acres was divided between his two sons. Arnold received the east 48 acres and Henry the west 48 acres of the tract. Arnold erected a house, barn, and other improvements at a point just east of the center of the line between the two subdivisions. Henry also owned land lying north and south of that belonging to Arnold. Many years ago the two brothers established a driveway extending from Arnold's barn to the north line of the 96-acre tract. Arnold states the facts as follows: "Q. After the division of this land, was there any agreement between you and Henry as to a roadway or driveway between your two places? A. Yes, sir. Q. You may state when that agreement was made, and what it was. A. Well, the agreement was that there was to be a road on the

line between us for the use of both of us; we was each to give one-half, 12 feet on each side of the line. Q. When did you say that agreement was made? A. That was about 28 years ago this summer. Q. You may state whether or not that was used as a road from that time on? A. Yes, sir. It was." Arnold testified that he and Henry did some work fixing up the road some 17 years ago. Henry established a temporary fence along the west side of the driveway, but it remained open on Arnold's side. Henry became insane, and his guardian, C. C. Wyandt, leased his land to Hugh Holt. About two years ago Holt drove some cattle down the road. Arnold Sexton objected and said that if it occurred again he would take up the cattle and Holt would be obliged to pay for them. Holt then caused a survey to be made and built a permanent fence on Henry Sexton's land two feet west of the surveyed line. The location of the boundary was confirmed by a subsequent survey made at the instance of Arnold Sexton.

The action was brought by Arnold Sexton to enjoin the maintenance of the new fence. The court made the following findings of fact and conclusions of law: "The common road set out and described in plaintiff's petition was created by the verbal agreement of said plaintiff and Henry C. Sexton; that the said plaintiff and Henry C. Sexton and his successors in possession have used said road as a common way under said agreement for more than 15 years, and that by reason of said agreement and said user the said plaintiff has acquired and now has the right to have said road kept open as a common road for the benefit of the premises of said plaintiff and said H. C. Sexton." Judgment was rendered for plaintiff, and the defendants appeal.

[1, 2] The arrangement between the two brothers was not reduced to writing. It was made for mutual convenience and was allowed to rest upon mutual confidence. It gave neither one any interest in the land of the other because of the statute of frauds. Therefore nothing but reciprocal licenses were created, and use under a license will not ripen into an easement by prescription, however long continued. Use according to permission to use is not adverse. To be adverse the use must be under a claim of right with the knowledge of the owner of the estate but without his consent. *Railway Co. v. Conlon*, 62 Kan. 416, 63 Pac. 432; *Insurance Co. v. Haskett*, 64 Kan. 93, 67 Pac. 446; *Jobling v. Tuttle*, 75 Kan. 351, 364, 89 Pac. 699, 9 L. R. A. (N. S.) 960; *Dotson v. Railway Co.*, 81 Kan. 816, 819, 106 Pac. 1045. In the case of *Insurance Co. v. Haskett* there were mutual licenses.

There is neither finding nor evidence that the use of the way ever changed in character from what it was when first begun. Perhaps

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the conduct of Arnold Sexton at the time of the cattle episode amounted to a revocation of the license he had granted to his brother. There is neither finding nor evidence of such a change in the situation of the licensee, or of such expenditures by him, on the faith of the license as might appeal to a court of equity. A right of way by necessity is not involved.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendants. All the Justices concurring.

**BALLARD v. HOME NAT. BANK OF
ARKANSAS CITY.**

WOOD v. SAME.

(Supreme Court of Kansas. Dec. 6, 1918.)

(Syllabus by the Court.)

BANKS AND BANKING (§§ 105, 140*)—CONTRACT TO PAY CHECKS—ENFORCEMENT—AUTHORITY OF BANK PRESIDENT.

Where a national bank through its president agrees with a customer, who is indebted to it, that if he purchases live stock, and in payment therefor gives checks on the bank, the checks will be paid, provided that by the time they are presented the drawer shall have resold the stock and deposited the proceeds with the bank, and in pursuance of such agreement the customer issues checks in payment for stock which he at once resells, delivering the proceeds to the bank, the holder of such checks can maintain an action for their amount against the bank, notwithstanding he did not know of the agreement, and notwithstanding nothing was said, at the time the deposit was made, about the agreement or the application of the funds.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 156–158, 162, 198, 199, 219, 225; Dec. Dig. §§ 105, 140.*]

Appeal from District Court, Cowley County.

Two actions, one by William N. Ballard and the other by Bert Wood, both against the Home National Bank of Arkansas City. From judgment for plaintiffs, defendant appeals. Affirmed.

Hackney & Lafferty, of Winfield, and Love & Wright, of Arkansas City, for appellant. W. R. Cline, of Erie, and Buckman & Bloss and A. M. Jackson, all of Winfield, for appellees.

MASON, J. Jasper Stewart was engaged in buying and selling live stock. His custom was to purchase horses and mules, giving in payment his checks on the Home National Bank of Arkansas City. Later he would borrow money from the bank upon his personal note to meet the checks. This plan became unsatisfactory to the bank, by reason of unsuccessful transactions made by Stewart, and it notified him that it would no longer loan him money, and that he must make some other arrangement if he desired to continue business relations with it. Sub-

sequently a conversation was had between the president of the bank and Stewart which it is contended resulted in an agreement that Stewart might continue to buy stock, giving checks therefor, which would be paid by the bank, provided money for the purpose was furnished by Stewart from the sale of the stock he had purchased. Stewart bought stock from several persons, giving his checks. He made sales sufficient for the purpose and deposited the proceeds in time to meet the outstanding checks. The bank, however, refused to pay them, and applied the deposit to the pre-existing debt of Stewart. Two separate actions were brought against the bank by holders of the checks. In each the plaintiff recovered, and the defendant appeals.

Stewart and the bank president, A. H. Denton, gave substantially the same account of their conversation. One who overheard it testified to some additional particulars. Denton's version was this: "I told him that, as I had informed him before, we would buy no more mules for Mr. Stewart, at least not until after the feed business and the unfinished business was settled. He said, 'Perhaps I can beat them around.' That was practically the end of the conversation. To which I made answer, 'That might do.'" Stewart testified that he spoke with Denton about buying some mules, and proceeded: "Mr. Denton, he says, 'No, we will buy no more mules, at present until we get this feed deal off.' * * * I says, 'Suppose I buy and check for some mules and beat the checks in?' He says, 'That might do.'" The third person testified: "Mr. Stewart told Mr. Denton that he had a bunch of mules down there that he was going to buy, and Mr. Denton spoke up and told him that he wouldn't pay any of his checks. He says, 'Well, I have these mules sold,' and he mentioned the man's name, I don't remember it; and Mr. Denton says: 'Well, that is all right; his checks are good.' He asked Mr. Stewart when he was coming in and Mr. Stewart told him the day, but I don't remember the date; it was along the last of the week some time. He says: 'If you are coming in, then you will beat those checks in, because you know how they do; some of them run around several days before they get in the bank.' That is about all the conversation I heard talked." We think this evidence sufficient to sustain a finding that the bank, by its president, agreed with Stewart that he might draw checks upon it in payment of stock, and that, notwithstanding his past-due debt to the bank, it would pay the checks, provided he "beat them in"; that is, provided he resold the stock and turned the proceeds over to the bank in time to furnish a fund for their payment. It was a fair question of fact whether, under all the circumstances, this was what each party intended. The jury by its general verdict, un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

der proper instructions, must be regarded as having rendered an affirmative answer, thus settling this issue.

The jury were instructed, in substance, that, in order to render a verdict for the plaintiff, they must find that in pursuance of the agreement Stewart bought the stock, giving his checks therefor, and deposited the proceeds with the bank. These facts also must therefore be regarded as established. We think these findings, considered in connection with the undisputed facts, compel the conclusion that, as against Stewart at least, the bank could not rightfully refuse the payment of the checks. "All the authorities are agreed upon the rule of law declared in the above case, that a bank which accepts a deposit of money made by a depositor for a special purpose, under an agreement that it will pay the amount when needed for that purpose, cannot rightfully appropriate such deposit to discharge the depositor's indebtedness to it." Note, 30 L. R. A. (N. S.) 517. See, also, notes, 111 Am. St. Rep. 425; 2 Ann. Cas. 206; 19 Ann. Cas. 488. It is not necessary, in order for this rule to apply, that there shall be what is strictly and technically known as a "special deposit." It is enough that there is an agreement for a particular application of the fund. The bank's right to a lien upon deposits is not of such character that it may not be waived. As was said in the case to which the note quoted from is attached: "Of the general rule that a bank to whom a depositor is owing a matured indebtedness may appropriate the general deposit of its debtor to the discharge of the obligation there can be no doubt. * * * But it is no less certain that a deposit made for a special purpose or under a special agreement cannot rightfully be so appropriated. * * * Indeed, the proposition that a bank enjoys no exemption from the general rule by which every party to a business transaction or agreement is legally bound to respect the obligation of his contract is one which ought to require neither argument nor citation of authority." *Smith v. Sanborn State Bank*, 147 Iowa, 640, 644, 645, 126 N. W. 779, 781 (30 L. R. A. [N. S.] 517, 140 Am. St. Rep. 336).

The defendant maintains that the evidence did not warrant the application of this principle, or, if so, that proper instructions were given concerning it. It is urged that the bank had no notice that the deposits made by Stewart were for the protection of the checks in question. They were turned into the bank without specific directions given at the time. They were, however, in the form of checks bearing upon their faces memoranda showing that they were given "for mules," which served to connect them with the transaction discussed by Stewart and Denton. But it would refine too closely to suppose that the bank did not understand the purpose of the deposit. At the time of

depositing one check, Stewart said to the bank president, "You might send Bert Wood (one of the plaintiffs) a draft for \$620." The president said, "Why don't you send him your own check?" Stewart did so, the check being one of those sued on. The president was asked with respect to other checks deposited by Stewart, "You knew they were for the purchase of mules?" He answered: "Well, I could have inferred so; yes, sir." The agreement had been made that if Stewart beat his checks in they were to be paid. His contract required him to get the money to the bank in time to meet the checks, and he did so. He was not required to make what could with strict accuracy be called a "special deposit." The direction for the application of the fund resulted from the previous agreement, and from the fact that the deposit was made in pursuance thereof. Complaint is made in this connection of an instruction that the plaintiff might recover "even though Stewart deposited the proceeds of the sale of the mules in the bank and took credit for the same generally on his account and without any direction to the bank as to how such deposit should be applied." The jury had already been told that the plaintiff had the burden of proving that the deposit was made in pursuance of the prior agreement. In view of this, we think the fair interpretation of the language quoted is that it was not essential to the plaintiff's recovery that any specific direction should have been given at the time of the deposit.

The defendant further maintains that, whatever may be the relation between the bank and Stewart, the plaintiffs have no cause of action against the bank, because there is no privity between them. Of course, by the usual rule, which obtains in this state, the holder of a check cannot ordinarily maintain action thereon against the bank, notwithstanding it may have had funds to meet it when it was presented. Note, 5 Ann. Cas. 189; note, 80 Am. St. Rep. 870; note, Ann. Cas. 1913D, 418. Special circumstances, however, may give to the issuance of a check the character of a pro tanto assignment, thereby vesting in the holder a right of action upon it against the bank on which it is drawn. *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. Here the actions are not brought upon the checks alone, but upon the entire transaction, of which the giving of the checks forms a part. If the plaintiffs had been present at the conversation between Stewart and Denton, it cannot be doubted that they would have a right of action against the bank. The contract made at that time was obviously for their benefit, and they are entitled to rely upon it, notwithstanding they had no prior knowledge concerning it. *Griffith v. Stucker*, 91 Kan. 47, 136 Pac. 937, decided at this session. See, also, *Anthony v. Herman*, 14 Kan. 494; *Harrison v. Simpson*, 17 Kan. 508; *K. P. Ry. Co. v. Hopkins*, 18 Kan.

494; *Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. 575; *Bank of Garnett v. Cramer*, 7 Kan. App. 461, 53 Pac. 534. *Gruenther v. Bank of Monroe*, 90 Neb. 280, 133 N. W. 402, decided since the adoption of the uniform negotiable instruments act. The bank had on hand funds which it not only was at liberty to apply to the checks presented by the plaintiffs, but which it had undertaken to use for that purpose—which by virtue of its agreement with Stewart had been so appropriated. The money obtained by the sale of the property of the plaintiffs was received by the bank under a virtual promise to hold it for their benefit, and pay them out of it.

The negotiable instruments act provides specifically that a bank is not liable to the holder of an unaccepted check (Gen. St. 1909, § 5442), and that the acceptance must be in writing (Gen. St. 1909, § 5385; *Rambo v. Bank*, 88 Kan. 257, 128 Pac. 182), and if on a separate paper operates only in favor of one to whom it is shown (Gen. Stat. 1909, § 5387). These provisions are declaratory of the law as it already existed. *Clark v. Bank*, 72 Kan. 1, 82 Pac. 582, 2 L. R. A. (N. S.) 83, 115 Am. St. Rep. 173; Gen. St. 1901, §§ 547, 548; *Eakin v. Bank*, 67 Kan. 338, 72 Pac. 874; *Bank v. Ringo*, 72 Kan. 116, 83 Pac. 119. The present actions are not brought simply on the promise of the bank to pay Stewart's checks issued in payment for stock. They are brought upon that promise, supplemented by the carrying out of the conditions on which it was based—the purchase of the stock, the issuance of the checks, the resale of the stock, and the deposit of the proceeds to meet the checks—in effect the receiving by the bank of the money appropriated by agreement to that purpose.

It is suggested that the making of such an agreement was beyond the power of the president of a national bank, or of the bank itself. The contract was not immoral or forbidden, and, even if when made it was invalid for want of capacity on the part of the officer or of the bank, it was so far carried out that a defense on that ground cannot successfully be interposed. See cases cited in *Harris v. Gas Co.*, 76 Kan. 750, 92 Pac. 1123, 13 L. R. A. (N. S.) 1171.

The judgments are affirmed. All the Justices concurring.

GRIFFITH v. STUCKER et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§§ 346, 347*) — STREET IMPROVEMENTS — CONTRACTOR'S BOND — VALIDITY — CONSTRUCTION.

After the work of improving streets of a city had been completed, but before formal acceptance by the city, the contractor gave a bond with sureties to the state of Kansas conditioned that, if he should pay all indebtedness incurred by him for labor and material furnish-

ed in making the improvements, the bond should be void, otherwise to be in full force. The contractor's contract with the city provided that he should give the bond required by chapter 179 of the Laws of 1887. The prescribed condition of such a bond is that the contractor shall pay all indebtedness incurred for labor or material furnished in making public improvements. The bond which was given was not filed for record with the clerk of the district court as the statute requires, and the improvements were actually made by a subcontractor who failed to pay his laborers and materialmen. *Held*:

(a) The bond was given pursuant to a statutory duty and not simply on a past consideration and the delay in giving it did not affect its character.

(b) The terms of the bond are to be interpreted as intended to accomplish the purpose of the statute, which is to protect laborers and materialmen who make contributions to public works.

(c) Labor and material furnished by the subcontractor were in contemplation of the statute and the bond furnished by the contractor.

(d) The provision for filing the bond was inserted in the statute for the benefit of laborers and materialmen. The obligation was complete when the bond was executed and delivered to the city.

(e) The subcontractor's laborers and materialmen may resort to the bond as security for the indebtedness due them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 876, 877; Dec. Dig. §§ 346, 347.*]

2. MUNICIPAL CORPORATIONS (§ 347*) — STREET IMPROVEMENTS — SUBCONTRACTOR'S BOND—TO WHOM AVAILABLE.

The contractor took from the subcontractor a bond with surety conditioned that the subcontractor would pay all bills for labor and material used in the performance of the subcontract. *Held*:

(a) The subcontractor's laborers and materialmen may resort to this bond as security for the bills due them arising from the performance of the subcontract.

(b) It is not necessary that such laborers and materialmen should have known of the bond and should have acted on the faith of it in order to make it available to them as security for the payment of their bills.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.*]

Appeal from District Court, Franklin County.

Action by W. E. Griffith against N. E. Stucker and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

F. M. Harris and W. S. Jenks, both of Ottawa, for appellant. F. A. Waddle, of Ottawa, for appellees.

BURCH, J. The city of Ottawa undertook to improve several of its streets. To that end contracts were let to N. E. Stucker. Stucker sublet a portion of the work to Lightfoot Bros., who failed before performance. The action was brought by W. E. Griffith, who is the assignee of laborers and materialmen having claims against Lightfoot Bros. The defendants are the obligors in a bond given by Stucker to the state of

Kansas, and the surety in a bond given by Lightfoot Bros. to Stucker. The defendants recovered and the plaintiff appeals.

[1] Chapter 179 of the Laws of 1887 provides as follows: "That whenever any public officer shall, under the laws of the state, enter into contract in any sum exceeding one hundred dollars, with any person or persons, for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take from the party contracted with a bond with good and sufficient sureties to the state of Kansas, in a sum not less than the sum total in the contract, conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building or in making said public improvements. That such bond shall be filed in the office of the clerk of the district court of the county in which such public improvement is to be made or such public building is to be erected; and any person to whom there is due any sum for labor or material furnished, as stated in the preceding section, or his assigns, may bring an action on said bond for the recovery of said indebtedness: Provided, that no action shall be brought on said bond after six months from the completion of said public improvements or public building." Civ. Code, §§ 661, 662 (Gen. St. 1909, §§ 6256, 6257).

Before beginning work, Stucker gave a bond that he would faithfully perform the obligation of his contract according to the plans and specifications furnished by the city. No relief is sought on this bond. After work on certain streets had been fully completed according to contract, but before the city had accepted the work, the city took from Stucker a bond to the state of Kansas conditioned as follows: "Now therefore if the said N. E. Stucker shall well and truly pay all indebtedness incurred by him for labor or material furnished in the construction of said improvement according to law, then the obligation shall be void and of no effect, otherwise to be and remain in full force." This bond was not filed with the clerk of the district court, but it covered improvements of streets included in Lightfoot Bros.' subcontract, and the plaintiff seeks the benefit of it. The court is of the opinion that it may be enforced by the plaintiff as a statutory bond. It is said that the bond limits liability to the indebtedness incurred by the contractor alone; the language being "indebtedness incurred by him." All labor and material expended on improvements embraced in Stucker's contract were furnished by him, whether furnished directly, or furnished indirectly through Lightfoot Bros., whom he employed. Stucker's contract with the city expressly provided that he should furnish the bond to secure claims for labor and material required

by chapter 179 of the Laws of 1887, and the execution of the bond to the state shows an intention to comply with the contract and with the law. The purpose of the statute was to protect the contributions of laborers and materialmen to public works. Where mechanics' liens are allowed, as upon public buildings, the statute furnishes additional security. Commissioners of Jewell County v. Manufacturing Co., 52 Kan. 253, 34 Pac. 741. Where mechanics' liens are not possible, as upon street improvements, the purpose was to secure laborers and materialmen against loss by a quasi mechanics' lien, the lien being upon the bond instead of upon the property; and the language of a bond tendered in compliance with the statute will be construed as designed to accomplish the end which the Legislature had in view.

The statute under consideration is analogous to the one enacted to protect laborers and others who aid in the construction of railroads, which requires railroad companies to take from contractors bonds to pay to laborers, mechanics, and materialmen all just debts incurred in carrying on construction work. Gen. Stat. 1909, § 7006. Such bonds protect laborers and materialmen employed by subcontractors. Wells v. Mehl, 25 Kan. 205; Mann v. Corrigan, 28 Kan. 194; Parkinson & Co. v. Alexander, 37 Kan. 110, 14 Pac. 466. On account of the peculiar wording of this statute, the bond provided for covers supplies in the nature of goods and provisions only when furnished to the contractor. The weight of authority is that a contractor's statutory bond given to secure the payment of claims for labor performed and material furnished in making municipal improvements is available to those who deal with subcontractors. 27 L. R. A. (N. S.) 588, 593, note. If this were not the law, it would be very easy for public contractors to defeat the statute and perpetuate the evils it was designed to remedy.

It is said that the obligation of the bond was not perfected by filing the instrument in the proper office. The requirement of the statute that the bond shall be filed with the clerk of the district court was intended for the benefit of laborers and materialmen who might have occasion to enforce it. The purpose was to preserve the instrument and make it easily accessible. The obligation was complete when it was executed and delivered.

It is said that the bond was given upon a past consideration, and consequently that it is unenforceable. The bond was given pursuant to a statutory duty which had not been discharged, and delay on the part of the city officials and the contractor in preparing and delivering the instrument necessary to fulfill the requirement of the statute could not invalidate it.

[2] Lightfoot Bros., as principal, and the American Fidelity Company, as surety, exe-

cuted and delivered to Stucker a bond reading as follows: "Whereas, said principal has entered into a certain contract in writing bearing date of April 11th, A. D. 1910, with the said N. E. Stucker to macadamize certain streets in the city of Ottawa, Kansas, and for furnishing crushed stone, which contract is hereby referred to and made a part hereof: Now, therefore, if the said Lightfoot Bros. shall well and faithfully perform all of its obligations under said contract and shall pay all bills for labor and material used in the performance of said contract and shall hold the said N. E. Stucker harmless from any and all loss, costs or expense on account of injury to any person or persons or property, then this obligation shall become null and void, otherwise to remain in full force and effect."

The court is of the opinion that this bond is available to the plaintiff. Stucker stood toward Lightfoot Bros. and their laborers and materialmen in the same relation that the city stood toward Stucker and his laborers and materialmen. The weight of authority is that without any statute the city could take a bond from Stucker conditioned to pay all laborers and materialmen, upon which they could sue directly. 2 Dillon, Municipal Corporations (5th Ed.) § 830, p. 1266; 27 L. R. A. (N. S.) 581, note. The reasoning by which the right of laborers and materialmen to sue on such bonds is established applies here.

It is said that the surety company can be liable only on two conditions: First, that some privity existed between Stucker and the laborers and materialmen because of some duty or obligation in the premises owed by him to them; and, second, that the object of the bond was to benefit the laborers and materialmen directly and not merely incidentally. Both conditions are clearly present. Stucker was obligated by law and by his contract with the city to provide security for the payment of the claims of Lightfoot Bros.' laborers and materialmen. These claims were debts of Lightfoot Bros. and not of Stucker. They were primarily liable to their own laborers and materialmen. Stucker was in effect only a surety of his subcontractor, and the very purpose and object of the bond was to secure payment by Lightfoot Bros. of their own debts, a matter of direct and special importance to those to whom they were indebted. This being true, a long line of cases extending from *Anthony v. Herman*, 14 Kan. 494, to *Wood v. Bank and Ballard v. Bank*, 136 Pac. 935, decided at the present sitting, establishes the right of the laborers and materialmen employed by Lightfoot Bros. to adopt the bond and enforce it by action brought directly against the surety company which signed it.

It is said that the laborers and materialmen could not take advantage of the bond unless they knew of it and acted upon the

faith of it. In the following cases the court has held to the contrary: *Kansas P. Ry. Co. v. Hopkins*, 18 Kan. 494; *Plano Manufacturing Co. v. Burrows*, 40 Kan. 361, 19 Pac. 809; *Stewart v. Rogers*, 71 Kan. 53, 80 Pac. 58; *Wood v. Bank and Ballard v. Bank*, 136 Pac. 935, just decided. The contract of Lightfoot Bros. with Stucker shows that they were subcontractors and not mere laborers and materialmen. The plaintiff sued on a bond not heretofore mentioned relating to work on a particular street. It was good as a statutory bond, but it was conceded at the hearing in this court that the right to relief upon it was barred by the statute of limitations. Consequently it may be regarded as eliminated from the case. The plaintiff is entitled to recover on Stucker's bond for those claims only which represent indebtedness incurred for labor or material furnished in making street improvements, and on the surety company's bond for those claims only which represent bills for labor and material used in the performance of Lightfoot Bros.' contract. It is contended that some of the plaintiff's claims fall outside these classes. The question cannot be determined here from the findings of fact in their present form. Should the district court conclude that there is anything substantial in the contention, the findings should be extended to cover it. Perhaps this can be done on the evidence already taken.

The judgment of the district court is reversed, and the cause is remanded, with directions to proceed as indicated and to render judgment in favor of the plaintiff for the sums found to be due him. All the Justices concurring.

BURREL COLLINS BROKERAGE CO. v. DUNN.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§§ 88, 547*)—STOCK SUBSCRIPTION—RIGHTS OF CREDITORS.

The capital stock of a corporation is a trust fund for the benefit of the general creditors of a corporation, and one who subscribes for shares of stock must pay for them either in money or in money's worth.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 337-364, 425-428, 2178-2181; Dec. Dig. §§ 88, 547.*]

2. CORPORATIONS (§ 565*)—ACTION AGAINST—SUFFICIENCY OF EVIDENCE.

The testimony examined, and held to be sufficient to support the decision of the court refusing the allowance of a claim made against an insolvent corporation by one who had turned over property and credits in payment for shares of stock.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

Appeal from District Court, Finney County.

Action by the Burrel Collins Brokerage Company, a copartnership, against Frank M.

Dunn, as assignee for the Garden City Wholesale Grocery & Fruit Company. From judgment for defendant, plaintiff appeals. Affirmed.

Edgar Foster, of Lakin, and A. Hoskinson, of Garden City, for appellant. H. O. Trinkle and Wm. E. Hutchison, both of Garden City, for appellee.

JOHNSTON, C. J. The Burrel Collins Brokerage Company presented a claim of \$1,489.96 to the assignee of the Garden City Wholesale Grocery & Fruit Company, which was disallowed. An appeal to the district court was taken, and on a trial there the court found that only \$101.07 of the claim was a legal charge against the assignee, and an appeal from that judgment was taken by the Burrel Collins Brokerage Company.

[2] Appellant claims that in May, 1910, George W. Chesebro started a grocery and fruit business in the name of the Garden City Fruit Company, and purchased several bills of goods from appellant, for which payment has not yet been made, and that about July 1, 1910, Chesebro and four others incorporated the Garden City Wholesale Grocery & Fruit Company for the purpose of buying and selling groceries, fruits, and vegetables, and that the corporation took over the property of the Garden City Fruit Company, and assumed liability on the debts of that company. Appellant therefore claimed to be a creditor of the new corporation, and entitled to have the full amount of its claim allowed. On the part of appellee it is contended that practically Burrel Collins himself was the Garden City Fruit Company, and that the shares of capital stock of the new company were full payment for all the assets and credits turned over to the new company. The testimony tends to support the claim of appellee. Chesebro himself testified that Collins furnished all the money and goods that went into the business of the old company; that Chesebro was managing that business for Collins on a salary; that the incorporation was made at the instance of Collins; and that the corporation was to take over all that the old company had in exchange for the Collins stock in the new company. He further testified that the stock was subscribed for in his name, but that he was acting for Collins, and was to assign the shares of stock to Collins. Collins, according to the testimony, desired to extend the business, and to procure some new money to carry it on, and two of the incorporators did pay into the treasury considerable sums of money for stock. If, as the testimony tends to show, Collins was the Garden City Fruit Company, and that he turned over whatever interest he had in that company, whether it be goods or claims, to pay for the shares of stock issued to Chesebro for him, he is not entitled to set up any claim that he owed to himself as a liability against the corporation.

[1] So far as creditors are concerned, the capital stock must be treated as a trust fund pledged for the payment of the debts of the corporation, and one who subscribes for stock must pay for the same either in money or money's worth. 10 Cyc. 472. Under some of the testimony the payment of the claims of Collins would be to require the corporation to return to him the money which he invested in the stock purchased for himself. Whatever may be his rights as against other incorporators, he is not entitled to an allowance of his claim as against the creditors of the company. Allowance was made for so much of the claim as was for goods purchased from appellant after the incorporation, and, as there appears to be sufficient testimony to uphold the decision of the trial court disallowing the remainder of the claim, its judgment will be affirmed. All the Justices concurring.

STATE v. JOHNSON.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 996*)—JUDGMENT—RECORD—CORRECTING MISTAKES.

In a prosecution for the violation of the prohibitory laws, the journal entry by mistake showed a conviction and sentence under a nuisance count, when in fact the defendant had been convicted and sentenced under a sales count. *Held*, that after an appeal to the Supreme Court it was proper for the trial court to correct the journal entry so that it speaks the truth, and, no error appearing in the record, the judgment is affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1483, 2529, 2544-2546; Dec. Dig. § 996.*]

Appeal from District Court, Shawnee County; A. W. Dana, Judge.

Mattie Johnson was convicted of selling intoxicants in violation of law, and appeals. Affirmed.

E. R. Simon and A. J. Bolinger, both of Topeka, for appellant. John S. Dawson, Atty. Gen., and W. E. Atchison, Co. Atty., of Topeka, for the State.

PORTER, J. The first count in the information charged the defendant with a sale of liquors in violation of law. The sixth count was for maintaining a nuisance. The verdict of the jury was guilty as charged in the first count; not guilty as charged in the sixth. The contention is that the court pronounced sentence under the sixth instead of the first count, and the journal entry so reads. However, after the cause was submitted in this court, a motion was filed in the district court setting forth the facts showing a mistake in the journal entry, and a supplemental abstract has been filed to which is attached certified copy of an order of the court correcting the journal, so that it now speaks the truth, and states that the defendant was sentenced upon the first count of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

information instead of upon the last. The mistake was made by the person who prepared the journal entry.

It is the duty of the court, and it has power at any time, to make an order correcting a mistake in the record of a judgment. See cases cited in the opinion in *State v. Linderholm*, 90 Kan. 489, 493, 135 Pac. 564. As the corrected journal reads, it shows that no error was committed.

In instruction No. 12, the court properly defined a "sale." The instruction requested by the defendant was rightly refused. There was a conflict in the evidence upon the question whether the defendant was acting as the agent of the purchaser.

The judgment is affirmed.

AMUSEMENT SYNDICATE CO. et al. v.
MILWAUKEE MECHANICS' INS. CO.
SAME v. PRUSSIAN NAT. INS. CO.
(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

INSURANCE (§ 507*)—POLICY—CONSTRUCTION—LOSS OF RENT—COMPUTATION OF TERM.

A policy, insuring the owner of a building used for a theater, stores, and offices, against loss of rent in case the building should be rendered untenable by fire, provided that, in case the structure were rebuilt, loss should be computed from the date of the fire and should cease when the building was rendered tenable. It further provided that, if the owner should elect not to rebuild, the loss should be determined by the time which would have been required for that purpose. The building was destroyed by fire. It could not be rebuilt, and an office building was erected instead. *Held*, the loss is to be computed by the arbitrary rule of the policy without taking into account time for proof of loss, time for the removal of debris, and delay incident to inclement weather occurring in the season following the fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1283; Dec. Dig. § 507.*]

Appeal from District Court, Shawnee County.

Two actions, both by the Amusement Syndicate Company and others, one against the Milwaukee Mechanics' Insurance Company, the other against the Prussian National Insurance Company. From judgments for plaintiffs, defendants appeal. Modified.

See, also, 85 Kan. 367, 116 Pac. 624.

E. S. Quinton, of Topeka, for appellants. Mulvane & Gault and D. R. Hite, all of Topeka, for appellees.

BURCH, J. The defendant insured the plaintiff against loss of rent for a building used for a theater, stores, and offices, should it be rendered untenable by fire. The policy contained the following provision: "It is understood and agreed that in case the above-named building, or any part thereof, shall be rendered untenable by fire, this company shall be liable to the assured for the actual loss of rents incurring therefrom,

but only as such loss shall be ascertained and estimated by the assured and this company, or, if they differ, by appraisers in the manner provided in this policy and not exceeding the sum insured; the assured agreeing to rebuild or repair said premises in as short a time as the nature of the case will admit. Loss to be computed from the date of the occurrence of said fire and cease on said building being rendered tenable; and, in case the assured shall elect not to rebuild or repair the premises, then the loss of rent shall be determined by the time which would have been required for said purpose." The building was destroyed by fire, and the circumstances were such that it could not be reconstructed according to the original plan. Therefore it was replaced by a store and office building.

On the occasion of a former appeal to this court, the following order was made: "The judgment is affirmed as to findings of liability and the rate of indemnity per month, and as to the allowance of the attorneys' fee, but remanded for a determination of the time it would have taken to reconstruct the old building, and the modification of the amount of recovery accordingly." *Syndicate Co. v. Insurance Co.*, 85 Kan. 367, 378, 116 Pac. 620, 624.

On return of the cause the district court made the following findings of fact:

"(3) By the terms of the contracts of insurance on the building, the insured had 60 days within which to make proof of loss, and the insurance companies 30 days after proof of loss was made within which to make election to pay or rebuild. Proof of loss was made November 1, 1906. There is no evidence of an election by the insurance companies within such time.

"(4) December 1, 1906, was the earliest date at which the insured was at liberty under the terms of the contract to proceed to let contracts for reconstructing the old opera house.

"(5) The evidence shows that it would have taken some four to six weeks to remove the debris, and that the winter season was a favorable time for so doing, but that reconstruction of the opera house could not have been commenced until March 15 to April 1, 1907, when the building season of the following year opened, and that it would have taken six months after April 1, 1907, in which to have reconstructed the old opera house, and that a total period of 12 months would have elapsed from the date of the fire before the reconstructed building would have been ready for occupancy.

"(6) The amount of damages sustained by plaintiff by reason of actual loss of rents on said Crawford Opera House building was \$240 per month, and that the amount for the period necessary to reconstruct an opera house was \$2,760, which amount exceeds the total amount of the policies sued on in these actions."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The provision of the policy providing for rebuilding in as short a time as the nature of the case would permit, and the provision that loss should be computed from the date of the fire and cease when the restored building became tenable, have no application, because the burned structure was not rebuilt. The situation is the same as if the new office building had not been erected and the ground on which it stands had remained unimproved. According to the policy, if actual reconstruction take place, the amount of the loss depends upon the facts. Loss begins with the fire and ends when a tenable building again exists. If reconstruction do not take place, the loss is determined by an arbitrary rule which has no reference to the date of the fire, the season of the year in which it occurs, the clemency or inclemency of the weather, or other fact or accidental circumstance which might delay actual reconstruction were it attempted. The question then is: Given the plans and specifications of the old building, how long would it take to construct it?

In finding No. 5 the court concluded that the building time necessary for the construction of an opera house like the old one is six months. Therefore the damages recoverable were six times the monthly rent of \$240, or \$1,440.

The judgment of the district court is modified, and the judgment in the companion case of *Syndicate Co. v. Prussian National Insurance Co.* is modified, and the damages are apportioned between the two companies as follows: \$576, with interest at 6 per cent. per annum from December 24, 1906, against the Milwaukee Company, and \$864, with interest at 6 per cent. per annum from December 24, 1906, against the Prussian Company. All the Justices concurring.

JUHLIN v. HUTCHINGS, District Judge.
(Supreme Court of Kansas. Dec. 6, 1913.)

INJUNCTION (§ 143*)—RESTRAINING ORDER—NOTICE—NECESSITY.

Gen. St. 1909, § 5847 (Code Civ. Proc. § 253), providing that an injunction shall not be granted against a person who has answered, unless upon notice, relates only to procedure in an injunction action, and does not require notice preliminary to the issuance of a restraining order, collateral and incidental to a suit to quiet title.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 315; Dec. Dig. § 143.*]

On petition for rehearing in original action in mandamus by Pearle T. Juhlin against F. D. Hutchings, as judge, etc. Petition for rehearing denied.

For former opinion, see 135 Pac. 598.

PER CURIAM. The plaintiff, on the motion for rehearing, vigorously contends that the order issued by the defendant as judge of the district court of Wyandotte county to

the plaintiff, to refrain from proceeding in an action of forcible entry and detainer pending in the city court of Kansas City until further order of the district court, is void for the reason that the judge had no jurisdiction to make the order. The contention is based upon the provision of section 5847 of the General Statutes of 1909, which provides: "An injunction shall not be granted against a party who has answered unless upon notice. * * *" And it is said that notice in such case is jurisdictional. There are several answers to this contention. The statute referred to relates to procedure in an injunction action. This order was issued in an action to quiet title to real estate, and to preserve the jurisdiction of the district court in that action. The restraining order was collateral and incidental to the main action. Even in an injunction action, we cannot concede that the issuance of an order of injunction, after answer and without notice to the other party, is absolutely void, although it might be erroneous. Mandamus is not a proper remedy in this case.

The judgment, refusing the writ of mandamus prayed for, is adhered to, and the petition for rehearing is denied.

RETTIGER et al. v. DANNELLY et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(*Syllabus by the Court.*)

PLEADING (§ 214*)—CONSTRUCTION—QUESTION OF LAW—CONTRACTOR'S BOND.

Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court; only where an ambiguous expression is used in such a contract may the practical interpretation placed upon it by the parties become a question of fact.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

Appeal from District Court, Neosho County.

Action by Rose L. Rettiger and others, partners, etc., against Ed. E. Dannelly and another. From the judgment for Dannelly on demurrer, plaintiffs appeal. Affirmed.

Farrelly & Evans, of Chanute, for appellants. Nation & Grant, of Erie, for appellees.

SMITH, J. The appellants in this case brought an action in the district court of Neosho county against the appellee and one Ed. E. Dannelly, in which the petition alleged, in substance, as follows: That the appellants are copartners engaged in the business of furnishing building stone. That the appellee is a corporation organized for the purpose and engaged in the business of furnishing surety bonds for contractors in the state of Kansas. That Dannelly entered into a contract with a church society at Chanute, by the terms of which he agreed with the society to construct a church build-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing in that city according to certain plans and specifications, and that he would furnish all labor and material of every kind to build such church. A copy of the contract between Dannelly and the society and also a copy of the surety bond were attached to the petition as exhibits and made parts thereof. That Dannelly procured from the appellee a surety bond, duly executed, and furnished it to the church society for the protection and benefit of the society and all parties that furnished either material or labor in the construction of the church building. That the surety bond provided that Dannelly should faithfully comply with all the terms and conditions of the contract between Dannelly and the society and pledged the payment to the society in the event said Dannelly should fail or refuse to comply with the provisions of his contract, the sum of \$12,000. It was further alleged in the petition that the appellants furnished Dannelly between September 9, 1909, and April 4, 1910, under oral contract, eight car loads of cut stone for use, and which was used in the construction of the church building; that the value and contract price of the stone furnished was \$1,800.30, of which sum \$1,157.53 was paid and \$642.77 remained unpaid and was past due. Also the petition alleged that Dannelly was insolvent, and that a judgment against him could not be collected; that the stone so furnished now forms a permanent part of the church building. The petition further embodied the terms of the surety bond, and alleged that the tenor and legal and equitable effect of the bond is that if Dannelly does not pay for the labor and material that forms a part of the church structure, and the church society does not pay therefor, the surety company will do so. The conditions of the bond are as follows: "Whereas, said principal has entered into a certain written contract, a copy of which is hereto attached and made a part hereof, bearing date of the 3d day of July, 1909, for labor and material for the erection and completion of a church building for the First Presbyterian Church at Chanute, Kan., now therefore the condition of the foregoing obligation is such, that if the said principal shall well, truly and faithfully comply with all the terms, covenants and conditions of said contract on his part to be kept and performed according to its tenor, then this obligation is to be null and void, otherwise to be and remain in full force and virtue in law." The appellee demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action against the company. The demurrer was sustained. This ruling and the rendering of judgment in accordance therewith constitute the only specifications of error.

The condition of the bond, above set forth, does not assure the payment of liabilities created by the contractor to subcontractors,

although, of course, such liabilities may be, and frequently are, included in bonds of this character. The terms of the contract or bond conclusively determine the obligations assumed thereunder, and such terms cannot be extended by any equitable considerations not imported by the language used.

The allegation of the petition that "the tenor and legal, as well as equitable, effect of said contract is that, if the said defendant Dannelly does not pay for labor and material that forms a part of said church structure, and said church does not pay therefor, said defendant surety company will do so" is not deductible from the language of the bond, but is extraneous thereto and inconsistent therewith. This portion of the petition, therefore, pleaded in connection with the contract or bond, is not to be taken as true on the hearing of a demurrer to the petition. Where a written contract is unambiguous in its terms, its interpretation or construction is a matter of law for the court. *Warner v. Thompson*, 35 Kan. 27, 10 Pac. 110.

Only where an ambiguous expression is used in a contract may evidence be introduced and the question become one of fact as to the practical interpretation placed upon it by the parties. *Cosper v. Nesbit*, 45 Kan. 457, 25 Pac. 866.

The appellants were not parties to this bond. It was bought by Dannelly, for the sole protection of the church society, that Dannelly would faithfully perform his contract in building the church. The church society, in the absence of the filing of a lien upon its property by appellants, was not financially interested in appellants' securing payment for the stone furnished by them to Dannelly and by him placed in the building; neither was the appellee financially interested therein, in the absence of any undertaking on its part that such payment should be made.

The order sustaining the demurrer and the judgment is affirmed. All the Justices concurring.

MARTS v. FREEMAN.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 120*)—INJUNCTION (§ 79*)—CONSTRUCTION OF DRAINS—AUTHORITY OF ROAD OVERSEER.

A public road extended east and west, crossing a valley through which a creek flowed. The road was low and subject to overflow from surface water from the north at a depression about half a mile west of the creek. Complaints were made to the township board of the condition of the road. M., whose land abuts upon the south side of the road at the depression, urged that a ditch should be constructed from a culvert at that place to the creek. Upon a view of the premises the board believed that the proposed ditch would benefit the road, but doubted their power to construct it. Thereup-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on, with M. and other people of the vicinity, they presented the matter to the county commissioners, who instructed the board to take the water off the road. The county attorney advised that the work should be done under the direction of the road overseer. The ditch was constructed accordingly under the supervision of the overseer, who dug it so far as could be done with a road grader, and it was then finished by M. at his own expense as he had agreed to do because of anticipated benefits to his own land. The ditch was a substantial improvement to the road and also of material benefit to M.'s land. It was kept open for ten years, when F., who owned land along the creek abutting on the south side of the road, obstructed it by a dam, causing the water to overflow M.'s land, and injure his crops. At the time of the obstruction the ditch, by action of the water, had become so deep and wide that it cut into and materially injured F.'s land. It is held that the road overseer was vested with authority to construct drains in public highways. His discretion in exercising this authority could not be controlled by a court except in case of fraud or bad faith.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 374-378; Dec. Dig. § 120.* Injunction, Cent. Dig. § 149; Dec. Dig. § 79.*]

2. HIGHWAYS (§ 120*)—CONSTRUCTION OF DRAINS—VALIDITY.

In exercising this authority, the fact that the overseer was advised or directed by the township trustee, township board, or county commissioners did not invalidate his act.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 374-378; Dec. Dig. § 120.*]

3. HIGHWAYS (§ 120*)—CONSTRUCTION OF DRAIN—AUTHORITY OF ROAD OVERSEER.

That the improvements were urged by and resulted in benefits to a landowner did not impair the right of the constituted authorities acting in good faith to make it for the use and benefit of the public.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 374-378; Dec. Dig. § 120.*]

4. HIGHWAYS (§ 120*)—DRAINS—OBSTRUCTION.

The fact that a water course so created is an artificial one affords no justification for obstructing it where it exists by lawful authority, although the obstruction causes the water to flow where it did before the ditch was opened.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 374-378; Dec. Dig. § 120.*]

5. HIGHWAYS (§ 120*)—CONSTRUCTION OF DRAIN—DAMAGES TO LANDOWNER—RIGHT TO OBSTRUCT.

It must be presumed that any damages to a landowner consequent upon such an improvement properly made was paid for when the right of way was appropriated, and the defendant, having no right to recover damages caused by opening and maintaining the ditch, has no right to obstruct it.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 374-378; Dec. Dig. § 120.*]

6. HIGHWAYS (§ 120*)—OBSTRUCTION OF DRAIN—DAMAGES TO INDIVIDUAL—RIGHT OF RECOVERY.

An individual who suffers special injury from a public wrong different from that suffered by the public at large may recover his damages therefor against the wrongdoer. This principle is applicable to the obstruction of the ditch referred to.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 374-378; Dec. Dig. § 120.*]

Appeal from Circuit Court, Dickinson County.

Action by Theodore Marts against A. J. Freeman. From judgment for plaintiff, defendant appeals. Affirmed.

Thomas Dever, of Junction City, for appellant. Hurd & Hurd, of Abilene, for appellee.

BENSON, J. This is an appeal from a judgment for damages to growing crops caused by the obstruction of a ditch in a public road. The defendant alleges that the ditch was wrongfully opened by the plaintiff's father, John Marts, to the defendant's injury, and without lawful right or authority, and prayed for an injunction to restrain the plaintiff from maintaining it.

At the time the ditch was opened the plaintiff's father owned abutting land on the south side of the road referred to. The defendant owned land abutting on the north side of the road. The west boundary of the defendant's land is an extension north of the east boundary of the Marts' land. The defendant also owned another tract south of the road. Chapman creek runs southwardly through both of the defendant's tracts. The road was established in the year 1893. The next year a culvert was placed in the road at a low place crossing the road on the John Marts' land, afterwards occupied by the plaintiff, and the land next north of it. The culvert is about 2480 feet west of a bridge over Chapman creek. The low place begins north of the road, and, extending southeastwardly and growing wider, crosses the east line of the Marts' land upon an adjoining tract of 80 acres. The surface drainage of approximately 650 acres north of the road is into this low place, finding its way after filling the depression to Chapman creek or into a branch flowing into that creek about a mile below the bridge.

In the year 1900 complaints were made to the township officers of water standing along and upon the road which extends across a valley for a considerable distance west of the creek. The plaintiff's father was desirous of having a ditch constructed along the road, which would serve to divert the water passing through the culvert from flowing upon his land. The township trustee and the township board visited the place, and upon examination believed that such a ditch would be a benefit to the road, but doubted their right to construct it without authority from the county commissioners. Later the county commissioners, at a meeting held when the township board was present, investigated the matter, and instructed that board to take the water off the road, and to make a ditch for that purpose. Mr. Marts, Sr., was present, and agreed to pay the expense of making the ditch, and also agreed to put a bridge across it to Freeman's south tract. The county attorney, who was also present, advised that the work should be

done under the direction of the road overseer. Afterwards the township board directed the road overseer to put the ditch on the south side of the road; the defendant objecting to having it made on the north side. The overseer constructed the ditch as deep as it could be made with a road grader. The surface of the ground at and near the bank of Chapman creek being about 4 feet higher than at the culvert, it was found necessary to have the ditch made deeper, and Mr. Marts agreed to deepen it accordingly at his own expense. He performed the work, making the ditch about 6 feet deep at the outlet, and about 2 feet deep at the culvert. He threw back the material excavated from the ditch along its south side and upon his land at the roadside, thereby forming a low dike, which served to hold the water in the ditch, and prevent it from overflowing upon his land except in times of heavy rains or freshets. He also built a bridge for the defendant, as he had promised, near the northwest corner of his 80-acre tract, which the defendant used for many years in going to and from his land. That tract has a frontage of about 320 feet on the road west of the creek. The ditch was a substantial improvement of the road, and carried off the water from ordinary rains. In freshets, however, it still overflowed the low places upon adjacent lands, and at times the dike has been washed away. The defendant repaired the bridge over the ditch at different times, and at one time dug a little ditch across the road to carry surface water from his north tract into the ditch. Evidence was given tending to show that he also assisted in digging the ditch in question.

The ditch grew wider and deeper toward its mouth by the action of the water until it was nearly 15 or 20 feet deep and 30 feet wide at the outlet, having cut into the defendant's land 5 or 6 feet near the creek, narrowing toward the west to a point, and taking away about 120 feet of his fence, and also cut into the road near the bridge. The township authorities restored the road by filling the cut and protecting the north side of the ditch. The defendant on April 10, 1910, after removing what was left of the bridge built for his use, which had fallen down, filled up the ditch at that point, where it was 8 or 9 feet wide, making a dam to the height of the surface of the ground. He also made another dam across the ditch on the same land. These obstructions caused an overflow upon the plaintiff's lands, resulting in damages, for which he sued; they also caused an overflow of the road near the culvert.

No record appears to have been made of any of the orders or proceedings of the township board or of any of the officers relating to this ditch.

The plaintiff requested an instruction to the effect that any person who should unlawfully obstruct a county road was liable for

resulting damages to any person injured thereby. The defendant, on the other hand, asked for an instruction to the effect that if, after the road overseer had graded the road, the plaintiff dug the ditch and built the dike in order to prevent surface water from flowing upon his land, such acts were an unlawful diversion, and the defendant would have the right to use such means as he saw fit to prevent such water from encroaching upon his premises.

The court refused these requests, and instructed the jury in substance that, if the ditch and dike were constructed by Marts, with the consent and approval of the road overseer, the township trustee, and township board, in conjunction with these authorities, for the common purpose of protecting and improving the road, and protecting his land, and the defendant filled up the ditch, and that it was not necessary that he should do so in order to protect his own land, and that such filling caused an overflow, which injured the plaintiff's crop, which would not have occurred but for such obstruction, the defendant was liable for the resulting damages. Following this, another instruction was given to the effect that, if the defendant obstructed the ditch to divert surface water which was flowing upon his own land, thereby injuring it, and the surface water would not have otherwise reached his land, the plaintiff could not recover.

Various specifications of error are presented; but they all depend upon a few underlying propositions, which will now be considered. It is contended that neither the township officers nor the county commissioners had any authority to authorize the construction of the ditch, although it is suggested that the road overseer may have had that authority under the provisions of section 7285 of the General Statutes of 1909. The statute making the township board commissioners of highways for the township did not take effect until after the ditch was opened.

[1] No specific duty respecting the drainage of roads appears to have been enjoined upon township trustees, although in the act relating to township officers (Gen. St. 1909, §§ 9584-9590) the trustee is charged generally with the duty to see that the road moneys are properly applied, also with the duty to prosecute for violations of the road laws, and is given the care and management of the property of the township and superintendency of its interests. Road overseers are primarily and specially charged with the repair of public highways. Necessary drainage is an ordinary and necessary incident of this power. *Harl v. Ohio Township*, 62 Kan. 315, 62 Pac. 1010; *Shanks v. Pearson*, 68 Kan. 168, 71 Pac. 252; *Dennis v. Osborn*, 75 Kan. 557, 89 Pac. 925. The fact that in exercising this authority in this instance the overseer was advised or directed by the township trustee, or township board, or by the county commissioners, or all of these officers, did

not impair that authority. He performed some of the work in person or by laborers employed by him, and the landowner was employed to complete it. All work was done with the approval and consent of the overseer as an improvement of the road, and it was done in pursuance of public authority.

It is true that the private interests of a landowner were promoted by the improvement, and that he was active in initiating and carrying it on. But the fact that such improvements are urged by and result in benefits to individuals does not impair the right of the constituted authorities acting in good faith to make them for the use and benefit of the public.

The evidence tends to prove that the defendant, with other owners of lands adjoining the road, was present at different times at consultations with the township officers and at one time with county commissioners when this ditch was under consideration, and assisted in digging the ditch and in cleaning it out. In his testimony, however, he denied that he assisted in digging the ditch, and stated that he always opposed it. As no special findings were requested, it cannot be known what the jury found from this evidence. But, so far as it was conflicting, it may be presumed from their general verdict that they found against the defendant upon any material fact necessary to uphold the verdict.

The dike so-called, thrown up by the plaintiff's father in constructing the ditch, was really a part of it, serving to hold the water within it, promoting the flow in the artificial channel, and tending, as we may presume, to keep the channel open. The authority to make the drain involved the exercise of judgment in the manner of its construction. If the overseer gave the landowner no express directions or authority to make the dike, still it must have been done with his consent, for it was visible part of the work under his charge and oversight. No complaint was made of it by the defendant or any one else, so far as the evidence shows. The fact that it was less than a foot in height, of such slight stability that it was frequently washed away and broken during heavy rainfalls, and that in freshets the water rose above it, appear to show that it had but little effect beyond holding the water in the channel under ordinary conditions. In this view its construction is an incident of establishing the ditch, involving the exercise of judgment on the part of the officer having authority to make the improvement, who is vested with a broad discretion not to be interfered with by a court except in cases of fraud or bad faith. *Shanks v. Pearson*, supra; *Murphy v. Fairmount Township*, 89 Kan. 760, 133 Pac. 169.

[2-5] Having determined that the ditch was rightfully established by public authority, it follows that its obstruction by the defendant was wrongful. The fact that a water

course thus created is an artificial one affords no justification for obstructing it where it exists by lawful authority, although the obstruction only caused the water to flow where it did before the ditch was opened. The public had previously appropriated land of these parties for highway purposes. This appropriation included the right to make the highway fit for public travel involving necessary drainage. It must be presumed that any damage consequent upon such improvement was paid for when the right of way was appropriated. Where land has been so taken for public use, the owner cannot recover further damages because of the injurious effects of repairs or improvements properly made in maintaining such use.

Among the cases illustrating this principle, one arising in Nebraska is closely in point. The owner of land abutting upon a public road sought to restrain the road authorities from opening a culvert and otherwise changing the course of surface water so that it would flow upon his land contrary to its previous course. The court said: "It is now the settled law of the state that, for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. * * * The owner of adjoining lands is entitled to compensation, not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement, and maintenance of a highway, taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance. * * * It must be presumed that he received such compensation, or at least had an opportunity to receive it, when the highway was originally constructed. He is not entitled to any further condemnation proceedings. Much less is he entitled to a perpetual injunction to restrain such highway improvement." *Churchill v. Beethe*, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442.

The same rule is tersely given in *Mills on Eminent Domain* (2d Ed.) § 55, where it is stated that the right of way appropriated for a road includes drains and gutters, and that the original compensation paid is supposed to cover damages for such uses.

As the defendant had no right to relief by action to prevent or to recover damages caused by the opening or proper maintenance of this ditch, it follows that he could not lawfully obstruct it.

[6] The only remaining question relates to the right of the plaintiff to recover private damages for the obstruction of this public ditch. It is a general rule that an individual who has suffered special injuries from a public wrong not common to the general public may recover damages therefor

against the wrongdoer. Addison on Torts (8th Ed.) 10; 2 Cooley on Torts, 1292; 2 Farnham on Waters, 1197; 2 Elliott on Roads and Streets (3d Ed.) § 850.

"A public wrong, though the perpetrator of it may be subject to prosecution by the public, may also have the nature and consequences of a private wrong, and be actionable as such in behalf of a person who sustains an injury differing in kind from that which the public at large suffers." 1 Sutherland on Damages (3d Ed.) § 4.

This principle, as applied to obstructions of highways, is stated in Thompson on Highways (3d Ed.) p. 345: "Although it is a general rule that a private action cannot be maintained for a public injury, as for a common nuisance, yet, if an individual suffer a more special injury than any other from such nuisance, he may have a separate action therefor."

It is not deemed necessary to discuss the effect of the evidence tending to show acquiescence in opening and maintaining the ditch in view of the conclusion that it was lawfully opened.

We do not decide whether the obstruction is within the provisions of section 17 of the road law relied upon by the plaintiff. Gen. St. 1909, § 7290. Nor is it necessary to decide whether the instructions accurately stated in all respects the rules of law applicable to the controversy. It is sufficient to say that no error appears in the instructions or rulings of the district court of which the defendant can complain.

The judgment is affirmed. All the justices concurring.

STATE v. BLAND et al.
(Nos. 18,820 and 18,821.)

STATE ex rel. DAWSON, Atty. Gen., v. FAIL,
Clerk of District Court, et al.
(No. 18,755.)

(Supreme Court of Kansas. Dec. 3, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 48*)—PLACE OF TRIAL—NECESSITY OF DESIGNATION.

A statute provides that the district court of Cherokee county shall be held in two places and prescribes that actions commenced in that court shall be entitled as sitting at one or other of the places. An information filed at one of the places and to which the defendants were recognized to appear was entitled "State of Kansas, County of Cherokee—ss.: In the District Court of said County and State," followed by the names of the parties, but did not name the place in which the information was filed and the case was tried. Held, that the omission of the name of the place in the county did not invalidate the information nor operate to the prejudice of the defendants.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 158; Dec. Dig. § 48.*]

2. CRIMINAL LAW (§ 636*)—TRIAL—ABSENCE OF DEFENDANT.

A defendant at liberty on a bond cannot, by voluntarily leaving the courtroom during a part of the trial, nullify the proceedings had nor impair the validity of a verdict rendered against him in his absence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. § 636.*]

3. CRIMINAL LAW (§ 1024*)—APPEAL BY STATE—DENIAL OF ATTORNEY'S FEES—INTOXICATING LIQUORS.

An appeal may be taken by the state from a decision refusing to allow fees to the Attorney General for convictions obtained by him in prosecutions for violations of the prohibitory liquor law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2614; Dec. Dig. § 1024.*]

4. OFFICERS (§ 100*)—COMPENSATION—INCREASE DURING TERM—ALLOWANCE OF ATTORNEY'S FEES—VALIDITY OF STATUTE.

The statute providing for the allowance of such fees is not repugnant to that part of section 15 of article 1 of the state Constitution which provides that certain state officers shall receive compensation for their services at stated times.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152-157; Dec. Dig. § 100.*]

5. COSTS (§ 308*)—CRIMINAL PROSECUTION—ALLOWANCE OF ATTORNEY'S FEES.

Where several defendants are jointly tried and convicted of offenses charged in a number of counts in a single information, the prosecuting attorney is entitled to the allowance of the fee provided in Gen. St. 1909, § 4377, for each count upon which each defendant is convicted.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1166-1169; Dec. Dig. § 308.*]

6. MANDAMUS (§ 4*)—GROUNDS—OTHER ADEQUATE REMEDY.

The extraordinary remedy of mandamus cannot be used where prompt and adequate relief may be had by an appeal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-21, 24-34; Dec. Dig. § 4.*]

(Additional Syllabus by Editorial Staff.)

7. OFFICERS (§ 99*)—"COMPENSATION."

The ordinary meaning of the term "compensation," as applied to officers, is remuneration, in whatever form it may be given, whether it be salaries and fees, or both combined.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 142-147; Dec. Dig. § 99.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1352-1357.]

8. OFFICERS (§ 99*)—"SALARY"—"FEES."

"Salary," as relating to the compensation of public officers, is generally regarded as a periodical payment dependent upon time, while "fees" depend on services rendered, the amount of which is fixed by law and payable when the judgment allowing them is entered.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 142-147; Dec. Dig. § 99.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6287-6291; vol. 8, pp. 7792, 7793; vol. 3, pp. 2712-2716.]

Appeal from District Court, Cherokee County.

Original Proceeding in Mandamus.

R. J. Bland and others were convicted of violating the prohibitory liquor law, and appeal and bring mandamus, and the State also

appeals. Affirmed on defendants' appeal, reversed on the State's appeal, and mandamus proceeding dismissed.

In Case 18,755:

Jno. S. Dawson, Atty. Gen., and W. P. Montgomery, of Topeka, for plaintiff. E. E. Sapp and A. S. Wilson, both of Galena, for defendants.

In Cases 18,820 and 18,821:

C. B. Skidmore, A. L. Majors, and S. C. Westcott, all of Galena, for appellants. John S. Dawson, Atty. Gen., and W. P. Montgomery, of Topeka, for the State.

JOHNSTON, C. J. R. J. Bland, Chas. Dixon, and Harry Brown were prosecuted for violations of the prohibitory liquor law. In the information each was charged in eleven counts with illegal sales of intoxicating liquors, and in the twelfth count each was charged with maintaining a common nuisance. Upon arraignment the defendants refused to plead, and thereupon a plea of not guilty was entered by the court as to each. The refusal to plead was based on the claim that the information was without validity because it was not entitled as the district court of Cherokee county, "sitting at Galena." The same objection was made to the introduction of testimony, but it was overruled. Upon the testimony offered, Dixon was convicted on the first, second, third, fourth, fifth, sixth, and twelfth counts and not guilty on five of the counts. Brown was found guilty on the same counts as was Dixon and not guilty on the remaining counts. Bland was found guilty on all of the counts except the eleventh, and as to that he was found not guilty. Motions for new trials and in arrest of judgment were overruled, and the sentence of the court was that Bland should be imprisoned in the county jail for 30 days and pay a fine of \$100 on each of the eleven counts on which he was convicted. Dixon and Brown were separately sentenced each to be imprisoned for 30 days and pay a fine of \$100 on each of the seven counts upon which they were convicted. In this connection the court adjudged that no attorney's fees should be taxed as costs on the convictions, and this ruling was based upon the ground that the prosecutions had been conducted by the Attorney General and not by the county attorney, and that, in the opinion of the court, the Attorney General was not, under the law, entitled to an allowance of attorney's fees. The question as to whether or not attorney's fees were allowable as costs in the case was reserved by the state for determination on appeal.

[1] It is first contended on behalf of the appellants Bland, Dixon, and Brown that, by reason of the absence of the words "sitting at Galena" from the caption of the information, the validity of the information was destroyed. The information was entitled, "State of Kansas, County of Cherokee—ss.: In the District Court of said County and

State," followed by the names of the parties. In the act providing for the holding of terms of the district court in Cherokee county, it is enacted that terms of court shall be held at the city of Columbus on the first Monday of January, May, and October, and at Galena on the first Monday of March and September and the second Wednesday of November, in each year. It is further provided that the clerk of the court shall maintain offices in Columbus and Galena and that all actions commenced in the court shall be entitled, "sitting at Columbus," or "sitting at Galena." Laws 1901, c. 156, §§ 1 and 2. In the Criminal Code it is provided that the information must contain the title of the action, specifying the name of the court to which it is presented. When the information was attacked, application was made to the court by the state to amend the information by adding the words, "sitting at Galena," and for the mere matter of formality an amendment might have been allowed; but evidently the court concluded, and rightly so, that the omission was not a material one. The information had been filed at Galena and the defendants had been recognized to appear there. They were brought to trial in Galena in the district court of Cherokee county, where the case was legally instituted. While terms of court are to be held at two places in Cherokee county, it is the same court which is held in both places. There is but one district court in the county, and cases filed at one place may be assigned and transferred for hearing and trial at the other place. The provision that actions filed in the different places shall be entitled as sitting at that place was directory only and a mere matter of convenience. It was essential to name the county where the offense was committed, and that was given in the caption and explicitly referred to in the body of the information. In a civil case it was contended that the omission of the name of the court and the county in the caption of a petition was fatal to the jurisdiction of the court and for the reason that is urged here, that is, that the statute required it to be done; but it was ruled that the omission did not affect the jurisdiction and that no prejudice could have resulted from it. *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268. Here the county and court were stated, and it is certain that the omission of the place in the county in which the information was filed did not result to the prejudice of the defendants. Aside from that, the Criminal Code provides that an information shall not be quashed "for a mistake in the name of the court or county in the title thereof," or "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Cr. Code, § 110, subs. 1 and 7 (Gen. St. 1903, § 6686).

[2] A second contention is that the absence of the defendants from a part of the trial defeats the judgments. It appears the defend-

ants were present when the trial began as well as the counsel who were acting for them. An objection to the admission of any evidence was made in their behalf based on the defect in the caption of the information. It was argued at length, and when it was overruled counsel withdrew from the case, and one of the defendants absented himself until the verdict was returned. The other two defendants were present throughout the trial and were given an opportunity to cross-examine the witnesses who testified in behalf of the state and also to offer testimony in their own behalf, but they did not avail themselves of the offers. Two of the defendants were present when the verdict was returned, and bonds in an increased amount for the appearance of all were given by all of them. Counsel appeared and presented motions for a new trial and in arrest of judgment in behalf of all the defendants, and all were present in court when these were overruled and the judgments of the court were pronounced. It is the right of the defendant in a criminal case to be present at all stages of the trial, but it has been held that his personal presence is not absolutely required during a trial for a misdemeanor. *State v. Baxter*, 41 Kan. 516, 21 Pac. 650. His presence is more important in a case of felony, and a trial of one charged with a felony during a compulsory absence of a defendant would be an infringement of his right. In felony cases, however, a defendant may waive his right to be present, and if, with full opportunity to be present, he voluntarily absents himself during the trial he waives his statutory right. *State v. Way*, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 603; *State v. Thurston*, 77 Kan. 522, 94 Pac. 1011. The voluntary absence of the defendants from the trial for the misdemeanors charged against them, when they had given a bond and obligated themselves to be present throughout the trial, is an effectual waiver of the right given them by law.

It follows that neither of the objections of the defendants can be sustained.

The remaining questions arise on the question reserved by the state.

[3] The decision of the trial court refusing to award judgment for the costs claimed by the state, or rather for attorney's fees to be taxed as costs, is one from which an appeal may be taken by the state. It falls within the third class provided for, namely, "upon a question reserved by the state." Crim. Code, § 283, subd. 3 (Gen. St. 1909, § 6857); *State v. Zimmerman*, 31 Kan. 85, 1 Pac. 257; *State v. Forney*, 31 Kan. 635, 3 Pac. 305; *Foss v. Jones*, 43 Kan. 72, 22 Pac. 1001.

The state sought to raise the same question in a mandamus proceeding brought against the district judge and the clerk of the district court; but, as the state is entitled to have the question determined upon an ordinary appeal, there is no occasion nor

ground for invoking the extraordinary remedy of mandamus.

Two questions arise on the appeal taken by the state: First, may any fees be allowed to the Attorney General as costs under statutes providing for the enforcement of the prohibitory liquor law; and, second, may fees be allowed upon each count upon which each defendant is convicted? The validity of the statute authorizing the taxation of fees in cases of this character has been attacked and upheld. In *re Ellis*, 76 Kan. 368, 91 Pac. 81; *State ex rel. v. Dawson*, 90 Kan. 839, 136 Pac. 320.

[4] The statute is now assailed upon a ground not previously considered, namely, that the allowance to the Attorney General of any fees would conflict with section 15 of article 1 of the state Constitution, which provides that: "The officers mentioned in this article shall, at stated times, receive for their services a compensation to be established by law, which shall neither be increased nor diminished during the period for which they shall have been elected." The Attorney General is one of the officers mentioned in the article and is subject to its provisions. No question arises as to the last clause of the section as the compensation of the Attorney General, by the payment of the fees challenged, has not been increased or diminished during the period for which he has been elected. It is contended, however, that the first part of the section, which provides that the officers shall, at stated times, receive for their services the compensation provided by law, prohibits the payment of any compensation to any of the officers mentioned other than that designated as salary. This clause is a direction to the Legislature to fix the compensation of certain state officers and to provide for payment of the same in whatever form it may be given at stated times. The admonition to provide for payment at stated times is for the benefit of the officer, and the provision does not carry with it the implication that the failure of the Legislature to make such provision would deprive the officer of his right to compensation. If the Legislature should prescribe the amount of compensation that an officer should receive and fail to fix the times when payment should be made, it would hardly be contended that the officer would not be entitled to compensation.

[7] The clause does not provide the form or medium of payment, and the ordinary meaning of the term "compensation" as applied to officers is remuneration in whatever form it may be given, whether it be salaries or fees, or both combined. 23 A. & E. Encycl. of L. 385. There is a limitation in the last clause of the section, and this provision has been interpreted and enforced (*Bailey v. Kelly*, 70 Kan. 869, 79 Pac. 735); but it is clear that the requirement that officers shall be paid compensation at stated

times does not mean that no compensation can be given if the time of payment is not fixed, nor does it mean that it must be paid in the form of salary. It has already been determined that compensation may be given to state officers in both salary and fees with, of course, the limitation that compensation cannot be increased or diminished during the term. *Nation v. Tulley*, 86 Kan. 564, 121 Pac. 507; *State ex rel. v. Dawson*, 90 Kan. 839, 136 Pac. 320.

[8] A statute giving compensation in the form of fees payable when judgment is entered and when they have been legally earned comes fairly within the clause providing for paying compensation at stated times. It is compensation that is established by law, and the provision that the fees are earned and to be taxed as costs when convictions are obtained amounts to a fixing of the times when compensation is payable. "Salary" is generally regarded as a periodical payment dependent upon time, while "fees" depend on services rendered, the amount of which is fixed by law and made payable at fixed times. There is nothing in the provision indicating that the stated times must be of equal duration nor that the times fixed for one kind of compensation shall be the same as that of another. The stated time for the payment of fees under the statute is when the judgment is entered finding them to be allowable and taxing them as costs in each case.

[5] Another question has been presented for determination, and that is the amount of fees that are allowable under the statute. The three defendants herein were prosecuted jointly under charges embraced in a single information. On the part of the state it is claimed that a fee should be allowed for each count upon which each defendant was convicted, and on the other side it is contended that no more should be allowed than if the convictions had been obtained upon each count against a single defendant. It is provided that the Attorney General's fees in this class of cases shall be measured by those allowed to county attorneys. Gen. St. 1909, § 4378. In the statute fixing the fees it is provided that: "The county attorney shall be allowed a fee of twenty-five dollars upon each count upon which the defendant shall be convicted, and the same shall be taxed as costs in the case. * * *" Gen. St. 1909, § 4377.

As will be observed, there can be no compensation unless the prosecution results in a conviction; but the prosecuting attorney is to be allowed a fee upon each count upon which a defendant is convicted. If the defendants had been tried upon separate informations, there would be no question of the right of the prosecuting attorney to a fee for each conviction of each defendant, and will the fact that all the defendants were jointly tried in one prosecution affect the amount of compensation? Although prosecuted to-

gether, each defendant is entitled to individual counsel and the compulsory process requiring the attendance of his own witnesses. Each is separately arraigned, and a plea is made by or in behalf of each defendant. Each is entitled to challenge jurors as if he were being tried alone, and each is entitled to the same number of challenges. Separate findings upon the several counts are required to be made as to each defendant, and separate judgments of conviction are entered against each defendant upon each count. When judgment is so rendered, each is liable only for the penalty assessed against him and is not responsible for the penalties assessed against the other defendants. The fact that one may pay a fine and suffer imprisonment under the sentence will not satisfy the judgment in respect to the other codefendants. Where several defendants are jointly charged with a felony, separate trials may be had upon request, and separate trials may also be had in other cases in the discretion of the court. Crim. Code, § 218 (Gen. St. 1909, § 6797). In all prosecutions of those jointly charged with offenses the individual rights of defendants are recognized and protected. On account of the provisions made for the assertion of individual rights and for separate findings and entries of judgment against each defendant, the prosecuting attorney must make additional preparation and render additional service. As the law requires that there must be separate convictions against each individual defendant, we think the prosecuting attorney is entitled to a fee for each conviction of each defendant.

Under a statute of Indiana giving the prosecuting attorney a fee for every conviction upon an indictment or presentment on a plea of not guilty, several persons were jointly charged for a riot, and it was held that there were as many convictions as there were defendants found guilty and that the prosecuting attorney was entitled to a fee against each defendant. *State v. Cripe*, 5 Blackf. (Ind.) 6. In *Penland v. State*, 20 Tenn. (1 Humph.) 383, 384, where several persons were jointly indicted and convicted, it was held that a fee should be taxed against each defendant under a statute which provides that: "Whenever any fine or cost shall be rendered in any court against any defendant upon any prosecution under any of the statutes which may be enforced to discourage and suppress gaming, ten dollars shall be taxed in the bill of cost as a fee for the attorney general." In *State v. Hunter*, 33 Iowa, 361, 364, it was held that the prosecuting attorney was entitled to separate fees upon the conviction of several defendants jointly indicted and tried. The court said: "The statute allows to that officer for each conviction on plea of guilty \$5, which 'shall be taxed against the defendant' and collected by the clerk, etc. The judgments being required to be several on the several

pleas of the defendants, this fee is properly taxable in each judgment. The judgments are the several convictions on the pleas of guilty entered, and the fee should be taxed as a part of each judgment." In Colorado, where the statute allows the district attorney a fee of \$20 for every conviction for felony, it was held that where several charges were made against two jointly, and separate trials had, and a conviction on each, the district attorney was entitled to a fee for the conviction of each. *Board of County Com'rs v. Graham*, 4 Colo. 201. In Texas a law gave the Attorney General a fee in cases where a judgment against convicted defendants was affirmed. A joint appeal was taken by several defendants with the result that the judgment was affirmed. A judgment taxing a fee against each defendant was sustained. *Hogg v. State*, 40 Tex. Cr. R. 109, 48 S. W. 580. See, also, *State v. Kinneman et al.*, 39 Ind. 36.

[5] On the appeal taken by the defendants Bland, Dixon, and Brown, the judgments against them will be affirmed. On the appeal taken by the state, the judgment refusing an allowance of fees to the Attorney General will be reversed, and the cause remanded, with directions to enter judgment in accordance with the opinion herein. The mandamus proceeding brought against the district judge and clerk of the district court will be dismissed. All the Justices concurring.

STATE v. BLOOM.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 307*)—INSTRUCTIONS—EVIDENCE.

On the trial of one charged with murder in the first degree, an instruction should be given defining and submitting to the consideration of the jury every crime, included in such charge, of which there is any evidence.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 638-641; Dec. Dig. § 307.*]

2. CRIMINAL LAW (§ 826*)—INSTRUCTIONS—REFUSAL OF REQUEST.

If, in such case, a request for a proper instruction is made before the charge of the court is given to the jury, it should not be refused on the sole ground of being out of time, notwithstanding any rule of court, but should be considered and given or refused on its merits.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2008; Dec. Dig. § 826.*]

3. HOMICIDE (§ 309*)—REFUSAL OF INSTRUCTION—EVIDENCE.

In this case there was evidence which entitled the accused to an instruction defining manslaughter in the fourth degree, as well as in the third degree, and the question of his guilt or innocence as to each of such degrees should have been submitted to the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

(Additional Syllabus by Editorial Staff.)

4. HOMICIDE (§§ 3, 79*)—"DANGEROUS WEAPON"—"WEAPON."

A "dangerous weapon" is ordinarily defined as one calculated or designed to inflict death or great bodily harm, or by the manner in which it is used is likely to produce death or great bodily harm. A "weapon" may be dangerous from the very design of its make, while any object that may be used to inflict injury upon another, offensively or defensively, may be a dangerous weapon, in the manner in which it is used. The Legislature, in defining manslaughter in the third degree (Gen. St. 1909, § 2506) and in the fourth degree (section 2514), wherein practically the only distinction is that the killing in the one case should be by a "dangerous weapon" and in the other by a "weapon," recognized the distinction that in the one case the weapon should be dangerous in itself, and in the other it became dangerous only as used (citing Words and Phrases, vol. 2, p. 1828; see, also, vol. 8, p. 7423).

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 5, 105; Dec. Dig. §§ 3, 79.*]

Appeal from District Court, Clark County.

H. C. Bloom was convicted of manslaughter in the third degree, and appeals. Reversed.

F. L. Martin and Van M. Martin, both of Hutchinson, for appellant. Jno. S. Dawson, Atty. Gen., H. R. Daigh, of Ashland, and A. B. Reeves, of Dodge City, for the State.

SMITH, J. The appellant was charged with the crime of murder in the first degree. Upon his trial he was convicted of the crime of manslaughter in the third degree. Numerous assignments of error are made, but, as the case is to be remanded for a new trial, we need only to discuss such questions as will probably arise on a second trial. Of these perhaps the principal question is whether the court erred in refusing to give a requested instruction defining the crime of manslaughter in the fourth degree and in not submitting to the jury a form of verdict for that degree, as well as the instruction defining the crime of manslaughter in the third degree and submitting a form of verdict for that degree, as it did.

Manslaughter in the third degree is defined in section 18 of the crimes and punishments act, section 2506 of the General Statutes of 1909, as follows: "The killing of another in the heat of passion, without design to effect death, by a dangerous weapon, in any case except wherein the killing of another was justifiable or excusable, shall be deemed manslaughter in the third degree."

Section 26 of the same act, section 2514 of the General Statutes of 1909, defines manslaughter in the fourth degree as follows: "The involuntary killing of another by a weapon, or by means neither cruel or unusual, in the heat of passion, in any cases other than justifiable homicide, shall be deemed manslaughter in the fourth degree."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It will be observed that, with the exception of the words "neither cruel or unusual," used in the latter definition and not in the former, and which may properly be disregarded as inapplicable to this case, the chief distinction between the degrees of manslaughter is the word "dangerous" before the word "weapon," used in the definition of third degree manslaughter, and not in the definition of fourth degree. This difference, however, may be very material in the case accordingly as a jury might view the evidence.

[4] The definition given in 30 Am. & Eng. Encyc. Law, 443, and in 2 Words and Phrases Judicially Defined, 1828, 13 Cyc. 257, and some other law writers, of a "dangerous weapon," being taken from the decisions of various courts, is one calculated or designed to inflict death or great bodily harm, or by the manner in which it is used is likely to produce death or great bodily harm. Some courts, also, give practically the same definition to the word "weapon." All of the courts, however, recognize that a weapon may be dangerous from the very design of its make, as a gun or a sword, while any object that may be used to inflict injury upon another offensively or defensively may be a dangerous weapon in the manner in which it is used. For instance, one authority (State v. Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498) holds that a pin thrust down the throat of an infant, causing death, constitutes a killing with a deadly weapon. It is said that where a weapon is in itself a dangerous weapon, it is the province of the court to so tell a jury in a criminal trial, whereas if the weapon is or is not dangerous according to the manner of its use, it is a question for the jury. It is evident that our Legislature, in defining the two crimes, wherein practically the only distinction is that the killing in the one should be by a *dangerous* weapon and in the other by a weapon, recognized the distinction that in one case the weapon should be dangerous in itself and in the other that it became dangerous only as used. The manner of the use is clearly to be determined as a fact by the jury.

[3] Upon the argument of the case in this court, the appellant's counsel exhibited a small knife, commonly known as a penknife, which he said was the only knife in the possession of the appellant at the time of the difficulty, and also said it was the knife exhibited to the jury at the trial. Counsel for the state, being present, made no objection to the statement. Assuming, then, that this was the evidence before the jury, it cannot be said as a matter of law that the knife, in itself, was designed to inflict death or great bodily harm upon an adversary. Neither can we say that it could not have

been considered by the jury simply as a "weapon," within the meaning of that word as used in the statutory definition of manslaughter in the fourth degree.

Counsel for appellant first requested an instruction to the jury, in substance, that under the evidence in this case, the only question for the consideration of the jury was whether the defendant was guilty or not guilty of manslaughter in the third degree. This request was refused by the court, but the court thereafter gave the jury an instruction defining manslaughter in the third degree in accordance with the statute, and submitted to the jury only two forms of verdict, one of which was to be used in case they found the defendant not guilty, and the other was to be used in case they found the defendant guilty of the crime of manslaughter in the third degree in accordance with the definition given of that degree.

[1, 2] Counsel for appellant submitted to the court an instruction defining manslaughter in the fourth degree, as defined in the statute, and asked that the instruction be given and a form of verdict submitted to the jury in accordance therewith. This request was refused, on the ground that it was too late, although it was made before the jury retired to consider their verdict. We think the appellant was entitled to have the instruction requested given, and to have a form of verdict in accordance therewith submitted for the determination of the jury; also, that the request was not made too late. State v. Clark, 69 Kan. 576, 77 Pac. 287. No rule of court or order of procedure should be technically followed to deprive a defendant on trial for a grave crime of any right under such circumstances. Sections 6815 and 6816 of the General Statutes of 1909 (Code Cr. Proc. §§ 236, 237).

The appellant also requested the court at the same time to give a proper instruction in regard to circumstantial evidence, substantially, that the jury should take into consideration in determining the guilt or innocence of the defendant all the circumstances surrounding the transaction as shown by the evidence. This instruction was also refused for the same reason. It should have been given. Exceptions were timely made to the refusal to give each instruction, and the motion for a new trial fairly embraced both questions. In overruling the motion for a new trial, the court remarked that the two instructions, respectively relating to manslaughter and circumstantial evidence, were requested at the time the court was about to read his instructions to the jury.

The judgment is reversed and the case is remanded for a new trial. All the Justices concurring.

MILLER v. MILLER et al.
(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. PERPETUITIES (§ 4*)—CREATION OF FUTURE ESTATES—VALIDITY.

A grantor executed a voluntary conveyance of land to his son for life, remainder to the son's wife for life, should she survive her husband, or so long as she remains his widow, remainder in fee to the heirs of his son's body, and, in default of such heirs, reversion to the grantor. The grantor filed the deed for record, and afterwards offered it to his son, who refused to accept it. At that time the wife and two children of the son were living. Held, the common-law restrictions on the creation of future estates were abolished by section 3, c. 22, of the General Statutes of 1888, providing that conveyances of land or of any other estate or interest therein may be made by deed, and the remainders to the son's wife and to the heirs of his body are valid, although the particular estate for life to him did not come into existence.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

2. REMAINDERS (§ 5*)—ACCELERATION—REFUSAL OF LIFE TENANT TO ACCEPT.

The remainders are not accelerated by the refusal of the son to accept the conveyance of the life estate to him.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. DEEDS (§ 76*)—INVALIDITY—EFFECT.

The provision for the son is not so complicated with the other gifts specified in the deed that the failure of one destroys them all.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 203-205; Dec. Dig. § 76.*]

4. DEEDS (§ 133*)—REMAINDERS—VESTING OF ESTATE—HEIRS.

The son has no heirs at all while living. Who the heirs of his body may be cannot be ascertained until his death, and children now in being take nothing under the deed, unless they outlive their father.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368-371; Dec. Dig. § 133.*]

5. DEEDS (§ 59*)—ACCEPTANCE—EFFECT OF RECORDING.

The recording of the deed by the grantor made it effective as to all persons benefited by it who did not dissent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136-139; Dec. Dig. § 59.*]

6. DEEDS (§§ 93, 109*)—EVIDENCE (§ 461*)—PAROL—CONSTRUCTION OF DEED.

The intention of the grantor is to be ascertained from the language employed in the deed. In case of doubt interpretation may be aided by evidence of the situation and circumstances of the grantor and his relation to the grantees at the time the deed would take effect if valid; but it cannot be impeached by testimony of the grantor that he did not intend anybody should have the land if his son refused to take.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232, 239, 280, 598-600; Dec. Dig. §§ 93, 109; Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

(Additional Syllabus by Editorial Staff.)

7. DEEDS (§ 7*)—ESTATES SUBJECT TO CONVEYANCE—"CONVEYANCES OF LAND"—"ANY OTHER ESTATE OR INTEREST THEREIN."

As used in Gen. Stats. 1888, c. 22, § 3, providing that conveyances of land, or of any other estate or interest therein, may be made by deed,

the words "conveyances of land" mean the land itself in fee simple, and "any other estate or interest therein" includes estates of freehold and less than freehold, of inheritance and not of inheritance, absolute and limited, present and future, vested and contingent, and any other kind a grantor may choose to invent consistent with public policy.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 10-12; Dec. Dig. § 7.*]

8. WILLS (§ 625*)—CONSTRUCTION—"EXECUTORY DEVISE"—NATURE OF ESTATE.

An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the deviser, but only on some future contingency. It differs from a remainder in three very material points: (1) That it needs not any particular estate to support it; (2) that by it a fee-simple or other less estate may be limited after a fee-simple; (3) that by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1447-1451; Dec. Dig. § 625.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2573-2575; vol. 8, p. 7656.]

Appeal from District Court, Miami County. Action by Lewis D. Miller against George W. Miller and Nettie J. Miller, in which, on application, others were made parties. From the judgment, defendants appeal. Reversed and remanded, with directions.

Sheridan, Meuser & Sheridan, of Paola, for appellants. W. L. Joyce, of Paola, for appellee.

BURCH, J. In March, 1902, Lewis D. Miller undertook to divide a portion of his real estate among his children, seven in number. To that end he executed a deed to each one of a particular tract of land. His wife joined in the execution of the deeds; but he retained them in his possession. Afterwards his wife died, and he remarried. On December 7, 1904, the day before his remarriage, he filed the deeds for record, and paid for the recording of them. As soon as they were recorded, they were returned to him. Each deed conveyed an estate in fee simple, except the one to his son George W. Miller. This deed was in form a warranty deed executed in consideration of parental love and affection, and granted the land to George W. Miller for his life, remainder to Nettie J. Miller, for her life, should she survive her husband, or so long as she remains his widow, remainder in fee to the heirs of the body of George W. Miller, and, in default of such heirs, reversion to the grantor. On February 1, 1905, Lewis D. Miller handed this deed to George W. Miller; but the son refused to accept it because of the discrimination his father had made against him and in favor of his brothers and sisters. At this time George W. Miller and Nettie J. Miller were husband and wife, and had two children, Vernon and Ethel. In February, 1906, Nettie J. Miller procured a judgment for alimony

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against her husband. In March, 1906, an execution was issued, and George W. Miller's interest in the land described in his father's deed to him was sold. Nettie J. Miller became the purchaser, and a sheriff's deed was issued to her. The action was instituted by Lewis D. Miller against George W. Miller and Nettie J. Miller to cancel the unaccepted deed and the sheriff's deed, and to quiet his title. On the application of Nettie J. Miller the children were made parties to the suit. Judgment was rendered in favor of the plaintiff, and the defendants appeal.

The district court held that the remainders to Nettie J. Miller and to the heirs of the body of George W. Miller were void. No estate of any kind vested in George W. Miller, because he repudiated the effort of his father to convey to him. The purpose of the grantor was to create freehold estates in remainder to commence at a future time. Under the common law this could not be done without the grant of a precedent particular estate to support them, and under the common law, whenever the particular estate is void at its inception, or for any reason does not come into being, remainders limited upon it are defeated.

[1] This court is of the opinion that the common-law rules referred to have been abrogated by statute.

The territorial Legislature of 1855 passed an act relating to conveyances, which dealt with the subject of the creation of future estates as follows: "When an estate hath been, or shall be, by any conveyance, limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter, born after the decease of his or her father, shall take the estate, in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death. And, hereafter, an estate of freehold, or of inheritance, may be made to commence in future by deed, in like manner as by will." Statutes of Kansas Territory 1855, c. 26, § 9.

In 1859 the act of 1855 regulating conveyances was revised, and section 9 was condensed and restated as follows: "Estates may be created, to commence at a future day." Kansas Statutes 1859, c. 30, § 6. This act remained in force until repealed in 1868, when another revision occurred. In this revision section 6 of the act of 1859 was omitted, and the subject was covered by a declaration as general as it was possible to make.

[7] "Conveyances of land, or of any other estate or interest therein, may be made by deed, executed by any person having authority to convey the same, or by his agent or attorney, and may be acknowledged and recorded as herein directed, without any other act or ceremony whatever." Gen. Stat. 1868, c. 22, § 3.

The words "conveyances of land" mean, of

course, the land itself in fee simple absolute. The words "any other estate or interest therein" include estates of freehold and less than freehold, of inheritance and not of inheritance, absolute and limited, present and future, vested and contingent, and any other kind a grantor may choose to invent consistent, of course, with public policy.

The doctrine of the particular estate arose from the necessity under the feudal system of always having a tenant to fulfill feudal duties, defend the estate, and represent it so that other claimants might maintain their rights. The only way to pass a freehold estate was by livery of seisin which operated immediately or not at all, and, if the freehold became vacant, the lord had an immediate right of entry, and all limitations of the tenancy came to an end. The result was that, in order to create a freehold estate, the enjoyment of which was to be postponed to a future time, it was necessary to support it by a precedent particular estate taken out of the inheritance, and to make livery of seisin to the particular tenant, which by fiction inured to the remainderman or remaindermen. A much more liberal and equitable doctrine applied to the transmission of estates by will.

[8] "An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the deviser, but only on some future contingency. It differs from a remainder in three very material points: (1) That it needs not any particular estate to support it; (2) that by it a fee-simple or other less estate may be limited after a fee-simple; (3) that by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same." 2 Bl. Com. p. 172.

The Legislature of 1855 placed conveyances by deed on the same footing as wills so far as the creation of future estates was concerned; but, following the lead of the Legislatures of some of the older states, the Kansas Legislature of 1868 undertook not only to permit the granting of future estates but to abolish other common-law restrictions on alienation not suited to allodial tenures and modern conveyancing, and to make transfers of interests in land as free as possible. The concluding portion of section 3 of the act of 1868, quoted above, expressly abolishes the common-law ceremony of livery of seisin which stood as an insuperable bar to the creation of freeholds to begin in future unless supported by a particular estate. The language was adapted from statutes of other states which usually provided that deeds duly acknowledged and recorded should be valid and pass estates in land "without livery of seisin, attornment, or other ceremony whatever."

It follows that the remainders to Nettie J. Miller and to the heirs of the body of George W. Miller do not require the support of the life estate to George W. Miller in order to be valid.

[2] The defendants claim the remainders were accelerated by the refusal of George W. Miller to take, and consequently that they occupy the same situation as if he were dead. If a testator devise an estate for life to his widow, with remainder over in fee, and the widow elect to take under the law and not under the will, the remainder is ordinarily accelerated to take effect as if the widow had died. The rule is equitable in character, and proceeds upon the assumption that the gift over of the fee was the principal thing in the testator's mind, that the life estate was a mere charge on that gift, and that he desired the gift in fee to take effect whenever the life estate for any cause was out of the way. The rule applies to other situations, but never when the result would be contrary to the testator's intention. 16 Cyc. 651; 24 A. & E. Encycl. of L. (2d Ed.) 418; 18 L. R. A. (N. S.) 272, note.

[4] The defendants Vernon Miller and Ethel Miller, children of George W. Miller, are not mentioned in the deed. The remainder in fee is given to the heirs of the body of George W. Miller, dubious and uncertain persons not now known, and who cannot be ascertained except on the contingency of George W. Miller's death. He has no heirs at all while he is living. We have, then, a deed under which George W. Miller takes nothing, and his two children now in being take nothing, unless they outlive their father. Nettie J. Miller's estate is simply a charge on the postponed fee, which she is not to enjoy unless she survive her husband, and then only during widowhood. Manifestly the grantor was not making a deed of no immediate benefit to any one but her, and which would put her in present possession to continue for her life, should she not remarry, although her husband is still living. If, therefore, the rule relating to wills were to be applied, the remainders could not be accelerated. That rule, however, will rarely govern grants by deed. A deed sounds in contract. It takes effect on delivery, and not after the grantor's death, and, in the absence of the equivalent of alternative provisions, the presumption is that each grantee is given what the grantor intended he should receive. If any one refuse to take, his share remains a portion of the grantor's estate, to be disposed of by will or by deed as he may desire, or to descend to his heirs, and not to be absorbed by other grantees whose portions are defined by the instrument.

[3] The only remaining question is whether or not the provision for George W. Miller is so complicated with the other gifts specified in the deed that the failure of one destroys them all. This question is one of interpretation, to be resolved by a consideration of the language of the instrument. In case of doubt the interpretation may be aided by evidence of the situation and cir-

cumstances of the grantor and his relation to the grantees at the time the instrument would take effect if valid.

The scheme of the instrument in question is perfectly simple, and the failure of one portion to become operative does not involve any of the others. If the extrinsic evidence were to be resorted to, it would confirm the deed. Lewis D. Miller and his first wife made a distribution of his property among their children. The deeds were not delivered in the lifetime of the first wife, and to make them effective against the second wife they were placed on record the day before her marriage to Lewis D. Miller. At that time all the children were in possession of the lands intended for them except one. George W. Miller had occupied the land in controversy for three or four years under an arrangement with his father that he should pay the taxes and have all the crops he could raise. He was given a life estate because of his dissolute habits and to prevent him from squandering the property.

[5, 6] Lewis D. Miller was permitted to testify that he did not intend anybody else should have the land if George W. Miller did not accept the deed. The recording of the deed made it effective as to all grantees benefited by it who did not dissent. *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490. The intention of the grantor must be derived, as in other cases, from the language of the instrument itself, which cannot be impeached except on the equitable grounds of accident, mistake, fraud, and the like, none of which appears. See *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L. R. A. (N. S.) 224.

The result is that the estate to Nettie J. Miller for life or during widowhood and the remainder in fee to the heirs of the body of George W. Miller should be confirmed; but the title of Lewis D. Miller should be quieted against George W. Miller and against the sheriff's deed to Nettie J. Miller.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment as indicated. All the Justices concurring.

PEOPLE v. BRADLEY. (Cr. 438.)

(District Court of Appeal, First District, California. Oct. 15, 1913.)

1. HOMICIDE (§ 253*) — TRIAL — EVIDENCE — SUFFICIENCY.

In a prosecution for homicide, evidence held sufficient to support the conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

2. HOMICIDE (§§ 55, 111*) — DEFENSES — UNLAWFUL ARREST.

Where accused was arrested by a police officer in plain clothes who did not disclose his authority, that fact will not justify accused in killing the officer or reduce the crime from

murder to manslaughter, where no force or show of force was resorted to by the policeman.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 79, 143, 144; Dec. Dig. §§ 55, 111.*]

3. CRIMINAL LAW (§ 696*)—TRIAL—MOTIONS TO STRIKE.

Accused cannot predicate error on the refusal of the court to strike out alleged incompetent evidence admitted without objection and under the stipulation of accused's counsel as to the mode of admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

4. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS.

In a prosecution for murder, where an eyewitness to the killing, who stated in the presence of accused that he saw him fire two shots into the body of deceased, and accused did not deny the accusation, but asked the eyewitness whether he could say how far back in the alley he was when he shot deceased, was not called, evidence of the statements of the witness of the killing, and accused's reply thereto, is admissible as an admission; the question whether accused did or did not unequivocally admit his guilt going to the weight and not to the competency of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Robert Bradley was convicted of murder in the first degree, and from the judgment and an order denying a new trial, he appeals. Affirmed.

T. L. Christianson and William H. H. Gentry, both of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

LENNON, P. J. The defendant in this case was charged with the crime of murder. Upon his trial he was convicted of murder in the first degree, and subsequently sentenced to life imprisonment in the state prison. He has appealed from the judgment and from an order denying him a new trial.

The defendant did not take the witness stand in his own behalf, and the case was submitted to the jury upon his plea of not guilty and the evidence adduced by the people.

[1, 2] The facts of the case upon which the people secured a conviction are briefly as follows: On the day of the homicide the defendant, in company with a companion, encountered the deceased, a special policeman, at the corner of East Twelfth street and Thirteenth avenue in the city of Oakland. The deceased, who was in plain clothes and without any insignia of his office, halted the defendant and his companion with the command, "Come here." The minor circumstances attending the meeting of the defendant and the deceased, as detailed by the companion of the defendant, need not be narrated. It will suffice to say that apparently they aroused the suspicions of the deceased

as to the character of the defendant, and that a partial search of the defendant by the deceased resulted in the discovery of an ordinary head cap in the pocket of the defendant. The defendant's possession of this cap, his explanation of how he became possessed of it and his conduct generally evidently confirmed the suspicion existing in the mind of the deceased which undoubtedly had impelled him to hail and halt the defendant in the first instance. Finally the deceased said to the defendant, "You are under arrest," or, "Come with me to the lockup." The defendant at first submitted to arrest and proceeded quietly with the deceased for a short distance until they came to an alley, whereupon the defendant suddenly turned into the alley and immediately cried out to the deceased, "Come on and have it out." Without more ado, the defendant fired two shots from a revolver at the deceased, both of which struck the deceased and killed him instantly. The search of the defendant was accomplished by the deceased without resorting to any more force than was necessary to unbutton the coat of the defendant; and the evidence before us does not disclose that the deceased at any time before, during, or after the arrest resorted to even a display of his club or pistol for the purpose of enforcing his authority or preventing the escape of the defendant. The defendant fled from the scene of the crime and was not apprehended until several months later. At the time of his arrest the defendant endeavored surreptitiously to rid himself of a loaded revolver, which was subsequently shown to be the weapon with which he killed the deceased.

We are satisfied that the evidence is amply sufficient to support the verdict of the jury finding the defendant guilty of a willful and malicious murder. Not even the semblance of a legal excuse is shown for the killing of the deceased. It may be conceded that the evidence does not show that the arrest of the defendant was authorized, and that therefore it was a trespass against the person of the defendant, which might have been rightfully resisted with the same degree of force employed in making the arrest. The evidence, however, affirmatively shows that no force or show of force was resorted to by the deceased at any time. The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest; but such facts alone were wholly inadequate either to justify the killing of the deceased or to reduce such killing from murder to manslaughter. *People v. Pool*, 27 Cal. 573; *Keady v. People*, 32 Colo. 57, 74 Pac. 893, 66 L. R. A. 353.

[3] It is insisted that the trial court erred to the prejudice of the defendant in permit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ting one Milton Schwartz, a stenographic reporter, to read as a witness for the people a transcription of his shorthand notes of a statement made to the district attorney in the presence of the defendant by one John H. Rector, who was an eyewitness to the killing of the deceased, but who was not called as a witness at the trial. Immediately after the witness Schwartz was sworn, the district attorney announced that it was his purpose to show by this witness that the defendant, in response to the statement of Rector, had admitted killing the deceased. No objection was interposed at any time to the testimony of the witness Schwartz or to the reading by him of the transcription of his shorthand notes of what was said and done by Rector and the defendant at the interview of Rector in the office of the district attorney. In fact, counsel for the defendant was the first to suggest and stipulate that the witness Schwartz might read from his transcription in lieu of testifying from his notes of that interview. The sum and substance of Schwartz's testimony was that Rector had stated in the presence of the defendant that he (Rector) had seen the defendant fire two shots from a revolver into the body of the deceased; that the defendant did not deny the accusation that he had fired the shots which killed the deceased, but did request and was granted permission to question Rector, and thereupon asked, among other questions, the following: "Can you say how far back in the alley I was when I shot him?" When the witness Schwartz had concluded the reading of his shorthand notes, counsel for the defendant moved the trial court to strike out all that was narrated by the witness, upon the ground in effect that the testimony of the witness, in so far as it purported to narrate the statements of Rector, was hearsay, and that the question put by the defendant to Rector could not be construed as an admission of guilt. The motion to strike out was denied; and, when stating its reasons for the ruling, the trial court practically charged the jury that the statement of Rector as detailed by the witness Schwartz was admissible only for the purpose of showing "the conduct of the defendant upon those statements being made in his presence * * * to show the conduct of the defendant with reference to the statements * * * and what he had to say."

The motion to strike out was properly denied. A motion to strike out evidence must be based upon an objection previously stated. *People v. Long*, 43 Cal. 444. This, of course, assumes that an opportunity to object presented itself, as it did in the present case. The record before us shows that counsel for the defendant not only failed in the presence of ample opportunity to object to the testimony now complained of, but expressly stipulated that it might be received for the pur-

pose for which it was offered. For these reasons alone the defendant will not now be heard to complain of the ruling denying the motion to strike out.

[4] But apart from these considerations, the statement of Rector, even though it was in part hearsay, was admissible under the exception to the general rule which permits in evidence accusatory statements made in the presence and hearing of the defendant by a person not called as a witness, for the single purpose of showing that the defendant's conduct in response to the accusation was not that of an innocent man, or that his statements in reply implicated him in the commission of the crime charged against him. *People v. Teshara*, 134 Cal. 542, 66 Pac. 798; *People v. Philbon*, 138 Cal. 530, 71 Pac. 650; *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

Counsel for the defendant contends that the question put to Rector by the defendant was not an unequivocal admission of guilt and was susceptible of a different construction. This is but an argument against the weight of the evidence rather than its admissibility; and it was for the jury to determine whether or not, under all of the circumstances, the language of the question involved an admission of guilt.

We have examined the other points made in support of the appeal. They are not well taken, and are not of sufficient merit to warrant a discussion of them.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

PEOPLE v. STIRGIOS. (Cr. 450.)

(District Court of Appeal, First District, California. Oct. 15, 1913.)

1. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS.

In a criminal prosecution, if accused desires a charge upon any particular portion of the case, he should request it, and, where he does not, he cannot object that the charge does not cover the particular point for which specific instruction was desired.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.*]

2. WITNESSES (§ 350*)—CREDIBILITY—CONVICTION—RELEVANCY.

In a criminal prosecution, where one of accused's witnesses admitted that he was convicted of felony upon his plea of guilty, and neither the merits of the conviction nor the reasons which induced the plea of guilty were relevant to the present prosecution, evidence thereof was properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149; Dec. Dig. § 350.*]

Appeal from Superior Court, Alameda County; William H. Donohue, Judge.

William Stirgios was convicted of burglary, and, from the judgment and an order

denying his motion for new trial, he appeals. Affirmed.

T. L. Christianson, of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

LENNON, P. J. This is an appeal from a judgment of final conviction and from an order denying a new trial in a case wherein the defendant was convicted of the crime of burglary in the first degree.

The evidence upon the whole case not only warranted but compelled the conviction of the defendant.

The record does not support counsel for the defendant in the claim that certain incriminatory statements and admissions of the defendant were shown to be induced by duress and promise of reward. Upon this phase of the case the most that can be said for the defendant is that the record shows a decided conflict in the evidence.

[1] The law of the case generally was fully, fairly, and correctly covered by the trial court in its charge to the jury. If counsel for the defendant deemed it essential that the jury should be specifically instructed upon any particular phase of the case, it was his privilege and duty to request such an instruction. In the absence of such a request, the charge to the jury is not open to attack on the ground that it failed to specifically cover a particular point in the case which counsel for the defendant deemed pertinent and material to the question of defendant's guilt or innocence.

[2] A witness for the defendant admitted on cross-examination that he had been convicted of a felony by pleading guilty thereto. Neither the merits nor demerits of the confessed conviction, nor the reasons which induced the plea of guilty upon which such conviction was founded, were relevant to the issues upon which the defendant in the present case was being tried, and therefore the lower court ruled correctly when it sustained an objection to a question by counsel for the defendant which called for the reasons which induced the witness to plead guilty.

The remaining points made in support of the appeal have been considered by us. They are absolutely without merit, and wholly undeserving even of mention.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

GILLIGAN v. DENVER & R. G. R. CO.
(Supreme Court of Utah. Nov. 24, 1913.)

1. RAILROADS (§ 273½*)—INJURIES TO PERSONS ON OR NEAR TRACKS—CARE REQUIRED. While a railroad company is not bound to exercise ordinary care to prevent injury to a

bare licensee, yet where a building, with the acquiescence of the company, had been erected upon its right of way, and used continuously for more than 40 years, the relationship existing was more than bare licensor and licensee, and the railroad company was bound to use ordinary care to prevent injuring the occupant and his property.¹

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 273½.*]

2. NEGLIGENCE (§ 1*)—NATURE AND ELEMENTS OF NEGLIGENCE.

Where the law imposes the duty of ordinary care, there is no distinction between negligence arising from negative acts of omission and positive acts of commission.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. RAILROADS (§ 273½*)—INJURIES TO PERSONS ON OR NEAR TRACKS.

Where a railroad company permitted a house to be erected upon its right of way, the duty imposed upon it to exercise ordinary care to prevent injury to the occupant is not limited to an injury occurring on its track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 273½.*]

4. RAILROADS (§ 282*)—INJURIES TO PERSONS ON OR NEAR TRACKS—ADMISSIBILITY OF EVIDENCE.

In an action against a railroad company for an injury to an occupant of a house located on its right of way, evidence as to the use and occupation of the right of way by other persons near the house in question was properly admitted to show the character and extent of the use and the relationship of the parties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. § 282.*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Patrick J. Gilligan against the Denver & Rio Grande Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Van Cott, Allison & Riter, of Salt Lake City, for appellant. Willard Hanson, of Salt Lake City, for respondent.

FRICK, J. This was an action to recover damages for personal injuries and loss of and damages to personal property which respondent suffered and sustained through the alleged negligence of appellant. The accident causing the injury occurred on the 15th day of February, 1912, at Bingham Canyon, Salt Lake county. The injury and damages aforesaid were caused by a train composed of an engine and three cars loaded with ore. The engine and cars were derailed, or left the track, rather, in descending a steep grade after the trainmen in charge had lost control of the same. It was in substance alleged in the complaint that the trainmen in charge of said train lost control thereof for the reasons: (1) That appellant had negligently failed to equip the engine and cars aforesaid with proper and sufficient braking

¹ Young v. Clark, 16 Utah, 43, 50 Pac. 532; Teakle v. San Pedro, L. A. & S. L. Ry. Co., 32 Utah, 275, 90 Pac. 402, 10 L. R. A. (N. S.) 466, Palmer v. Railroad, 34 Utah, 466, 93 Pac. 689, 16 Ann. Cas. 223, distinguished.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appliances; (2) because the rails were so worn that the braking appliances on said engine and cars were useless, causing the wheels of said cars to skid on the rails and to leave the track; and (3) because the train was negligently managed and operated at a great and dangerous rate of speed while descending a steep grade, and that for all of said reasons the engine and cars left the track and caused the injury and damages complained of.

The undisputed facts, in substance, are: That on the 15th day of February, 1912, the respondent, as tenant, was occupying a portion of a certain building in Bingham Canyon, using the same for a tailoring establishment, which business or occupation respondent followed; that early on the morning of the day aforesaid the train referred to above, composed of what is called a Shay engine and three cars loaded with sulphide ore, was descending a steep grade on what is called the "Copper Belt" railroad, which is located along the side of the mountain and passed the rear end of the building occupied by respondent; that before reaching the point where said building was located the trainmen lost control of said train, and when the train had run down the track at a very high rate of speed to about where said building was located the three cars left the track on the side nearest the mountain, while the engine cut loose from the cars, left the track, and rolled down the hill, striking the wall of the building adjoining the one occupied by respondent, while the tender and trucks passed into and through the building occupied by him in which he and others were asleep at the time; that the tender and trucks aforesaid, in passing through the building, seriously injured the respondent and destroyed a large amount of tailoring goods which he had in stock; that the building in question was located entirely within a line drawn 100 feet parallel to the line of said railroad track which was owned and operated at the time of the accident, and for a long time prior thereto, by the appellant as the successor of the original owner, which was known as the Bingham Canyon & Camp Floyd Railroad Company, organized in September, 1872; that appellant claimed said 100-foot strip on which said building was standing as being a portion of its right of way, and which strip had been claimed by the original company as more particularly set forth in the case of *Railroad Co. v. Stringham*, 38 Utah, 113, 110 Pac. 868, to which case we refer for a full statement of the facts constituting appellant's claim of title to said 100-foot strip; that said building was fronting on the principal street of said Bingham Canyon, which street was running lengthwise through the town somewhat irregularly, following the course of the canyon, and the buildings of the town were constructed along either side of said street; that as early as 1870 or 1871 a building had

been erected on the spot where the one in question stood, which, for a long time, was used as a public school; that thereafter said building was destroyed by fire, and another one was erected on the same spot; that the building in question, with a number of others on either side thereof, were erected on said 100-foot strip, and all of said buildings, including the one in question, ever since 1870 or 1871 had continuously been occupied and used for either public or private purposes, and the ground upon which they stood had been so occupied and used under a claim of ownership, and during all of said time, and at the time of the accident, both buildings and ground were treated and regarded by all as private property which was owned by the occupants or their landlords; that neither the appellant, nor any of its predecessors in interest, had at any time during the time aforesaid, or at all, objected to the use of said buildings and ground for the purposes aforesaid, nor made any claim of ownership to said 100-foot strip, except as such claim might be deduced from the filing of the maps and plats and the construction and operation of the railroad as explained in the *Stringham Case* before referred to; that the railroad referred to in said case originally was not constructed as far up the canyon as the point of the accident in question, and the upper portion of the railroad where the accident occurred was not constructed until some time in 1875, when it was constructed as a tramroad with 20-pound rails per yard laid two feet apart, which road was operated by horse power in propelling cars upgrade and by means of gravity in the opposite direction; that the railroad in question was not constructed nor operated in the manner as described it was on the date of the accident until about the year 1902 and thereafter, at which time the tramroad was replaced by an ordinary narrow gauge railroad.

All of the evidence relating to the use of the 100-foot strip, and the buildings thereon, and the claims made by the apparent owners and occupants thereof, was admitted over appellant's objections.

We shall not set forth the evidence describing the accident, nor that with respect to the alleged negligence of appellant, since counsel do not seriously contend that there was not sufficient evidence with respect to the matters complained of to authorize a finding by the jury that appellant was guilty of negligence in the sense that it and its employees in charge of the train omitted to exercise ordinary care.

[1] For the purposes of this decision only, we shall also assume, without deciding, that the legal title and ownership of the 100-foot strip on which the building in question was located was in appellant, and that it acquired title thereto from its predecessors in interest as before stated. The record discloses that this was the view taken by the

trial court. Upon that theory that court in substance charged the jury as follows: That while the right of way of the railroad company partakes of all the incidents of private ownership and control "nevertheless if, with the knowledge and without the objection of the said company, persons are permitted to use the right of way either for the erection and maintenance thereon of buildings or for a passageway over the same, and such use for a very long period of time has been definite, open, and continuous, a license from the company to make such use of the right of way is presumed, and it would be the duty of the company to exercise reasonable and ordinary care in the operation of its railroad to prevent accidents and injuries to such persons and their property." The appellant requested the court to charge the jury that the respondent was a bare licensee on its right of way, and as such it owed him no duty except to refrain from "willfully, wantonly, or maliciously doing injury, and there is no proof in the case that the injuries of which plaintiff complains were so inflicted." The court refused to so charge, but submitted the case to the jury upon the theory outlined in the portion of the court's charge we have quoted. The jury found for the respondent, assessing his damages in the sum of \$15,000, and judgment was duly entered, from which this appeal is prosecuted.

The principal assignment of error relates to the giving of the charge of the court quoted above, and in refusing to charge as requested. Exceptions to the charge as given and to the refusal to charge as requested were taken at the proper time and in the manner required by our practice. Counsel for appellant, stating it in their own language, contend that: "Inasmuch as the defendant (appellant) was the owner of the ground on which the building occupied by the plaintiff (respondent) stood, the plaintiff, if not a trespasser, was at most a bare licensee, and the only duty the defendant owed him was to refrain from injuring him willfully or wantonly. There was no duty on the part of the defendant to exercise ordinary care for his protection, and the trial court committed error in so charging the jury."

The question therefore arises: What, in view of the undisputed facts, were the relations existing between them, and what duty, if any, did the law impose upon appellant with respect to the care it was required to exercise in order to prevent injury to the persons and damage to the property of those who were occupying and using the 100-foot strip claimed as a right of way by it?

The relation that parties may sustain toward each other, and the duties arising therefrom, cannot, in any given case, always be stated with precision. There are, however, some well-recognized fundamental legal principles from which, when applied to the facts conceded or found in any given case, both

the relation and the duties arising therefrom may be deduced. Thirty years ago the New York Court of Appeals, in the case of *Barry v. New York Cent. & H. R. Ry. Co.*, 92 N. Y. at page 292, 44 Am. Rep. 377, clearly pointed out that where a railroad company knowingly permits others to use, occupy, or pass over its right of way, although it be for their own convenience, for a long period of time, such permissive use, although in one sense a mere license, nevertheless creates certain rights in the persons using the right of way which the railroad company is bound to recognize, and as to them it owes the duty of exercising ordinary care in the operation of its trains and in the management of its railroad in order to prevent injuring them or their property. The doctrine just referred to is clearly stated by Mr. Justice Andrews in the following words: "There can be no doubt that the acquiescence of the defendant for so long a time, in the crossing of the tracks by pedestrians, amounted to a license and permission, by the defendant, to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant, in respect of persons using the crossing to exercise reasonable care in the movement of its trains. The company had a lawful right to use its tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but, so long as it permitted the public use, it was charged with knowledge of the danger to human life from operating its trains at that point, and was bound to use such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury."

The New York Court of Appeals, thus, at an early date, made a clear distinction between the occupation or use of a railroad right of way which is open and long continued, and a mere casual use thereof, although the latter use may also be permissive. For cases illustrating the rights of a bare licensee, see *Nicholson v. Erie Ry. Co.*, 41 N. Y. 525, and *Sutton v. New York Cent. & H. R. Ry. Co.*, 66 N. Y. 243. In the cases just cited it is held that a railroad company is not required to exercise ordinary care in the operation and management of its trains to prevent injury to one who is on its property as a bare licensee or a trespasser. This court has also so held. *Palmer v. Railroad*, 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229. As pointed out in the *Barry Case*, *supra*, however, where persons are in long and continued use or possession of the railroad right of way, the relation between the railroad company and such persons is more than that of bare licensor and licensees, and therefore, as to such persons, the company is bound to exercise at least ordinary care to prevent injuring them while they are on the right of way in the capacity aforesaid. The doctrine outlined above has been adopted by so

many courts of last resort in this country that it may be said to be one of general application. This is practically conceded by counsel for appellant. It is also conceded by them that this court is firmly committed to the doctrine as stated in the Barry Case. See *Young v. Clark*, 16 Utah, 42, 50 Pac. 332, and *Teakle v. San Pedro, L. A. & S. L. Ry. Co.*, 32 Utah, 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486. In the latter case the rule is fully elucidated and applied, and hence we refrain from citing the many cases where the doctrine has been invoked. The case at bar is, however, much stronger in the facts and circumstances from which a duty to those using the right of way may be implied than are most of the cases coming within the class. In the case at bar the occupation and use of the 100-foot strip was open, continuous, and under a claim of right for a period exceeding 40 years. The use of the property was the same as if owned by the occupants rather than that of a bare licensee. While it is true that respondent had not occupied the property for so long a time, yet his rights were the same as those of his predecessors in interest, and appellant for that reason owed him the same duty as occupant of the property as though he had been in possession thereof for the full period of time aforesaid. There can be no doubt that, under the undisputed facts, the respondent was not merely a bare licensee to whom the appellant owed no duty except to refrain from willfully or wantonly injuring him or his property, but upon the contrary it owed him the duty of exercising ordinary care and diligence in the management, operation, and control of its railroad and trains to prevent injury.

[2] Appellant's counsel insist, however, that in view that its ownership of the 100-foot strip is at least tacitly conceded, therefore, although some duty was by law imposed on appellant, yet as against respondent it was only required to refrain from acts of active, as contradistinguished from acts of passive, negligence. It is said that while respondent might, perhaps, have claimed protection as against active negligence, yet that he could not do so as against what is termed passive negligence. That is, mere acts of omission as contradistinguished from acts of commission. We cannot yield assent to the contention. Nor can we conceive any good reason for the supposed distinction. Where the law imposes the duty of ordinary care, it does not and cannot distinguish between negligence arising from negative acts of omission or positive acts of commission. The only question that the law concerns itself with under such circumstances is: Do the acts complained of constitute want of ordinary care, and, if so, was the alleged negligence which is the result of want of ordinary care the proximate cause of the injury in issue? Where the acts complained of are in fact willful or wanton, they as a general rule

are affirmative, and as such are actionable in favor of a bare licensee, and, indeed, may be so in favor of a trespasser. *Palmer v. Railroad*, supra. We think that, where the law fixes want of ordinary care as the test of liability, it becomes wholly immaterial whether the want of ordinary care arises from acts of omission or from acts of commission. That is, the law does not inquire whether the negligence was what is denominated active rather than passive—positive rather than negative.

[3] Counsel with much vigor contend that, although appellant owed respondent the duty of exercising ordinary care not to injure him, yet it was only required to exercise such care in case he attempted to cross its railroad track or was in such close proximity thereto as to be in imminent danger from a passing train or cars. In other words, counsel argue that on any portion of the right of way apart from the track appellant owed respondent no duty except to refrain from willfully and wantonly injuring him, for the reason that under such circumstances respondent himself was a bare licensee. A number of cases which it is contended support the foregoing statement of the law are cited. Among the numerous cases cited by appellant, we refer to the following as fair samples coming within the class: *Carr v. Missouri Pac. Ry. Co.*, 195 Mo. 214, 92 S. W. 874; *Kirby Lumber Co. v. Gresham* (Tex. Civ. App.) 151 S. W. 847; *Shults v. Chicago, B. & Q. R. R.*, 83 Neb. 272, 119 N. W. 463; and *Chicago, R. I. & P. Ry. v. Payne* (Ark.) 146 S. W. 487, 39 L. R. A. (N. S.) 217. We have carefully examined all of the cases cited by counsel, and in our judgment they do not support their contention. The only case that apparently does so is the last case cited, and, when the facts in that case are carefully considered, it is clearly distinguishable from the case at bar. It is quite true that it is held in those cases that from the undisputed facts, or from the facts as found, the party injured was a bare licensee, and as such the railroad company owed him no duty except to refrain from injuring him willfully or wantonly. The reason that induced the courts to arrive at such a conclusion in those cases was, however, not the one suggested by counsel, but it was for the reason that when the law was applied to the facts in the case no other relation than that of bare licensor and licensee was established. The case of *St. Louis, etc., Ry. Co. v. McCauley* (Tex. Civ. App.) 134 S. W. 798, is, in our judgment, on principle not distinguishable from the case at bar. In that case the railroad company permitted its right of way, some distance away from the track and parallel therewith, to be used for upwards of 20 years for a highway, and, in view that such a use was permitted for such a long period of time, it was held that the railroad company was required to exercise ordinary care in the management, operation, and control of its

railroad and trains to prevent injury to those who were using the right of way for the purpose aforesaid. It was there contended, as it is here, that the injured person was a bare licensee, and that therefore the company owed him no duty except to refrain from inflicting willful or wanton injury. The court, however, held as already indicated. We especially refer to that case because it emanates from the same court to which counsel refer us as holding that the duty of the railroad company to exercise ordinary care is limited to those crossing or who are attempting to cross its tracks. No attempt was made in the McCauley Case, *supra*, to cross the track, and the injured person did not approach very near thereto, but was injured because of the negligent operation of an engine, which frightened her horse, which was hitched to a buggy and by reason of being frightened became unmanageable and ran away injuring the plaintiff who was driving him. Limiting the doctrine as counsel suggests would be to rob it of its humanity, and in most cases would merely amount to—

" * * * keep the word of promise to our ear
And break it to our hope."

We can see neither reason nor justice in such a limitation, and as we read the cases none such is intended to be made by the courts. The rights of respondent and the duty of appellant arose out of the nature and long-continued use of the 100-foot strip by the occupants thereof. Had respondent been casually using the 100-foot strip at some point distant from the building in question on the morning of the accident, and had been injured by the engine or cars after they had left the track, a different question might be presented. He was, however, injured at a place where he had a right to be, and appellant had for many years recognized such a right by acquiescing in the use of the ground by the occupants of the buildings. This being so, the law imposed the duty on appellant of exercising ordinary care for the safety of those who were occupying the 100-foot strip while they were where they had a right to be, and so long as its negligence was the proximate cause of any injury inflicted on them they may recover.

We are clearly of the opinion that the court committed no error in charging as it did, and therefore could have committed none in refusing to charge as requested.

[4] Nor did the court err in admitting the evidence with regard to the occupation and use of the 100-foot strip at and near the point of the accident. The evidence, under the pleadings, was admitted and was admissible for the purposes of showing the character and extent of the use of said strip, the relation of the parties, and the duty that was enjoined upon the appellant, and for those purposes was clearly proper.

Appellant also offered a request to charge

that it was not liable to respondent for any goods of his that were stolen or taken away by others. The court refused this request, and it is insisted that it erred in doing so. Appellant's rights in that respect were, however, clearly guarded by the court's general charge, and hence it has no real cause for complaint.

The judgment is affirmed, with costs.

MCCARTY, C. J., and STRAUP, J., concur.

BAILEY v. SPALDING-LIVINGSTON INVESTMENTS CO.

(Supreme Court of Utah. Nov. 18, 1913.)

1. TRIAL (§ 199*)—INSTRUCTIONS—PROVINCE OF JURY—CONSTRUCTION OF CONTRACT.

An instruction, in an action for commissions for selling land, that if the written agreement in evidence constituted the agreement of the parties, plaintiff's claim was to be "governed by that contract," and, if it was modified, that the contract as modified "would determine the right of the plaintiff to commission" without construing and applying the contracts, was erroneous for leaving their construction and application to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 467-470; Dec. Dig. § 199.*]

2. CONTRACTS (§ 176*)—CONSTRUCTION—PROVINCE OF JURY.

The court should declare the legal effect of a contract involved, and not permit the jury to do so.†

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

3. BROKERS (§ 88*) — MISLEADING INSTRUCTIONS—CONSTRUCTION OF CONTRACT.

In an action for commissions for selling lands, an instruction that if the original contract between the parties "was changed by mutual agreement for the mutual advantage of both parties," etc., was misleading as permitting the jury to believe that the modified contract might not have been binding because not as favorable to plaintiff as the original, especially where the court did not construe the contracts in the instructions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by W. D. Bailey against the Spalding-Livingston Investments Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

James Ingebretsen, of Salt Lake City, for appellant. Willard Hanson and Thomas Marioneaux, both of Salt Lake City, for respondent.

STRAUP, J. The plaintiff seeks to recover compensation for commissions alleged to have been earned by him and his assignors as agents in the sale of lands for the defendant. The defendant was engaged in selling lands in Sanpete county through agents who solicited and procured purchasers. The complaint is in four counts. The first for commissions alleged to have been earned by the plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Manti Savings Bank v. Peterson, 30 Utah, 475, 86 Pac. 414, 116 Am. St. Rep. 362.

tiff, and unpaid, amounting to \$3,152; the second for \$1,680, the third \$169, and the fourth \$42, for commissions earned by other agents and unpaid. The defendant pleaded the general issue and payment. The case was tried to a jury, who rendered a verdict in favor of the plaintiff on the first count for \$2,770, the second \$1,323, the third \$79. The fourth was abandoned and not submitted. On the defendant's motion for a new trial the court set the verdict aside as to the second count, but permitted it to stand as to the first and third. The defendant appeals. So the controversy on the appeal chiefly relates to the unpaid commissions claimed to have been earned by the plaintiff. Agency is not disputed.

The plaintiff contended that his right to commissions and the amount thereof were fixed and controlled by a written agreement between him and the defendant, the material parts of which are: "That the second party (the plaintiff) shall act as agent for the first party (defendant) in the sale of land and water rights belonging to said first party and located in what is commonly called 'Gunnison Valley,' in Sanpete county, Utah. Said second party shall act as said agent until this contract is rescinded or modified, and which may be done by either party upon notice to the other party. All sales made by said second party are and shall be subject to the approval of said first party, and shall not be binding on said first party until approved by it. Said second party shall receive as commission for said sales ten per cent. of the agreed purchase price of each sale." The plaintiff claimed, and adduced evidence to support the claim, that he, under that contract, solicited and procured purchasers with whom the defendant entered into written contracts to sell lands—lands shown them by the plaintiff—one at an agreed price of \$7,670, one \$8,800, another \$12,312, another \$19,127, and one for \$3,200, and claimed that he was entitled to 10 per cent. of these amounts, a total of \$5,373, of which \$2,221 had been paid, leaving a balance unpaid of \$3,152. He contended that whenever the defendant entered into a written agreement with a purchaser solicited and procured by him, he was entitled, as commissions, to 10 per cent. of the agreed purchase price, though nothing whatever was paid by the purchaser and nothing whatever received by the defendant, and though the contract, without the defendant's fault, was subsequently abandoned and canceled. The defendant contended that the plaintiff was paid in full, except the sum of \$24.65, which had been offered him, but not legally tendered. Defendant further contended, and adduced evidence to support the claim, that sales made by agents were not approved by it until one-fourth of the purchase price had been paid, and that the written contract of the plaintiff, and the contracts of all other agents, as to commissions and the amount thereof, were

modified, whereby agents selling farm lands (those claimed to have been sold by plaintiff were such) were to receive a commission of 8 per cent. instead of 10 per cent. payable 4 per cent. on payment of one-fourth of the purchase price, 2 per cent. when the first deferred payment was made, and 2 per cent. when the second was made. Agents, however, were given the option to take a 6 per cent. commission in cash and in full of all commissions when one-fourth of the purchase price had been paid, but in no event was the agent entitled to any commission until one-fourth of the purchase price had been paid to the defendant. The defendant further contended, and adduced evidence to support the contention, that the purchasers, or most of them, procured by the plaintiff were procured under the contract as modified. The plaintiff denied that the contract was so modified, or that he received notice of such modification, notwithstanding a partial settlement of accounts in recognition of such modification. The defendant further claimed, and adduced evidence to support the claim, that when the plaintiff produced the purchasers who had agreed to take lands at the agreed price of \$7,670 and \$19,127, the ability of the purchasers to pay was questioned by the defendant. Neither of such purchasers was able to pay one-fourth of the purchase price. The first was able to pay but \$500; the second was not able to pay anything, unless he was able to sell other lands and some mining stock owned by him. If he was able to sell those, he was able to pay one-fourth of the purchase price; if unsuccessful in that he was not able to pay anything. Before the defendant entered into written contracts with those purchasers it was, as shown by the defendant's evidence, expressly agreed between the plaintiff and the defendant that as to those sales the plaintiff should not be entitled to any commission until one-fourth of the purchase price had been paid, and in proportion as paid, and that upon such express understanding and agreement, and not otherwise, did the defendant enter into the written contracts with those purchasers. The one who purchased at the agreed price of \$7,670 took possession, paid \$500, and no more, then abandoned his contract and surrendered the premises. The defendant refunded him \$175. The other who purchased at the agreed price of \$19,127 paid nothing. He, with the assistance of the defendant and its agents, tried to sell his lands and mining stock with the proceeds of which he had expected to make the first payment, but was unable to sell them. He thereupon paid nothing and abandoned and surrendered his contract with the defendant. The plaintiff did not claim that anything more was paid with respect to these sales, denied that he made any agreement as shown by the defendant, and contended that under his original contract a 10 per cent. commission of the "agreed price"

of \$19,127 and \$7,670 was due him, or the sum of \$2,679. It was these transactions which chiefly gave rise to the controversy involved in the first count. With respect to other transactions controversies arose as to whether the plaintiff was entitled to a commission of 10 per cent. as claimed by him, or 6 per cent. as claimed by the defendant. Much evidence was adduced by the parties with respect to these divergent claims and contentions.

At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor. The court refused the request. It withheld the fourth count from the jury, and submitted the case to them on the first, second, and third. With the consent of counsel the court let the jury take the pleadings, and the bill of particulars which, on the defendant's demand, had been furnished by the plaintiff, to ascertain and determine the issues. Then, after charging them that the burden of proof was on the plaintiff, and that "each cause of action is to be considered on its own merits whatever they may be from the evidence," further instructed them: "You are instructed that if you find from the evidence that the document marked 'Exhibit 1' dated November 1, 1909 (which was the written contract between the plaintiff and defendant referred to) constituted the only agreement between the plaintiff and the defendant company, then the claim of the plaintiff on the first cause of action as to commissions would be governed by that contract. But if you find from the evidence that such a contract was entered into and existed for a time, and was afterwards changed by mutual agreement for the mutual advantage of both parties then whatever contract was finally in force when each particular transaction involved was carried on would determine the right of the plaintiff to a commission, if any, on that cause of action."

Complaints are made of the ruling refusing to direct a verdict and of the instruction last referred to. The complaint as to the first is without merit. The evidence, even on the part of the defendant, shows that it, on account of commissions, was indebted to the plaintiff in the sum of \$26.45. So for that, if for no other reason, was the court justified in refusing to direct a verdict in favor of the defendant; for the plaintiff, as to that amount, was entitled to a direction of a verdict in his favor.

[1] Now, as to the instruction. We think it erroneous and harmful. By it the jury were not only made the judges of the facts, but of the law. Under it they were required to find whether the written agreement constituted the agreement between the parties, and, if so, then were they told that the plaintiff's claim, as to the first cause of action, was to be "governed by that contract," leaving them to interpret it, to construe it, to apply it, as they saw fit, and to give it what-

ever effect they thought proper. If they found it was modified, then were they told that the contract as modified "would determine the right of the plaintiff to a commission," again leaving all questions of interpretation, construction, application, and effect of the contract to the jury, wholly unaided by the court, and permitting them to construe it and apply it as they saw fit, and to give such effect to it as they thought proper. Nowhere did the court give the jury for their guidance any principle of law whatever, except to instruct them that the burden of proof was on the plaintiff, and that they were the judges of the credibility of the witnesses and the weight of the evidence. For all the court did was to give the jury the pleadings and the bill of particulars to ascertain and to determine the issues for themselves, and then told them that if the written contract constituted the agreement between the parties, plaintiff's right to commission "was governed by that contract"; if they found it was modified, then the contract as modified "would determine the right of the plaintiff to commissions." The court thus made the jury the judges of both the law and the facts.

[2] "The terms of an oral contract must necessarily be ascertained from the testimony of the witnesses, and it is the duty of the court to instruct the jury as to the law applicable to the various phases arising upon such testimony. But where the court presents to the jury a particular view of the facts, and this embodies the terms of a contract which are in themselves precise and explicit, the court should declare their legal effect, and it would be error to leave this to be determined by the jury. In such a case the rule is the same as if the contract were in writing." *Spraggins v. White*, 108 N. C. 449, 13 S. E. 171. The proposition is elementary. We had occasion to refer to it in the case of *Manti Savings Bank v. Peterson*, 30 Utah, 475, 86 Pac. 414, 116 Am. St. Rep. 862.

[3] The charge is further objectionable and misleading because of the expression that if the contract "was changed by mutual agreement for the *mutual advantage of both parties*." From that the jury may have believed that the contract, though modified as claimed by the defendant, was not to the plaintiff's advantage, because when so modified it was not as favorable to him as was the original agreement. This expression was especially misleading and harmful inasmuch as the jury were permitted, without guidance, to place their own interpretation on the contract as modified, if found to have been modified, and to give whatever legal effect to it they saw fit.

The judgment of the court below is reversed, and the cause remanded for a new trial. Costs to appellant.

McCARTY, C. J., and FRICK, J., concur.

TOOELE MEAT & STORAGE CO. v. MORSE, District Judge.

(Supreme Court of Utah. Nov. 17, 1913.)

1. JUSTICES OF THE PEACE (§ 155*)—APPEAL—NOTICE OF JUDGMENT—WRITTEN NOTICE.

Under the general rule that a written notice is contemplated where a statute requires notice without stating the manner of notification, Comp. Laws 1907, § 3744, requiring notice of the entry of a justice's judgment to be given by the successful party, either personally or by publication, contemplates a notice in writing.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.*]

2. JUSTICES OF THE PEACE (§ 155*)—APPEAL—NOTICES OF JUDGMENT—SUFFICIENCY.

Only a substantial compliance with Comp. Laws 1907, § 3744, requiring notice of entry of a justice's judgment to be given by the successful party, either personally or by publication, is required.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.*]

3. NOTICE (§ 9*)—SUFFICIENCY AND FORM.

Mere informalities in a notice which do not mislead will not vitiate it; and, while a particular form of notice required by statute must usually be followed with reasonable strictness, it is generally sufficient if the notice proceeds from an authentic source and fully informs the party to be notified of the substance of the matters required to be noticed (citing 5 Words and Phrases, pp. 4842 to 4844; see, also, vol. 8, p. 7733).

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 16-21; Dec. Dig. § 9.*]

4. JUSTICES OF THE PEACE (§ 155*)—APPEAL—NOTICES OF JUDGMENT—SUFFICIENCY.

Plaintiff's attorney wrote defendant's attorney that he desired to say that in the case of E., a corporation, which he represented as plaintiff, against the T. Company, in which defendant's counsel represented the defendant, before a justice named, judgment was entered in said court in favor of plaintiff and against defendant for the amount stated, and that an abstract of judgment was issued and filed in the district court on a date named, and that the judgment, with interest, would amount to the sum named. *Held*, that the letter was sufficient as a notice of entry of judgment required by Comp. Laws 1907, § 3744, to be given by the successful party on rendition of a judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.*]

5. JUSTICES OF THE PEACE (§ 155*)—APPEAL—ENTRY OF JUDGMENT—NOTICE TO ATTORNEY.

Under Comp. Laws 1907, § 3335, providing that, where a party has an attorney, the service of papers, except of process, must be upon the attorney instead of the party, notice of entry of judgment for plaintiff in a justice's court was properly served upon the attorneys of defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.*]

6. JUSTICES OF THE PEACE (§ 155*)—APPEAL—NOTICE OF JUDGMENT.

Comp. Laws 1907, § 3744, requiring notice of entry of a justice's judgment to be given

to the losing party, should receive a reasonable construction and application.¹

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.*]

7. JUSTICES OF THE PEACE (§ 155*)—NOTICE OF JUDGMENT—FILING IN JUSTICE COURT—NECESSITY.

Comp. Laws 1907, § 3744, providing that notice of entry of a justice's judgment must be given to the losing party, either personally or by publication, and the time of appeal shall date from its service, requires such notice and proof of its service to be filed in the justice's court, where judgment is entered, and made a part of the record, since any question of the sufficiency of the notice must be determined from the record.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-533; Dec. Dig. § 155.*]

8. JUSTICES OF THE PEACE (§ 164*)—APPEAL—RECORD.

The appellate court on appeal from a justice's judgment should be able to determine its jurisdiction from an inspection of the record.²

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 607-636; Dec. Dig. § 164.*]

Application for writ of mandate by the Tooele Meat & Storage Company against Charles W. Morse, as District Judge. Writ denied.

Evans & Evans, of Salt Lake City, for plaintiff. W. S. Marks, of Tooele, for defendant.

FRICK, J. Upon the application of the plaintiff herein this court issued an alternative writ of mandate directed to the defendant, the Honorable Charles W. Morse, as judge of the district court of Tooele county, Utah, requiring him to show cause why a permanent writ should not issue compelling him to reinstate and hear a certain appeal which had been dismissed by him in a case wherein the Elite Candy Company was plaintiff and the Tooele Meat & Storage Company, the plaintiff herein, was defendant. The appeal aforesaid was taken from a judgment entered on the 8th day of February, 1912, in the justice's court of Tooele city in favor of said plaintiff and against said defendant. The appeal was taken pursuant to Comp. Laws 1907, § 3744, which, so far as material here, is as follows: "Any person dissatisfied with a judgment in a justice's court, whether the same was rendered on default or after trial, may appeal therefrom to the district court of the county at any time within thirty days after the rendition of any final judgment. Notice of the entry of the judgment must be given to the losing party by the successful party either personally or by publication, and the time of appeal shall date from the service of said notice." On the 18th day of September, 1912, the

¹ State v. District Court, 28 Utah, 133, 110 Pac. 381, Ann. Cas. 1912B, 437.

² State v. District Court, 26 Utah, 267, 103 Pac. 261.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

attorney for the plaintiff in the action in which judgment as aforesaid was entered wrote the attorneys for the defendant in said action in part as follows: "Evans & Evans, Attys. Salt Lake City, Utah: In pursuance to the request of your Mr. P. C. Evans at Wendover at a recent meeting we had there, I desire to say the case of Elite Candy Company, a corporation, which I represented as plaintiff against Tooele Meat & Storage Company, a corporation, in which you represented the defendant, before L. E. Kramer, city justice of the peace of Tooele City, Tooele county, Utah, that judgment was entered in said court in favor of the plaintiff and against the defendant on the 8th day of February, 1912, for the sum of \$170.93, and for \$5.20 costs. That an abstract of judgment was issued from said court and filed in the district court on the 13th day of May, 1912. Since that date there has been accruing costs in the sum of \$6.00. The judgment, with interest to date, would be \$188.35 and costs due would make a total due of \$193.55."

In addition to the foregoing the letter also stated that the plaintiff would discount the amount of the judgment 20 per cent. if paid. On the 21st of September, 1912, the attorneys for the defendant, in a letter to the attorney aforesaid, acknowledged receipt of the foregoing letter and informed him that they would consider the subject-matter of his letter later and would advise him further in the matter.

Without further communication between the parties the attorneys for the defendant, on the 28th day of October, 1912, attempted to appeal from the judgment aforesaid by serving the statutory notice of appeal. The transcript was accordingly sent to the district court, where counsel for the plaintiff in said action moved to dismiss the appeal upon the ground that it was not taken within the time required by the statute aforesaid. The district court received the letters aforesaid in evidence and granted said motion and dismissed said appeal, whereupon this proceeding to reinstate the same was commenced, as before stated.

The only question presented for determination by the parties is whether the letter written by plaintiff's attorney and received by defendant's attorneys in the action aforesaid was a substantial compliance with the statutory provision we have quoted above respecting the giving of the notice of entry of judgment in the justice's court. The district court held that the letter constituted sufficient notice of the entry of judgment in the justice's court to set the time in motion within which an appeal must be taken, and in view that the notice of appeal was not served within 30 days after said notice was received and acknowledged by the attorneys for the defendant in said action that the appeal was not taken in time. The plaintiff herein contends that the letter did not con-

stitute the notice contemplated by the statute, and hence was no better than if no notice had been given, and that therefore the appeal was taken in time.

[1, 2] We think the law is well settled that, where a statute requires notice to be given but is silent with respect to the manner of notification, written notice is understood. 29 Cyc. 1117. The statute to which we have referred being silent with respect to the kind or character of notice that should be given, we shall assume, and so hold, that a notice in writing is contemplated. It must, however, also be kept in mind that the statute does not prescribe any particular form of notice, but all that is required is that "notice of the entry of judgment must be given to the losing party." A substantial compliance with the statute in that regard is, we think, all that is necessary.

[3] The law respecting notice is well stated in 29 Cyc. 1117, in the following words: "The general rule in respect to notices is that mere informalities do not vitiate them so long as they do not mislead, and give the necessary information to the proper parties." Of course, where the statute prescribes a particular form of notice, then, as a general rule, the form required must be followed with reasonable strictness, as under such circumstances the form may be regarded as matter of substance. But where the statute does not prescribe a form, the question ordinarily is whether the notice actually given constitutes a substantial compliance with the statute. If the notice required by the statute therefore emanates from an authentic source and is such as to apprise the party to be notified fully of the whole substance of the matters concerning which the statute requires notice to be given, the notice is ordinarily held sufficient. *Fry v. Bennett*, 7 Abb. Prac. (N. Y.) 352. See, also, 5 Words and Phrases, pp. 4842 to 4844.

[4] We think the notice in this case fully measures up to the foregoing requirements. The court wherein the judgment was obtained and the names of the parties to the action were given, and the date of the judgment and the amount thereof, with costs, were clearly stated. We cannot see how it can well be said that anything more could have been required in order to fully inform the defendant in that action of the entry of the judgment and the time when, and the amount for which, it was entered. From a mere inspection of the letter the defendant could prepare its notice of appeal, and this is certainly all the information that could be required. Counsel for the plaintiff herein, however, do not claim that the contents of the letter were insufficient as a notice of the entry of judgment; but what they do claim is that notice of that fact cannot be imparted or served in the form it was done. They contend that in order to constitute notice it must be a formal notice of the entry of judg-

ment and nothing else. It seems to us that counsel's own conduct shows that they deemed the notice sufficient in the form it was given. In attempting to take the appeal, so far as the record shows, they acted upon that notice only and upon nothing else. As we have seen, they acknowledged receipt of the letter on the 21st day of September, 1912, and on the 28th day of October following, without any further notice, served their notice of appeal. Had they acted seven or eight days sooner, their appeal would have been in ample time. From their own conduct, therefore, it appears that, if they had thought the notice contained in the letter was insufficient, they would have waited indefinitely for a formal notice and then have appealed within 30 days after receiving the same. They must have deemed the notice contained in the letter as being at least of some force or they, in all probability, would not have acted as they did.

[5] Again, if formal notice had been served, it would still have been good service if made upon counsel, since they were the attorneys for the defendant in the action pending in the justice's court. Such is the effect of Comp. Laws 1907, § 3335, and such is the law generally. See *Tripp v. Santa Rosa, etc.*, Ry. Co., 144 U. S. 126, 12 Sup. Ct. 655, 36 L. Ed. 371; *Davis v. Wakelee*, 156 U. S. 684, 15 Sup. Ct. 555, 39 L. Ed. 578; *Neuberger v. Doyce*, 29 Or. 458, 45 Pac. 908.

The only two cases cited by plaintiff's attorneys, namely *Deimel v. Obert*, 20 Ill. App. 557, and *Williams v. Brummel*, 4 Ark. 129, are not in point. All that is decided in those cases is that, where a statute requires "notice in writing" to be served, the statute is not complied with by merely reading a notice to the party to be served without delivering a copy of the notice to him. In the case at bar counsel could have accepted service of any formal notice, and their acknowledgment of the receipt of the letter was in legal effect an acceptance of the notice if it was otherwise sufficient as such.

[6] We think the statute should receive a reasonable construction and application. Its evident purpose is to give a judgment creditor time to appeal his case if he so desires; and, in order to make the purpose effectual, the statute requires that he be notified in writing of the entry of the judgment against him before he is required to act. Where, however, a party is notified of the entry of judgment in writing, as was done in the case pending in the justice's court, we can see no good reason for holding that more can reasonably be required. We have already (*State v. District Court*, 38 Utah, 138, 110 Pac. 981, Ann. Cas. 1913B, 437) given the statute a reasonable application by holding that a party may waive the notice by doing some unequivocal affirmative act indicating that he does not rely on the notice. There is nothing in the statute, however, that requires a particular notice to be served in a particular

manner, but all that is required is that the judgment debtor be notified in writing of the entry of judgment against him so that he may avail himself of his right to prosecute an appeal. It is clearly apparent that the judgment debtor in this case had ample notice of the entry of judgment against it for more than 30 days before an appeal was attempted, and hence it had all that the statute contemplates that it should have; and in view of this neither the district court nor this court is authorized to grant it more.

[7, 8] In concluding this opinion we desire to state that in our judgment the statute contemplates that the notice of entry of judgment and proof of service thereof should be filed in the justice's court where the judgment is entered and made a part of the record in the case. When that is done, a mere inspection of the record will disclose what every record on appeal should disclose, namely, whether or not the record discloses jurisdiction in the appellate court. If in the case herein referred to defendant's attorney had filed a copy of his letter which he claimed constituted notice, together with the one he received from plaintiff's attorneys in which they acknowledged receipt of the former letter with the justice and the latter had included the letters in the transcript which he certified upon appeal, the record would have disclosed the notice of entry of judgment and acceptance thereof, and in such case all the appellate court would have been required to do would have been to pass upon the sufficiency of the notice if its sufficiency were assailed. That is all the appellate court should be called on to do in any case. That is, in every case the appellate court should be able to determine its jurisdiction from an inspection of the record. *State v. District Court*, 38 Utah, 267, 103 Pac. 261. As pointed out in the case just cited, if the record on appeal fails to disclose jurisdiction and the appellant nevertheless asserts that the facts which confer jurisdiction exist but do not appear of record, or if the appellee insists that the evidence showing that the appeal was not taken in time exists but does not appear from the record, then the appellate court should permit either party to file his evidence in the justice's court from which the appeal comes and have that court certify up such evidence as part of the record, and when the record is presented to the district court that court from a mere inspection thereof may then determine whether or not it has jurisdiction of the appeal and rule accordingly. The evidence showing jurisdiction or want thereof should first be presented to and filed in the court of original jurisdiction and by that court made a part of the record on appeal. In the case before us, however, no question was raised with regard to whether notice of entry of judgment was served or accepted; the manner of proof being waived, the receipt of the letter constituting notice of entry of judgment acknowledg-

ed, the district court was called upon to determine only the sufficiency of the notice, the same as in any case where its sufficiency is assailed. Such a question may arise in any case, and that question must then be determined from what appears on the record and not from evidence dehors the record.

For the reasons heretofore stated the writ requiring the district court to reinstate the appeal should therefore be, and it accordingly is, denied, with costs.

MCCARTY, C. J., and STRAUP, J., concur.

MARONEN et al. v. ANACONDA COPPER MINING CO.

(Supreme Court of Montana. Nov. 24, 1913.)

1. MASTER AND SERVANT (§ 118*)—REGULATION OR OPERATION—VIOLATION OF STATUTES—CIVIL LIABILITY.

That a penalty is imposed for a violation of Rev. Codes, § 8536, requiring the doors on the safety cage in a shaft mine to be closed when carrying the men, would not make one violating it immune from civil liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 118*)—REGULATION—CAGE DOORS.

Rev. Codes, § 8536, making it unlawful to operate a shaft mine unless it is equipped with a safety cage, with steel doors, and providing that the doors "must be closed" when carrying the men, imposed an absolute duty, and the employer cannot excuse noncompliance on the ground that he cannot comply with the statute by exercising ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

3. MASTER AND SERVANT (§ 118*)—RETROACTIVE STATUTES.

Rev. Codes, § 8536, making it unlawful to operate a shaft mine unless equipped with a safety cage with steel doors which are required to be closed when it is operated, does not create any right of action or destroy any defense available when it was enacted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

4. DEATH (§ 11*)—RIGHT OF ACTION—COMMON LAW.

At common law there was no civil right of action for death caused by wrongful act.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. § 11.*]

5. DEATH (§ 15*)—RIGHT OF ACTION—NATURE.

The right of action for death by wrongful act or neglect, given by Rev. Codes, § 6486, to decedent's heirs or personal representatives, while independent of the right of action decedent would have had, is of the same character and can only be maintained if decedent could have maintained an action had he survived.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 17; Dec. Dig. § 15.*]

6. DEATH (§ 21*)—ACTIONS—DEFENSES—NEGLECT CONSTITUTING CRIME.

In an action by heirs for death by a negligent act, which is also a crime, defendant is not limited to those defenses available in a criminal

prosecution for the same offense, enumerated by Rev. Codes, § 9200, but may make all defenses available in an ordinary action for negligence.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 28, 30-32; Dec. Dig. § 21.*]

7. ACTION (§ 32*)—FORMS OF ACTION—ABOLITION.

While the common-law forms of action are abolished, the principles underlying them have not been changed.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 257-261, 316; Dec. Dig. § 32.*]

8. NEGLIGENCE (§ 102*)—FORM OF ACTION—AT COMMON LAW.

At common law one receiving personal injuries caused by negligence could sue either in trespass or in case, whether the action be a tort or a crime; the remedy being in trespass if the injury was direct and in case, if consequential or resulting from nonfeasance, when negligence must be alleged.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 168; Dec. Dig. § 102.*]

9. APPEAL AND ERROR (§ 1001*)—FINDINGS—CONCLUSIVENESS.

If there is any substantial evidence to support a verdict, the Supreme Court will not disturb it, as every presumption is in favor of the correctness of the trial court's conclusions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.*]

10. TRIAL (§ 343*)—FINDINGS—GENERAL FINDINGS.

A general finding for defendant is equivalent to a finding in its favor upon every issue necessary to support the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

11. DEATH (§ 23*)—MASTER AND SERVANT (§ 233*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

If one employed to open and close the cage doors of a shaft mine cage, pursuant to Rev. Codes, § 8536, neglected his duties while being lowered or hoisted and was injured therefrom, neither he nor his heirs could recover against the employer.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 23.*; Master and Servant, Cent. Dig. §§ 681, 684-686, 701-742; Dec. Dig. § 233.*]

12. MASTER AND SERVANT (§ 118*)—MASTER'S DUTY—SUFFICIENCY OF EMPLOYEES.

Rev. Codes, § 8536, providing that the doors of a shaft mine safety cage "must be closed" when carrying men, does not require the employment of a man solely to tend the doors or prohibit the employer from imposing that duty upon one having other duties not interfering therewith.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

13. MASTER AND SERVANT (§ 118*)—CONSTRUCTION.

Rev. Codes, § 8536, providing that the doors of a shaft mine cage must be closed when carrying men, must be given a reasonable construction in view of the evil sought to be remedied by it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

14. MASTER AND SERVANT (§ 276*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for the death of an employee killed by falling out of a shaft mine cage through the open door, evidence held to sustain a finding that decedent was to all intents a sta-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion tender and required to close the door when he entered the cage to be hoisted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Flora Maronen and others against the Anaconda Copper Mining Company. From a judgment for defendant and an order denying a motion for new trial, plaintiffs appeal. Affirmed.

Maury, Templeman & Davies, of Butte, for appellants. C. F. Kelley and L. O. Evans, both of Butte, W. B. Rodgers, of Anaconda, and D'Gay Stivers, of Butte, for respondent.

HOLLOWAY, J. The plaintiffs are, respectively, the surviving children and widow of August Maronen, deceased, and prosecute this action for damages on account of the death of the father and husband by the alleged wrongful act of the defendant. The complaint recites the relationship of the plaintiffs to the deceased and alleges that on September 7, 1911, August Maronen was an employé of the defendant company engaged in underground mining; that the company was carrying on mining operations through the Mollie Murphy shaft, a vertical shaft, more than 300 feet deep; that while in the discharge of his duties as such employé, and while at the 1,200-foot level in the shaft, he entered one of the defendant's mining cages for the purpose of being hoisted to the surface; that the defendant hoisted him from the 1,200-foot level to about the 1,000-foot level in the shaft when Maronen fell from the cage, receiving injuries from which he died. The gravamen of the charge is that the defendant hoisted Maronen without having closed the cage doors, and because of this fact alone the accident occurred. The act or omission is charged to have been wrongful and unlawful. The answer admits the employment and the operations of the defendant company through the Mollie Murphy shaft; that while being hoisted through that shaft and at about the 1,000-foot level, and while the cage doors were not closed, Maronen fell from the cage, receiving the injuries from which he died, and that if the doors had been closed he would not have fallen from the cage. All other allegations of the complaint are denied; and in addition the defendant pleaded assumption of risk, negligence of fellow servants, and that the decedent's death was due to his own fault, neglect, and disobedience of orders. These affirmative allegations were traversed by reply, and the cause, being at issue, was tried to the court without a jury and resulted in a judgment for defendant, from which judgment and an order denying them a new trial the plaintiffs prosecute these appeals.

The complaint charges the defendant with violating section 8536, Revised Codes, which

makes it unlawful for any person or corporation to carry on mining operations through a vertical shaft more than 300 feet deep, unless the shaft is equipped with a safety cage with steel doors, and said doors "must be closed when lowering or hoisting the men," except that when sinking only the doors need not be used. For a violation of any of the provisions of the section a penalty is prescribed.

[1, 2] Practically all of appellants' preliminary hypotheses may be conceded at once, in substance if not in the form in which they are expressed, viz.: That section 8536 is a penal statute and its violation is a crime; that section 6486, Revised Codes, gives to these plaintiffs a right of action against this defendant, provided the defendant's wrongful act or neglect was a proximate cause of August Maronen's death; that the fact that a penalty is attached to a violation of section 8536 does not render the defendant immune from civil liability; and that the duty to close the cage doors when men are being lowered or hoisted is an absolute one, in the sense that the employer will not be heard to say that by the exercise of ordinary care he cannot comply with the requirement. The foregoing questions aside, and we are brought to a consideration of the character of this action and, as an incident thereof, the defenses, if any, which are available.

There is not any contention made that the defendant company had not fully complied with the law in providing and properly equipping the cage in use. The only charge of wrongdoing is in failing to close the cage doors before attempting to hoist employes.

[3, 4] That section 8536 does not create any right of action or destroy any defense available at the time of its enactment are questions set at rest by the former decision of this court. *Osterholm v. Boston & Mont. Con. C. & S. Min. Co.*, 40 Mont. 508, 107 Pac. 490. In the absence of some statute creating this right of action, these plaintiffs would be remediless, for it was the rule at common law that, for the death of one person caused by the wrongful act of another, the law furnished no remedy by civil action (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960); and it was to supply this lapse that Lord Campbell's Act was adopted in England, and statutes of the same general character have been enacted in this country. Our own provision is found in section 6486, above, which declares that when the death of one person, not a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. It is by virtue of that section that these plaintiffs are now in court; and the character of this action and the defenses available are to be determined from a construction of that section. The statute does not deal with questions of plead-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing, and the facts necessary to be stated in any given instance depend upon the character of the right asserted. In *Melville v. Butte-Balaklava C. Co.*, 47 Mont. 1, 130 Pac. 441, we gave to this provision of the law our most earnest consideration. Its history was traced and its purpose determined. There was involved directly the inquiry: "Do the words of the statute, 'wrongful act or neglect of another,' imply actionable wrong or negligence toward the deceased or toward the surviving wife and children?" After a thorough examination of the subject, in the light of the history of the provision and its amplification by other tribunals, Chief Justice Brantly, speaking for the court, said: "The meaning of the expression 'wrongful act or neglect of another' thus became established and clearly limited to those cases only wherein the death is wrongful as against the deceased and to preclude recovery when death was due to the decedent's own fault." Referring to the legislative history and the former decisions of this court which recognize the rule that under this statute recovery can be had only in a case in which the deceased was himself without fault, the Chief Justice proceeded: "The interpretation thus given the statute by the Legislature, and impliedly by these decisions of this court, has become so firmly established as the rule of decision in this jurisdiction that we do not feel justified in departing from it. To sustain the plaintiffs' contention would be to adopt an interpretation which the Legislature never intended that the statute should have and thus destroy defenses of which defendant cannot be deprived, except by act of the Legislature. If a change should be wrought, it is the office of that body to make it, and not of this court"—and concluded by quoting from the opinion of the Supreme Court of the United States in *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513, a carrier and passenger case where a like statute was considered, as follows: "The two terms, therefore, 'wrongful act' and 'neglect,' imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed but only injured. The company is not under two different measures of obligation, one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages."

[5] The rule of law is, then, settled in this state that, while the right of action given in section 6486 to the heirs or personal representatives is independent of that which the

deceased would have had if he had survived his injury, yet it is of the same character and depends upon the same facts; and the inquiry whether a given state of facts constitutes a cause of action in favor of the surviving widow and children depends upon the answer to the inquiry: Would the same facts, if stated by the injured man, constitute a cause of action in his behalf? That the allegations disclosing a breach of a statutory duty charge legal negligence, and that this complaint states a cause of action for damages for negligence, may be conceded even though the word "negligent" or "negligently" is not used.

[6] But the immediate question before us is not whether the complaint states a cause of action but whether the facts alleged constitute a cause of action, independently of the element of negligence. We might answer this interrogatory by reference to the foregoing decisions of our own court and conclude this discussion upon the evidence but for the earnestness with which counsel for appellants contend that, because the act or omission charged in this instance amounts to a crime, the defendant is limited to those defenses only which would be available to it in a criminal action in which it was defendant, prosecuted by the state upon indictment or information charging the unlawful killing of August Maronen. The pleas available in a criminal action are enumerated in section 9209, Revised Codes: "There are four kinds of pleas to an indictment or information. A plea of: (1) Guilty. (2) Not guilty. (3) A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. (4) Once in jeopardy"—but these are declared to be applicable to a charge presented by indictment or information and they are not applicable to civil actions. There is not any more reason for applying the provisions of section 9209, above, to this action than there is for invoking the other rules of criminal procedure. Counsel for appellants would scarcely admit that in all actions of this character the county attorney must appear for the plaintiff; that the action must be initiated by filing a complaint, indictment, or information; that defendant should be brought into court by warrant; that the proceeding might be commenced in a justice of the peace court and defendant be entitled to a preliminary examination; that the pleas must be made orally; that the defendant should be entitled to twice the number of peremptory challenges allowed the plaintiffs; that plaintiffs should be compelled to sustain the burden of proving the charge made by evidence beyond a reasonable doubt; that a jury trial could not be waived; and that a unanimous verdict only could be returned—and yet the reason for invoking one provision of the Code of Criminal Procedure is just as cogent as that in favor of any other one. Counsel err

in assuming that the ordinary defenses available in negligence actions never were applicable to a charge which amounts to a crime when made in a civil action.

Aside from the few fundamental principles enumerated in the Constitution, we have but two sources to which to resort in order to determine rules of substantive law or law of procedure: The Codes and the common law. "Law is a solemn expression of the will of the supreme power of the state." Rev. Codes, § 3550. "The will of the supreme power is expressed: (1) By the Constitution. (2) By statutes." Section 3551. "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, or of the Codes, is the rule of decision in all the courts of this state." Section 3552. There is not any rule of the Constitution or provision of the Codes which lends support to the view for which appellants contend, and we are equally certain that such a rule was not invoked at common law.

[7] While the common-law forms of action have been abolished in this state, the principles which underlie them have not been changed, and a reference to the forms as well as the principles not infrequently aids in determining the character of a right or a remedy. The Lord High Chancellor of Great Britain in his recent address to the American Bar Association, in referring to the common law with special reference to its growth and development, said: "Its paradox is that in its beginning the forms of action came before the substance. It is in the history of English remedies that we have to study the growth of rights." If August Maronen had not been killed but only injured and had brought his action for damages against this defendant charging the violation of this same statute as a proximate cause of his injury, would his complaint state a cause of action independently of the element of negligence?

[8] At common law the injured party had his remedy in trespass or by an action on the case, dependent upon the character of the act which caused the injury, but it was immaterial whether the wrongful act amounted to a crime or only a tort. If the injury was the immediate and direct result of the wrongful act, the remedy was sought in trespass; but if the injury was, as to the act complained of, consequential or arose from nonfeasance, then the remedy was by an action on the case. To illustrate: (1) If the defendant had struck Maronen with the cage or had thrown him from it, his form of action would have been trespass, and, if the injury resulted from the defendant's negligence, the action would not have differed from any other negligence action so far as it affected the defenses available; but, if the injury resulted from defendant's intentional act, then a plea of justification alone would have been

available. (2) But for the injury arising from his fall from the cage which resulted from the omission to close the cage doors, his action would have been on the case, and negligence must have been alleged. *Fleming v. Lockwood*, 36 Mont. 384, 92 Pac. 962, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263. So far as this action is concerned, these observations upon the rules of pleading at common law are somewhat more speculative than practical. They answer appellants' contention and aid in determining the line of demarcation between the class of personal injury actions in which negligence is not a necessary element and the class in which the allegation of negligence is necessary.

This complaint states a cause of action for damages caused by negligence, but it does not state a cause of action upon any other theory; and, having set forth facts which disclose legal negligence on the part of defendant, it was permissible for it to interpose any of the ordinary defenses applicable in negligence cases. Possibly there may be found authorities which dispute this conclusion. The Illinois court has reached a different result, but upon a different penal statute. Aside from the Illinois cases, the decisions cited by counsel for appellants are not in conflict with our conclusion. As we view them, they are not in point in fact or in principle. We do not think there is any analogy between this case and an action for damages caused by dueling, assault and battery, or an abortion. But, whatever may be said of the authorities elsewhere, the decision in *Osterholm v. Boston & Mont. Con. C. & S. Min. Co.*, above, is decisive of the question in this state. In our opinion, however, the determination of this controversy is to be found in the merits as disclosed by the evidence, and it is of little consequence by what name the successful defense is designated.

[9] The trial court heard the witnesses, observed their demeanor while upon the witness stand, and every presumption will now be indulged in favor of the correctness of its conclusions. If there is substantial evidence to support any of defendant's special defenses or from which a fair inference to that effect can be drawn, then this court will not interfere.

On September 7, 1911, the deceased, with Powers, Conroy, Ryan, and Updegraff, all miners employed by the defendant company, were directed to cement up a leak in a bulkhead in a drift on the 1,200-foot level from the Mollie Murphy shaft where gas was escaping. In the course of their operations Updegraff became affected by the gas, and Ryan, Maronen, and Conroy took him upon the cage, and without closing the doors the signal to hoist was given, and when at the 1,000-foot level or thereabouts Maronen fell from the cage and was killed. The evidence given upon the trial is very meager, and there are not

any disputed questions of fact. Plaintiffs called Mrs. Maronen, who testified to the relationship existing between them and the deceased, to the habits and earning capacity of the deceased and his contributions to these plaintiffs. Then, upon an admission by the defendant as to the expectancy in life of one of Maronen's age as shown by the standard tables of mortality and as to the cost of an annuity, plaintiffs rested their case. The defendant called the mine foreman, the shift boss, and two of the men who were with Maronen when he fell from the cage. At the close of their testimony the cause was submitted without rebuttal. To set forth even a brief abstract of the testimony of defendant's witnesses would not serve any purpose, useful or otherwise. We have studied it carefully, and our conclusion is that it tends to prove the following facts: That at the time of this accident, and for some considerable time prior thereto, there were but two men regularly employed on each shift in the Mollie Murphy shaft, and for this reason there were not any station tenders, but the men on shift or working in the shaft when they were being hoisted or lowered were required to open and close the cage doors themselves; that as to Maronen this duty was imposed by specific instructions given him individually; that the rule required the first man upon the cage to close the door on his side of the cage; that, at the time these men entered the cage for the purpose of bringing Updegraff to the surface, Maronen was the first man to enter the cage; that he did not close the door next to where he stood; and that it was through that door that he fell. The cause of his fall is not disclosed. There is a bare suggestion that after the cage started he became affected by the gas. Just before starting, Ryan asked Maronen and Conroy how they felt and received a response from each that he felt fine.

[10] With the evidence from which these fact conclusions are drawn before it, the trial court made a general finding in favor of the defendant which is equivalent to a finding in defendant's favor upon every issue necessary to support the judgment. *City of Butte v. Mikosoviz*, 39 Mont. 350, 102 Pac. 593; *Hansen v. Larsen*, 44 Mont. 350, 120 Pac. 229. There is some evidence that the rule requiring the miners to close the cage doors was habitually violated by Conroy and possibly by others, but there is not any evidence that such violations were countenanced by the defendant; on the contrary, it is disclosed that, when some miners in its employ were detected violating the rule a short time before this accident occurred, they were immediately discharged. Neither do we attach importance to the fact that, at the precise time of this accident, Maronen's place of regular employment was not in the Mollie Murphy shaft. He had been working there but a short time before, was familiar with the conditions, and under-

stood the duty which was imposed upon him. When this safety cage statute in its present form was enacted, the Legislature understood that a corporation is an intangible entity, and that the duty to close the cage doors must of necessity be imposed upon some servant of the corporation.

[11] If a corporation employed a man whose sole duty it was to open and close the cage doors at a particular station, and such station tender neglected his duty when he himself was being lowered or hoisted, with the result that he was killed or injured, neither his heirs or personal representatives in the one instance, nor he himself in the other, could recover, for the very obvious reason that he would be responsible for the result—would be the sole author of his misfortune. We are not called upon in this instance to determine to what extent a corporation operating under this statute may impose upon its workmen generally the duty to close the cage doors. We are not required to complicate the question before us in order to make its solution more difficult.

[12] At the time this injury occurred there were only two men regularly employed on each shift on the work reached through the Mollie Murphy shaft, and the question for solution is: Was it the duty of the defendant corporation, under those circumstances, to employ station tenders (a man for each station, where the two miners or either of them might be sent to work), whose sole duty it would be to open and close the cage doors, or in this particular instance, when five men were lowered to perform a particular piece of work out of the ordinary, was it incumbent upon the employer to hire a sixth man to go along for the special purpose of closing the cage doors? This statute does not impose such a duty in terms.

[13] Its provisions are to be given a reasonable construction, in view of the evils sought to be remedied by its enactment. Notwithstanding its penal character, it is a police regulation designed to protect the lives of the men engaged in the extrahazardous occupation of deep underground mining. But it was not intended to lay an embargo upon the mining industry, and consequently it does not contemplate that it shall be necessary that two or three men be employed to wait upon one man who is actively engaged in mining. It does impose a duty and contemplates that in its discharge some one shall be employed to act for the corporation in performing the manual labor of opening and closing the cage doors. If the man so engaged is capable, understands the method to be pursued in fulfilling the obligation of his employment, and is not incumbered with other duties which tend to interfere with the discharge of the mechanical operation of opening and closing the doors, it would seem that the corporation discharged its duty in the first instance, though it might thereafter be liable to some one else

injured by reason of the failure of this agent or servant to discharge the duty assigned him; in other words, so long as the other duties imposed upon the man who is to open and close the cage doors do not interfere with his work of opening and closing the doors, the statute does not expressly or impliedly prohibit the imposition of such dual duties or make the employment of a man, whose sole duty it shall be to open and close the doors, imperative. The evidence tends to show that Maronen was an experienced miner and a capable man; that in each door opening of the cage used in the Mollie Murphy shaft were double doors which closed inwardly and locked or fastened by a simple device; that each door weighed less than 15 pounds and opened and closed easily; that the doors upon this cage were in good working condition, and that it required no technical knowledge or experience, and very little labor, to close them; that, so far as the defendant was concerned, the work which Maronen was required to do upon the occasion when he was injured had no relation whatever to, and could not interfere with, the discharge of his duty to close the cage door; that he had ample opportunity to close the door before the cage was hoisted; that it was his duty to do so; that he failed in the discharge of that duty and paid the penalty with his life. The evidence does not show or tend to show that he was so engrossed with his attention to Updegraff that he could not close the door or that in the excitement he forgot to do so. Conroy likewise failed to close the door on his side of the cage and explains his remissness by saying, "It was dangerous, but we took the chance, I guess."

[14] Our conclusion is that the trial court was justified in finding that Maronen was to all intents and purposes a station tender in the sense that it was his duty to close the door when he entered the cage to be hoisted, and that his death resulted from his failure to discharge a duty which could be and was rightfully imposed upon him; and, because he could not have succeeded upon these facts in an action if he had been injured only, neither his heirs nor personal representatives can succeed in this one.

The judgment and order denying plaintiffs a new trial are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

ANDERSON v. BERRUM. (No. 1,919.)

(Supreme Court of Nevada. Dec. 13, 1913.)

1. TRESPASS (§ 19*)—TITLE TO SUPPORT—LICENSE.

Where plaintiff had a license to cut timber on another's land, and to flume it or carry it out, he may maintain an action for injuries

caused by defendant's trespassing sheep to the roads and the flume.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 18-31; Dec. Dig. § 19.*]

2. TRESPASS (§ 19*)—RIGHTS OF ACTION.

Where plaintiff had a license to cut and remove timber from a third person's land, he is not entitled to damages for injuries to the herbage on such land caused by defendant's trespassing sheep, for only the owner entitled to the herbage could maintain such action.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 18-31; Dec. Dig. § 19.*]

3. TRESPASS (§ 43*)—COMPLAINT—SUFFICIENCY.

In an action for damages by trespassing sheep, where it appeared that plaintiff had only a license to cut timber on the lands of a third person, he cannot, under a complaint alleging damages to the herbage on that land and other land owned by him, recover anything for injury to the verdure; the complaint not designating how much damage was done on the different lands.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 102-111; Dec. Dig. § 43.*]

4. WITNESSES (§ 268*)—CROSS-EXAMINATION.

The cross-examination must be limited to matters stated in the examination in chief and questions to test the accuracy, veracity, and credibility of the witness, though it is, of course, competent to call out anything tending to modify or rebut the conclusion or inference resulting from the facts stated by the witness in his direct examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 981-948, 959; Dec. Dig. § 268.*]

5. WITNESSES (§ 268*)—CROSS-EXAMINATION.

The rule limiting the cross-examination to matters stated in the examination in chief does not prevent the cross-examining party from making the witness his own after the adverse party has concluded his case in chief, nor does it prevent the court from allowing a rigid examination if the witness be hostile.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 981-948, 959; Dec. Dig. § 268.*]

6. WITNESSES (§ 286*)—EXAMINATION—REDIRECT EXAMINATION.

Where plaintiff was cross-examined as to why, in his former suit, he did not claim as great damage as in the present one, those questions were proper, and will not authorize his attorney on his redirect examination in asking him leading questions suggesting the answer.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 930, 994-999; Dec. Dig. § 286.*]

7. APPEAL AND ERROR (§ 1048*)—REVIEW—HARMLESS ERROR.

The allowance of leading questions on the redirect examination of plaintiff is not reversible error where the matters elicited might as well have been elicited by a longer series of direct questions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

8. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

The allowance of leading questions is a matter principally within the discretion of the trial court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

9. APPEAL AND ERROR (§ 971*)—REVIEW—HARMLESS ERROR.

While ordinarily the allowance of leading questions is no ground for reversal even if the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

trial court abuses its discretion, the abuse may be so flagrant as to require a reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.*]

Appeal from District Court, Douglas County; Frank P. Langan, Judge.

Action by S. C. Anderson against Louis Berrum. From a judgment for plaintiff, defendant appeals. Affirmed on condition that plaintiff enter remittitur.

Summerfield & Curler, of Reno, for appellant. Alfred Chartz, of Carson City, for respondent.

TALBOT, C. J. Plaintiff brought this action to recover for trespass by defendant's band of about 2,800 sheep. In the complaint filed upon the commencement of the action the different items constituting the damage, but not the amount claimed for each, were stated, and an aggregate sum of \$350 demanded, and, after demurrer was interposed and sustained, plaintiff filed an amended complaint, in which he asked judgment for twice that amount, and specified the sums he claimed for the different acts causing the damage.

According to the amended complaint, it is sought to recover as damages \$350 for herding and grazing the sheep upon the lands of the plaintiff, and the eating and tramping of the grass and verdure so it would not replenish, \$50 for knocking down a part of the piles of cordwood which plaintiff had upon the land, \$150 for tramping and filling with rocks and debris the road and trails used by the plaintiff for packing wood, and \$150 for tramping, choking up, and filling springs which were situated on the land, and which were used by plaintiff for household, stock, and domestic purposes, and for fuming wood.

H. M. Yerington had executed an agreement, called a lease, to J. F. Barrett, who assigned it to the plaintiff, and which allowed Barrett, or the plaintiff as assignee, the right of entering upon the flume and the timber lands, aggregating 2,115 acres, described therein, "for the purpose of fuming wood through said flume to Carson river, and cutting the timber upon said land to any extent he may deem advisable (but not to hold possession of any part of said flume or timber lands for any other purpose whatsoever)."

[1] As claimed by the appellant, this so-called lease did not convey the grass on the land to Barrett, or to the plaintiff as assignee. Nevertheless, the court properly admitted it in evidence, because it tends to sustain plaintiff's right to cut and flume the wood, and incidentally to use the road and trails, and to recover for damage done to them and to the wood. The agreement was in force by the consent of the parties, notwithstanding the omission of any provision specifying the time during which the privilege of cutting and fuming timber was to continue.

[2] Exception is taken to the following instructions, which were requested by the defendant and refused by the court:

"The jury is instructed that, plaintiff having failed to prove legal title to any of the lands described in the complaint as having been leased by him from H. M. Yerington, he is not entitled to recover damages for or on account of defendant's sheep having been herded or grazed upon said land."

"The jury is instructed that the plaintiff has not offered any testimony of any damage suffered by him, if any, for loss of verdure or grass on said land described in the complaint, and in arriving at the amount of damage, if your verdict should be for the plaintiff, you cannot take into consideration any loss the plaintiff may have sustained for verdure or grass eaten up or destroyed by defendant's sheep when upon said land."

If they had been given, these instructions would have told the jury that the plaintiff could not recover damages for the herding or grazing of sheep or for the eating or loss of the grass and verdure on the Yerington land, which would have been strictly correct so far as the instructions go. As the right to the grass or to use the land for grazing purposes was not conveyed by Yerington to plaintiff or his assignor, the right to recover any damage for the grazing or eating of the grass, or the mere trespass of the sheep upon the land, remained in Yerington or the owner of the land, and to him, and not to the plaintiff, the defendant would be responsible in law for the eating of the grass and the destruction of the verdure.

[3] Plaintiff is not entitled to recover anything on account of the Yerington land under paragraph 4 of the amended complaint, which alleges the claim for \$350, or the largest item of the damage, for the grazing upon the lands described in the complaint, and which does not designate how much of this damage was done on the Yerington land, nor how much on the other land. In view of the testimony of the plaintiff that most of the grass was upon his land, possibly it may be inferred that most of the grass eaten was upon his land; but the amount of the damage which he sustained by the grazing or eating of the grass on his own land, and which he would be entitled to recover, is not shown by allegation or proof. As the plaintiff could recover only for injury to property or some right belonging to him, the error in refusing to instruct the jury that he could not recover for the grazing and eating of the grass on the Yerington land, which had not been conveyed to him, is apparent.

The elements of damage are separate, and the purpose of having them alleged separately is that they may be considered and proved separately. The claims for knocking down the wood, for filling the road and trails with rock and debris, and for tramping and choking the springs are provable and recoverable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

under their own allegations, and not under the one for herding and grazing the sheep upon the lands. The sheep might have eaten the grass and destroyed the verdure without committing any other damage. The right of action for injury to the wood belonging to the plaintiff was as separate from any right of action in favor of Yerington for trespassing and grazing upon the lands as if the grass destroyed had been on land in which the plaintiff had no interest.

After refusing these instructions, which may have resulted in the award by the jury to the plaintiff of damages for the eating of the grass and the destruction of the verdure, the owner of the land could bring a suit, and recover the damage occasioned in this regard from the defendant, who would be doubly mulcted if he could not avoid the payment of this damage in this action. These instructions did not mean that the plaintiff could not recover for any injury to his own property or right, and, if they had been given, and the plaintiff had desired one which would have told the jury that, notwithstanding the plaintiff could not recover for the grazing and eating of the grass and verdure on the Yerington land, he was entitled to compensation for any damage which he sustained by reason of the filling and injury to the roads and trails, the trampling of the springs, and the lessening of the flow of water which he used in moving and fuming the wood, he should have drawn and presented it to the court.

[4, 5] Over the objection of the defendant, the court allowed plaintiff to answer upon his redirect examination several leading questions which put into his mouth words of his attorney, some of which questions were:

"Q. You first brought suit in Ormsby county for \$299? A. Yes, sir. Q. Under my advice? A. Yes, sir. Q. Didn't I tell you at that time he might pay, and it would be better to take \$299 than to go all through the courts?

"Mr. Curler: We object to the question on the ground that it is leading, suggestive, and hearsay, and the answer to that question would be a self-serving declaration.

"The Court: Objection overruled; answer the question.

"Mr. Curler: We note an exception on the grounds stated in the objection.

"A. I told Mr. Chartz I wanted to sue for \$800. Q. And what was my advice? A. You said I could not sue in the justice court for more than \$300. Q. Didn't I also advise you to sue for as little as possible in order to get the money?

"Mr. Curler: Same objection.

"The Court: Same ruling and exception.

"A. I know you did.

"The Court: Note an exception upon the grounds stated in the former objection.

"A. Yes; you told me to put in the justice's court, and get quick suit of it. Q. And sue for as little as possible because he might

pay it. A. Yes, sir. Q. Then you brought another suit in this court immediately following that, and they knocked you out?

"Mr. Chartz: Strike that out.

"Mr. Curler: I wish to insist upon our objection to the whole of this testimony for this reason: The fact that a matter is brought out on cross-examination does not change the rule as to the form of question. On redirect examination the same rule applies as to form, so far as the form of the question is concerned, and that the witness was asked the question on cross-examination does not give his counsel any more privilege of putting the answers in his mouth than if these questions were put upon direct examination and not upon redirect examination.

"The Court: The ruling of the court will stand.

"Mr. Chartz: Now, then, Mr. Anderson, after that suit in the justice's court was disposed of in whatever way it may have been, you brought a suit in this court, which counsel has referred to, in which you claimed therein \$350 damages, and that was demurred to, and the demurrer sustained, and then you brought suit for \$700; very likely you have forgotten.

"A. I don't know about that. Q. Now, you brought that suit in Ormsby county, and they demurred to that, because you had not named the county of Douglas in it with specific local subdivision of Mallory Canyon. Didn't I advise you still to sue for a small amount to the end that Mr. Berrum might pay and not put us through a suit? * * * Q. Did I advise you at that time to still sue for as small an amount as possible? A. Yes, sir. Q. In order that he might pay without further litigation? A. Yes, sir; I know you did. Q. Then after that I further advised you as to the amount, and didn't I tell you to sue for the full amount? A. Yes, sir; you put it in for \$700 in place of \$800. Q. I did? A. You forgot this \$800.

"Mr. Chartz: That is all. Oh, I forgot myself for \$800."

In this, and in most jurisdictions in this country, the cross-examination must be limited to matters stated in the examination in chief and questions to test the accuracy, veracity, and credibility of the witness. *Buckley v. Buckley*, 12 Nev. 423; *Id.*, 14 Nev. 262; *Ferguson v. Rutherford*, 7 Nev. 385; *Cokely v. State*, 4 Iowa, 477; *People v. Miller*, 33 Cal. 99; *Houghton v. Jones*, 68 U. S. (1 Wall.) 706, 17 L. Ed. 503; *Hughes v. Coal Co.*, 104 Pa. 207; *Hurlburt v. Meeker*, 104 Ill. 541; *Jones on Evidence*, § 820. This rule does not prevent the cross-examining party from making the witness his own after the adverse party has closed his case in chief, and does not prevent the court from allowing, in its discretion, a rigid examination of the witness if he is hostile. *Nash v. McNamara*, 30 Nev. 143, 93 Pac. 405, 16 L. R. A. (N. S.) 168, 144 Am. St. Rep. 694; *Houghton v. Jones*, 68 U. S. (1 Wall.) 706, 17 L. Ed.

508. On cross-examination it is competent to call out anything tending to modify or rebut the conclusion or inference resulting from the facts stated by the witness on his direct examination. *Wilson v. Wagar*, 28 Mich. 452.

[8, 7] There were no good reasons for allowing questions so flagrantly leading, such as the hostility or lack of understanding of the witness, and this testimony does not come under any of the exceptions to the rule forbidding the putting to a party to the action of leading questions by his own attorney. As an excuse for asking these leading questions, it is said that when a party brings out new matter upon cross-examination he makes the witness his own, and that leading questions may be asked on re-examination. *People v. Court*, 83 N. Y. 438. But no such rule applies to new matter which is properly a part of the cross-examination of the witness, or relating to matters testing his accuracy or veracity, and it ought not to apply to a party to the action when he is being interrogated by his own attorney. The reasons which allow a litigant to call the opposing party or a hostile witness to the stand and ply him with leading questions should ordinarily preclude the asking of leading questions on his cross, redirect, or any examination by his own attorney. If the bounds of proper cross-examination are not exceeded, and they were not in this instance, the witness is deemed to be continually the witness of the party introducing him. *Stephen's Digest of the Law of Evidence* (Chase Ed.) art. 127, note 1.

[8, 8] The questions which the defendant's attorney asked the plaintiff relating to his having claimed, in an action brought in the justice's court and in the original complaint in this action, about half the amount of damage he claimed on the trial were proper cross-examination, because they tended to test his accuracy or vary his testimony. *Stephen's Dig. of Ev. art. 129; Jones on Ev. § 822*. They did not relate to new matter in any way authorizing his own attorney to ply him with leading questions. The same rule applies to any witness, but for greater reasons to a party to the action. Although on redirect examination the allowing of these leading questions was unfair and improper, it is not deemed reversible error, and especially in view of the conclusion that the judgment must be reduced or the case remanded for a new trial, under the claim that the verdict is excessive, and that the evidence will not sustain a recovery for more than \$350. After it had been shown that the plaintiff had brought the suits originally for less than the amount of damage he claimed upon the trial, it would have been proper for his attorney to have asked him to explain why he had sued for less than he was claiming, and, if the leading questions had been disallowed, as they should have been, no

doubt by direct questions the plaintiff's reasons would have been elicited. Whether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules regarding them is not ordinarily a ground for reversal. *State v. Williams*, 81 Nev. 380, 102 Pac. 974; 1 *Greenleaf, Ev. § 435*; *Jones, Ev. § 819*; 1 *Wigmore, Ev. § 776*; *Maguire v. People*, 219 Ill. 16, 76 N. E. 67; *City v. Witman*, 122 Ind. 538, 23 N. E. 796; *Gibson v. Glizoxinski*, 76 Ill. App. 400; *Peters v. U. S.*, 94 Fed. 127, 36 C. C. A. 105; *State v. Whalen*, 148 Mo. 286, 49 S. W. 989. But the improper allowing of leading questions may be so prejudicial as to require a reversal. *Woodruff v. State*, 72 Neb. 815, 101 N. W. 1114; *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617; *Turney v. State*, 8 *Smedes & M. (Miss.)* 104, 47 Am. Dec. 75.

As a considerable sum, but something less than half of the \$350 claimed for grazing and eating the grass, may have been allowed by the jury for grazing and eating the grass on the Yerington lands, it is evident that the judgment should not stand for the full \$500 awarded by the verdict. If within ten days the plaintiff files in this court a written consent thereto, an order will be made that the amount of the judgment be reduced to \$350, and that the costs of the appeal be paid by the plaintiff. If such consent is not filed, the judgment will be reversed, and the case remanded for a new trial.

NORCROSS, J., concurs.

NOTE.—McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

CAMPBELL v. GOLDFIELD CONSOL. WATER CO. (No. 1,985.)

(Supreme Court of Nevada. Dec. 12, 1913.)

1. WATERS AND WATER COURSES (§ 21*)—MINING LOCATIONS—APPROPRIATION.

The location of a mining claim on land in which a spring arose will give the locator no claim to the water flowing from the spring in a natural channel, as against an appropriator; for title to such flow can only be acquired by appropriation and application to a beneficial use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 14; Dec. Dig. § 21.*]

2. WATERS AND WATER COURSES (§ 7*)—SPRINGS—APPROPRIATIONS.

Where the waters of a spring flow in a natural water course, they are the subject of a beneficial appropriation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 2; Dec. Dig. § 7.*]

3. WATERS AND WATER COURSES (§ 30*)—CHANGE IN USE OF WATER BY APPROPRIATION.

One having no right to the waters of a spring which flow in a natural water course

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

cannot object that a prior appropriator has changed his use of the stream.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 20; Dec. Dig. § 30.*]

Appeal from District Court, Esmeralda County; Peter J. Somers, Judge.

Action by Luther E. Campbell against the Goldfield Consolidated Water Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Thompson, Morehouse & Thompson, of Goldfield, for appellant. Potter, West & Potter, of Los Angeles, Cal., W. H. Bryant, of Denver, Colo., and Henry M. Hoyt, of San Francisco, Cal., for respondent.

NORCROSS, J. This is an action to quiet title to a certain spring, known as Hyde spring, and the waters therein and flowing therefrom, and for a permanent injunction restraining respondent from interfering therewith.

Plaintiff, appellant herein, in his complaint asserted title to the spring in question, and the waters flowing therefrom, by virtue of ownership of a certain unpatented mining claim known as the "Capricorn" in the Lida mining district, county of Esmeralda, which he alleged embraced said spring, and that he and his grantors and predecessors in interest had been in the exclusive possession and occupation of said mining claim, including said spring, for more than four years prior to the commencement of the action. The complaint further alleged: "That said spring of water and the flow therefrom is a part and parcel of said lands hereinbefore described, and has not been appropriated or diverted by any person or persons." Defendant, respondent herein, in its answer denied specifically the allegations in the complaint, and set up ownership in itself of the land embracing said spring by virtue of a certain mining location, known as the "December South," made on the 29th day of December, 1904, by the grantors and predecessors in interest of respondent, and by virtue of a relocation of said ground as a mining claim, known as the "Spider No. 1," made on the 1st day of January, 1907, by certain others of respondent's grantors and predecessors in interest. For a further answer and defense, respondent set up ownership of the spring and the waters flowing therefrom by virtue of an actual appropriation of the waters flowing from said spring and the application thereof to a beneficial use by its grantors and predecessors in interest, and, also, an appropriation regularly granted to the grantors and predecessors in interest of respondent, by the office of the State Engineer of the state of Nevada, made on June 22, 1908, under and by virtue of that certain act of the Legislature, relative to the appropriation of waters, approved February 16, 1903, as amended March 1, 1905. Defendant prayed for judgment that

plaintiff take nothing by this action, and that defendant be decreed to be the owner of the spring in controversy and the waters flowing therefrom.

The court below found as facts that the plaintiff was the owner of the Capricorn claim (located January 1, 1908); that the spring in controversy was within the boundaries of defendant's Spider No. 1 claim. That on December 29, 1904, W. H. Hyde, C. L. Hyde, and K. P. Allred located the said December South claim, and thereafter perfected such location, and that the said claim included the said spring, and that said Hydes and Allred continued in the occupancy thereof until the 1st day of January, 1907. That at the time of the location of the said December South claim the said spring thereon and the waters flowing therefrom were public waters of the state of Nevada. That in the month of December, 1905, the said Hydes and Allred applied all the waters flowing from said spring to a beneficial use by using the same for mining and domestic purposes and the irrigation of certain lands. That on the 20th day of December, 1905, the said Hydes and Allred made application to the State Engineer to appropriate said waters for a beneficial use, and thereafter on the 22d day of June, 1908, the said State Engineer issued his certificate of appropriation to the defendant as the assignee and grantee of the said Hydes and Allred, which said certificate contains the following provisions:

"Amount of appropriation, 1 cu. ft. per sec.; amount of prior appropriations, 0 acre feet per year; date of appropriation, Dec. 20, 1905; description of land to be irrigated, and for which this appropriation is determined, 3 acres during 1906-07-08 in S. W. $\frac{1}{4}$ Sec. 31 T. 5 S. R. 41 E. and S. E. $\frac{1}{4}$ Sec. 36 T. 5 S. R. 40 E.

"The right to water hereby determined is limited to irrigation and the use is restricted to the place where acquired and to the purpose for which acquired; rights for irrigation not to exceed three acre feet per year for each acre of land for which appropriation is herein determined."

That on the 1st day of January, 1907, the said December South mining claim, being then subject to forfeiture for failure to perform the annual labor thereon, was relocated by one Speed Barnes under the name of the "Spider No. 1" claim, and thereafter and on the 16th day of December, 1907, the said Speed Barnes sold the said Spider No. 1 claim to the said K. P. Allred, who thereafter, and on the 15th day of July, 1908, sold and transferred the said Spider No. 1 claim to the defendant; that ever since December 29, 1904, the defendant and its predecessors in interest have at all times been in the actual, quiet, and peaceable possession of said spring, the stream of water flowing therefrom, and the pipes and ditches con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—62

veying the same, and said waters have at all times, under their direction and control, been applied to a beneficial use for mining, domestic, and irrigating purposes, and during all of the time herein mentioned said defendant and its predecessors in interest have been in the peaceable, quiet, and lawful possession of said pipe line and ditches used for diverting said waters. Upon these findings judgment was entered in favor of the defendant, decreeing it to be the owner of the said Hyde spring and the waters flowing therefrom, and also to be the owner of the Spider No. 1 lode mining claim as described in said judgment and decree, which description embraced the said Hyde spring.

[1] There is evidence sufficient to support all the findings in the case with the possible exception that the Spider No. 1 claim, as originally located, embraced the spring in controversy. There is evidence in the case which might tend to support appellant's contention that the side lines of the Spider claim were, subsequently and after appellant had located the "Capricorn," changed so as to include the spring, but we do not consider this question material as affecting defendant's superior right to the water based upon actual appropriation, and we express no opinion upon the question of the sufficiency of the evidence to support this finding. Conceding for the purposes of this case, without so deciding, that the spring may be within the exterior limits of the "Capricorn" claim, such fact, nevertheless, would avail plaintiff nothing. He does not assert any right to the flow of water from this spring by virtue of appropriation, but bases his right solely upon the alleged ownership of a mining claim, the exterior boundaries of which he alleges embrace the spring. This, in the absence of an appropriation of the water flowing from the spring in a natural channel, would give the plaintiff no right thereto as against an appropriator. Title to such flow may only be acquired by appropriation and application to a beneficial use. The court below found that long prior to plaintiff's location of the Capricorn claim, the grantors and predecessors in interest of defendant had appropriated the flow from the spring and applied the same to a beneficial use, and that ever since such time defendant and its grantors and predecessors in interest had continued to so apply such flow of water.

[2, 3] Many other questions are raised in the brief of counsel for appellant, and discussed at length by respective counsel, but we think it unnecessary to consider them. For example, it is contended that a spring is not subject to appropriation; that the purpose of the appropriation may not be changed without consent of the state authorities. Whatever may be the law respecting a spring from which no water flows, there can be no question as to the right to appropriate water flowing in a natural water course, the

source of which is a spring. As to the question of a change in the purpose of the diversion to a different beneficial use from that of the original appropriation, appellant, not having any interest in the water by virtue of an appropriation, is in no position to complain.

Appellant, not having established any appropriation of the water whatever, and respondent having established an appropriation thereof upon the part of its grantors and predecessors in interest long prior to the time appellant claims to have initiated his right by location of the mining claim, and respondent and its predecessors in interest having since such appropriation continuously diverted said water and applied the same to a beneficial use, the superior right to the flow of the water from the spring is in respondent.

The judgment should be modified to correspond to the prayer for judgment in the answer, and as so modified is affirmed.

TALBOT, C. J., and McCARRAN, J., concur.

MILLER v. MILLER et al. (No. 2055.)
(Supreme Court of Nevada. Dec. 16, 1913.)

On petition for rehearing. Petition denied.
For former opinion, see 184 Pac. 100.

McCARRAN, J. The petition for rehearing in this proceeding is denied. Upon the hearing of the case upon appeal, the appellant, if he so desires, may present for the consideration of the court such proposed additions or modifications of the transcript of the record as he may deem essential to a proper consideration of the questions involved on the appeal. The court will then determine whether appellant is entitled to have the additions or modifications considered as a part of the record of the case.

TALBOT, C. J., and NORCROSS, J., concur.

CHAPPELEAR v. STATE
(Criminal Court of Appeals of Oklahoma.
Dec. 13, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 82*)—JOINT OFFENDERS.

Separate informations may be filed against defendants complained of as being joint offenders, and together held for the commission of a single crime.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 225; Dec. Dig. § 82.*]

2. INDICTMENT AND INFORMATION (§ 161*)—RIGHT TO AMEND—TIME.

By leave of court, an information may be amended, as to matters of substance or form,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

after a plea of not guilty has been entered, and before the trial has begun.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516-523; Dec. Dig. § 161.*]

3. INDICTMENT AND INFORMATION (§ 122*)—PRELIMINARY COMPLAINT—VARIANCE.

When it appears that the charge in the complaint before the committing magistrate is substantially the same as that charged in the information filed in the district court, a motion to quash, on the ground that the offense charged in the information differs from that charged in the complaint upon which the defendant was held to answer, is unavailing, and was properly overruled.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 321-325; Dec. Dig. § 122.*]

4. CRIMINAL LAW (§ 1141*)—APPEAL—RECORD—PRESUMPTION.

Error must affirmatively appear from the record; it is never presumed. Every presumption favors the regularity of the proceedings had upon the trial. The plaintiff in error must affirmatively show prejudicial error; otherwise the judgment of the trial court will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015, 3020, 3022, 3023; Dec. Dig. § 1141.*]

(Additional Syllabus by Editorial Staff.)

5. LARCENY (§ 40*)—VARIANCE—NUMBER OF ANIMALS STOLEN.

In a prosecution for larceny of animals, a variance between the information and proof as to the number stolen was immaterial.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-126, 160; Dec. Dig. § 40.*]

Appeal from District Court, Washita County; James R. Tolbert, Judge.

Ben Chappellear was convicted of cattle theft, and appeals. Affirmed.

Jones & Bashore, of Cardell, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the district court of Washita county, on the 30th day of March, 1912, in which the defendant was found guilty of larceny of domestic animals, and his punishment assessed at imprisonment in the penitentiary for the term of five years. The evidence shows that Ben Chappellear and Tom Smith, residing near the town of Cloud Chief, learned that their neighbor, Charley Maddox, was going to ship some cattle from the town of Dill, on the Orient Railroad to Wichita. Maddox and his brother drove the cattle to Dill, arriving with them there about dark; the cattle were put into the railroad stock pens. Chappellear and Smith took five of the cattle out of the railroad stock pens, and drove them back in the general direction from which they had come, but by a different road; the loss of the cattle was discovered by Maddox when he went back to load them, and search was made. Investigation led to the finding of the cattle tracks and horse

tracks, and the subsequent finding of the cattle on the day following where they had been left, in a field about 15 miles from where they had been taken; that the horse tracks following these cattle were the tracks of the horses rode by Chappellear and Smith. Witnesses also testified to seeing Chappellear and Smith driving the stolen cattle. There was no evidence offered on the part of the defense. The record shows that on November 20, 1911, the county attorney of Washita county filed preliminary complaint with the county judge of said county, which said complaint charged Ben Chappellear and Tom Smith with the larceny of five head of cows, the property of Charley Maddox. The defendants were arrested, and waived preliminary examination, and gave the required bond and were released. That on the 14th day of December, 1911, the county attorney filed in the district court an information, charging Ben Chappellear and Tom Smith with the larceny of five head of cows. Defendants were arraigned and entered pleas of not guilty and present bond continued. That on the 20th day of February, 1912, the county attorney filed an amended information against the defendant Chappellear, charging the larceny of two head of cows, the property of Charley Maddox. Thereafter on the 15th day of March, 1912, this case came on for trial, and the state and the defendant announced ready, and a jury was impaneled to try the cause. Thereupon the county attorney read the information to the jury, and made his statement of the case. Thereupon the defendant's counsel moved to quash the information, for the reason that no preliminary examination had been had or waived by the defendant upon the charge stated in the information, upon which the defendant is now sought to be tried; that the same has been filed without leave of court, or notice to the defendant, or his counsel, and that he has never been arraigned upon this information, nor has he pleaded to such information. Thereupon the defendant was arraigned and entered his plea of not guilty. The action of the court is assigned as error. The defendant has filed a brief of 31 closely printed pages without citation of authority to support the contention made.

[1] The argument advanced is that after the defendants had been jointly held for trial, the county attorney had no power other than to file an information, jointly charging them with the larceny as charged in the original complaint. Under the statute any defendant in a felony case may demand that a separate trial be awarded him; and, where the state asks it, a separate trial may be granted, in the discretion of the court. Section 5878, Rev. Laws. In our opinion it is within the discretion of the county attorney to inform against them either jointly or severally, and separate informations requiring separate tri-

al may be filed against defendants complained of as being joint offenders, accused of the commission of a single crime. *People v. Plyler*, 121 Cal. 160, 53 Pac. 553.

[2] In the case of *Rollen v. State*, 7 Okl. Cr. 673, 125 Pac. 1087, it was held by this court that: "By leave of court, an information may be amended, as to matters of substance or form, after a plea of not guilty has been entered, and before the trial has begun."

[3] The question presented, as to whether or not the amended information charged an offense different from that charged in the preliminary complaint will be answered by stating that this court has held in numerous decisions that when it appears that the charge in the complaint before the committing magistrate is substantially the same as that charged in the information, a motion to quash, on the ground that the offense charged in the information differs from that charged in the complaint upon which the defendant was held to answer, is unavailing, and was properly overruled. *Ponosky v. State*, 8 Okl. Cr. 116, 126 Pac. 451; *Morgan v. State*, 8 Okl. Cr. 444, 128 Pac. 159; *Sayers et al. v. State*, 10 Okl. Cr. —, 135 Pac. 944.

[5] Quantity and number are not ordinarily essential to be proved as alleged, and a variance as to the number of animals stolen is not fatal to a conviction. Where an information alleges the taking of a certain number of animals, the state is not bound to prove the exact number alleged in the information, because the number of animals stolen at any one time is immaterial and does not tend to change in any way the degree of the crime.

[4] Counsel in their brief stated: "A review of the whole case will be necessary in order for this court to determine whether there is prejudicial error, and the court will presume that the defendant was prejudiced until it is made from the whole record to appear that he was not." The presumption is just the opposite. Error must affirmatively appear from the record. It is never presumed. Every presumption is in favor of the regularity of the proceedings had upon the trial. The general rule, often announced by this court, is that the plaintiff in error must affirmatively show prejudicial error, otherwise the judgment of the lower court will be affirmed. *Killough v. State*, 6 Okl. Cr. 311, 118 Pac. 620.

After a careful examination of the record we are satisfied that under well-settled rules, sustained and upheld by the decisions of this court, no error has been committed to the prejudice of the substantial rights of the defendant. The judgment of conviction is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

RAY v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 16, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§ 289*)—INSTRUCTIONS—EVIDENCE.

It is not error for the court to charge the jury that under the law a person would be guilty of robbery if he took whisky, money, or other property from the immediate presence of the person of the injured party against his will by means of force or fear.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 594; Dec. Dig. § 289.*]

2. HOMICIDE (§§ 18, 309*)—SUBMISSION OF ISSUES—MURDER—ELEMENTS OF OFFENSE.

(a) When the facts plainly disclose that a homicide occurred in an attempt to perpetrate a robbery or other felony, the issue of manslaughter should not be submitted to the jury.

(b) Premeditated design to affect death is not an element of murder committed in the perpetration of a felony.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 24-31, 649, 650, 652-655; Dec. Dig. §§ 18, 309.*]

3. HOMICIDE (§ 300*)—SELF-DEFENSE—REFUSAL OF INSTRUCTIONS.

When the proof clearly discloses the fact that an accused was the aggressor and brought on the difficulty by violent and felonious action and without any justification from the deceased, and there is no proof indicating that such accused had withdrawn from the controversy, the law of self-defense cannot be invoked, and it is not error for the court to decline to give an instruction attempting to submit any such issue.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.*]

Appeal from District Court, Washington County; R. H. Hudson, Judge.

Ace Ray was convicted of murder, and appeals. Affirmed.

J. R. Charlton, of Bartlesville, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. Plaintiff in error, Ace Ray, was convicted at the February, 1912, term of the district court of Washington county on a charge of murder; the information having charged him, with Vernie Neal, jointly with the murder of James D. Terry in said county in December, 1911. Separate trials were had in which it appears that both parties were convicted and given life imprisonment. This appeal involves the trial of Ray only.

The proof on behalf of the state is to the effect that Vernie Neal and Ace Ray, on the night before the killing, were drinking heavily and having considerable trouble. The record discloses that they were engaged in a number of affrays. Early on the morning of the homicide they went to the place of Jesse Boyd and procured a revolver by force, which was taken charge of by Neal. A short distance from the scene of the homicide and immediately after the revolver was se-

cured, the deceased and a person driving a buggy were met in the road. Neal drew the gun and forced the person driving the buggy to get out of the vicinity hurriedly. He then turned to the deceased, pointed the gun at him, and required him to go to his place of business and open up his house; he and the accused Ray following closely behind with the pistol continuously pointed at the deceased. He demanded that the deceased give them whisky and threatened to kill him if he did not. The deceased refused them the whisky. Some words were passed, and the deceased informed them again that he would not give them whisky, and replied, to their demands that they would kill him if he did not, that they would have to kill him. A shot was heard, and shortly afterward the deceased was found lying on the floor of his place, dead from the effects of a bullet wound. The accused made a statement in which he gave some of the details of the killing in line with the state's contentions. These statements were never contradicted by any one. One witness testified to the immediate facts surrounding the killing, including the shooting. The principal efforts on behalf of the accused appear to have been expended in trying to contradict and discredit the testimony of this witness, which in many details was contradicted, and his story is more or less improbable and unsatisfactory. The proof on behalf of the state, however, independent of this testimony, is entirely sufficient to warrant a conviction. The theory of the state was that the accused and Vernie Neal conspired together to rob the deceased James D. Terry, and that in the perpetration of this robbery Terry was killed. There is no doubt in our minds that this theory is correct.

[1] Counsel for plaintiff in error have filed a memorandum brief in which it is argued that the court committed error in charging the jury as follows: "You are instructed that if you find and believe from the evidence in this case, beyond a reasonable doubt, that on or about the 7th day of December, 1911, in Washington county, state of Oklahoma, the defendant, Ace Ray, and one Vernie Neal conspired and confederated together to wrongfully take from the possession of the deceased, James D. Terry, from his person or immediate presence, and against his will by means of force or putting him in fear of an unlawful injury, immediate or future, to his person or property, whisky, money, or other property, of no matter how trifling value," etc. Counsel contend that this instruction is erroneous and base their contention on the ground that whisky kept for an illegal purpose is not property and therefore could not be subject to larceny or robbery. For the purpose of this case it is not necessary for us to determine whether or not whisky kept for illegal purposes is subject of larceny and robbery. It is sufficient to

say that the proof nowhere discloses that the whisky sought by the accused and his co-conspirator was being kept for an unlawful purpose.

[2] Counsel next contend that the court erred in failing to define the crime of manslaughter in the first degree. With this contention we cannot agree. The only error committed by the court was in referring to manslaughter at all. There is no element of manslaughter disclosed by the proof in the record. There is no plea of insanity invoked at the trial of the case, and a man who is not so drunk but that he can have three or four fights and by main strength take from another a loaded revolver and go out on the highway intimidating and harassing the citizens, and then undertake to rob somebody of his money or other property, is not entitled to mitigating consideration at the hands of the courts and juries of the country. The theory upon which the instruction of manslaughter was given was that, if the accused was too drunk to form the premeditated design contemplated by law, he would not be guilty of murder. Counsel is in error in this for the reason that premeditated design to affect death is not an element of murder committed in the perpetration of robbery.

[3] The only other proposition raised by counsel that we feel called upon to discuss is the question of the court's failure to give the law of justifiable homicide. This assignment is wholly without merit. Nowhere in the record is there a suggestion of proof on behalf of the accused or the state that the law of self-defense was relied upon. We have said many times that under the law in this state a person cannot provoke a difficulty by assaulting his opponent and killing him, and then justify himself under the law of self-defense, and especially so when there is no provocation for the assault in the first place. Whatever reason there may be for the rule, it is much stronger when a person goes out on the highway and at the point of a six-shooter marches an individual over the country into his place of business and demands that he give up his belongings or be killed, and then, if a difficulty ensues, kill him. There could be no element of self-defense pleaded. The only mitigating circumstances in this entire record, from the viewpoint of the writer, is that the accused, Ace Ray, was probably less guilty than his co-conspirator, Vernie Neal. Neal seems to have been the leader and the man who used the gun; Ray making him a willing companion in all his controversies, encounters, and efforts. This probably accounts for the fact that the death penalty was not inflicted.

We find no reason to interfere with the judgment of the trial court. It is therefore in all things affirmed.

DOYLE, J., concurs. FURMAN, J., absent and not participating.

HENRY v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 13, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1130*)—APPEAL—BRIEF—CITATIONS.

Where counsel rely upon Oklahoma cases in support of their propositions, they must in their briefs cite the page and volume of the Oklahoma Reports on which such cases can be found.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

2. CRIMINAL LAW (§§ 543, 1169*)—TESTIMONY ON PRIOR TRIAL—ADMISSIBILITY—HARMLESS ERROR.

(a) Where a witness has testified for the state in a criminal case, and said cause is tried again, and the state proves that such witness had left the state declaring that he was going into another state, and a subpoena is issued for said witness to testify in behalf of the state, and the sheriff's return thereon shows that the witness could not be found in the county in which the cause is pending, the testimony of the witness given on such previous trial may be admitted on behalf of the state or the defendant.

(b) If the court should err in the admission of evidence on the part of the state, and subsequently thereto the defendant takes the witness stand in his own behalf, and admits the truthfulness of the evidence so erroneously admitted, such error becomes harmless and will not be ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 1233, 1236, 3088, 3130, 3137-3143; Dec. Dig. §§ 543, 1169.*]

3. CRIMINAL LAW (§§ 895, 1144*)—PRESUMPTION OF REGULARITY—PRESENCE AT TRIAL—WAIVER OF RIGHTS.

(a) Every presumption of law must be indulged in favor of the regularity of the proceedings in courts of record, and if the record shows that the defendant was present when the trial began but is silent as to the presence of a defendant during the trial, in the absence of an affirmative showing that the defendant was actually absent, and that such absence was not the result of his consent or procurement, a judgment will not be reversed because the record did not show affirmatively the presence of the defendant.

(b) *Humphrey v. State*, 3 Okl. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972, expressly overruled. *Wood v. State*, 4 Okl. Cr. 436, 112 Pac. 11; *Mendenhall v. United States*, 6 Okl. Cr. 436, 119 Pac. 594; *Killough v. State*, 6 Okl. Cr. 311, 113 Pac. 620; *Williams v. State*, 7 Okl. Cr. 251, 123 Pac. 190, 126 Pac. 697; *Burns v. State*, 8 Okl. Cr. 554, 129 Pac. 657—cited and reaffirmed.

(c) Any statutory or constitutional right of a defendant not inalienable may be waived, where it can be done without affecting the rights of others, and without detriment to the community at large, and where it does not affect the jurisdiction of the court as to the subject-matter. *State v. Frisbee*, 8 Okl. Cr. 406, 127 Pac. 1091, reaffirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2116, 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. §§ 895, 1144.*]

4. CRIMINAL LAW (§ 636*)—PRESENCE OF DEFENDANT—NECESSITY.

It is not necessary that a defendant should be present when a motion for a change of

venue, or a motion for a continuance, or a motion for a new trial are argued and submitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1465-1482, 2120; Dec. Dig. § 636.*]

5. ARREST OF JUDGMENT.

For assignment of error not supported by the record, see opinion.

6. HOMICIDE (§ 253*)—DEATH PENALTY—SUFFICIENCY OF EVIDENCE.

For a case in which a verdict of assessing the death penalty is sustained by the law and evidence, see statement of evidence and opinion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

7. CONSTITUTIONAL LAW (§ 77*)—PARDON (§ 4*)—COMMUTATION OF SENTENCE—OFFICERS—DUTIES.

(a) No official of Oklahoma has the shadow of a right to set aside or disregard the laws of this state, as a matter of whim or caprice.

(b) Officials should set an example of obedience to law. If they disregard the law, how can they blame the people for taking the law into their own hands?

(c) The Governor is without the lawful right to set aside and nullify the law inflicting the death penalty for crime in all cases upon the ground that he is opposed to capital punishment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 141; Dec. Dig. § 77.* Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.*]

Appeal from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Newton Henry was convicted of murder, and appeals. Affirmed.

See, also, 6 Okl. Cr. 430, 119 Pac. 278.

Sam Bartell testified that in June, 1911, he was a justice of the peace of the Oklahoma City District; that on the 23d day of June, a little after 12 o'clock, he went to the Carrington Hotel in Packingtown, Oklahoma City, and there found Charley Lucas lying dead on the ground with his feet toward the porch; that there was a gunshot wound entering his body right over the heart; that the deceased was in his shirt sleeves; that he searched the body, and found no weapons on it or about it.

Robert Dunn testified: That in 1911 he lived in Packingtown, Oklahoma City, and was a carpenter by occupation. That he was acquainted with Charley Lucas in his lifetime, and saw him last alive about 12 o'clock on the 23d day of June, 1911; and that deceased was working for, and residing with, witness, three or four blocks from the Carrington Hotel. That after deceased had his dinner he left the home of the witness, stating that he was going to go to the home of Lucy Carrington. He said he was going for his clothes. Deceased was dressed in trousers and undershirt. Deceased was not armed at the time. That deceased did own a pocketknife, but it was left in the inner pocket of his coat hanging on the side of the wall. That witness knew the defendant, Newton Henry; had a conversation with him

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

the morning before the shooting. Defendant told witness that he had had trouble with Charley Lucas, and said that Charley was after his woman. He said, "The crazy son of a bitch is after my woman." He also stated that Charley Lucas owed him 60 cents, and that he (defendant) had run him away from his house and said that if he ever caught him there again he would kill him. This conversation occurred on the morning of the day of the killing. Witness heard the shooting. Two shots were fired. A little boy came up, and said that defendant had killed Lucas, and called on witness to run and catch him. Witness went immediately to the place where the shooting had occurred. When he got there, defendant had gone to the river bottom. Defendant was going west, then turned and went south. Witness could not get close enough to the defendant to have any conversation with him. Witness then went to the Carrington Hotel, and found Lucas lying there dead on the ground. Witness saw no knife or other weapon around there. Witness testified that he was acquainted with one Steve McNeal; that the said McNeal left the state of Oklahoma soon after the trial of the case was over, and went to the state of Texas. This evidence was received without objection.

J. G. Dunn testified that he was acquainted with a man named Steve McNeal, or "Trust Luck"; that after the first trial in this cause the said "Trust Luck" left the state of Oklahoma, and said that he was going back to Texas.

The state then introduced a subpoena issued on the 10th day of April, 1912, by the clerk of the superior court of Oklahoma county, for the said Steve McNeal to testify in this cause, as a witness on behalf of the state, which subpoena was returned in court indorsed as follows to April 11, 1912: "I cannot find the within named Steve McNeal within my county. He is dead. [Signed] Jack Spain, Sheriff, by E. L. Stout, Deputy."

Upon this showing that the said Steve McNeal was absent from the jurisdiction of the court and could not be produced as a witness, the state then introduced L. J. Sartain, who testified that he was court reporter in the superior court of Oklahoma county in July, 1911; that as such reporter he took the testimony in the former trial of this case; and that Steve McNeal, or "Trust Luck," then testified as a witness for the state; and that what purported to be a copy of the testimony of the said "Trust Luck," which was handed to the witness for his inspection, was a true and correct copy and transcript of the testimony given by said witness on said trial. To the introduction of this evidence, counsel for appellant made a general objection that such evidence was not admissible unless the state first proved that said witness was without the jurisdiction of the court, and, further, that due diligence

had not been used by the county attorney's force to bring said witness into court. Which objection was by the court overruled. To which counsel for appellant excepted. Thereupon the state read the testimony given by the said Steve McNeal in the former trial of this cause. Said witness testified that he knew Charley Lucas in his lifetime, and that he remembered the occasion of his being killed by the defendant at the Carrington Hotel on the day of the 23d of June, 1911. About two days before the killing, the defendant told witness that the Carrington Hotel had changed hands, and that he (defendant) was now the sole owner of the same; and he desired to get something to protect the house with, and wanted to buy a pistol from witness for this purpose, and obtained a pistol from witness. Defendant also told witness that he had been cleaning out the house since he got possession of it; and also told witness that deceased, Charley Lucas, owed him 60 cents, which he refused to pay, and that he had ordered the deceased out of the house, and that deceased had appeared to be looking for something to fight with, after he walked out of the house.

Lucy Carrington testified: That on the 23d day of June, 1911, she was living at the Carrington Hotel in Packingtown, Oklahoma City, Okl., and that she had resided there since the preceding February. That she was acquainted with both the deceased and the defendant, and had been running the Carrington Hotel, until about two or three weeks before the killing, when she sold her interest to the defendant. That after witness sold her interest in the hotel to the defendant she remained there as cook. That the husband of witness had become involved in some trouble in Oklahoma City, and had left the state and gone to Kansas, and had not returned since. That the deceased, Charley Lucas, had been living at the Carrington Hotel until about two days before the killing. That, when deceased left the Carrington Hotel, he left his clothes for the witness to wash for him. That about 12 o'clock on the 23d day of June, 1911, the witness was in the kitchen getting dinner at the Carrington Hotel. That she saw deceased coming to the porch of the kitchen about six or eight feet from the porch. That deceased said to her: "Good morning. I came to get my clothes. Have you got my clothes done? I want to go in town this afternoon, and thought I would come up and see if you have got my clothes done." And witness replied that she had them washed, but had not ironed them yet, and that she would send them to him by her little boy that afternoon. That just then the defendant walked in the room, and said to deceased: "I told you to stay away from here; you went away owing me." Deceased replied, "I came here after my clothes." Defendant then rushed on deceased with a gun. Deceased then had his hands

upon a clothes line. The gun fired twice, and deceased sank down in a heap. He did not say a single word. Defendant walked back to his room and came out putting on his coat and had his hat on his head, and witness said to defendant, "Don't kill him," and that defendant made no reply. That defendant walked up to a table on the porch. That there was an old rusty butcher knife lying on this table back of some pans. Defendant picked up this knife, looked at deceased, and then looked at witness. The witness then became frightened and ran back in the house, and did not see defendant any more until after he left the building. Witness heard defendant say, when he left the building, that deceased had drawn that knife on him. Witness stated deceased had not drawn the knife on defendant; that no one else saw the killing besides witness so far as she knew. This witness was subjected to a severe and searching cross-examination, but her statements with reference to the killing were in no manner weakened or impaired thereby.

Jack Spain testified that on the 23d day of June, 1911, he was sheriff of Oklahoma county; that immediately after the killing witness searched the premises for defendant and was unable to find him; that defendant was not arrested until 8 o'clock p. m., when he was found in a pool hall, and arrested by a deputy sheriff.

J. H. Reder testified: That on the 21st day of June, 1911, he heard the defendant say that he had some trouble with the deceased; that deceased owed defendant a little room rent, and deceased seemed to think he did not owe it. Defendant stated that he then went and got a knife, and when he got back deceased was gone. Defendant said, "If I had found him, I would have tried to get it from him," and further stated, "I will either get my 60 cents or get him (deceased)."

The state here rested its case.

Defendant, Newton Henry, testified in his own behalf: That on the 7th day of June, 1911, he came into possession of the Carrington Hotel as lessee. That it was turned over to him by Lucy Carrington. That he knew deceased, Charley Lucas. That he was renting a room at the Carrington Hotel. That he was paying \$4 per week for room and board. That deceased left the house on the 17th day of June without paying defendant a single cent of what he owed him. That defendant talked to the deceased about paying his board bill twice, and that deceased kept putting him off. That deceased stole his clothes out of the building a couple of days before the killing. That the deceased returned to the hotel, and defendant then said to him, "If you won't pay me, why don't you stay away?" That when deceased came to the hotel he generally talked with Lucy Carrington. That he bought the pistol on the Monday before the homicide for the purpose of protecting his house. That on the day

before the killing Bob Dunn informed defendant that Charley Lucas was going to kill him (the defendant) about the Carrington woman. That about 12:30 o'clock, while he was cleaning up the house, he started to go to the pump to get some water, carrying his pistol in his pocket. Just as he turned the corner he saw the deceased at the kitchen door. That when defendant saw deceased he ordered him to leave, to go away. That deceased was sort of bent over as if he was watching and waiting for something. That the deceased made a break toward him, and said, "I will put you away," and that he shot deceased. That he shot deceased because he was scared and did not know whether deceased would shoot him or cut him. Doesn't remember whether he shot once or twice. That after the shooting defendant saw a knife about two feet away from deceased on the ground.

Counsel for defendant then said: "We want to introduce the testimony of Steve McNeal. Do you want me to go through and make another showing." The county attorney replied, "No, I am willing for the record to show that you introduced the testimony of the same witness that I offer." Counsel for defendant then said: "All right. Gentlemen of the jury, this is the testimony of Steve McNeal, the same witness that Mr. Hooker read the testimony of, the man that was supposed to be dead. On the other trial there were not many witnesses around, and we just grabbed up one of the state's own witnesses, and I want to read you his testimony." Said witness testified that he knew the defendant, and had known him since the previous November; that he was acquainted with the general reputation of the defendant in that community for peace and quietude; and that such reputation was good.

J. F. Palmer testified for defendant that the general reputation of the defendant for peace and quietude in the community in which he resided was good.

Neal Shaw testified for defendant that a few days before the shooting he heard a conversation between deceased and defendant about a bill which was due the defendant. Defendant told deceased that he did not want him in the house, and for him to go out and never come back again; and that the deceased gave the defendant some back talk. The witness heard shots fired in the difficulty in which deceased lost his life. He heard the defendant say, "I thought I told you to stay away from this house." If the deceased made any reply, witness did not hear it. Immediately after this he heard the shots fired.

Judge Peters testified for defendant that the general reputation of the defendant for peace and quietude was good. Several other witnesses testified in behalf of appellant to the same effect.

Defendant here rested his case.

James S. Twyford, of Oklahoma City, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). [1] First. In the brief filed in this cause counsel for appellant referred to a number of the decisions of the Supreme Court of Oklahoma, and also of this court, without giving the page and volume upon which such decisions could be found. In Appendix C of the second volume of the Revised Statutes of Oklahoma, 1910, will be found the rules of this court. On the subject of briefs these rules say: "All citations of Oklahoma cases must be by the volume and page of the Oklahoma Criminal Reports." We have had frequent occasion to call the attention of the bar to this rule. See *Johns v. State*, 8 Okl. Cr. 585, 129 Pac. 451; *Ryan v. State*, 8 Okl. Cr. 623, 129 Pac. 685; *Tucker v. State*, 9 Okl. Cr. —, 132 Pac. 689. We have no objections to citations being made to any other reports; but the Oklahoma Criminal Reports are published by the state officially, under the immediate supervision of the members of this court. They can be purchased for a nominal sum, and lawyers who cite Oklahoma cases must give the page and volume of the official reports where they can be found. They are conveniently at hand, and such citations greatly expedite the labor of this court. Those lawyers who intend to practice law in this court should make themselves familiar with, and conform to, the rules of the court. Unless they do so, in ordinary cases their briefs will not be considered; but, as this is a capital case, and as the extreme penalty of the law has been assessed by the jury, we will relax the rule in this instance, as we do in all cases of great gravity, and will treat the brief of counsel for appellant as though it was in strict compliance to the rules of the court, and was in all respects regular.

[2] Second. Counsel for appellant contends that the testimony given by Steve McNeal upon the former trial of this cause was improperly admitted in evidence over objections of appellant. It was proved that the said McNeal had left Oklahoma county, stating that he was going to Texas, and that a subpoena had been issued for him to testify as a witness for the state upon the present trial, and this subpoena had been brought into court with a return thereon indorsed by the sheriff of the county that the said Steve McNeal could not be found in Oklahoma county. In the absence of a showing that the witness was within the jurisdiction of the court, we think that this authorized the admission of the testimony of the said Steve McNeal. See *Hawkins v. United States*, 3 Okl. Cr. 651, 108 Pac. 561; *Warren v. State*, 6 Okl. Cr. 1, 115 Pac. 812, 34 L. R. A. (N. S.) 1121. Even if there was any question about this, the record also shows that, subsequent to the admission of this testimony, evidence

given upon the other trial by the said Steve McNeal in favor of appellant was offered in evidence by his counsel upon the ground that said McNeal was beyond the jurisdiction of the court. This places the matter beyond question and waives any possible error that there may have been in the admission of the testimony originally. Appellate courts will not permit litigants to take inconsistent positions before them. See *State v. Clark*, 121 Mo. 500, 28 S. W. 562. If it be conceded that the admission of the testimony of the said Steve McNeal was error, such error would not be ground for reversal, because the material facts testified to by the witness McNeal were admitted to be true, by appellant, when he took the witness stand. Therefore appellant could not have been injured by McNeal's testimony, and it would be a burlesque upon justice and bring the law into contempt to reverse a conviction on account of the admission of testimony which was admitted to be true by the defendant himself.

[3] Third. Counsel for appellant in his brief says: "The record shows that upon resting the case the court instructed the jury in writing, and is silent as to the argument of counsel." Upon this omission of the record to state that argument was made, counsel takes the position that the judgment must be reversed, because the record does not affirmatively show that argument was made and that appellant was present during said argument. In support of this contention, he cites the case of *Humphrey v. State*, 3 Okl. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972. *Humphrey v. State* was modified in *Wood v. State*, 4 Okl. Cr. 436, 112 Pac. 11, and also in *Mendenhall v. State*, 6 Okl. Cr. 436, 119 Pac. 594, and again in *Williams v. State*, 7 Okl. Cr. 251, 123 Pac. 190, 126 Pac. 697; and, upon a more full investigation of all the authorities and the reason of the law, *Humphrey v. State* was expressly overruled in *Burns v. State*, 8 Okl. Cr. 554, 129 Pac. 657, which contains a full discussion of the authorities upon this question and announces the settled policy of this court.

It is true that the defendant has the constitutional right to be heard in person or by counsel in the argument of his cause. It is also true that defendant had the right to be personally present during every stage of the proceedings of his trial, and, if the record affirmatively shows that the defendant was deprived of either of these rights, a judgment must be reversed. These are rights which may be waived, and unless they are asserted at the trial the presumption of law will be that they were waived unless the contrary affirmatively appears in the record. Every presumption of law is in favor of the regularity of proceedings in courts of record. In *Killough v. State*, 6 Okl. Cr. 311, 118 Pac. 620, Judge Doyle said: "Error must affirmatively appear from the record; it is never presumed. Every presumption favors the regularity of the proceedings had upon the

trial. The plaintiff in error must affirmatively show prejudicial error; otherwise the judgment of the trial court will be affirmed."

When a record is silent upon the subject of the argument of counsel, the presumption of law is either that argument was waived or it was omitted from the record through the carelessness of the clerk. It would be a great reflection upon the intelligence and fidelity of the counsel, who represented appellant in the trial court, to assume that he allowed the case to be submitted to the jury without argument unless it was done by consent of appellant, or that he allowed the case to be argued in the absence of appellant without objecting thereto, unless such absence was at the request of appellant. Any statutory or constitutional right of the defendant not inalienable may be waived, where it can be done without affecting the rights of others, and without detriment to the community at large, and where it does not affect the jurisdiction of the court as to the subject-matter. A failure to insist upon such right in seasonable time will operate as an estoppel to his afterwards setting it up against the state. See *State v. Frisbee*, 8 Okl. Cr. 406, 127 Pac. 1091. By the express terms of section 6005, Revised Laws of Oklahoma, this court is forbidden to reverse any conviction on account of any error in the proceedings, unless, after an examination of the entire record, it appears that the error complained of has deprived defendant of some substantial right, or has resulted in a miscarriage of justice.

[4] Fourth. Counsel for appellant contends that this judgment must be reversed because appellant was not present when his motion for a new trial was argued. There are two conclusive answers to this contention: First, there is nothing in the record which indicates that appellant desired to be present when such argument was made, or that he did not consent that such argument might be made in his absence; therefore, even if this were a good objection, the failure of appellant to assert his rights at the time would operate as a waiver on his part of any right which he may have had in the matter. In the second place, there is no provision of law requiring that a defendant must be present when a motion for a new trial is argued. Such proceeding is no part of the trial proper any more than a motion for a change of venue or a motion for a continuance; but, on the contrary, a motion for a new trial asks a review by the judge of the trial, which has concluded. Counsel could with as much show of reason claim that a defendant should be present in this court when his application for a new trial is argued, submitted, and decided. A trial begins when the jury are called into the box to be examined as to their qualifications (see *Caples v. State*, 3 Okl. Cr. 72, 104 Pac. 493, 26 L. R. A. [N. S.] 1033), and ends when the jury have returned their verdict; and if it affirmatively appears

from the record that a defendant, without consent on his part, was absent during any of such proceedings, the judgment will be reversed; but as far as the law goes no good reason can be shown why a defendant should be present when a motion for a new trial, a motion for a continuance, or a motion for a change of venue is being argued. It has been expressly decided in Oklahoma that such presence is not necessary. See *Ward v. Territory*, 8 Okl. 12, 56 Pac. 704; *Saunders v. State*, 4 Okl. Cr. 264, 111 Pac. 965, Ann. Cas. 1912B, 766; and *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 356.

[5] Fifth. In his brief counsel for appellant says: "The court erred in refusing the plaintiff in error the right to file a motion in arrest of judgment before sentence." We have diligently searched the record and have failed to find that counsel for appellant asked permission or attempted to file a motion in arrest of judgment, and that the court denied him this right; we have also examined the record critically to find, if we could, as to whether or not there was any ground for arresting this judgment, and we find that there is none, and that, on the contrary, the proceedings and papers in the case were all regular and in conformity to law.

[6] Sixth. Counsel for appellant in his brief says that this cause should be reversed "because the court erred in overruling the motion for a new trial." Counsel did not attempt to point out the error of the court complained of in the motion for new trial or show how appellant was injured thereby. On the contrary, he has assumed the proposition in controversy and has substituted assertion for evidence and argument. This court would thereby be at liberty in an ordinary case to entirely disregard this contention, but, on account of the gravity of this case, we have carefully examined the motion for a new trial to see if we could find any error therein complained of which would warrant this court in setting aside the verdict and judgment. We find that the motion for a new trial is merely a formal one, and the only specific errors of which it complains are that the verdict is contrary to the law and the evidence. There is also a general complaint that the court erred in its instructions to the jury, and we are of the opinion that the court did err in charging the jury on the law of self-defense and in submitting the issues of manslaughter in the first and second degrees. The state's evidence makes out a case of deliberate and premeditated assassination. The testimony of appellant makes out a case of mutual combat provoked by himself when armed with a deadly weapon, intending that it should result in the death or serious bodily injury of himself or deceased. Under his own testimony he could not invoke the law of self-defense. Neither do the circumstances proved mitigate the offense from murder to manslaughter in either degree; but these errors of the court

were in favor of, and not against, appellant, and therefore he could not have possibly been injured thereby.

We have read all the instructions of the court and analyzed them carefully, both by paragraphs and also in connection with each other, and we fail to find a single paragraph which is in the least calculated to influence the jury adversely to the rights of appellant. The trial of the case from beginning to end was eminently fair, and in no instance was appellant deprived of a single substantial right. We cannot say that the verdict of the jury is contrary to the law. Neither can we say that the verdict is contrary to the evidence. It was proved that appellant had repeatedly threatened to kill the deceased, growing out of a controversy between them with reference to a debt of 60 cents alleged by appellant to be due him from deceased, but which deceased denied. Appellant had said that he would either get his 60 cents or get deceased. This controversy was intensified by jealousy between the parties on account of Lucy Carrington. With reference to this matter, appellant had said, "The crazy son of a bitch is after my woman," and had stated that if he ever caught deceased at the Carrington Hotel again he would kill him. Here again we have proof of our statement that illicit love is a most prolific source of crime and assassination among men. For a full discussion of this question, see *Burns v. State*, 8 Okl. Cr. 554, 129 Pac. 657. It was proved that deceased went to the Carrington Hotel, which was a public house, on the day of the homicide, after his clothes, which he had left there to be washed by Lucy Carrington, and that deceased was unarmed at the time. It was proved that a few days before the homicide appellant purchased a pistol, and at the time of the difficulty he was going to the pump to get some water with his pistol in his pocket; that he came upon deceased at the back porch, and asked deceased what he was doing there. Deceased replied that he had come after his clothes. Appellant said, "I told you to keep away from here," and, pulling his pistol, rushed upon and shot an unarmed man. Appellant then fled to the river bottom, and could not be found by officers until 8 o'clock that night, when he was arrested by a deputy sheriff. Appellant offered no explanation of his attempted flight. The jury could not believe that it arose from any cause other than conscious guilt. Here we find every element of murder, deliberately committed in a cowardly manner. In fact, the jury could not have reasonably arrived at any other conclusion.

[7] Seventh. It is true that this court possesses the power of modifying a judgment and reducing the punishment of death to imprisonment for life. See *Fritz v. State*, 8 Okl. Cr. 342, 128 Pac. 170; but this power, like the power to pardon, parole, or commute sentences, cannot be arbitrarily exercised

by any official of Oklahoma. No lawyer of respectable intelligence and learning, and who regards his reputation as such, will assert that either of these powers can be lawfully exercised, except for special reasons, which may arise in an individual case, or that they can be arbitrarily used so as to operate as a wholesale suspension or repeal of any law or provision of law. As a great misapprehension exists as to the right to commute the death penalty, and as this misapprehension has done infinite harm to the administration of law in Oklahoma, and as this is a death penalty case, it is imperatively necessary for this court, which alone has the right to finally construe the law and the Constitution in criminal cases, to declare the true meaning and scope of the right to commute the sentences of the courts. Courts are required by law to take judicial notice of any facts affecting a question pending before them, which are of such general and public notoriety, that every one will be fairly presumed to be acquainted with them. See *Hunter v. N. Y. O. W. R. R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246. The Supreme Court of the United States, in the case of *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200, said: "Facts of universal notoriety need not be proved." In *Wynehamer v. People*, 13 N. Y. 378, the Supreme Court of that state said: "We must be allowed to know what is known by all persons of common intelligence." To the same effect, see *Town of North Hempstead v. Gregory*, 53 App. Div. 350, 65 N. Y. Supp. 867. The courts also hold that judicial notice takes the place of proof, and is superior to evidence. See *State v. Main*, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *State v. Morris*, 47 Conn. 179; *Commonwealth v. Margynski*, 149 Mass. 68, 21 N. E. 228.

It is a matter known to all persons of common intelligence in the state of Oklahoma that the Governor takes the position that legal executions are judicial murder; and that he refuses to permit them to be carried into effect, upon the ground that he would thereby become a party thereto; and that he has expressed his fixed determination to strictly adhere to this policy until the expiration of his term of office. As this is a capital conviction, and as the Governor's action presents an absolute bar to the enforcement of the law in Oklahoma, we cannot, without a failure to discharge our duty, omit to take judicial notice of, and pass upon, this position of the Governor, as unpleasant as it is for us to do so. If we remained silent, the Governor and the people would have the right to think that the courts acquiesced in the position which he has assumed, when as a matter of fact nothing is further from the truth. We therefore cannot avoid deciding this matter.

That the position of the Governor is ut-

terly untenable is shown by the following considerations:

First. There is no provision of law in Oklahoma which requires the Governor to approve a verdict assessing the death penalty before it can be executed. His duty with reference to such verdicts is negative and not affirmative. He has nothing whatever to do with them, unless he may be satisfied that an injustice has been done in an individual case; then he may commute the sentence or pardon the offender; but this can only be done upon the ground that, upon the facts presented, the defendant was a fit subject for executive clemency, and that an exception should be made in his favor as against the general rule of law.

Second. It is not true that when a defendant is executed according to law the Governor is in any wise responsible therefor. The execution takes place in obedience to law and not because the Governor orders it; and the Governor has not a shadow of legal or moral right to interfere with the law, unless he can say upon his official oath that special reasons, applicable alone to the given case before him, justify such action. The Governor's alleged conscientious scruples with reference to the infliction of capital punishment cannot lawfully justify his action in a wholesale commutation of death penalties. The Governor has no legislative powers at all; he can neither enact or repeal laws either directly or indirectly, which he does attempt to do when he sets aside the death penalty in all murder cases. The law recognizes the fact that some good men are honestly opposed to the infliction of capital punishment, but it prohibits such persons from passing upon this question. Paragraph 8, § 5859, Revised Laws 1910, is as follows: "If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror." This provision of law precludes the Governor from commuting a death penalty, in a single case, upon the ground of his alleged conscientious scruples. So it is seen that he is not only not compelled to approve such a verdict, but that he is positively forbidden by law to allow his scruples to influence him in the least in his action. It would indeed be an idle thing for the Legislature to enact a law and then make its execution depend upon the whim or caprice of any juror or Governor. If the Governor's position is correct, then we do not have a government of law in Oklahoma, but a government of men only. If it were necessary for the Governor to approve such verdicts before they could be carried into execution, then the Governor should have made his views known before he was elected, and he should have refused to take the oath of office. There is no logical escape from this conclusion. The Governor's

position can only be explained upon the hypothesis that he imagines himself to be a dictator, and that his will is supreme and above the law. In this the Governor is mistaken.

Third. During the last campaign for the election of the present Legislature, which occurred after the Governor had served two years of his four years' term, he took an active part in the campaign and personally appealed to the people to elect a Legislature who would support what he called "my policies." In that campaign he also made a vicious assault upon this court, which has inflexibly demanded the strict enforcement of all of the laws of Oklahoma. His position on the subject of capital punishment was then well known to all of the people of Oklahoma. His action in commuting the death penalties of a number of atrocious murderers had caused a great wave of indignation to pass over the entire state. The issue was clearly drawn; and the advocates of, and those who objected to, the death penalty, debated the question as to whether or not capital punishment should be repealed. In fact, this was probably the most discussed question in the state. The Governor personally took part in a number of these debates. This is a matter of public history of which this court must take judicial notice. The election passed off, and the policies of the Governor were not indorsed by the people in the election of the members of the Legislature; on the contrary, a Legislature was elected which was hostile to the policies of the Governor, and which refused to repeal the law of capital punishment. If he desires to prove that he regards himself as a servant of the people, he should now no longer interfere with the execution of their will, or he should resign from his office.

Fourth. If it be conceded that the Governor's position is correct, and that he has the right to suspend the execution of any provision of law, of which he may not approve; and if it be true that the other officials of the state are answerable to him, and not to the people—then we have an empire in Oklahoma, and not a free state. This would establish a precedent which would justify any subsequent Governor, who might be opposed to the prohibitory liquor law, to commute all jail or penitentiary sentences inflicted in such cases upon the ground that he did not like the law, and that he knew better than the people what should be done in such cases. The same principle would apply to all laws. Concede the principle contended for by the Governor, and where will the matter end? It would utterly demoralize the enforcement of law in Oklahoma, and would convert the state government into one of men and not of law. What do the people of Oklahoma think of this?

A careful investigation of the authorities on this question has failed to disclose a

single law writer, who has ever in the least sustained the position of the Governor. Mr. Bishop, one of the greatest writers of law that America has produced, says:

"Alike under our national Constitution and the Constitutions of the several states, either by express words or by construction the government is divided into three separate branches—the executive, the legislative, and the judicial—and no one branch is permitted to discharge the functions of another. If the executive power cannot repeal laws directly, so neither has it any just right to undertake indirect repeals by pardon (commutation or parole). With us, a pardon (commutation or parole) is properly grantable only for some special cause arising out of the particular instance. But, if whenever there is an unavoidable and honest mistake it is the legislative will that the victim of the mistake shall be punished, the Governor has no right to open a pardon shop to frustrate this will. It is an attempt to repeal so much of the law, and the power of repeal is with the Legislature. * * * Of practical importance—not exceeded by any of the ordinary expositions in law books are some questions heretofore neglected by legal authors, relating to the principles which should guide the executive power in granting and withholding pardons (commutations or paroles).

"Public Motives, Not Private.—No official person, whatever his station or the nature of his office, is justified in performing any official acts from private motives, or in pursuance of mere private views. An executive officer, asked to grant a pardon (commutation or parole) should neither comply nor refuse merely because he would personally be pleased to see the prisoner suffer or to see him go free. He should act upon public consideration. For example:

"Appeal from Legislature.—He does not sit as a court of appeal from the Legislature. If he believes the law under which a prisoner is suffering to be unwise or unjust, still this opinion cannot properly incline him to grant the pardon (commutation or parole), because the power which makes and unmakes laws is not in him, and officially he is required to look upon the law as just and wise, however his private opinion may revolt. * * *

"Proceed by Rule.—The pardoning officer, therefore, should proceed by rule, as do the judges in the performance of judicial acts. Technically, the power of pardon (commutation or parole) is termed discretionary; so are a large part of the powers of courts. With a court, for instance, it is discretionary whether to try a cause when it is reached on the calendar, or to continue it. Yet this discretion should be exercised on public considerations, and according to rule, not from mere private impulses or views. And a judge who should continue causes or bring them on for trial as personal motives impelled, to the

injury of suitors, would commit thereby a high misdemeanor in office, for which he ought to be impeached. And the same would follow if the President or a Governor should act thus on private views in granting or withholding pardons (commutations or paroles).

"Practical Restraint—(Impeachment).—In popular writings, we often meet with injuriously false views on this subject. Nothing can be more pernicious than the opinion, sometimes afloat, which assigns to the President or Governor the authority to pardon (commute or parole) without limit, and denies to the impeaching power the right to interfere. The granting of pardons (commutations or paroles) is discretionary in its nature; therefore it is necessarily the more open to control by the impeaching power. If it comes to be understood that a single man, intrusted with the high function of pardon (commutation and parole), can open all the prisons of the country and let every guilty person go free, thus at a blow striking down the law itself, and not be himself punished for the high misdemeanor, the most disastrous consequences to liberty and law will sooner or later follow. Such a conclusion is itself the annihilation of law, and only upon law can liberty repose."

See Bishop's New Criminal Law, vol. 1, pp. 117, 178, 179, 180, 181, 559, 561.

Mr. Bishop cites authorities supporting this text but it is so manifestly just, and as this opinion is already quite lengthy, we will not consume unnecessary time with further quotations.

The law of Oklahoma prescribes the penalty of death for willful murder. This punishment, like most of our penal laws, was taken by the Legislature from the divine law. In the thirty-fifth chapter of the Book of Numbers, the Bible says:

"Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death: but he shall be surely put to death. And ye shall take no satisfaction for him that is fled to the city of his refuge, that he should come again to dwell in the land, until the death of the priest.

"So ye shall not pollute the land wherein ye are: for blood defileth the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.

"Defile not therefore the land which ye shall inhabit, wherein I dwell: for I the Lord dwell among the children of Israel."

We are also told in the nineteenth chapter of Deuteronomy:

"That innocent blood be not shed in thy land, which the Lord thy God giveth thee for an inheritance, and so blood be upon thee.

"But if any man hate his neighbor, and lie in wait for him, and rise up against him,

and smite him mortally that he die, and fleeth into one of these cities:

"Then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die.

"Thine eye shall not pity him, but thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee."

Many other passages of Scripture can be quoted to the same effect, for the Bible is absolutely unanimous in its statements that the legal punishment for willful murder shall be death.

Statistics show that in England, where capital punishment for murder is rigidly inflicted, within the last 25 years the volume of crime has decreased 50 per cent.; while in America, where capital punishment is rarely inflicted, the volume of crime has increased over 50 per cent. in the last 25 years. This shows that those persons who so bitterly denounce capital punishment are not infallible in their views, notwithstanding their assumption of superior intelligence and virtue; but we will not discuss the wisdom and justice of capital punishment. This is a question for the people or the Legislature alone. The supreme question is: Shall the laws of Oklahoma be enforced? One of the most mischievous tendencies of the present day is a disposition manifested among the people to set their individual judgments up against the law, and to assert their right not to obey any law unless it meets with their personal approval. This is anarchy, pure and simple. It is bad enough for private citizens to feel and act this way, but it is much more criminal for officials to do so, and the higher the official the greater the crime committed. All state officials have taken an oath to support the laws of the state. No Governor has the right to say, directly or substantially, either by words or by actions, which speak louder than words: "I think that capital punishment is wrong. I know that it is taught in the Bible, and is provided for in the laws of Oklahoma; but I occupy a higher plane than this. I am not such a barbarian as to believe this is right. I am a better judge of what punishment should be inflicted than is taught in the Bible, or than the ignorant, savage, and bloodthirsty people of Oklahoma have provided for in their laws. Therefore, notwithstanding my official oath, I will place my judgment above the law, both human and divine, and make my will supreme in this state, and will not permit capital punishment to be inflicted in Oklahoma, no matter what the law is, or how atrocious the offense committed may have been. All officials are only my personal servants and it is their duty to execute my orders, and not stop and inquire as to what the law is. The courts must recognize and bow to me as their master, and accept and follow my will as

the supreme law; and if they dare to question my absolute right to do as I please about anything I will publicly brand such judges as fools and crooks, and charge that they have entered into a conspiracy with criminals and that they are using the law as a cloak to protect crime."

Nothing could more impair the reputation of the state, nothing could be more demoralizing to respect for law, or more highly calculated to incite mob violence, than such conduct as this. We are taught in the Bible that: "Because sentence against an evil work is not executed speedily therefore the heart of the sons of men is fully set in them to do evil." Ecclesiastes viii, 11.

Some say that these passages of Scripture are obsolete, and are not applicable to the present age of moral enlightenment and civilization; but many occurrences have taken place in Oklahoma in recent years which prove that these teachings of the Bible, like all other divine laws, are just as true and as applicable to the people of this day as they were in ancient times. We very much fear that, if some assurance is not given to the people of Oklahoma that sentences will be executed in the future, matters will go from bad to worse. If officials place their individual views above and defy the law, how can they expect that the people will respect and obey the law? It is the duty of officials to set an example of obedience to law. If officials do not obey the law, can they blame the people for taking the law into their own hands? This court will not render a single opinion which can be used in excuse for mob violence. It will to the last extremity defend the exclusive right of the people to enact laws, and continue to demand, as it has uniformly done since the day of its organization, the strict enforcement of all of the laws of the state as enacted by the people or the Legislature, it matters not whose criticism and enmity it may incur thereby, or what amount of misrepresentation, abuse, and vilification may be heaped upon it therefor. The members of this court would be fools, cowards, and traitors if they took any other position.

This is the second time that this cause has been before this court on appeal. See 6 Okl. Cr. 430, 119 Pac. 278. On the first appeal the conviction was reversed for errors of law. We then stated that if the evidence for the prosecution was true it made out a case of murder; but we were of the opinion that sufficient latitude had not been granted appellant in the cross-examination of the witness Lucy Carrington, and we felt that it was possible that, had the proper latitude been granted on cross-examination, facts might have been developed which would so impair and destroy her testimony as to have warranted the jury in finding appellant guilty of manslaughter; but, upon the second trial of this cause, the said Lucy Carrington

was subjected to the most searching cross-examination, and no fact was developed which in the least shook her testimony or impaired its credit. On the contrary, the answers given by this ignorant negro woman, to every question asked, leads us now to believe that her entire testimony was the truth; and the evidence taken as a whole is much more satisfactory as to the guilt of appellant than it was upon the former trial. In both trials the jury found the appellant guilty of murder, and in each instance assessed his punishment at death. There was nothing in either record which indicated that the jury were prejudiced against appellant or that they were ignorant, bloodthirsty barbarians. On the contrary, they were representative citizens of Oklahoma, and men of intelligence, fairness, and integrity. Each one was voluntarily selected by appellant, they saw the witnesses, and heard the testimony. We feel that we should respect their judgment, and should not disturb it except for just cause, and that the evidence makes out a case of murder. The law prescribes the death penalty in such cases at the discretion of the jury. There is nothing in the record which even intimates that the jury were influenced by passion or prejudice in assessing the death penalty, or that any mistake was made in their doing so. Under these circumstances, no official of Oklahoma has the lawful right to interfere with the execution of their verdict.

As there is no legal reason why this case should be reversed or modified, we have no discretion but to affirm the judgment of the lower court.

The appeal in this case having prevented the execution of appellant at the time set in the original sentence, the judge of the superior court of Oklahoma county is directed to resentence appellant according to section 5979, Revised Laws 1910, and also in accordance with the provisions of the act of March 29, 1913, on page 206 of the Session Laws of Oklahoma, 1913. It is true that the latter law provides that the punishment of death must be inflicted in the state penitentiary by electrocution, and was passed subsequent to the commission of the offense; but this is not an *ex post facto* law, so far as appellant is concerned, because under the provisions of article 5981, Revised Laws 1910, which was in force when the offense was committed, the death penalty could be inflicted either by hanging or by electrocution, at the discretion of the court before whom the case was tried. Now it must be by electrocution, and the sentence of the court must be in conformity to the provisions of the act of 1913, hereinbefore referred to.

We find no error in the record, and the judgment of the superior court is in all things affirmed, and the court is directed to

at once take steps to have its sentence carried into execution as directed by law.

ARMSTRONG, P. J., and DOYLE, J.,
concur.

Ex parte HAWKINS.

(Criminal Court of Appeals of Oklahoma.
Dec. 13, 1913.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 73*)—STATES (§§ 41, 42*)—LIEUTENANT GOVERNOR—ABSENCE OF GOVERNOR—EXERCISE OF POWERS.

(a) The Constitution of the state grants certain clearly defined powers to the Governor, or the acting Governor, and vests him with a wide discretion in the discharge of many of his duties. Courts have no right to substitute their discretion for the discretion of the Governor, or the acting Governor, or to nullify any of his official acts; unless it clearly appears that the Governor, or acting Governor, has usurped power not granted him, or has used his discretion in such a manner as to violate the law.

(b) The Constitution intends, and the public necessities require, that some one, with the powers of Governor, should always be in the state to approve bonds, honor requisitions, make appointments, fill vacancies, quell riots, and transact all other business, which pertains to this office, without expense or delay to the people, or interruptions in the administration of justice.

(c) A Governor may visit other states, and travel in foreign countries, as he pleases, without forfeiting his office, and may carry his title with him; but his powers as Governor become dormant the very moment he crosses the state line, but they revive again as soon as he returns within the borders of the state.

(d) The Governor cannot lawfully say to persons, who have business with his office: "I am going into another state to attend banquets and play golf, or for any other purpose, and you must wait until it suits my convenience to return."

(e) During the absence from the state or inability of the Governor to act, the Lieutenant Governor is vested with all of the powers of Governor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 134-137; Dec. Dig. § 73; States, Cent. Dig. §§ 47, 48; Dec. Dig. §§ 41, 42.*]

2. STATES (§ 42*)—POWERS OF LIEUTENANT GOVERNOR—ABSENCE OF GOVERNOR.

The powers of the Lieutenant Governor to act as Governor during the absence from the state, or the inability of the Governor to act, are not derived from the invitation or request of the Governor; neither can they be denied at the pleasure of the Governor, but they rest alone upon the provisions of the Constitution of Oklahoma.

[Ed. Note.—For other cases, see States, Cent. Dig. § 48; Dec. Dig. § 42.*]

3. PARDON (§§ 8, 10*)—WHAT CONSTITUTES — RIGHT TO REVOKE.

An agreement or promise by the Governor, or acting Governor, to pardon a convict, does not amount to a pardon. An absolute pardon takes effect upon its execution, and delivery, to the person pardoned, or to some one representing him, or as soon as it leaves the Governor for this purpose, and cannot be revoked by any official; but parols and conditional pardons do not become effective and enforceable until they have been received and accepted by the prison-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes.

er, and they may be revoked by the Governor. Ex parte Crump approved and reaffirmed.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 10, 14, 15, 23; Dec. Dig. §§ 8, 10.*]

4. HABEAS CORPUS (§ 59*)—PLEADING (§ 310*)—EXHIBITS—IMPEACHMENT OF RECITALS—INCONSISTENT POSITION.

(a) Where a petition for a writ of habeas corpus has attached to it a parole granted to a petitioner, which has been accepted and agreed to by him; he is bound by the conditions and recitals of such parole, and will not be permitted to contradict or impeach them.

(b) Counsel are not permitted to take inconsistent positions in this court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 55; Dec. Dig. § 59; *Pleading, Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. § 310.*]

Petition for habeas corpus by Nelson Hawkins. Petition denied.

On the 21st day of June, 1909, petitioner was convicted of manslaughter in the first degree in the district court of Pontotoc county, and his punishment was assessed at confinement in the penitentiary for the period of 40 years. An appeal was taken to this court, and the judgment of the lower court was affirmed. See *Hawkins v. State*, 5 Okl. Cr. 276, 114 Pac. 356. During the month of September, 1911, Hon. Lee Cruce, Governor of the state of Oklahoma, absented himself from the state for a number of days; and during his absence, Hon. J. J. McAlester, Lieutenant Governor of the state, acted as Governor, and under the Constitution was vested with all of the powers of Governor, during the absence of the said Hon. Lee Cruce from the state of Oklahoma. See *Ex parte Crump*, 135 Pac. 428, decided at the September term of this court. On the 21st day of September, 1911, Lieut. Gov. McAlester, as acting Governor, issued a parole to petitioner, who was then confined in the penitentiary under and by virtue of his conviction and the judgment thereon as hereinbefore stated. Upon its face this parole is dated the 21st day of September, 1911, at the hour of 9:56 a. m. The parole was not presented to, and accepted by, petitioner until the 22d of September, 1911, as appears from the following indorsement thereon: "I, Nelson Hawkins, hereby declare that I have carefully read, and do clearly understand the contents and conditions of the above parole agreement, and I hereby accept the same and pledge myself to honestly comply with all of the said conditions. Dated at McAlester, Oklahoma, this 22d day of September, 1911. [Signed] Nelson Hawkins. Witnesses: John P. Crawford. Ed. Lanier."

The record contains the following stipulation: "It is stipulated between the petitioner and respondent herein that the Frisco Passenger Train No. 407 from St. Louis to Oklahoma City on the 21st day of September, A. D. 1911, being the train on which Governor Cruce returned to the state of Oklahoma, arrived within the borders of the state of

Oklahoma between 8:04 and 8:06 a. m. of said date. Dated this the 20th day of November, 1913. [Signed] E. G. McAdams, Attorney for Petitioner. Charles West, Attorney General, Attorney for Respondent. C. J. Davenport, Asst. Atty. Gen."

Thereafter on the 29th day of September, 1911, the attention of Gov. Cruce being called to this matter by the county attorney of Pontotoc county, he revoked the parole granted by the Lieutenant Governor, and directed that petitioner should be taken into custody, and returned to the penitentiary to serve out that portion of his sentence which was unexpired at the date of said parole, in accordance with the original judgment and sentence of said court. This was accordingly done, and petitioner did not attempt to assert any right under the parole granted by the Lieutenant Governor, until the 15th day of November, 1913, when he applied to this court for a writ of habeas corpus, based upon the ground that the parole granted by the Lieutenant Governor was valid, and that the Governor was without power or authority to revoke the same. To this petition he attached, as Exhibit A, a copy of the parole granted by Lieut. Gov. McAlester, which upon its face shows that it was issued at the hour of 9:56 a. m. on the 21st day of September, 1911. He also attached, as Exhibit B, a copy of the revocation of the said parole, issued by Gov. Cruce on the 29th day of September, 1911. On November 19th petitioner amended his petition for a writ of habeas corpus, and alleged that the date, which appears upon the face of the parole, was not correct, and was not on said parole when it was signed by said Lieutenant Governor; and further alleged it to be true that the parole was signed by the Lieutenant Governor about the hour of 8 a. m. on September 21, 1911.

W. D. Halfhill and S. V. O'Hare, both of Muskogee, for petitioner. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). [1] First. The Constitution of the state grants certain clearly defined powers to the Governor, or the acting Governor, and vests him with a wide discretion in the discharge of many of his duties. Courts have no right to substitute their discretion for the discretion of the Governor, or the acting Governor, or to nullify any of his official acts; unless it clearly appears that the Governor, or acting Governor, has usurped powers not granted him, or has used his discretion in such a manner as to violate the law. It is the duty of the courts to indulge every presumption in favor of the regularity of the official acts of the Governor, or the acting Governor, and only interfere where it is clear that he has violated the law.

This case presents simply a cold question

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of law, and must be decided as such without reference to any other considerations. Article 6, § 16 (Williams' Constitution, § 165), provides in express terms that all of the powers of the Governor shall devolve upon the Lieutenant Governor during the inability of the Governor to discharge the powers and duties of said office, and until such disability shall be removed. No one will contend that the powers of the Governor can be exercised by him during his absence from the state, any more than that a judicial officer of Oklahoma could open court and try cases, or could discharge any other official duty in another state, or upon foreign territory. The office of Governor of Oklahoma was not created for the benefit of the man who temporarily holds this position. It is in no sense his private property; but it is alone for the people of Oklahoma, and must be confined to Oklahoma, and cannot be placed upon wheels and hauled all over the face of the universe. The Governor may go to other states, and travel in foreign countries, with all of the military pomp and glory of the Commander in Chief of the Oklahoma Militia, as he pleases, without forfeiting his office, and may carry his title with him; but his powers as Governor become dormant the very moment he crosses the state line, and they revive again as soon as he returns and is within the borders of the state. During his absence, or inability to act, the Lieutenant Governor is vested with all of the powers of Governor. The business of the people requires that a Governor should always be in the state to approve bonds, honor requisitions, make appointments, quell riots, fill vacancies, and transact all other business which pertains to this office, without expense or delay to the people, or interruptions in the administration of justice. An emergency may arise at any moment requiring the presence of the Governor within the state. The Constitution provides that there shall always be some one within the state clothed with power to perform the duties of chief executive. The Constitution must be obeyed, let it please or displease whom it may. There is nothing more ridiculous than to contend that the Governor, as a matter of whim or caprice, can leave the state to attend banquets, or play golf, in other states, or for any other purpose, and say to those who have business with his office: "Wait until it suits my convenience to return." This question was fully considered by this court in the case of *Ex parte Crump*, decided at the September term of this court. All that was said by Judge Doyle in that case is approved, and reaffirmed. It necessarily follows that, if Gov. Cruce was within the borders of Oklahoma, at the time that the Lieutenant Governor granted this parole, it was unauthorized by law and is a nullity.

[2] Second. Counsel for petitioner contend that because the Governor wrote a letter, before leaving the state, to the Lieutenant

Governor, inviting him to come to the capital and take charge of the office and see how it felt to be a real Governor; that the Governor was estopped from denying the validity of any act of the Lieutenant Governor during the absence of the Governor from his office.

With this contention we cannot agree. It is not supported either by law or by reason. There is no rule of law as to how a real Governor should feel, except that he should act as the servant of the people. The powers of the Lieutenant Governor to act, during the inability of the Governor, are not derived from the invitation or request of the Governor; but they rest alone upon the provisions of the Constitution of Oklahoma. No matter what the Governor may have written the Lieutenant Governor, this neither added to, nor took from, his powers to act as Governor of Oklahoma during the absence from the state of the Governor.

[3] Third. Counsel for petitioner contend that because the application for the parole was presented to the Lieutenant Governor on the evening of September 20, 1911, and the Lieutenant Governor then considered said application, and stated that he would grant said parole, in contemplation of law, the parole was, in fact, granted on the evening of September 20, 1911, when the Governor was undeniably not within the borders of the state; but counsel failed to cite any authorities supporting this contention. An absolute pardon takes effect upon its execution and delivery to the person pardoned, or to some one representing him, or as soon as it leaves the control of the Governor. It cannot be revoked. See *Ex parte Crump*, supra. But this is not true as to paroles or conditional pardons; they are revokable, and do not become effective and enforceable until they have been received and accepted by the prisoner. Such acceptance is a condition precedent to the validity of the parole, or conditional pardon. The parole was not accepted by petitioner until the 22d day of September, 1911, which was 24 hours after the return of the Governor to the state of Oklahoma. The parole did not become valid and enforceable until it was accepted by petitioner. Suppose that a Governor, on the last day of his term, should promise an unconditional pardon to a prisoner, but through inadvertence, or on account of the press of other matters, should neglect to execute such instrument; who would contend that a prisoner could be released from custody upon such a showing as this?

[4] Fourth. The original petition filed in this case alleged that petitioner was illegally restrained by the warden of the penitentiary, and alleged that he had been paroled on September 21, 1911, by Lieut. Gov. McAlester. Attached to the petition was the parole, which on its face shows that it was signed at 9:56 a. m., September 21, 1911; there was also attached to the petition the revocation

of the purported parole, in which it is recited that Lee Cruce, Governor, was in the state at the time of the signing of the parole. The purported parole and its revocation were made a part of the petition.

It was therefore shown by the petitioner himself, by attaching to his petition the purported parole, and the revocation thereof, that the Governor has revoked the purported parole; and that the Governor was in the state at the time the Lieutenant Governor attempted to act. In the revocation of parole, attached to the petition, there is the recital that: "The undersigned, Lee Cruce, Governor of the state of Oklahoma, was upon the said day and hour upon which the said parole was issued in the state of Oklahoma, and the said parole being granted without the knowledge and consent or signature of the Governor." As stated, these exhibits, the purported parole and the revocation, were presented to the court by the petitioner himself. He was therefore in no position to say that the facts therein stated were not true. It is nowhere claimed that the day and hour upon which the parole was granted was not in the parole at the time of its acceptance by petitioner, or that it has since been in any manner altered. Petitioner having accepted the parole will not now be permitted to contradict any of its recitals. In *Ex parte Ridley*, 3 Okl. Cr. 350, 106 Pac. 549, 26 L. R. A. (N. S.) 110, this court said: "The petitioner accepted and agreed to the conditions of the parole, thereby securing his release from imprisonment, and he is bound by its terms and conditions." Such contradiction will not be permitted under any circumstances, in the absence of an allegation that petitioner was deceived or misled by some condition or recital of the parole. See *Rosson v. State*, 23 Tex. App. 287, 4 S. W. 897. Attorneys will not be permitted to take inconsistent positions in this court. See *Newton Henry v. State*, 136 Pac. 982, decided this term of court. Both the parole and the revocation thereof are documents of state, and public records, attested by the Secretary of State, and verified by the great seal of the state of Oklahoma. If it be permissible to contradict such instruments at all, which we do not concede, it should only be done under proper allegations and absolutely clear proof.

Other interesting questions are raised by counsel for petitioner; but, owing to the conclusion at which we have arrived, it is not necessary to discuss them. As the record presented by petitioner shows that the Governor was in the state when this parole was granted and accepted by petitioner, the Lieutenant Governor was without power to act, and his attempted parole of petitioner was void and a nullity and conferred no rights upon petitioner. The Governor was clearly within his legal right in the revoca-

tion of the attempted parole and ordering the arrest of petitioner.

The writ of habeas corpus is denied, and the warden of the penitentiary is directed to retain petitioner in his custody, until the expiration of the time fixed for his imprisonment in the original judgment of the district court of Pontotoc county.

ARMSTRONG, P. J., and DOYLE, J., concur.

DEARING v. HOCKERSMITH et al.

(Supreme Court of Idaho. Nov. 13, 1913.
Rehearing Denied Dec. 16, 1913.)

1. PLEADING (§ 194*)—ANSWER—DEMURRER.

Where a demurrer is filed to certain answers, and such demurrer assigns as grounds: (1) That the answers do not state facts sufficient to constitute a defense in the action; (2) that the two answers and each of them are ambiguous, uncertain, and unintelligible, and this court finds that the answers consist of denials and of affirmative matter which were proper defenses to the complaint—there was no error on the part of the trial court in overruling the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 444, 445, 446, 449-452; Dec. Dig. § 194.*]

2. BANKS AND BANKING (§ 142*)—PAYMENT OF CHECK—DISCHARGE OF DEPOSIT.

Where D. draws a check in favor of H., and it is agreed between D. and H. that H. is to act as trustee and agent to draw the money and apply it for the purpose of paying a mortgage upon real property belonging to D., and H. presents the check to the bank for payment, and the bank pays such check, such payment is a cash discharge of D.'s deposit to the extent of the check drawn.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 410-413; Dec. Dig. § 142.*]

3. BANKS AND BANKING (§ 142*)—PAYMENT OF CHECK—DISCHARGE OF DEPOSIT.

Where the record of the bank shows that a deposit on the 18th day of November was received by the bank from H., and said deposit includes different checks to different parties, among which was the check in controversy, and the bank credits all of said checks in the personal name of H. on his personal account with the bank made on that day, as a depositor and not as a trustee, and the evidence shows that there was nothing said at the time, or at any other time, that the sum so deposited should not be drawn by H. on his own personal check for such use as H. might determine to apply it to, nor that the bank was advised in any way that such deposit made that day should be applied to any particular purpose, and the trial court in his findings so found, the bank is justified when it pays on presentation of checks, and charges the same against the deposit of H. until said deposit is exhausted. The court did not err in making a finding to that effect.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 410-413; Dec. Dig. § 142.*]

4. BANKS AND BANKING (§ 154*)—PAYMENT OF CHECK—ACTION AGAINST BANK—SUFFICIENCY OF EVIDENCE.

Referring to the allegations of the complaint in this case, it is alleged that H., the trust company, and L., the cashier of the trust compa-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

ny, acting in concert and without the knowledge of the plaintiff, combined, connived, and conspired for the purpose of cheating and defrauding the plaintiff out of \$625, by fraudulent statements made to her by L. and H., by inducing the plaintiff to sign her name to the check on the trust company, where she had deposited said money in the name of H., and made payable to him. We have recited in this opinion as briefly as we could the evidence directly connected with the deposit; and, after careful consideration, we hold that there is no evidence in this case, or any law when applied to the facts, which would subject the defendant bank or Leonard to any damage resulting from a conspiracy by defrauding plaintiff or misappropriating \$625, or any sum, for the use or benefit of Leonard or any one connected with the bank, for which they were under obligation to answer.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 515, 516, 518-533; Dec. Dig. § 154.*]

5. APPEAL AND ERROR (§ 1009*)—FINDINGS—CONFLICTING EVIDENCE.

Where the evidence shows clearly that the preponderance of the evidence is with the defendants, under the rule of this court, where the evidence is only indefinitely conflicting as to some fact which is not controlling as proof, and there is substantial evidence supporting the findings of fact by the trial court, the findings and decree entered in accordance therewith will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from District Court, Idaho County; Edgar C. Steele, Judge.

Action by Etta Dearing against J. W. Hockersmith and others. From judgment for defendants, plaintiff appeals. Affirmed.

L. Vineyard, of Grangeville, for appellant. C. T. McDonald and Jas. De Haven, both of Grangeville, for respondents.

STEWART, J. This is an action brought by appellant against the respondents to recover the sum of \$625 alleged to have been placed under the control of J. W. Hockersmith as trustee of appellant, and it is claimed that Hockersmith and F. L. Leonard, cashier of respondent bank and trust company, combined and connived and conspired to appropriate and apply said sum to their own use. The allegations of the complaint were denied by the defendants, except the issuing of the check of the plaintiff to Hockersmith. The case was tried and judgment was rendered for the respondents, and the action was dismissed. A motion for a new trial was made and denied, and this appeal is from the judgment, and also from the order denying the motion for a new trial.

A motion has been made in this court to dismiss the appeal from the order overruling the motion for a new trial, for the reason that no notice of motion for a new trial and no motion for a new trial were ever filed, and there was no certificate of the presiding judge in said cause showing what papers or records were used upon the hearing or notice of intention to move for a new trial, or upon the motion for a new trial.

This motion is sustained as to the appeal from the order overruling the motion for a new trial, and the case will be considered on the record as an appeal from the judgment.

[1] It is necessary in this opinion to set forth the substance of the pleadings, for the reason that the appellant relies upon this appeal that the court erred in overruling the demurrer to the answers, to which exception was taken.

The complaint alleges that the plaintiff is a widow, and that at the death of her husband on the 3d day of August, 1909, the plaintiff's husband was the owner of a dwelling house and lot in Grangeville, upon which a real estate mortgage existed, unpaid, for the sum of \$600 and interest; that J. W. Hockersmith is the administrator of the said estate of Robert J. Dearing, deceased, and has been so since his appointment; that the appellant reposed faith, trust, and confidence in him and his honesty and integrity, and placed in his hands, on or about the 3d of November, 1909, the sum of \$625, her own individual and separate property, to be applied by Hockersmith, in payment of said above-mentioned mortgage, and that Hockersmith accepted and promised and agreed with the plaintiff to apply and pay the same on said mortgage and for no other purpose; that contrary to said agreement and promise, and in violation of the trust and confidence reposed in Hockersmith, and contrary to his agreement and promise, Hockersmith and the Grangeville Savings & Trust Company (this defendant will hereafter be designated as Trust Company), by and through the said defendant F. L. Leonard, the cashier of said Trust Company, acting in concert and without the knowledge of the plaintiff, did on or about the 3d of November, 1909, combine, connive, and conspire for the purpose of cheating and defrauding the plaintiff out of the said \$625 by the following false and fraudulent statements made to her by the said Leonard, with the knowledge of the defendant Hockersmith, to wit: By fraudulently inducing her, the plaintiff, to sign her name to a check on the said Trust Company, where she had deposited said money, in the name of Hockersmith, and made payable to him, and in return for so making said check defendant Leonard fraudulently induced her to believe, by stating to her, that he would see that the said money placed to the credit of Hockersmith would be paid on said mortgage as soon as it would be due or accepted by the owner and holder of said mortgage; that, relying upon said statements of the defendants, which were made for the purpose of cheating and defrauding this plaintiff, she signed said check, and that, contrary to the terms of said trust, defendants fraudulently diverted and misappropriated the \$625 to their own use and benefit, without her knowledge, until long after it was so misappropriated, to wit,

about the 23d day of March, 1912; that \$625 was allowed to be checked out by said Leonard by said Hockersmith on debts and liabilities Hockersmith owed said defendant Trust Company, and with full knowledge as aforesaid on the part of Leonard that said act was fraud upon the rights of the plaintiff, and contrary to the terms of said trust and to her damage, for which she prays judgment.

The defendants, the Trust Company and Leonard, filed an answer, and deny that Hockersmith and the Trust Company, by and through Leonard, or otherwise, acting in concert and without knowledge of plaintiff, or otherwise, did, about the 3d of November, 1909, or at any other time, or at all, combine, connive, or conspire for the purpose of cheating or defrauding the plaintiff of \$625, or any other sum whatever, or that the defendants, or either of them, made false and fraudulent statements to the plaintiff with or without knowledge of defendant Hockersmith, and deny that they, or either of them, fraudulently induced the plaintiff to sign her name to a check on the defendant Trust Company; deny that they fraudulently or otherwise induced plaintiff to sign a check in the name of Hockersmith, or any other person, or at all; deny that Leonard fraudulently induced her to believe, by stating to her, that he would see that money paid to Hockersmith would be paid on said mortgage as soon as it would be due, or at any other time, or at all; deny that, relying upon said statements of defendants, or either of these answering defendants, or which were made as aforesaid, she signed said check; and deny that false or fraudulent statements were made by either of these defendants; and deny that, contrary to the terms of trust aforesaid or otherwise, made with her by said defendants, or either of them, they fraudulently diverted or misappropriated \$625, or any other sum; and deny that any of said money was used or appropriated by the defendants, or either of them; and deny that the money was allowed to be checked out by Leonard by Hockersmith on his debts or liabilities he owed the Trust Company; and deny that either of them had any knowledge of any fraud on the rights of the plaintiff; and deny that the defendants, or either of them, had any knowledge of any trust agreement between plaintiff and Hockersmith; and deny that by any acts of these defendants, or either of them, the plaintiff has been damaged in the sum of \$625, or any other sum.

Hockersmith filed an answer, and denies that there was any conspiracy or conniving with or without the plaintiff's knowledge, or that he did, on the 3d of November, 1909, or at any other time, connive or conspire for the purpose of cheating or defrauding the plaintiff out of the sum of \$625, or any other sum; denies that he made any false or fraudulent statements, or that the said Leonard made any false or fraudulent statements to plaintiff,

with knowledge of this defendant, and denies that by false or fraudulent statements or otherwise he induced the plaintiff to sign her name to the check on the Trust Company; denies any statement to the plaintiff for the purpose of cheating or defrauding the plaintiff; denies that this defendant fraudulently diverted or misappropriated the sum of \$625. For a second defense, he alleges that on September 7, 1912, the defendant Hockersmith was duly and regularly adjudged a bankrupt, and that the indebtedness sued on herein was scheduled by this defendant, and the schedule filed with his petition for adjudication.

To these answers of defendants counsel for appellant filed a demurrer upon two grounds: (1) That said answers, and each of them, do not state facts sufficient to constitute a defense in this action; (2) that the two answers, and each of them, are ambiguous, uncertain, and unintelligible. The ruling of the trial court is assigned as error. There is no merit in this contention. These answers consist of denials and of affirmative matter which were proper defenses to the complaint.

[2] The trial court found in this case: (1) That the Grangeville Savings & Trust Company is a corporation duly organized and existing under the laws of this state, with its principal place of business at Grangeville; and (2) that F. L. Leonard is and has been, during all the times herein mentioned, the cashier of the defendant corporation. The court also found (6) that the plaintiff did not deposit any money in the defendant bank in the name of J. W. Hockersmith, and that (7) defendant Leonard did not state to plaintiff that he would see that any sum or amount of money would be paid on said mortgage as soon as the same was due. The court also found (8) that no sum of money was deposited in the defendant bank by the plaintiff to the credit of defendant Hockersmith for any purpose whatever. As to the check, the court found (9) that the plaintiff drew a check against her own personal checking account in said defendant bank in the sum of \$625, said check being made payable to defendant Hockersmith individually and unqualifiedly, and was personally delivered by the said plaintiff to the defendant J. W. Hockersmith, without the knowledge of the defendant the Grangeville Savings & Trust Company, and its cashier, F. L. Leonard, or either of them. The court also found (10) that the defendant Hockersmith took said check and deposited it in the defendant bank to his own personal checking account, together with other checks and moneys, and checked it out to his own use and benefit, and that said sum so deposited and checked out was not applied in payment of debts and liabilities he owed to the defendant Grangeville Savings & Trust Company. The court also finds (11) that the plaintiff made another agreement with the defendant J. W. Hock-

ersmith in 1912, whereby he was not to pay the mortgage off on her place, but was to keep the said money and use it, and to pay her interest for the same.

There is no evidence in the record that contradicts or conflicts with the evidence offered by the defendants in support of findings 1, 2, 6, 7, 8, 9, 10, and 11, and there is evidence in the record which conclusively proves that the findings of the court above named are supported by the preponderance of the evidence.

Counsel for appellant contends very earnestly that the bank should be held responsible on the ground that Leonard, cashier, had notice that the check given by appellant to Hockersmith and by him deposited in the respondent bank was a trust fund, and relies upon the case of *Duckett et al. v. National Mechanics' Bank of Baltimore*, 39 L. R. A. 84. That case differs very materially from the case at bar. In that case there were two checks drawn on the City National Bank of Laurel, Md., and the first reads: "Pay to the order of James Scott, cashier, two thousand dollars (\$2,000.00) for deposit to credit of Henry W. Claggett, being balance of purchase money due him as trustee from John R. Coale. C. H. Stanley." The second check is drawn on the bank and reads: "Pay to the order of James Scott, cashier, two thousand and twenty-four and thirty one-hundredths dollars (\$2,024.30) to deposit to the credit of Henry W. Claggett, trustee. C. H. Stanley." These two checks were deposited to the personal account of Claggett, and were dissipated by him. We have examined that case, and in our judgment, while the facts are not the same as the present case, yet the law applicable in that case is applicable to the case now being considered. The case is quite lengthy, and we quote from the syllabus:

"(1) A check, stating that it is 'for deposit to credit of' a person named without adding the word 'trustee' to his name, although it contains a further clause, stating that it is 'the balance of purchase money due him as trustee,' does not impress the funds with a trust so as to prevent a bank in which he deposits it from crediting the check to his individual account.

"(2) A check, stating that it is for 'deposit to the credit of' a person named, with the word 'trustee' added to his name, is an explicit notification to the bank in which he deposits it that he is not the actual owner of the money, and if the bank credits it to his individual account, and loss ensues to the trust estate by reason of his drawing out the fund by check on his personal account, the bank is liable for participation in the breach of trust.

"(3) A bank is not responsible for the use of trust funds made by trustee, unless it knowingly participates in the breach of trust, or profits by the fraud."

If the law announced in the above case is

applicable to the facts in this case, we are satisfied that the plaintiff cannot recover in this action against the defendant Grangeville Savings & Trust Company.

Before citing other authorities, we call attention to the check in question in this case: "No. ——. Grangeville, Idaho, 11/3, 1909. Grangeville Savings & Trust Co. Pay to the order of J. W. Hockersmith \$625.00 six hundred twenty-five & no/100 dollars. Etta M. Dearing." The check, as introduced in evidence, bears the stamp of the bank, and reads: "Grangeville Savings & Trust Co. Grangeville, Idaho. Paid Nov. 18, 1909."

The Supreme Court of Kansas in the case of *First National Bank of Sharon, Pa., v. Valley State Bank of Hutchinson*, 60 Kan. 621, 57 Pac. 510, holds: "(1) When an agent, rightfully in possession of his principal's money, deposits it in a bank of which he is president to his own credit and as a part of his general deposit account, and tells the cashier the name of the person to whom it belongs, and instructs him to remit it to the owner, but the remittance is not made, and the agent in a short time checks against the general balance of the account, inclusive of the deposit in question, reducing it far below the amount of such deposit, the bank has the right to presume that the agent knows the remittance has not been made and has revoked the order to make it, and that the checking out of the deposit by the agent is within the authorized terms of his agency; and in such case the bank will not be charged with notice of a trust in favor of the owner of the money to the extent of the deposit made by the agent. (2) Nor does the trust in favor of the owner of the money arise if subsequently, and at a time when the agent's general deposit is below the amount of his principal's money deposited by him, he discovers that the remittance has not been made, and therefore directs that the balance to his credit be applied upon his debt due to his principal, if he is also at the same time indebted to the bank, and it chooses to assert its lien upon his funds for its protection; but the bank may refuse to do as directed, and instead thereof may apply the balance of his account to the payment of a debt which the agent in his individual liability owes to it." This case substantially involves the principle which applies to the facts in this case, although differing somewhat from it in point of fact.

A similar question was considered by the Supreme Court of Georgia in the case of *Munnerlyn v. Augusta Bank*, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159, and in that case the court holds: "A check in favor of a third person, signed by the trustee as agent and presented by the payee, is a sufficient demand for the repayment of the deposit, and upon refusal to pay the trustee's right of action becomes complete."

Under the principle announced in the foregoing authorities there can be no question

but that the rule of law applied to the facts in this case is as follows: Where one party draws a check in favor of another, and it is agreed between such parties that the payee is to act as trustee and agent to draw said money and apply it for the purpose of paying a mortgage upon real property, and the payee presents the check to the bank for payment, and the bank pays such check, such payment is a cash discharge of the deposit of the party drawing the check to the extent of the check drawn.

The foregoing authorities were cases where the facts are practically the same as in this case, and the law applicable to the facts in those cases was applied, and we are of the opinion that it is a law that governs the facts of this case. While the evidence in this case shows that the plaintiff testifies that she took the check to the bank herself and left it there, this statement of the plaintiff is disapproved conclusively by the testimony of Hockersmith and Leonard, and the record of the bank. Hockersmith testifies that on the 18th day of November, 1909, he deposited in the bank the following checks: "November 18, 1909. Check on Trust Company, \$10.00; check on Trust Company, \$30.00; check on Trust Company, \$46.10; check on Trust Company, \$15.65; check on Trust Company, \$19.25; check on Trust Company, \$208.00; check on Trust Company, \$625; check on Bank of Camas Prairie, \$8.15; check on Bank of Camas Prairie, \$48.85; check on Bank of Camas Prairie, \$5.15; total, \$1,016.15."

[3, 4] The bank record shows that this deposit on the 18th of November was received by the bank as stated by Hockersmith, and he was credited with the same in his own personal name on his personal account with the bank as a depositor, and not as a trustee, and the evidence also shows that there was nothing said at that time or at any other time that the sums so deposited should not be withdrawn by Hockersmith upon his own personal check for such use as Hockersmith might determine to apply the same to, nor that the bank was advised in any way that such deposit made that day should be applied to any particular purpose, and the trial court in his findings so found.

Referring to the complaint in this case, wherein the cause of action is alleged, the allegation of the complaint was that Hockersmith and F. L. Leonard, cashier of the respondent bank and trust company, combined, connived, and conspired to appropriate and apply said sum to their own use. This allegation was the basis and the facts upon which plaintiff sought to recover in this action, and the trial court found against the plaintiff.

We have above set out the allegations of the pleadings and the findings of the court and some of the evidence that was introduced. We will now call attention to the evidence that was given upon the question of

the transactions which took place between Leonard and Hockersmith and the plaintiff, and the evidence relating to whether there was a conspiracy proved in this case to apply the sum involved to the use of such parties.

Counsel for appellant called as a witness the defendant Hockersmith and cross-examined him on plaintiff's behalf, and his testimony relating to the check, material to its history, and what was done with it, is here related, partly in detail without question, and partly with the question and answer.

The witness states that he has been acquainted with the plaintiff, and that she came to their house as a little girl. The check was presented to him, and he states that the plaintiff drew the check and delivered it to him on the day of its date. He was asked this question: "Do you know how she came to deliver this check to you?" His answer was: "Well, she gave me the check. She had a mortgage on the place here. * * * She had a little mortgage on her place here, and she gave me that check, and I was going to pay the mortgage, and the mortgage was not due at that time, and there was not enough quite to pay the mortgage, and I *taken the check into the bank and passed it into the window.*" He was asked whether she had the money in the bank when she drew the check, and the witness replied: "I suppose it was, or she wouldn't have gave it to me." He then admitted that he indorsed his name on the check. "She told me that the money was in the bank, and that the money was there for the purpose of paying the mortgage." The witness was interrogated as to whether he had any conversation with Leonard, the cashier, with reference to the payment of the check and with reference to the payment of the mortgage, and he answered that he had. "She told me that she told Leonard." Then he was asked this question: "Well, did Leonard say anything to you about it? A. No, he did not. * * * I knew what the check was for." He makes a statement, in answer to questions, that at the time the check was given he and the plaintiff talked about the matter, and he was asked the question: "Did she authorize you to draw all that money out? A. Yes, sir. Q. How was it to be drawn out? What was to be done with it? A. In the first place it was to be applied on that mortgage. Q. That was the purpose for which it was deposited?" Some other questions that had been asked the plaintiff in a bankruptcy action were here read by counsel for plaintiff, and the witness answered, as follows: "Q. And for no other purpose? A. No, not that I know of. Q. Did you ever have any conversation with Mr. Leonard with reference to that? A. No." Counsel then asked witness: "Now, have you got any explanation to make there when you took the check in as to the conversation

you and Mr. Leonard had? A. I can tell you the conversation as soon as I remember it. I taken the check in and shoved it into the window, and I says, 'Fred, here is that check.' Q. By 'Fred' you mean the cashier; you mean Mr. Leonard? A. Yes, sir, Mr. Leonard; and I says, 'What am I going to do with it?' I says, 'The mortgage isn't due, or at least he is attending to it anyway,' and I says, 'I don't know what to do with it.' He says, 'Who is it to be paid to?' I says, 'Mr. Reed holds the mortgage, or at least he is attending to it anyway.' 'Well,' he says, 'you can just deposit it the same as your other checks. Mr. Reed would use it anyway, and you may just as well have the use of it as Mr. Reed.' 'Well,' I says, 'what if this money should not happen to be in here at the time it is needed?' 'Well,' he says, 'your credit is good; we will stand back of it,' or gave me to understand that." We call special attention here to this language used by this witness, to show his intention at the time he took the check to use the money for his own use, and not to deposit it for any special use.

The witness was asked: "Q. That he would take care of it? A. That it would be taken care of." Counsel then read from the evidence taken in the bankruptcy proceedings the following questions: "You never drew that money out yourself? A. No. Q. You never drew it out of the bank? A. No." Counsel for defendants at this time made the statement that he did not think Mr. Hockersmith testified to that, and counsel for appellant said he did, and proceeded to read the same questions again, and counsel for appellant then asked the witness: "What do you mean by that? A. Well, I supposed it was checked out. Q. You checked it out? A. I don't just understand your question. Q. At whose request did you check that money out? A. Well, I was sending in checks there all the time. Q. Well, I am talking about this \$625, for the purpose of paying off this mortgage. A. It was put in there for the purpose of paying off that mortgage. Q. Then at whose instance was it checked out? A. Mine, I suppose. I drew the checks. * * * Well, I supposed when he said it went in there the same as my money, it was just the same. Q. I understand. A. And if it was checked out, it was just the same? Q. Well, you owed the bank at that time. A. Well, I could not swear to that, whether I did or not. My impression is that I did. Q. Did you owe that bank then? A. At the time I deposited it? Q. At the time that money was put in the bank by Mrs. Dearing. A. I think I did. Q. And, as you stated, you owed the bank? A. I did owe the bank; I think I did at that time. Q. That is, that \$625 was checked out for different things, and not for the purpose of paying the mortgage? A. That is correct."

The witness was then asked whether

Leonard was controlling that thing, and the witness answered: "What I mean by that, if I owed them any interest or anything like that, he always checked that himself, checked on me. Q. If you owed him anything? A. If there was anything owing in there he drew checks on me for it." Witness further states: "I was not present when the check was drawn; the check was handed to me. She was not in the bank when she handed me the check. Q. Did Leonard tell you what he was doing with that money? A. He did not. Q. Did not say what he was going to do with it, or what he did do with it? A. No; did not say anything." We call attention to this answer, that Hockersmith denies that Leonard said anything to him about the use of the money when it was deposited, which corroborates the evidence of Leonard which we will call attention to later in this opinion.

Counsel again repeats the questions previously asked this witness about the conversation he had with Leonard when he took the check to the bank, and repeats the question of a statement that the mortgage is not due: "And I says, 'I will better take it to Reed.' Q. That is the money, the check? A. Yes, sir." Counsel then reads a former question: "And he says—that is Leonard—'You better deposit it to your credit here.' A. He, as I remember, did not say, 'You had better,' he just says, 'You deposit it in your own name.' Q. Here? A. Here; yes, sir. Q. Instead of at Reed's? A. Yes, sir; he says, 'Your credit is good.'" Further questions were asked the witness, which have been answered before, and such questions and answers were practically as formerly given.

The plaintiff was a witness, and counsel for appellant asked her what arrangement, if any, she had made with Hockersmith and Leonard with reference to a portion of that money that was placed there and to her credit by the Artisans: "What arrangement, if any, did you make with reference to a disposition of a portion of that money? A. I talked with Mr. Hockersmith a day or so before I left, two days before I left, that I would leave \$625, as the mortgage was \$800, and I thought I would leave \$25 for little expenses he might need. Q. That would cover the interest? A. The interest was paid up until the next June, until the mortgage was due, and the taxes were also paid the year I left. I told him the mortgage would come due in June, June the 1st. I left here in November, and I told them that I wanted the mortgage paid. I then went to the bank the day before I left. I took my checkbook and went to the bank and made the two checks for which I drew one for \$625, and made the other for \$74 to myself. I wrote one to J. W. Hockersmith for \$625. I went to Mr. Leonard and asked him what I should do with this check I have got. I have

drawn it for this mortgage of \$625. He said, 'Mrs. Dearing, I will advise you to leave it. I will see that it is paid for nothing else except the mortgage.' I said, 'See that it is paid for nothing else, as I want a home for myself and the children.' Q. What did he say? A. He said it would be paid for the mortgage and nothing else. Q. Did you leave the check? A. I left the check in the bank with Mr. Leonard, and he said he would see it would be paid for nothing else but the mortgage. He would see it was paid on the mortgage." We call attention to the statement above made by the plaintiff, that she left the check in the bank with Mr. Leonard, and he said he would see it would be paid for nothing else but the mortgage. This statement of the plaintiff contradicts the testimony of Hockersmith, in that Hockersmith testifies that he deposited the check delivered to him by Mrs. Dearing, and that he took the check to the bank with other checks and deposited them upon his own account. This statement of the plaintiff is also contradicted by Leonard's testimony, which will be referred to later on in this opinion. The witness then says she went away to Boise, for nearly two years. She could not hear from Hockersmith, and she wrote Mr. McDonald, an attorney, about the matter. She was then asked if she got a statement from the bank, and she answered she had: "I got it from the bank addressed on the envelope." This bank account reads as follows:

| | |
|---|-------------------|
| Etta M. Dearing in account with Grangeville | |
| Savgs. & T. Co. | |
| November 2, 1909, balance per passbook..... | \$699 53 |
| November 22, 1909, deposit..... | 2 50 |
| Check returned | \$ 74 53 |
| " " | 625 00 |
| Balance due you..... | 2 50 |
| | <hr/> |
| | \$702 03 \$702 03 |
| Balance due you 1-30-11..... | 2 50 |

The plaintiff was then asked when she first found out that the money had not been paid according to her understanding with Leonard and Hockersmith on the check that she left in favor of Hockersmith for that purpose. Her answer was: "I never really found out for sure. The first I found out I wrote to my father-in-law, Mr. Dearing, J. F. Q. What time was that? A. Right after I got that return from the bank. Q. In 1911? A. Yes. After I got the return from the bank, and then it was the first time I learned that the money had not been paid. I then wrote to Hockersmith. Got two letters from him." "After I found out the mortgage had not been paid in 1911, I came up then in the spring of 1912; came up from Boise to Grangeville. Before I left Boise I was not satisfied writing to Mr. Dearing, and I wrote to Mr. Hattabaugh. * * * When I got to Lewiston I met Mr. Leonard. * * * I asked him in regard to the matter. He did not know. I asked him if the money was left in the bank. He answered

that he did not know, and I asked him if Mr. Hockersmith had any account to meet with the bank, and he did not know, and I told him that I would be down at 9 o'clock in the morning when the bank opened, and he said the bank opened at 9 o'clock. I asked him if there was a note in the bank from Hockersmith to me. He said, 'Nothing in the bank.' He said it might be in Hockersmith's own bank box, which he had no right to show me. I then asked him if Hockersmith had any money in the bank. He says, 'Mrs. Dearing, there was a check drawn on the bank last week by Hockersmith for \$700 and some odd dollars, and the bank owes him nothing.'"

As to the conversation had in the bank at 9 o'clock, she was asked: "Q. State any further conversation with Mr. Leonard at that time. A. Well, I didn't have any further conversation with Mr. Leonard at that time. Q. He denied that he knew there was any money there to be paid on that mortgage? A. Yes, sir; he denied that absolutely; and, as far as seeing the note, I never saw the note. I don't know there is a note there or not. Q. Did you ever authorize any note to be executed to you by Mr. Hockersmith? A. No, I never did."

Leonard was called as a witness for the defendant, and in his evidence gave testimony with reference to the transactions had by him and the plaintiff and Hockersmith. He testified that he was cashier of the bank. He was handed the check in controversy, and was asked to examine the paper and state what it was, and he answered, "A check by Etta M. Dearing, dated November 3, 1909, drawn against the Grangeville Savings & Trust Company, payable to the order of J. W. Hockersmith, amount \$625, indorsed by J. W. Hockersmith." He was asked if he had seen the check before. "A. I presume I saw the check when the statement was made, I don't recall. Q. I will ask you whether or not this check was delivered to you for Hockersmith. A. It was not. Q. You heard Mrs. Dearing testify in regard to coming up here and making this check and giving it to you? A. I did. Q. State what the conversation was. A. Nothing, unless she asked me in regard to the standing of Hockersmith. Q. What was Mr. Hockersmith's standing at that time? A. That it was good at our bank at that time for a thousand dollars without security." A paper was handed Leonard by counsel for defendant, and he was asked what it was. "A. It is a deposit slip showing a deposit made November, 1909, showing the deposit made by Hockersmith." It happened to be a copy, and some objections were made to it, and counsel asked Leonard when he made the copy. "A. A clerk made that out. Q. When? A. Yesterday. Q. This deposit slip you say is Hockersmith's? A. Yes, sir. Q. Made out by one of your clerks? A. Of a copy of the deposit on that day. Q. I will ask you to state how

much cash and checks Mr. Hockersmith deposited at the time he deposited the check from Mrs. Dearing to Hockersmith in the sum of \$625. A. He deposited \$1,016.15. Q. I will ask you to state approximately how long Hockersmith had been doing business with you. A. Since opening business in 1904. Q. I will ask you to state whether or not you told Mrs. Dearing anything in regard to this money should be applied on the mortgage on the place here. A. Why, Mrs. Dearing never talked with me in regard to us having any mortgage whatever. If Mrs. Dearing asked me, she asked me in regard to the responsibility of J. W. Hockersmith as a customer, and she got the same information as any customer that would come into the bank. Q. Who deposited that check? A. Mr. Hockersmith, with other checks, as shown in the slip. Q. In March, 1912, when Mrs. Dearing came back, did you have a conversation with her in regard to Hockersmith owing her some money? A. I met her on the train, and she talked about different matters, and she brought up the Hockersmith proposition, and I presume she did ask something. I could not tell whether he had money, and, being on the train, could not tell anything. Q. Do you remember her coming into the bank next morning? A. I do not. Q. Do you remember her ever asking you about the note? A. I don't remember her ever asking the question. I do remember her saying on the train that Hockersmith was to pay her interest. Q. How much interest was he to pay her? A. I don't remember the amount; I think 10 per cent."

It was agreed by counsel that the statement of the bank, heretofore referred to, contains a history of the transaction with Hockersmith, the amount of the deposit made \$1,016.15, and a copy of that statement has heretofore been incorporated in this opinion. The above statement was agreed to by counsel; that it showed what the books show in reference to the transaction between Hockersmith and the bank.

The witness was asked the question: "When was the note given you? A. The last term of court he came in and handed me the envelope with the note. He says, 'Put that away for safe-keeping,' and that is all I know about it. The note is down in the safe with the others, showing the whole thing, signed up and with the indorsement on the back of it. Q. You say the first time you knew about this note was when Hockersmith brought it to you in an envelope at the last term of this court? A. The first I saw the note, I never saw the note before that."

Some controversy arose whether the witness did not, on inquiry from counsel in November or October last that there was a note in the vault, bring out the note and show it to the attorney at the window in the presence of Hockersmith. "Q. How long was it Mrs. Dearing was in your bank a day or two before she left for Boise? A. I don't remem-

ber talking to Mrs. Dearing after she got off the train. Q. I mean in Grangeville. A. I could not tell. Q. Was she down in your bank at that time? A. Might have been for all I know. Q. She might have had a conversation with you at that time? A. Might have. Q. Might have asked you with reference to this mortgage? A. Might have. Q. Might have talked with you about this money that was deposited by the Artisans to her credit? A. I don't know whether she did or not. She had the privilege of checking it to anybody she desired. Q. Did she write any checks to you? A. Not to my knowledge. Q. You say that this statement that you see shows her account in your bank which you sent her in 1911, showing the statement of her account? A. It is a copy of the ledger, a copy of her account. Q. It does not pretend to show that this money was disbursed? A. Nothing of my business to show how she got rid of her money. Q. How came you to render this statement to her? A. We send out statements regularly every month. It bears date January 30, 1911."

Upon cross-examination counsel further interrogated the witness: "Q. After this money was deposited in the bank to Mrs. Dearing from the Artisans' lodge, did you ever at any time have any conversation with Mr. Hockersmith in reference to what portion of that money was to be applied on or what purpose? A. I am not supposed to know what that was for. Q. I am asking you if you ever had any conversation. A. I don't know as I was to have any conversation with Hockersmith. Q. I am asking you about that conversation. A. I am not supposed to know about it. I am not supposed to ask her her business, or him his business. Q. Do you say, then, that you did not have a conversation with reference to this money being paid on this mortgage which was embraced in this check of \$625? A. Not at that time that deposit was made. Q. Well, at any other time? A. Well, not at that time; but I don't recall what was said after that deposit was made. That was a matter between themselves entirely. I was not present when that proposition was made. Q. After this check was made by Mrs. Dearing to Hockersmith? A. Her account shows when the check was put in. Q. Did you ever have any conversation with reference to what was to be done with it? A. I only know that she had that check, and she checked it out to him. Q. All you know is that she paid this \$625? A. Yes, sir. Q. Did not Gus Hockersmith ask you, when he brought that check in there, 'What am I to do with that check? There is not money enough to pay the mortgage anyhow,' Hockersmith said to you, and you made a reply something like this, or he says first, 'Reed won't take it,' you asked about the mortgage, whom it was payable to; he said, 'To George M. Reed,' that he held the mortgage; that it was not due; and he says, 'What am I to do with it?' and

you said to him, 'Just deposit it here in your name;' that you might as well have it as Reed—did you ever have any such conversation? A. I don't know as I thought the check was made payable to him, I had no right as an outsider to come in; they could burn up the check if they wanted. Q. Did he not tell you at that time, in the course of that conversation, 'This money has got to be paid on this mortgage,' and he said to you, 'What, if I had all this money in my own business, what am I going to do when this has to be paid?' and you remarked that you would attend to that, and you would stand behind him? A. We were not collecting anybody's mortgage. Q. Did you have such conversation? A. I did not. As I stated this morning, he was good for a thousand dollars, and he collected it afterwards. Q. Then you say you had no such conversation as that with Mr. Hockersmith? A. I don't say as I don't remember, I don't guarantee anybody's loss outside of the bank. Q. To be more specific, I will call your attention: Did not Wess say to you, when he took the check to you, or exhibited it, he says to you, 'Here is that check,' and you says, 'Yes, sir,' that is what he said to you; and he says, further, he told you the mortgage is not due; he says, 'Did you?' 'Yes,' and you told Leonard that, and he says, 'Yes.' Did you have any such conversation as that with him? A. If we did, I don't remember. He did not have to put that check into our bank, but he had enough outside to pay us off if he wanted to. Q. He says, 'I better take it to Reed?' A. That is not my testimony. Q. Then you said to him, 'You better deposit it to your credit here?' A. I don't remember any such conversation, he might have asked if he could borrow money, and I told him he could have it if he had the security. Q. He said to you, 'If I should not have the money to replace it?' and you said, 'We will fix that up?' A. We were not guaranteeing mortgages. Q. Did you have that conversation? A. Not to my knowledge, if he was good any time after that he could have the money. Q. You says to him his credit was good, and you would stand back of him, did you say that to him? A. No, sir. Q. I will ask you to state whether or not you ever had control of Mrs. Dearing's money in any respect from the time it was first deposited to her credit in the bank? A. None whatever, we have no control of any one's account; they can check it out in 15 minutes if they want to."

We have taken particular pains here to state the evidence which relates to the conversations of these three witnesses with reference to the transactions involved in this action. I am satisfied from this evidence that there can be no question but that there is no evidence given by either one of the parties which even hints that any conspiracy was entered into between Leonard and Hockersmith to in any way defraud or deceive the

plaintiff in this case; but there is evidence that Hockersmith may have had in his mind that his long friendship with the plaintiff and her confidence in him could be used to secure her money for his own benefit by giving her a note drawing interest. The record is uncontradicted that he did draw a note, payable to the plaintiff, dated October 1, 1910, due on or before two years, for \$625, at 10 per cent. interest from date until paid, payable October 12, 1912, and that after the plaintiff discovered that the money had been dissipated by Hockersmith she had a conversation with Hockersmith about paying the interest and tactfully consented to the note, and that she had corresponded about it. But it is clear in this case that Leonard had nothing to do with any of the transactions between the plaintiff and Hockersmith, except that the bank of which he was cashier received from the plaintiff for deposit in that bank \$625 which was paid out upon the order of the plaintiff, and that there was no agreement made by Leonard or the bank to in any way obligate either Leonard or the bank for any obligations of Hockersmith to the plaintiff, or any agreement or suggestion made as to how the money should be used by Hockersmith or the plaintiff. If the facts in this case are sufficient in law to create a liability by a bank or a cashier of the bank, then the banks of this state have assumed a responsibility which will make it impossible for banks to subsist under the laws of this state.

Black's Law Dictionary defines conspiracy in criminal law: "A combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is innocent in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful."

Section 6540, Rev. Codes, defines conspiracy as follows: "If two or more persons conspire: 1. To commit any crime; * * * 4. To cheat and defraud any person of any property by any means which are in themselves criminal, or to obtain money or property by false pretenses."

The evidence in this case shows that the deposit of the check of \$625 was made by Hockersmith as his own personal account, and that no other obligation or agreement was made between the bank or any of its officers and Hockersmith, that such deposit should become a trust fund. The obligation of the bank when such deposit was made was to keep the fund safe and return it to the proper person who deposited the same, or to pay it to his order. If Hockersmith had deposited the check as a trustee, then as such trustee he would have a right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate

the money when drawn to a proper use. If this rule is not adopted it would place upon a bank a duty of inquiring and investigating as to the appropriation made of every fund deposited by a trustee or other like fiduciary, and if this duty is imposed it would practically put an end to the banking business, because no bank could possibly conduct business if without fault on its part it was held accountable for the misconduct or malversation of its depositors who occupy some fiduciary relation to the fund placed by them with the bank. *Duckett v. National Mechanics' Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

As to the fact of depositing money in a bank in trust for a third person, a note to the above case cites the following: "*See Cunningham v. Davenport* [147 N. Y. 43, 41 N. E. 412], 32 L. R. A. 373 [49 Am. St. Rep. 641], and *Bath Savings Inst. v. Hathorn* [88 Me. 122, 33 Atl. 836], 32 L. R. A. 377 [51 Am. St. Rep. 382]."

[5] There is another ground which in our judgment is sufficient and conclusive as to whether this case should be reversed. The trial judge saw the witnesses who testified in this case, and had a full opportunity to determine the credibility of the witnesses, and he made his findings and entered his judgment upon what he deemed to be the preponderance of the evidence received in the case. In my judgment there is conflict upon several matters which are involved, and upon which evidence was given upon both sides. The evidence of Leonard is contradicted by statements made by plaintiff and Hockersmith as to conversations which took place at the bank about what was to be done with the money, but Leonard's evidence is concise and decisive, and there is nothing contradictory in any statement of Leonard's, either in his evidence given or his refusal or failure to answer particular questions which were propounded to him upon cross-examination. He had previously answered at different times the same questions, and the cross-examination threw no light upon his statements; the evidence of plaintiff is contradicted in many facts by Hockersmith, and Hockersmith's testimony is contradicted by the plaintiff in certain matters and statements made by others; but, notwithstanding this conflict, we think the evidence shows clearly that the preponderance of evidence is with the defendants, and under the rule of this court, where the evidence is only indefinitely conflicting as to some facts, and there is substantial evidence supporting the findings of fact by the trial court, the findings and decree entered in accordance therewith will not be disturbed. *Brinton v. Steele*, 23 Idaho, 615, 131 Pac. 662; *Stuart v. Hauser*, 9 Idaho, 53, 72 Pac. 719; *Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722. In *Hayne*, New Trial and Appeal, vol. 2, § 288, the author in speaking of the rule above stated, says: "This rule has been

announced more frequently than any other rule of practice."

The judgment appealed from in this case is affirmed. Costs awarded to respondents.

SULLIVAN, J., concurs. AILSHIE, C. J., sat at the hearing, but took no part in the decision of this case.

BROWN'S ESTATE v. STAIR.

(Court of Appeals of Colorado. Dec. 8, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 227*)—CLAIM AGAINST ESTATE—FORM AND SUFFICIENCY.

A statement of a claim against an estate which recited that decedent "held in trust and converted the sum of \$2,000 belonging to" claimant, which amount was set out at the right of the claim, and further recited: "Ored-it—Paid on above account, \$500; balance, \$1,500"—was sufficient under *Mills' Ann. St. 1912*, § 8002 (Rev. St. 1908, § 7212), making formal pleadings unnecessary in probate matters.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 811-818, 842; Dec. Dig. § 227.*]

2. EXECUTORS AND ADMINISTRATORS (§ 256*)—HARMLESS ERROR—SUFFICIENCY OF PLEADINGS.

Where the executrix had known long before the filing of a claim against the estate the facts upon which it was based, she could not have been prejudiced by any formal insufficiency in the claim filed, which merely stated the amount with credits, and recited that it was for the conversion of trust funds belonging to the claimant.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 850-856, 860-863, 910-919; Dec. Dig. § 256.*]

3. EXECUTORS AND ADMINISTRATORS (§ 225*)—EXHIBITION OF CLAIM—NOTICE OF INTENTION—NECESSITY.

Under *Laws 1903*, p. 516, § 121, subd. 4, repealing *Mills' Ann. St. 1891*, § 4780, subd. 4, and substituting therefor a provision that all other demands against an estate which shall be filed in the county court within one year from the granting of letters, and allowed, shall compose the fourth class of claims, notice of intention to exhibit claims is not necessary to arrest the running of limitations; a filing only being necessary.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 789-800, 802, 803, 805; Dec. Dig. § 225.*]

4. EXECUTORS AND ADMINISTRATORS (§ 256*)—CLAIMS AGAINST ESTATE—WAIVER OF OBJECTIONS—PREJUDICIAL OBJECTIONS.

Where defendant, in an action to establish a claim against an estate, entered upon trial in the district court on appeal without objecting to that court's jurisdiction on the ground that the probate court did not have jurisdiction to try the issue involved, which was the existence of a constructive trust, the objection to the district court's jurisdiction was waived.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 850-856, 860-863, 910-919; Dec. Dig. § 256.*]

5. ABATEMENT AND REVIVAL (§ 17*)—PLEADING MATTER IN ABATEMENT—PENDING SUIT.

The fact that a former suit is pending is a matter of defense, which must be pleaded to be available, or, if there are no formal pleadings,

as in probate proceedings, must be raised by proper objection at the trial in the probate court, and cannot be first raised on appeal to the Court of Appeals.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 123-136; Dec. Dig. § 17.*]

6. MONEY RECEIVED (§ 9*)—RIGHT OF ACTION.

Claimant could maintain an action against an estate as for money had and received to recover the value of one-half of the real estate received by decedent from a client of claimant and decedent, where the parties had agreed to equally divide the fee; but decedent, without claimant's knowledge accepted land for himself and claimant in payment of the fee, and gave a receipt to the client in claimant's name for an arbitrary amount fixed as claimant's part of the fee.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 31; Dec. Dig. § 9.*]

7. MONEY RECEIVED (§ 1*)—RIGHT OF ACTION—COMMON LAW.

At common law, an action could be maintained in assumpsit or debt as for money had and received, upon the theory of a quasi or constructive contract to recover money belonging to plaintiff, but improperly converted by defendant in breach of contract.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

8. MONEY RECEIVED (§ 9*)—RIGHT OF ACTION.

Where a liability is discharged by payment to one who does not assert a hostile claim to the funds, another claimant who is entitled to his share in the funds may maintain an action against the person receiving the funds as for money had and received.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 31; Dec. Dig. § 9.*]

9. CONTRACTS (§ 5*)—"QUASI CONTRACT."

A "quasi contract" is a constructive contract which is raised by law to enforce legal duties by contract actions, where an express or implied contract does not actually exist.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 7; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 7, p. 5883.]

10. TRUSTS (§ 91*)—"CONSTRUCTIVE TRUST"—NATURE.

A "constructive trust" is raised in equity, independent of any intention of the parties to create a trust, for the purpose of preventing fraud or doing justice, and is frequently called a trust *ex maleficio* or *ex delicto*.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 139; Dec. Dig. § 91.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1476-1479; vol. 8, p. 7614.]

11. ACTION (§ 28*)—CONSTRUCTIVE TRUST—REMEDIES FOR ENFORCEMENT—ELECTION.

One entitled to enforce a constructive trust may either enforce the trust or waive the tort upon which it is founded, and sue in assumpsit for the value of the property wrongfully taken or withheld.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28.*]

12. PRINCIPAL AND AGENT (§ 76*)—GROUNDS—PROPERTY OTHER THAN MONEY—FORM OF REMEDY—ESTOPPEL TO OBJECT.

Where an agent to collect a money demand, due to his principal and himself jointly, accepts land in satisfaction thereof without authority, he and his executrix are estopped to object, when sued in assumpsit by the principal for his share, that assumpsit for money had and

received would not lie, and that some other remedy should have been adopted.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 158-161; Dec. Dig. § 76.*]

13. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS AGAINST ESTATE—EVIDENCE.

The value at which real estate, accepted by decedent in settlement of an attorney's fee due to him and claimant jointly, was taken, as shown by decedent's receipts, would be at least *prima facie* evidence of the amount of the joint fee claimed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.*]

14. EVIDENCE (§§ 282, 317*)—HEARSAY.

In an action against an estate to recover claimant's share of a fee collected by decedent, due to them jointly for legal services, evidence by the client as to statements made by decedent in the presence of claimant and herself as to the amount of the fee, and that it was to be equally divided between decedent and claimant, was not hearsay or declarations of a party to a mere stranger so as to be objectionable on that ground; the client being a party to the transaction of which the contract for payment of the fee was a part.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1135, 1174-1192; Dec. Dig. §§ 282, 317.*]

Appeal from District Court, City and County of Denver; Carlton M. Bliss, Judge.

Proceeding by Gobin Stair against the Estate of Charles Courtland Brown, deceased. From a judgment for claimant, defendant appeals. Affirmed.

William Young and John F. Tourtellotte, both of Denver, for appellant. George K. Andrus, of Denver, for appellee.

KING, J. Charles Courtland Brown, an attorney at law, died in the city and county of Denver, October 25, 1908. Letters testamentary issued November 4, 1908; December 7th was fixed as claim adjustment day, and notice duly published. October 29, 1909, Gobin Stair filed in the county court the following claim:

Estate of C. C. Brown, Deceased, to Gobin Stair, Dr. April, '98. That C. C. Brown held in trust and converted the sum of two thousand dollars belonging to Gobin Stair \$1,000
Credit—Paid on above account..... 500

Balance \$1,500

December 3d notice of the filing of said claim was served on the executrix. Trial was had December 17, 1909, and judgment rendered disallowing the claim for reasons which do not appear of record. An appeal to the district court was taken, and upon trial *de novo* in that court a judgment in the sum of \$1,411.86 in favor of the plaintiff was rendered upon verdict of a jury, from which judgment an appeal was taken to the Supreme Court.

In the district court, immediately after the opening statement made to the jury by claimant's counsel, which statement, by re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quest of opposing counsel, was taken down by the reporter, motion was made to dismiss the proceeding for the reasons: (1) No such account has been filed as required by law. (2) No notice of the filing of such claim was served on the executrix within one year after the issuance of letters testamentary. (3) There is a fatal variance between the claim as filed and the opening statement of counsel for claimant. This motion was overruled. The same objections were interposed to the introduction of evidence, and overruled.

Such further statements of the proceedings as are deemed necessary will be made in connection with the opinion on the errors assigned.

[1, 2] 1. Appellant contends that the claim as filed does not comply with the provisions of law relative to the manner of exhibiting claims against estates. Upon its face, the claim as filed appears to be upon an account of one transaction only, consisting of a single debit of \$2,000 for money received by Brown for the use of the claimant, and converted to Brown's own use, and a single credit of \$500 paid thereon. Although inartistically drawn, it sufficiently states the demand under the statute making formal pleadings unnecessary in such probate matters. Section 8002, Mills' 1912; R. S. 1908, § 7212. It appears beyond controversy that the executrix knew of the claim. As the facts generally upon which it was based were, and for a long time prior to its filing had been, known to her, she could in no manner have been prejudiced by the form in which it was presented.

[3] 2. Appellant also contends that, because no notice of intention to exhibit said claim was served by the claimant on the executrix until after the expiration of one year from the granting of letters testamentary, the claim was barred by the statute of limitations, in support of which counsel cited *Alvater v. First National Bank*, 45 Colo. 528, 103 Pac. 378. That case is not controlling, inasmuch as it was based upon statutory provisions different from those which obtain and govern the proceedings in the present case. That opinion expressly states that the claim was barred by reason of the provisions of the fourth subdivision of section 4780, Mills' Ann. Stats. 1891, which is as follows:

"(4) All other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be exhibited within one year from the granting of letters, as aforesaid, shall compose the fourth class; provided, * * * all demands not exhibited within one year as aforesaid, shall be forever barred unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator," etc.

While it is not clear why that statute was held to be applicable in that case, it was probably so held because the adminis-

tration of the estate was in process of settlement prior to the taking effect of the act of 1903, while the latter act was in full force and effect at the time of the issuance of letters testamentary in the instant case. By that act (Acts 1903, p. 516, § 121, subd. 4) section 4780 of Mills' Annotated Statutes was repealed, and the following substituted for subdivision 4 quoted in the opinion, to wit:

"(4) All other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be filed in the county court within one year from the granting of letters as aforesaid, and thereafter allowed by the court, shall compose the fourth class; provided, * * * all demands not filed within one year as aforesaid, and afterwards allowed, shall be forever barred," etc.

Under the former act it was held that a claim was not exhibited until notice given as provided in section 4784. That rule does not apply to the new section, in which filing only is necessary within the year to arrest the running of the statute.

3. Appellant's counsel urge that the court erred both in denying appellant's motion to dismiss the action upon the opening statement of plaintiff's counsel and the motion to grant a nonsuit at the close of his testimony, because, it is said, the opening statement, which, together with the claim filed, constitute the pleadings in the case in the district court, as well as the evidence introduced in support of the claim, constituted a departure and variance from the cause of action stated in the claim itself, and for the further reason that the cause of action stated by counsel and established by his evidence, if any cause of action was proven, was to declare and enforce a resulting trust which the probate court had not jurisdiction to try or determine, and for that reason jurisdiction to try the issues was not vested in the district court by the appeal. This contention was earnestly urged upon the oral argument, and *Cree v. Lewis*, 49 Colo. 186, 112 Pac. 326, and *Marshall, Adm'r, v. Marshall*, 11 Colo. App. 505, 53 Pac. 617, relied on, in addition to many other authorities cited in the printed brief.

[4] There was nothing in the opening statement made by counsel which necessarily constituted a departure or variance from the cause of action exhibited by the claim on file, and nothing whatever in said statement, nor in the evidence offered in support of the claim, showing a cause of action of which the county court could not take cognizance, nor issues which it might not try and decide. If such cause of action upon a resulting trust had been disclosed by the evidence, we think appellant waived the question of jurisdiction of the district court to try it by failing to make the proper objections until after the cause had been tried upon its merits. The district court has original jurisdiction of the subject-matter of trusts and partnerships, and to try all the issues that are al-

leged by counsel for appellant to be involved. By the appeal it acquired jurisdiction of the persons, and by entering upon the trial without objection predicated upon the jurisdiction of the probate court to try the issues that objection should be regarded as waived. *Tucker v. Tucker*, 21 Colo. App. 94, 121, Pac. 125; *Fairbanks, Morse & Co. v. Macleod*, 8 Colo. App. 190, 194, 45 Pac. 282; *Marshall, Adm'x, v. Marshall*, 11 Colo. App. 505, 509, 53 Pac. 617. But, without regard to waiver, appellant's contention is untenable, unless the court first adopts her theory that the cause of action was upon and for the enforcement of a trust resulting from the fact that Brown took in his own name the title to real estate which was paid for in part by the funds of the claimant; that he elected to proceed upon that cause of action; that the county court had not jurisdiction to try that issue; therefore the district court acquired none; and that, as an action for money had and received, or as for money received in trust and unlawfully converted, it cannot be sustained. The claimant did not accept that theory, and the court rejects it.

Plaintiff claimed, and his evidence tended to show, that his father and he were attorneys for Mrs. Julia Smart in a suit pending against her in the district court of the city and county of Denver; that claimant's father, being about to die, advised his son to secure the services of said Courtland C. Brown, an experienced attorney, to assist in the case; that after his father's death the claimant advised his client to secure the services of said Brown as associate counsel, which she did; that an express agreement was then made or definite understanding had between Stair and Brown, of which Mrs. Smart had personal knowledge, that such fees as the attorneys might collect would be equally divided between Stair and Brown, and as to the amount the said Brown authorized the fixing thereof by Stair, and so stated to Mrs. Smart; that Stair and Brown were associated as counsel during the pendency of the proceedings and until the conclusion thereof in favor of their client; that immediately upon the conclusion of the suit Brown advised the client and her husband to depart from the state and remain away; that before departing, and at divers times thereafter, she asked Brown for settlement, but was put off on various pretexts, and after she had gone to California, some time during the year 1907, was told that Brown would go to California in February, 1908, and then make the settlement. In the spring of 1908 Brown went to California, and there met the client, and demanded of her a fee of \$3,000 in cash, or, in lieu of cash, a deed for certain real estate in the city of Denver, which the client valued at \$4,000 or more. Mrs. Smart protested against the charge as exorbitant, and unconscionable, and contrary to her agreement with the Stairs, and asserted her right to settle the same with Stair

according to the original agreement. Negotiations for settlement continued, during which Brown, insisting upon payment or a deed in accordance with his terms, threatened to return to Colorado and "tie up" all the plaintiff's property and income to secure the payment of his fee, and produced a power of attorney from Stair, authorizing him to settle with the client for all services jointly performed by Stair and Brown. Armed with this power of attorney, and under threats of legal proceedings, Brown induced Mrs. Smart to execute a deed conveying to him the real estate, under an agreement that the conveyance should satisfy the fees of both Brown and Stair, and that Brown would settle with Stair. After receiving the deed, he tendered to Mrs. Smart a receipt of \$3,500, signed by him individually, in satisfaction of his fees, and one of \$500, signed by him as attorney in fact for Stair, in satisfaction of Stair's fees. Mrs. Smart protested against such division of the fees, declaring that the agreement had been for an equal division between the attorneys, that she had delivered the deed with the understanding that the fees were to be so divided, and demanded a return of the deed, which was refused, with the statement that \$500 was all that Stair had earned. Pending the negotiations in California, Brown wrote to Stair, without advising him of the amount of fees he was undertaking to collect, stating that he had insisted upon \$500 to be paid to Stair, and secured his permission to settle for that amount, either for Stair alone or to be divided between the two. Upon receiving the receipts given by Brown as aforesaid, and his refusal to return the deed, Mrs. Smart notified Stair of the amount of fees demanded and the deed given, whereupon Stair tendered a return of Brown's check for \$500, and demanded a conveyance to him of one-half the real estate, or payment of one-half its value, as his share of the fees as agreed upon. Brown refused, and Stair commenced suit against Brown in the district court, the nature of which is not disclosed by the record, except by the indefinite statements by counsel for either side. While that suit was pending, Brown died, the suit was abandoned, and claimant elected to file his claim as a general creditor against the estate as for money had and received by Brown and wrongfully withheld or converted.

[5] Appellant urges in this court that the former suit is still pending, and therefore is a bar against this proceeding. That question was not raised in the trial court. Former suit pending is a matter of defense, which must be pleaded, or, where there are no formal pleadings, must be raised by proper objections at the trial, or will be considered as waived.

[6-8] Under the facts which claimant's evidence tended to prove, he had a right to sue in equity for an undivided one-half interest in the real estate, title to which Brown

had wrongfully taken in his own name, or wrongfully retained after demand for conveyance, or, waiving the tortious act of Brown, sue for the value of one-half of said real estate, or the amount of claimant's fees which Brown had received and withheld. At common law, the action might have been in assumpsit or in debt as for money had and received, upon the theory of a quasi or constructive contract. It was proven beyond any question, and we think is not disputed, that Brown was authorized to collect from Mrs. Smart the attorney's fees which were due to Mr. Stair, whatever that amount might be, and which were payable in cash; that, without Stair's knowledge or consent, he accepted in payment of said fees a parcel of real estate, giving a receipt in Stair's name as for a fixed amount in cash, which he assumed to be the share to which Stair was entitled, thereby discharging the client from any liability for services performed by Stair. It is well settled that, where the liability of the person from whom money was due has been discharged by payment to one claimant who does not assert any hostile claim to the whole amount, another claimant who is entitled to a share in the money may maintain an action for money had and received against the claimant so paid. 27 Cyc. 859; *Webb v. Morris*, 64 Hun, 11, 18 N. Y. Supp. 711. Upon these authorities, and for the reasons given, the claimant herein had the right to proceed against the estate as for money had and received, and the privity between the claimant herein and Brown sufficient to support an action for money had and received results from the fact that Brown had retained property of the claimant which he had in conscience no right to keep. In such cases, the law implies a promise that he will pay it over. 27 Cyc. 857, and cases cited under notes 41, 42, and 44; *Mumford v. Wright*, 12 Colo. App. 214, 55 Pac. 744; *Zang v. Bernheim*, 7 Colo. App. 528, 44 Pac. 380.

[9, 10] An action for money had and received has often been sustained upon the principle of quasi contract, which bears the same relation or analogy to a contract proper that a constructive trust bears to an express trust. The quasi contract is a constructive contract, as distinguished from either implied or express contracts, and is defined rather as a relation than as a contract—a fiction of law adapted to enforce legal duties by actions of contract where no proper contract exists, express or implied. 1 Keener, *Cases on Contracts*, p. 92; *McCarthy v. Boston & L. R. R.*, 148 Mass. 550, 552, 20 N. E. 182, 2 L. R. A. 608; 3 Blackstone, Comm. 159, 166. In this class of relations, commonly designated as contracts in order to adapt the case to a remedy, intention is disregarded; the duty defines the contract. Maine, *Ancient Law*, 1; Keener, *Quasi Contracts*, 5. A constructive trust arises purely by con-

struction of equity, and is entirely independent of any intention of the parties to create a trust, and often directly contrary to such intention. It is frequently called a trust *ex maleficio* or *ex delicto*. It is entirely in invitum, forced on the conscience of the trustee to prevent fraud, or to work justice. 39 Cyc. pp. 26, 27; Washburn, *Real Property*, § 1430; *Walker v. Bruce*, 44 Colo. 109, 117, 97 Pac. 250.

[11] From the close analogy between constructive contracts and constructive trusts may be drawn the reason for the well-settled rule that a person entitled to recover may elect to proceed in equity to declare and enforce the trust, or may waive the tort from which the trust *ex delicto* is raised, and sue in assumpsit for the value of that which has been tortiously taken, or, if not wrongfully taken, wrongfully and tortiously withheld. Keener, *Quasi Contracts*, 159; *Miller et al., Ex'rs, v. Miller*, 7 Pick. (Mass.) 183, 19 Am. Dec. 264; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 668, 669, 17 Am. Dec. 532; *Connecticut & Pass. Riv. R. R. v. Newell*, 31 Vt. 364; *Standish v. Ross*, 3 Ex. Rep. 527; *Doon v. Ravey*, 49 Vt. 293, 296; *Martin v. McCarthy*, 3 Colo. App. 37, 41, 32 Pac. 551, and cases cited.

In *Ainslie v. Wilson*, *supra*, it is said: "If an agent receives property for his principal, and there is no presumption that it has been converted into money, the action for money had and received will not lie; but, if the agent appointed to collect a money debt should accept from the debtor in extinguishment property as money, he would not be permitted to question this form of action." (*Assumpsit*.)

[12, 13] In the instant case it has been shown that Brown received a conveyance of real estate in satisfaction of a money debt owing from their client to him and the claimant jointly, and which was payable in cash, and that he gave his receipt for the same in the sum of \$4,000 as for money paid and received; that, so far as Stair was concerned, the said Brown was acting as his agent, whether considered as a partner in this single transaction, or under the power of attorney by virtue of which he professed to act, and thereafter he ought to have been estopped from questioning, as to form, an action brought by Stair to recover his share of the fee collected, and his executrix should now be so estopped; and, further, the amount or value for which the real estate was taken, as shown by Brown's receipts, would be at least *prima facie* evidence of the amount of the joint fee so collected. By his settlement with Mrs. Smart in full for himself and his associate, and by tendering or paying to Stair the sum of \$500, Brown admitted the right of Stair to share in the fees collected to that extent, but denied his right to recover any greater amount, or to have any portion of the real estate conveyed to him, so that

the main question in issue upon the trial, and necessary to be determined by the court, was the amount of said fee belonging to the claimant herein. The evidence tended to show that the real estate was actually worth the sum of \$4,000, and, due allowance having been made by the jury and court for taxes paid by Brown, the verdict cannot be said to be excessive.

[14] Appellant insists that the evidence was not sufficient to sustain the finding of the jury; that, inasmuch as a resulting trust in realty was involved in one phase of the case at least, the character of the testimony necessary to sustain plaintiff's claim for money value is the same, and governed by the same rigorous rule that is applied in establishing resulting trusts in real estate, namely, that it must be clear, certain, satisfactory, and, according to some authorities, conclusive; that it cannot be established by mere hearsay or circumstantial evidence, or evidence of the declarations of a party to a mere stranger to the transaction. Assuming, but not deciding, that to establish plaintiff's claim for money had and received the same character and amount of evidence is required as apply to a resulting trust, we think the evidence received is sufficient, and satisfies the rule, granting, of course, that the testimony of Mrs. Smart was given full credit by the jury, as it must have been. There is no reason apparent from the record why it should be discredited. The testimony of Mrs. Smart to statements made by Brown in her presence relative to the amount of the fee, and that it was to be equally divided between Brown and Stair, was not mere hearsay, or declarations of a party to a mere stranger to the transaction, or in chance conversation such as is condemned by the Supreme Court of the United States in *Purcell v. Coleman*, 4 Wall. 519, 18 L. Ed. 459, and *Leroy et al. v. Norton*, 49 Colo. 490, 113 Pac. 529, and by numerous decisions of the Supreme Court and Court of Appeals of this state. The conversation at the time the contract of employment of Brown was entered into was triangular, between Stair, Brown, and Mrs. Smart; she was not a stranger to the transaction, but a party to it, materially interested in it, and her questions to Brown and the answers given by him in the presence of Stair were such as, if believed, would convincingly establish a definite agreement and understanding as to the division of the fees. This agreement and understanding Brown violated, retaining six-sevenths of the fee actually collected, paying to Stair only the remaining one-seventh, and it seems impossible that the jury could have arrived at any other verdict on the evidence, if credited.

The instructions given fully and fairly state the law of the case. No objection or assignment of error has been overlooked or regarded as abandoned. Finding no preju-

dicial error, and being satisfied that substantial justice was done, the judgment will be affirmed.

Affirmed.

SMITH et al. v. SCHLINK.

(Supreme Court of Colorado. Nov. 3, 1913.
Rehearing Denied Dec. 1, 1913.)

1. JUDGMENT (§ 747*)—CONCLUSIVENESS—MATTERS CONCLUDED.

A decree in a suit to set aside an execution sale of real property on the ground that it constituted the judgment debtor's homestead, in which suit the court had jurisdiction of the parties and the subject-matter of the controversy, adjudging that the sale was valid as to one lot and that a deed should be delivered to the purchaser by the sheriff unless the judgment debtors redeemed before a certain date, which they failed to do, and that all the right, title, and interest of the judgment debtors should pass by such deed, which was not appealed from nor modified in any manner, conclusively determined that the title to such lot was in the purchaser, and the judgment debtors could not thereafter question such title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1053, 1284-1296; Dec. Dig. § 747.*]

2. APPEAL AND ERROR (§ 1201*)—POWERS OF LOWER COURT AFTER REMAND.

Where a decree enjoining trespasses on real property was reversed on the ground that the complaint did not state facts sufficient to show a right to equitable relief and remanded for further proceedings according to law, the trial court could allow an amendment of the petition so as to show a right to an injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673, 4677-4683; Dec. Dig. § 1201.*]

Error to District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Action by Charles L. Schlink, administrator of Joseph P. Schlink, deceased, against William H. Smith and others. Judgment for plaintiff, and defendants bring error. Affirmed.

See, also, 44 Colo. 200, 99 Pac. 536.

H. B. O'Reilly, of Denver, for plaintiffs in error. Stuart & Murray, of Denver, for defendant in error.

GABBERT, J. [1, 2] The subject-matter of controversy is lot No. 29, Case and Ebert's addition to the city of Denver. The case has an extended history, as will be learned from the opinion in *Smith v. Schlink*, 15 Colo. App. 325, 62 Pac. 1044, where is given in detail a statement relative to the contention over the lot involved. From this statement it appears that Schlink recovered a judgment against Smith, which was afterwards affirmed by the Court of Appeals, and that on this judgment an execution was sued out and levied on property which included the lot in question. In due course, a sheriff's deed issued. Later an action was commenced by Smith, the purpose of which was to set aside the execution sale. This action

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appears to have been based upon the ground that the lots sold under the execution were homesteaded. The trial of this case resulted in a judgment to the effect that the sale was invalid as to all of the lots except No. 29, and that a deed to this lot should not be delivered by the sheriff until a date specified, and, if at any time prior to this date Smith should pay a sum named, it should operate as a redemption from the sale of that lot, but, in the event such payment was not made, then all the right, title, and interest of the judgment debtors should pass by the sheriff's deed, which he was then authorized to execute and deliver. This decree stood, and was never vacated, modified, or altered in any respect. The right of redemption given the judgment debtors was not exercised and the sheriff's deed issued. From this statement it is apparent that whatever right or title the judgment debtors may have had to the lot in question passed by the sheriff's deed. Whether or not the judgment and decree under and by virtue of which this result was brought about was erroneous is not a matter which can be inquired into. Those proceedings are no longer open to review. Notwithstanding this situation regarding the title, it appears that the judgment debtors, or their representative, insisted in asserting title to this lot; force being resorted to by both parties to maintain their alleged rights.

Schlink then brought an action to enjoin further trespass by the judgment debtors, and to recover damages for the trespasses committed by them. The trial of this case resulted in a judgment in favor of Schlink, enjoining the Smiths from further trespasses upon the premises. From this judgment the defendants appealed to the Court of Appeals, where the case was considered and the judgment of the district court reversed, in the case to which we have referred. It appears from the opinion, that it was with great reluctance that the judgment of the district court was disturbed, for the reason it appeared the defendants in fact were without any right, title, or interest in the premises, but, notwithstanding this situation, the court held that the plaintiff had not pleaded facts which entitled him to the equitable relief granted by the trial court. In closing the Court of Appeals said: "So far as we can, we have settled the question of title between the parties and simply permit the appellee to recover what if any damages he has sustained. We regret the necessity to leave this question open and we entertain the hope, though it may be ill founded, that, when the defendants discover their inability to attack the title secured to the plaintiff by the decree in the suit of Smith v. Schlink, they may be willing to forego any further contest in the premises and prevent further litigation, and the parties may come together and adjust their various altercations." In order to more definitely understand the rea-

son which impelled the Court of Appeals to reverse the judgment, it should be stated that it was determined the action by Schlink was one in trespass, and that, having dismissed his claim for damages, he could not maintain his suit for an injunction. The cause was remanded to the trial court without any definite instructions or mandate with respect to allowing amendments to the pleadings.

When the case reached the trial court, the plaintiff obtained leave and filed an amendment to his complaint, restoring allegations theretofore withdrawn, and, as supplemental thereto, alleged additional matter upon which he predicated an application for a preliminary injunction, which was granted. The defendant answered. On the trial of the issues thus made, the finding of facts were in favor of plaintiff, and a judgment entered, enjoining the defendants from further trespasses upon the lot involved, and from any and all attempts, direct or indirect, to claim the lot or take possession of it, and were likewise perpetually prohibited from claiming any right or title to any portion of the lot against the title of the plaintiff and his grantees. Thereafter the defendants and their counsel were cited to show cause why they should not be punished for contempt, for a willful disobedience of the decree. This matter was tried and resulted in a judgment finding the respondents guilty of contempt, and a fine imposed upon each of them. This judgment was afterwards brought to this court for review, and is reported in the case of Smith v. Schlink, 44 Colo. 200, 99 Pac. 566. The main point presented by respondents was to the effect that the trial court was without authority to allow the amendment to the pleadings of plaintiff, upon which the decree was predicated for the violation of which they had been adjudged guilty of contempt. Ruling on this question, this court held that under an order, remanding a cause to an inferior court, "for further proceedings according to law," the trial court may allow such amendment of the pleadings as justice requires, and that a judgment within the issues of a cause, of which the court has jurisdiction, however irregular, is not void in such sense that disobedience of its mandate will not constitute contempt. The judgment in the contempt proceedings was affirmed. In closing the opinion, it was stated in substance that steps had not been taken in any way to modify or set aside the decree, which was the basis of the contempt proceedings. Respondents filed a motion for a rehearing, grounded, among others, upon the proposition that we were in error in holding that no steps had been taken to review the original judgment. In support of this, attention was directed to the fact that a writ of error had been sued out to the original judgment, and a transcript of the proceedings lodged in this court in connection with the record of the con-

tempt proceedings. This application was denied. Thereafter the defendants filed, what they have designated, an application for final disposition of the main cause on its merits.

From a reading of the briefs, filed prior to those filed in support of the motion for a rehearing, it fairly appears that the only question which the plaintiffs in error, or respondents in the contempt proceedings, sought to have reviewed, related solely to the latter, and that whatever might have been said in the briefs with respect to the original judgment was merely by way of argument to support the contention that the trial court was without jurisdiction to enter the decree upon which the contempt proceedings were predicated. Such being the situation, this court was not mistaken in stating that steps had not been taken to review the original decree. In addition to this, the fact that a motion for rehearing, based upon the ground that the court had made a mistake in this respect, was overruled, it might well be said that the right of plaintiffs in error to have the original case considered on its merits is foreclosed. But waiving these questions, we shall proceed to consider the case upon its merits, in hopes, as expressed by the Court of Appeals, that our conclusion will end further litigation between the parties involving the title to the lot.

As previously stated, the Schlink title appears to have originated with the sheriff's deed, by virtue of a decree of the district court, entered many years ago, which was never vacated or modified in any way, shape or form. Speaking of this decree, the Court of Appeals said: "We do not believe it lies with the Smiths at this time or any time hereafter to question the validity of that decree or the character of the proceedings, or the suit which resulted in the judgment, or the legality or sufficiency of the finding in any litigation which is now pending between the parties. We are likewise quite clear that there is no way known to the law by which the Smiths can now assail that decree. It is as between these parties *res adjudicata*. That suit was properly brought in a court of competent jurisdiction which had jurisdiction by service and appearance of the parties, and however erroneous that decree may have been, when once it was entered and remained unexcepted to, unassailed, and unattacked, it must always remain, as between the Smiths and Schlink, a final adjudication of the title to lot No. 29. It conclusively, whether legally or not, if it had been properly assailed, settled Schlink's title to lot No. 29, and the Smiths cannot now or hereafter, in any suit of which we can conceive, in any forum of which we know, or by any process of which we are advised, attack the legality and conclusiveness of that adjudication."

Such being the situation of the title to the property involved, the only question present-

ed for consideration is whether, from the record before us, the plaintiff was entitled to the relief granted by the trial court. This record consists of the pleadings, orders, and judgments of the district court and the Court of Appeals, as the evidence upon which the decree was based was not preserved by a bill of exceptions, neither were exceptions necessary to preserve the rights of the defendants preserved in this manner. So that in considering the question to be determined, two propositions are involved: (1) Did the trial court have authority to permit the plaintiff to amend his complaint after the cause had been remanded by the court of appeals, and (2) if so, did the complaint, as amended, state facts sufficient to entitle the plaintiff to the relief granted?

By the opinion in 44 Colo. 200, 99 Pac. 566, in the contempt proceedings, it was determined that the trial court had this authority. The question is there fully discussed, and it is therefore unnecessary to enter upon a discussion of it here.

The Court of Appeals, in the case of *Smith v. Schlink*, held that, in an action to restrain the commission of a trespass upon property, the complaint must allege facts showing the probability of irreparable injury, and that the wrongs complained of must be of repeated and continuous character and must occasion damage which cannot be ascertained by any accurate standard and cannot be remedied in an action at law. Without going into details, we think the complaint as amended, after the cause was remanded to the district court, states a case, bringing it within the rule announced by the Court of Appeals, by which to determine whether in an action for trespass to real property the plaintiff may be entitled to an injunction to restrain trespasses. Such being our conclusion, it follows that the plaintiff was entitled to the injunctive relief which the trial court granted.

In conclusion, we might add that the efforts of the defendants to question the title of plaintiff to the property involved seems to be based principally, if not wholly, upon an attempt to attack the title obtained by a sheriff's deed under a judgment which was never appealed from, and which has not been modified in any manner, rendered in a case wherein the court was vested with jurisdiction of the parties and the subject-matter of controversy. It is clear that this course cannot avail them anything, that they are precluded from questioning that title, and that it was eminently proper for the trial court to enjoin them from further trespassing upon the rights of plaintiff under the facts narrated in his amended complaint.

The judgment of the district court is affirmed.

MUSSER, C. J., and HILL, J., concur.

PEOPLE v. GODDING.

(Supreme Court of Colorado. Nov. 3, 1913.
Rehearing Denied Dec. 1, 1913.)

1. CRIMINAL LAW (§ 147*)—LIMITATION OF PROSECUTIONS—"FELONY"—"PUNISHABLE."

The receipt of deposits in a bank or the incurring of an indebtedness on behalf of the bank by an officer or agent with knowledge of its insolvency, which, under Rev. St. 1908, § 345, is punishable by a fine, imprisonment in the penitentiary, or both, is a "felony" within section 1949, requiring indictments or informations for felony to be found or filed within 3 years after the offense is committed, and for a misdemeanor within 18 months, since "punishable" as used in Const. art. 18, § 4, providing that the term "felony," when used in the Constitution or laws, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, means "liable to punishment," or "which may be punished," and not "absolutely punishable," and hence an offense which may be punished by imprisonment in the penitentiary is a "felony," even though in the discretion of the court a lighter penalty may be inflicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 271, 272; Dec. Dig. § 147.*

For other definitions, see Words and Phrases, vol. 3, pp. 2736-2744; vol. 8, p. 7662; vol. 7, p. 5849.]

2. STATUTES (§ 178*)—CONSTRUCTION—CONSTITUTIONAL RULES—FELONIES AND MISDEMEANORS.

Const. art. 18, § 4, providing that the term "felony," wherever it may occur in the Constitution or laws of the state, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, is not merely a rule of construction, but defines the term "felony" and classifies crimes on the basis of punishment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 257; Dec. Dig. § 178.*]

3. CRIMINAL LAW (§ 27*)—FELONIES AND MISDEMEANORS—STATUTORY PROVISIONS.

Under such section, where the Legislature prescribes imprisonment in the penitentiary as the punishment for an offense, it is a felony, though the Legislature calls it a "high misdemeanor."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29-31; Dec. Dig. § 27.*]

4. STATUTES (§ 226*)—ADOPTION FROM OTHER STATES.

While the construction placed upon a statute by the Supreme Court of the state from which it is taken by the Legislature of another state will ordinarily be followed by the courts of such other state, if the statute has been changed and enacted in a form more closely resembling the statutes of other states, the construction given by such other states should govern, especially when the decision of the state from which the statute is taken stands practically alone in its interpretation thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

5. CRIMINAL LAW (§ 27*)—FELONIES AND MISDEMEANORS—STATUTORY PROVISIONS.

The words "and none other" in Const. art. 18, § 4, providing that the term "felony," wherever it may occur in the Constitution or laws of the state, shall be construed to mean a criminal offense, punishable by death or imprisonment in the penitentiary, and none other, do not limit the term "felony" to offenses punishable exclusively by death or imprisonment in the penitentiary, since they modify or relate to the

word "offense," and mean "and no other offense."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 29-31; Dec. Dig. § 27.*]

En Banc. Error to District Court, Otero County; J. E. Rizer, Judge.

An information charging John E. Godding with a violation of the banking laws was quashed on motion, and the People bring error. Reversed and remanded, with directions.

John W. Davidson, Dist. Atty., of Pueblo, and A. B. Wallis, Deputy Dist. Atty., of La Junta, for the People. Glenn & Gobin, of Rocky Ford, and John H. Voorhees, of Pueblo, for defendant in error.

BAILEY, J. [1] The information for consideration is laid under Section 81 of an act in relation to banks and banking, being Section 345 of Revised Statutes of 1908, as follows:

"If any banker or any president, director, manager, cashier, or other officer, or any agent, clerk or employé, of any banker, bank or banking institution, doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing by such banker or in such bank or banking institution, or if any such banker, officer or agent, shall create or assent to the creation of any debts or indebtedness by such banker, bank or banking institution, in consideration or by reason of which indebtedness any money or other valuable property shall be received by such banker, or into such bank or banking institution, after he shall have had knowledge of the fact that such banker, bank or banking institution is insolvent, he shall upon conviction thereof be punished by a fine not exceeding five thousand dollars, or by imprisonment in the penitentiary not exceeding five years, or by both such fine and imprisonment, in the discretion of the court."

It was filed June 27th, 1910, and charges that the offense was committed on the 17th day of December, 1907. Defendant filed a motion to quash on the ground that the offense charged is shown on the face of the information to have been committed, if at all, more than eighteen months before the prosecution was begun and is therefore barred by limitation. Section 1949, Revised Statutes of 1908, is as follows:

"No person or persons shall be prosecuted, tried or punished for any offense denominated a felony as defined by the constitution of the state of Colorado (murder, arson and forgery excepted), unless the indictment for the same shall be found by a grand jury, or unless the information or complaint for the same shall have been filed within three years next after the offense shall have been done or committed; nor shall any person be pros-

ecuted, tried or punished, for any misdemeanor or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal statute, unless the indictment, information or complaint, or action for the same, shall be found or instituted within one year and six months from the time of the committing of the offense or incurring the fine or forfeiture."

The issue is whether the offense charged is a felony, as contended by the state, with the period of limitation fixed at three years, or whether it is a misdemeanor, as contended by the defendant in error, where the period of limitation is one year and six months. The court below held it to be a misdemeanor and that the action was barred, sustained the motion to quash, and discharged the defendant. The people bring the case here to have it determined whether the above statute creates an offense which is a felony under the law.

The people contend that because of the punishment prescribed, the offense was and is a felony. They rely, to support this contention, upon Section 4, Article 18 of the constitution, which is as follows:

"The term felony, wherever it may occur in this constitution, or the laws of the state, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, and none other."

If the offense is a felony the trial court was wrong in quashing the information and entering a judgment discharging the defendant, and the same must be reversed; if it is a misdemeanor, then the judgment is right and should be affirmed.

As we understand the contentions of counsel for defendant in error, they are: First. That section 4 of Article 18 neither creates nor defines a felony, but is merely a rule of construction of the word "felony" wherever it is found, either in the constitution or the statutes; Second. That the word "punishable" should be strictly construed and held to mean *absolutely so punishable*, and since Section 845, supra, provides for a fine or imprisonment in the penitentiary, the offense is thereby reduced from the grade of felony to that of misdemeanor; and, Third. That the words "and none other" limit the definition of the term, where used in the constitution, exclusively to the two modes of punishment, and since the statute provides for alternative punishment, fine or penitentiary imprisonment, in the discretion of the court, the offense is but a misdemeanor, to conform to the lower penalty that might be imposed.

[2] However persuasive and forceful the argument may be on the proposition that this section neither creates nor defines a felony, we are nevertheless unable to accept the conclusion, in view of the decisions of this court, the first of which was rendered more than twenty-five years ago, directly and specifically holding the contrary.

In re Lowrie, 8 Colo. 499, at page 501, 9

Pac. 489, at page 490 (54 Am. Rep. 538), the court speaking to this proposition said:

"The statutory punishment for the offense of which the petitioner was convicted, grand larceny, is confinement in the penitentiary for a term not less than one nor more than ten years. The petitioner was, therefore, convicted of a felony, as the term is defined by section 4, article 18, of the constitution, which is: 'The term "felony," wherever it may occur in this constitution, or by the laws of this state, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, and none other.'"

In City of Greeley v. Hamman, 12 Colo. 94, on page 95, 20 Pac. 1, on page 2, the court says:

"A crime or misdemeanor consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention or criminal negligence.' Since felonies are defined in the Constitution to be offenses punishable by death or imprisonment in the penitentiary, it follows that, under the foregoing statute, misdemeanors are violations of the public laws not thus punishable."

In Brooks v. The People, 14 Colo. 413, on page 414, 24 Pac. 553, the following was said:

"And under our constitution the test by which to determine whether an offense less than capital shall be deemed a felony or a misdemeanor is made to depend upon whether the same is punishable by imprisonment in the penitentiary or in the county jail."

In Williams v. The People, 26 Colo. 272, on page 275, 57 Pac. 701, on page 702, the court said:

"Under our constitution, article 18, section 4, a felony is any criminal offense punishable by death or imprisonment in the penitentiary; and an act that is done feloniously is one that is done with a more or less deliberate purpose or intent to commit a crime of the nature of a felony."

From the foregoing it is manifest that this court has expressly recognized this section as a definition of the term felony, and that the test by which to determine whether an offense is a felony is by the punishment prescribed. No sufficient fact, reason or argument has been advanced why the rule already announced in this respect should be overturned, nor have we the slightest inclination to do so.

To the further contention, that the term "punishable" as used in this section should be construed to mean *absolutely thus punishable*, and that where a statute prescribes an alternative penalty, of fine or penitentiary imprisonment, in the discretion of the court, then the offense is a misdemeanor, we have only to say that it is against the overwhelming weight of authority. In Encyclopedia of Law, 2nd Ed. Vol. 8, page 281, it is said:

"By statute it is provided in many of the United States that all offenses which are punishable by death or imprisonment in the state prison are felonies. Under such a provision it is the liability to punishment upon conviction, rather than the actual punishment inflicted, which makes a crime a felony, so that the grade of the offense is not reduced because the statute gives the court a discretion to impose a less punishment."

In Cyc., Vol. 12, page 132, the text is: "In many states by statute all crimes which are punishable in the state prison or penitentiary, with or without hard labor, are felonies. A crime is a felony under such a statute, if it may be punished by imprisonment in a state's prison, although the court or jury may in its discretion reduce the punishment to imprisonment in jail or fine, and although such punishment is in fact imposed."

In Bishop's New Criminal Law, Vol. 1, § 618, it is said:

"In a considerable number of our states, statutes have defined felonies to be all offenses which are punishable either by death, or by imprisonment in the State prison. In minor particulars these statutes differ. If by the statutory terms the court or jury is at liberty to inflict some milder punishment instead of imprisonment or death, the offense is still a felony; it suffices that the heavier punishment *may* be imposed."

The text above quoted is supported by cases almost without number, from many states, including New York, Georgia, Virginia, West Virginia, Florida, Maine, California, Missouri, Michigan, Kansas and others. While it is true that there is some difference of phraseology in the several statutes, which have been considered by various courts, defining felony, some using the expression "liable to be punished" or "may be punished" instead of the expression of our constitution, which is "punishable by," still no one has ever doubted that the effect and intent is practically the same. In Florida, Maine, Virginia, California, West Virginia and some other states, the statutory or code provisions use the expression "punishable by," as here, and the courts of those states have held that expression to mean those offenses which may be or are liable to be thus punished, and not those which must be so punished. The text in 32 Cyc., page 1262, defines punishable as "liable to punishment; deserving of or liable to punishment, which may be, not only which must be, punished," and cites many authorities in support of the definition.

It is clear from the decisions of the courts, as well as from Bishop on Criminal Law, that the expression "punishable by" is identical in meaning with "liable to punishment" or "which may be punished," or other similar expressions, and that the maximum penalty governs in fixing the grade of the of-

fense; and that the offense is still a felony, if punishable by death or imprisonment in the penitentiary, even though the court or jury may in its discretion impose a lesser penalty.

[3] It is contended by counsel for defendant in error that the decisions referred to come from states which have statutes declaring either what a felony is or what offenses constitute felonies or misdemeanors, and that Colorado has no such classification. This view was held by the trial judge. We are of opinion that the section of our constitution under consideration not only defines a felony, but is, so far as it goes, a classification of crimes on the basis of punishment, placing all offenses which may be punished by death or imprisonment in the penitentiary under the head of felonies. It is doubtless for this reason that the general assembly has made no further classification. We do not hesitate to say that notwithstanding the fact that the legislature may have prescribed for certain offenses punishment in the penitentiary and denominated them high misdemeanors, such offenses are in fact felonies. It was beyond the power of the legislature, in view of this constitutional provision, to legally otherwise denominate them. Undoubtedly another purpose of the section is to inhibit the legislature from designating any offense a felony which had for its penalty a less punishment than imprisonment in the penitentiary.

[4] In *Lamkin, et al. v. The People*, 94 Ill. 501, the supreme court of that state held, under a limitation statute, quite similar to ours, and from which ours was probably taken, that where the punishment prescribed for the offense might be either imprisonment in the state penitentiary or some lesser punishment, the statute of limitation applicable to offenses punishable by such lighter grade of punishment determined the period within which the prosecution must be brought, and that in such a case the prosecution should be initiated within eighteen months, and if brought later a motion to quash would be sustained. It was there held that the word "punishable" must be construed to mean *absolutely so punishable*. That decision was followed in the case of *Baits v. The People*, 123 Ill. 428, 16 N. E. 483. But those two cases stand alone and are in conflict with the great weight of authority. In many of the cases holding the contrary view the case of *Lamkin v. The People*, supra, is referred to as the only one to maintain an opposite doctrine. While it is true that the construction placed upon the statute by the supreme court of the state from which it is taken will ordinarily be followed by the supreme court of the state borrowing it, when the latter state has no decision on the subject, still in case the statute has been changed from that of the state from which it comes, and has been enacted in a form more closely resembling the stat-

utes of other states on the subject, the construction given by such other states should govern, especially when the decision of the state from which the statute is taken stands practically alone in its interpretation thereof. We do not agree with the conclusion of the Illinois supreme court on this proposition, and prefer to follow the contrary view announced in many other states, because, as we conclude, it is supported by the sounder and more satisfactory reasoning.

[5] As to the third contention of counsel, that the words "and none other" in this section limit the definition of the term felony, where used in the statutes, exclusively to two modes of punishment, either by death or imprisonment in the penitentiary, it is sufficient to say that according to every rule of construction, grammatical and otherwise, there can be but one interpretation put upon these words, and that is that they relate to the word *offense* and not to the character or mode of punishment. The words "and none other" mean *and no other offense*. So that the true reading of Section 4, Article 18, should be thus:

The term felony, wherever it may occur in this constitution, or the laws of the state, shall be construed to mean any offense, and no other, the penalty for which shall be death or imprisonment in the state penitentiary.

If the construction contended for by defendant in error is the correct one, this section should read:

The term felony, wherever it may occur in this constitution or the laws of the state, shall be construed to mean any offense the penalty for which shall be death or imprisonment in the state penitentiary, and not otherwise.

Had the constitutional convention intended it to so read, how simple and natural it would have been to have thus stated it. The expression "and none other," as used in the section, is a pronominal adjective phrase modifying *offense*, and can modify nothing else. To support the contention of defendant in error it must be held that the words "and none other" either qualify the participial adjective *punishable* which would violate all rules of grammatical construction and all usage of language, or relate to the adverbial phrase "punishable by death or imprisonment in the penitentiary." The only words which express an adverbial meaning and can refer to the method of punishment, that could properly take the place in the section that the words "and none other" occupy, are the words *and not otherwise*, and such substitution would be permissible and proper only on the theory that "and none other" and *not otherwise* mean the same thing. No one will say that that is true. Indeed, it is not only not true, it is impossible for it to be so. The words "and none other" stand in lieu of *no other offense*; the word *offense* is omitted

to avoid repetition and to simplify the statement. The word "other," as thus used, has both an adjective and pronominal sense, and can modify or relate to nothing but the noun *offense*.

It is therefore manifest that this section means that every offense which may be punished by death or imprisonment in the state penitentiary is a felony, even though, on conviction, in the discretion of the court, in a proper case, a lighter penalty might be inflicted.

The judgment of the district court is reversed and the cause remanded, with directions to the court to reinstate it, overrule the motion to quash the information, and proceed in conformity with law.

WHITE, J., not participating.

McKEOWN v. LAWRENCE et al.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. ACTION (§ 38*)—SINGLE CAUSE OF ACTION.

A complaint against an individual defendant and the public trustee of a city, alleging that, on his execution of a deed of trust securing his note for \$1,800, the defendant agreed to loan plaintiff that amount as a building loan, that on his completion of a dwelling he was entitled to receive the remainder of the amount due on the loan which defendant refused to pay over, with prayer for the surrender of the note and the cancellation of the deed of trust, or that the individual defendant be required to pay the remainder of the loan, stated a single cause of action against the individual defendant.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 33.*]

2. DISMISSAL AND NONSUIT (§ 24*)—CHANGE OF PARTIES—DISMISSAL.

Where a party defendant has been improperly joined, it is the duty of the court to permit the plaintiff to dismiss as to such defendant.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 44, 45, 52, 54; Dec. Dig. § 24.*]

3. SPECIFIC PERFORMANCE (§ 106*)—DEFENDANTS—FORMAL PARTIES.

In an action for breach of the terms of a loan contract secured by a deed of trust executed and delivered to the public trustee, with prayer for specific performance, or in the alternative for a rescission of the agreement, the public trustee, while not a necessary party, was a proper party defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-351; Dec. Dig. § 106.*]

4. DISMISSAL AND NONSUIT (§ 53*)—OBJECTION TO PLEADINGS.

Upon a complaint alleging plaintiff's execution of a note and deed of trust to secure a building loan, defendant's breach of the contract and refusal to advance the remainder of the loan, with prayer for specific performance, or in the alternative for a rescission of the contract, it was the duty of the court to require the defendant to plead to the complaint, and the dismissal of the proceeding was error.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 107-110, 112-114, 118, 120-123; Dec. Dig. § 53.*]

Error to District Court, Denver County; Geo. W. Allen, Judge.

Action by David McKeown against Jessie D. Lawrence and another. Judgment for defendants, and plaintiff brings error. Reversed, with instruction.

W. W. Dale, of Denver, for plaintiff in error. Clarence J. Morley, of Denver, for defendants in error.

SCOTT, J. It was alleged in the complaint in this case: That on the 1st day of June, 1909, the plaintiff, David McKeown, was the owner of lots Nos. 41 and 42, block 8, Highland place, in the city and county of Denver. That on that day he executed and delivered to the public trustee of the city and county of Denver his deed of trust of that date for the purpose of securing plaintiff's note to defendant Jessie D. Lawrence in the sum of \$1,800, payable three years after the date thereof, with interest at 6 per cent. per annum. That this trust deed was executed in pursuance of an agreement with the said Jessie D. Lawrence by and through her attorney, Barton Lowe, wherein it was agreed that the defendant Lawrence should loan to the plaintiff the sum of \$1,800 as a building loan, and that plaintiff was to construct on the said premises a five-room brick dwelling, and that the money for said loan was to be advanced by the said Lowe for and on behalf of the defendant Lawrence to the plaintiff as the work of construction of the building should progress. That in pursuance of this agreement Lowe advanced to the plaintiff on the loan the sum of \$737.31, leaving a balance due thereon of \$1,062.69, which sum became due and payable to the plaintiff upon completion of the building. That the dwelling house was completed by the plaintiff and entirely finished on or before the 1st day of September, 1909, and according to the terms and conditions of the said agreement, and by reason thereof, plaintiff was entitled to receive the additional sum of \$1,062.69, being the remainder of the amount due on the loan and to secure which the note and trust deed were executed. It is further alleged that on the 28th day of July, 1909, following the agreement and execution of the note and trust deed, the agent Barton Lowe died intestate, and that Rose A. Lowe was appointed and qualified as the administratrix of the estate of Barton Lowe. It was also alleged that W. H. Malone, one of the defendants, is the duly qualified and acting public trustee in and for the city and county of Denver. Also that the defendant Jessie D. Lawrence has refused to comply with the said agreement and to pay the plaintiff the remainder due on said loan, but on the contrary claims that the plaintiff is indebted to her for the full amount of the said \$1,800 secured by the said trust deed. The plaintiff alleges also that he is able and willing to refund to the defendant Jessie D.

Lawrence the said sum of \$737.31, with interest thereon from the date of the note and trust deed, provided that the defendant Lawrence will surrender the note and cause the trust deed to be canceled. This sum of money was tendered into court with an offer to pay any other or additional sum which the court might find the defendant entitled to by reason of the premises.

The prayer was that the defendant Lawrence surrender the note and cause the trust deed to be canceled upon payment by the plaintiff to the defendant Lawrence of the said sum of \$737.31, together with interest found to be due, or that in lieu thereof the said defendant Lawrence shall pay to the plaintiff the remainder of the sum for which the note was executed, to wit, the sum of \$1,062.69 being due the plaintiff under the terms of the agreement.

The administratrix does not seem to have appeared in the action. The defendants, W. H. Malone, public trustee, and Jessie D. Lawrence, filed separate demurrers but identical in language and for grounds as follows: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that several causes of action have been improperly joined in that the complaint seeks to recover judgment and decree requiring this defendant to satisfy of record a certain deed of trust, and also seeks to recover a money judgment against the defendant Rose A. Lowe, as administratrix, and that this defendant has no connection, direct or remote, with the said claim against Rose A. Lowe, administratrix; (3) that there is defect or misjoinder of parties defendant in that this defendant is joined as a defendant with the defendant Rose A. Lowe, administratrix, upon a cause of action with which this defendant has no connection.

On the 23d day of May, 1910, these separate demurrers to the complaint were sustained by the court, and the plaintiff allowed ten days in which to amend his complaint. On the 28th day of May, 1910, the plaintiff moved the court to dismiss as to Rose A. Lowe, administratrix. On June 25, 1910, this motion of the plaintiff was denied by the court, but for what reason does not appear in the record. On the same day the plaintiff tendered his motion to amend the complaint by striking out the name of Rose A. Lowe, as administratrix, as one of the defendants. This motion was likewise denied. On September 13, 1910, the court ordered the dismissal of the suit as to the defendants Jessie D. Lawrence and W. H. Malone, as public trustee. The court later dismissed the suit.

The only reason given, as disclosed by the record, for the denial of the motion of the plaintiff to dismiss as to the administratrix and to amend the complaint in that regard is as follows: "The Court: The motion will have to be denied for the reason that the court has sustained demurrers as to the

other defendants on the ground of misjoinder of parties and misjoinder of causes of action. They are out of court, as the court understands it." Just how the defendants Lawrence and the public trustee could get out of court by reason of the court's action in sustaining their separate demurrers to the complaint does not appear.

It would seem from the briefs of counsel that the demurrers were sustained upon the ground of misjoinder of parties defendant and the improper joining of several causes of action. The dismissal by the plaintiff as to the defendant administratrix would have relieved the complaint of each of these objections.

[1-3] There is but one cause of action stated in the complaint, viz., the failure to comply with the terms of a contract duly stated, and praying specific performance, or in the alternative a rescission of the agreement. If we admit that the administratrix of the estate of Lowe was not a proper party to the action, then it was the duty of the court to permit the plaintiff to dismiss as to such administratrix. The motion to amend by striking her name from the complaint was but a repetition in another form of the motion to dismiss as to the particular defendant. The public trustee was merely a formal party defendant. It is usual in such cases to make such official a party to the suit. He may not be a necessary party defendant, but he is a proper party. If the court had permitted the plaintiff to dismiss as to the administratrix of the agent Lowe, as it should have done, the complaint would have stated a good cause of action against defendant Lawrence, and but one cause.

[4] It is inexplicable that the court should upon its own motion have dismissed the case as to the defendant Lawrence, the real party in interest and the only party charged with wrong, or that it should have a few days later dismissed the entire proceeding. Such action was clearly error. Under the complaint, the plaintiff executed to the defendant Lawrence his promissory note in the sum of \$1,800 for a loan of that amount of money and secured the payment of this by the execution of a trust deed upon his premises. The defendant has advanced but \$737.31 of this sum and refuses to advance the remainder of the loan. Plaintiff, alleging completion of the building according to the agreement, demands the remainder of the sum for which he has executed his note and trust deed, or that the defendant accept a return of the sum received, together with interest, and cancel the note and trust deed. It was the duty of the court to require this defendant to plead to the complaint.

The judgment is reversed, with instruction to proceed in accordance with these views.

MUSSER, C. J., and GARRIGUES, J., concur.

MAYN v. PEOPLE.

(Supreme Court of Colorado. Dec. 1, 1913.)

BRIDGES (§ 28*)—CRIMINAL OFFENSES—WILLFUL OR MALICIOUS INJURY.

Under Laws 1903, p. 410, requiring all persons operating steam threshing machines, or using the public roads for transporting such machines or other heavy machinery, to use a sufficient number of heavy planks when necessary to protect all bridges from being broken thereby in passing over them, and providing that any person purposely destroying or injuring any bridge shall forfeit a sum not less than \$100 nor more than \$300, and shall be liable for all damages occasioned thereby and all necessary costs for rebuilding or repairing the bridge, the mere intentional attempt to cross a bridge with a traction engine, without complying with such statute under the honest belief that the bridge would support the engine, did not make the person so attempting criminally liable under Rev. St. 1908, § 1874, providing that any person willfully and maliciously breaking down or otherwise destroying or damaging any bridge shall be punished as there provided.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 64-66; Dec. Dig. § 28.*]

Error to La Plata County Court; Richard McCloud, Judge.

Matthew F. Mayn was convicted of an offense, and he brings error. Reversed and remanded, with directions.

Perkins & Main, of Durango, for plaintiff in error. Fred Farrar, Atty. Gen., and Frank C. West, Asst. Atty. Gen., for the people.

CARRIGUES, J. 1. Defendant owned and operated a threshing machine which, in his work, was transported from place to place with a traction engine. November 1, 1912, he attempted to drive the engine across a public bridge without planking it, and the weight damaged the bridge. He was arrested, tried, and convicted on an information drawn under an act of the Legislature entitled "An act concerning the offense of malicious mischief" (S. L. 1889, p. 242), which provides that, if any person shall willfully and maliciously break down, level, demolish, or otherwise destroy or damage any bridge, he shall on conviction be punished as provided by the act (R. S. 1908, § 1874).

The information charges that defendant wantonly, willfully, maliciously, and unlawfully broke down, injured, and damaged a bridge, the property of La Plata county, by driving and transporting a steam threshing engine and machine over and upon it without protecting it with planks, which was necessary, and damaged it in the sum of \$90.

2. There is no dispute about the material facts. In 1912 the county commissioners erected a cable or suspension bridge across Pine river. In November defendant, while trying to cross it with a traction engine, cracked three of the strings. There is no direct evidence of malice or evil design or intention, nor any facts from which they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

might be implied, and they are eliminated from the case. The Attorney General makes no claim that the evidence shows any malicious intent to damage the bridge. Before driving onto it, defendant and his engineer went under the bridge, made a personal inspection, and honestly believed they could safely cross. Besides, it is natural for every person to protect his life and guard his property from damage, and it does not seem reasonable that the defendant would drive upon the bridge with the evil intent of breaking it down. Supporting defendant's theory that it was an accident, the uncontradicted evidence shows that, at the point where the damage occurred, one of the supporting rods, suspended from the cable through an I-beam which supports the stringers, had slipped on the cable and dropped through the I-beam several inches, so that it was without any support from the rod, which weakened the bridge.

3. The information evidently was drawn, the case tried, conviction had, and sentence pronounced on the theory that if the defendant omitted a duty imposed by statute in not planking the bridge, which resulted in its injury, he was guilty of malicious mischief, regardless of evil intent. The court refused all instructions on the questions of accident, good faith, evil design, or intention. It gave as one instruction section 5831, R. S. 1903, regarding the planking of bridges, and told the jury that "unlawful" meant contrary to law, without authority of law, and implies that the act was not done as the law allows or requires. The theory was that if it was unlawful to cross the bridge without planking it, which resulted in the damage, defendant was guilty of malicious mischief because the act was unlawful, regardless of evil intent. Defendant requested instructions substantially as follows, which were refused by the court: The statute under which this prosecution is brought is entitled "An act concerning malicious mischief," and before you can find the defendant guilty you must be satisfied from the evidence beyond a reasonable doubt that in doing the act complained of he was moved by wanton and malicious intent or purpose to injure the bridge; and, if you find from the evidence that the injury complained of was the result of a mistake in judgment without any intent to injure or destroy the bridge, you must acquit the defendant. If the defendant in the exercise of his honest judgment believed it was not necessary to plank the bridge, he cannot be held to be criminally liable for a mistake in judgment unaccompanied by any intentional violation of the law. In order to convict the defendant, you must be satisfied from the evidence beyond a reasonable doubt that the injury to the bridge was caused by the willful act of the defendant; and, if you find that it was caused by any defect in the

construction or the condition of the bridge, you will acquit him. We cannot approve of the theory adopted by the prosecution.

4. In 1903 the Legislature passed the following statute:

"Section 1. It shall be the duty of all persons, associations and corporations operating steam threshing machines or vehicles, or using the public roads for transporting such machines, or other heavy machinery, to use a sufficient number of heavy planks, wherever necessary, to protect all sidewalks, bridges, culverts and causeways from being broken by said steam threshing machines, or other heavy machinery, in passing over the same.

"Sec. 2. If any person, association or corporation shall purposely destroy or injure any sidewalk, bridge, culvert or causeway, or remove any of the timber or plank thereof, or obstruct the same, he shall forfeit a sum not less than one hundred dollars, nor more than three hundred dollars; and shall be liable for all damages occasioned thereby and for all necessary costs for rebuilding or repairing the same. And all forfeitures and sums of money recovered under this act shall be turned into the county road fund." Sess. Laws, 1903, p. 410.

The defendant seems to have been tried for violating the above statute imposing only a civil liability, and sentenced for violating the malicious mischief act imposing a criminal liability. The mere intentional doing of an act prohibited by statute, or omitting the performance of a statutory duty, does not alone constitute malicious mischief, though it may damage the property of another. The malicious mischief statute is criminal, and it is not its province to make simply the intentional doing of an unlawful act, which injures another's property, a crime independent of any evil purpose or intention. The bridge statute given to the jury carries with it its own penalty, which is civil, and had no place in the trial of this case.

Judgment reversed, and cause remanded, with directions to dismiss.

Reversed and remanded, with directions.

MUSSER, C. J., and SCOTT, J., concur.

BUSHNELL v. LARIMER & WELD IRR. CO.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. JUDGMENT (§ 715*)—RES JUDICATA.

A judgment in a former action by defendant herein against plaintiff irrigation company herein, involving the same water rights, adjudging that defendant herein should have the use and enjoyment of a certain headgate with others and restraining plaintiff herein from interfering with defendant's water right or the amount or manner of diversion, was a bar to a subsequent suit by plaintiff herein to restrain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendants from opening the headgates of their ditch and taking necessary water.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244-1246; Dec. Dig. § 715.*]

2. JUDGMENT (§ 713*)—RES JUDICATA.

A former adjudication is conclusive in a subsequent proceeding between the same parties as to all questions which might have been raised and determined in the prior proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

Error to District Court, Larimer County; Jas. E. Garrigues, Judge.

Suit by the Larimer & Weld Irrigation Company against E. H. Bushnell and others. Judgment for plaintiff, and defendant named brings error. Reversed.

Fancher Sarchet, of Ft. Collins, for plaintiff in error. Rhodes & Farnworth, of Ft. Collins, for defendant in error.

SCOTT, J. This suit was brought by the Larimer & Weld Irrigation Company against E. H. Bushnell, plaintiff in error, and other defendants.

It was alleged in the complaint in substance: That the plaintiff is the owner of a line of ditch known as the Larimer & Weld Irrigation Company's canal, and from which it supplies water to irrigate many thousands of acres of land to various consumers, including the defendant, each of said defendants having contracts to which the plaintiff was a party, giving them right to have and receive from the plaintiff water sufficient to irrigate their lands mentioned and described in the several contracts. That the plaintiff has a superintendent in charge of this canal, whose duties are to regulate and operate the canal and make distribution of water to the parties entitled thereto. That, in order that the superintendent of the plaintiff's canal may properly run and operate the same and make proper distribution of the water therefrom, it is necessary that he should have charge and control of the headgates upon the canal used for the distribution of water. It is then charged that the defendants claim and undertake to exercise the right or privilege of control and operation of the various headgates belonging to the plaintiffs and to raise and lower such headgates and take water from the said canal without any supervision by the plaintiff's superintendent, and refuse to allow the plaintiff to have any voice or say as to any water so needed by said defendants, and as to when it is proper that said headgates should be open or closed, or as to what quantity of water said defendants are to receive from the canal through said headgates, and that defendants have opened said headgates without authority from the said superintendent and have assumed to take from plaintiff's superintendent the right to conduct and operate said ditch or control

the same, or the distribution of water therefrom, in so far as the headgates of the defendants are concerned.

The complaint prays for an injunction to prevent these acts and to compel the defendants to receive the water to which they are entitled by the direction and order of the superintendent of the plaintiff. To this complaint the plaintiff in error, defendant Bushnell, filed his separate answer, in which he pleads that the matters and things involved in the complaint are as to him res adjudicata. It is alleged in this answer that an adjudication of the matters complained of was had in the case of the said defendant Bushnell against the Larimer & Weld Irrigation Company, plaintiff in this case, instituted in the district court of Larimer county on the 4th day of January, 1901. The pleadings and decree in that case are fully set out in Bushnell's answer in this case. From these it appears that there were certain original owners of appropriations and priorities of the irrigation ditch, then known as "irrigation ditch No. 10," taking its supply of water from the Cache la Poudre river, and that Benjamin Eaton, the grantor of the Larimer & Weld Irrigation Company, entered into a contract with each of the said owners of priorities and consumers of water, among which was Franklin W. Garrett, from whom Bushnell deraigned his title. The contract between Eaton and Garrett was fully set out in the complaint in the case of Bushnell v. Irrigation Co., as follows:

"Know all men by these presents that I, Franklin W. Garrett, of the county of Larimer, state of Colorado, for the consideration hereinafter expressed to be performed by Benjamin H. Eaton, his heirs and assigns, do hereby sell, give, grant and release unto the said Benjamin H. Eaton, his heirs and assigns, all the right, title and interest which I have in and to any shares or privileges or any surplus credit for and on account of any work or labor performed on account of the same in the irrigation ditch known as Irrigation Ditch Company Number Ten (10), said ditch being located on the north side of the Cache la Poudre river in the county of Larimer, state of Colorado. Witness my hand and seal this 24th day of April, A. D. 1878.

"And I, the said Benjamin H. Eaton, do hereby agree as a consideration for said grant and sale above made that the said Franklin W. Garrett, his heirs and assigns, shall have the right and privilege and the said right and privilege is hereby granted unto the said Franklin W. Garrett, his heirs and assigns, to take from said irrigation ditch number ten (10), at the place where the lower portion of said ditch as now constructed intersects with a new survey made by the said Benjamin H. Eaton, a sufficient

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quantity of water to irrigate one hundred and sixty (160) acres of land and no more. The right to irrigate the said one hundred and sixty (160) acres of land from said ditch shall be perpetual and without expense to the said Franklin W. Garrett, in maintaining said ditch. And it is further agreed by the said Benjamin H. Eaton that in case he should fail to keep the said ditch in repair so that there should not be sufficient supply of water in said ditch to irrigate said one hundred and sixty (160) acres, then the said Benjamin H. Eaton shall forfeit his right by virtue of such sale above made after due notice of such failure and neglect on his part and further neglect and failure after said notice on his part to perform his agreements as aforesaid."

It was further alleged in that complaint that after the execution of this contract the said Eaton acquired the right of way and the appropriation and priorities and right to the use of waters of said irrigation ditch No. 10 for the purpose of enlarging and extending the same. Also that on the 24th day of April, 1878, the said Garrett was the owner of the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 8, township 7, range 68 west, and other lands adjacent thereto. The land thus described is the land now owned by Bushnell and involved in this case. It was further alleged that, pursuant to the terms of the said contract, the said Garrett diverted from the said ditch the continuous use, for irrigation and domestic purpose, of sufficient water for 160 acres of said land, including the said described tract; that afterwards Eaton sold and conveyed to the defendant company the said irrigation ditch and the said appropriations of water so acquired by him; that Garrett conveyed the said tract of land involved in this suit, together with all rights to the use of water contained in the contract with Eaton, to Henry T. Miller; and that during the month of November, 1894, Miller conveyed the land, with all of the said rights to water and use thereof as provided in said contract, to the then plaintiff Bushnell, defendant in this case, who has ever since been the holder and owner of the same.

It is then set forth in the complaint in that case that Garrett, Miller, and plaintiff during all the times mentioned, and while each is and was the owner of the water rights in question, enjoyed an uninterrupted use of water under the contract with Eaton for irrigation and domestic purposes, and had the sole and exclusive control of the said headgates of that certain lateral ditch extending from ditch No. 10 and known as the Larimer and Weld canal, to the land aforesaid, which said lateral ditch was and is used for the purpose of conducting the said water to the said premises; that Garrett, Miller, and the plaintiff in succession continuously used the said water upon the said lands for irrigation and domestic purposes and enjoy-

ed the sole and exclusive control of said headgates and the free and uninterrupted use of said headgates until some time during the month of July, 1900, when the defendant in that case, the irrigation company, caused the said headgates to be locked, and denied to the plaintiff Bushnell the use of water, and refused and still refuses to recognize Bushnell's right to the use of the water under the terms of the Eaton contract with Garrett.

Bushnell prayed in that case for an injunction against the defendant company from in any manner interfering with him, his heirs and assigns, in the use of the water under the terms of the Eaton contract. To this complaint the defendant, the Larimer & Weld Irrigation Company, filed its answer, admitting the facts set up generally in the complaint, but alleged that on the 31st day of December, 1881, Garrett assigned all his rights and interests under the Eaton contract to the said irrigation company and received in consideration therefor the usual water contract of the Larimer & Weld Irrigation Company for what was known as two water rights, including one for the premises involved in this action, and therefore that Bushnell's rights were limited to such new contract.

Among other provisions in the said contract between Garrett and the irrigation company are the following: "In consideration whereof the said second party agrees to surrender and cancel, and hereby does surrender and cancel, a certain agreement between Benjamin H. Eaton and himself in regard to water for 160 acres of land, dated the 24th day of April, 1878. And in case the second party shall fail to perform and complete all and each of said agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interests hereby created or then existing in favor of the second party, or derived from him, shall utterly cease and determine, and all equitable and legal interests in the water rights hereby contracted to be conveyed shall revert to and rest in said first party without any declaration of forfeiture, or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid, or service performed, as absolutely, fully, and perfectly as if this contract had never been made."

The plaintiff Bushnell in his replication to the answer of the Larimer & Weld Irrigation Company in that case admitted the execution of the assignment and agreement set up in the answer of the irrigation company, but contended that the irrigation company should not prevail for two reasons:

(1) That, at all times since the execution of the said assignment and agreement, the Larimer & Weld Irrigation Company had

treated the said Garrett and his successors in interest as though the latter contract had not been executed, and has abandoned the same, and that the Eaton contract was in full force and effect upon both parties thereto and their successors in interest for that during each and every year since the 2d day of November, 1881, Garrett and his successors in interest, Miller and the plaintiff, have taken water from the canal of the said company and regulated the headgates of the lateral through which water has been taken to irrigate the lands of the plaintiff at all times, without any let or hindrance as to the amount of water required to irrigate said land, as at such time was deemed necessary by the plaintiff and his predecessors to divert water from the canal of the defendant and apply it upon his said land, and that the defendant since said date, and its employes, at all times immediately preceding the commencement of the action, acted upon and treated the said contract set out in the irrigation company's answer as of no binding force and effect, and at all times since the execution of the contract between the irrigation company and Garrett have not attempted in any way to enforce any of the provisions of the latter contract, but have acted entirely upon the contract as between Garrett and Eaton, and that Garrett, acting upon the said conduct of the defendant irrigation company, its officers, agent, and employes, and relying thereon, sold, assigned, and transferred said water right upon that express understanding and belief to Henry T. Miller, and that the said Miller, relying upon the conduct of the defendant, its officers, agent and employes, and from the statement then made to him by Eaton, then the president of the defendant company, to the effect that the contract between Eaton and Garrett was in force, and that he had the privilege of taking all the water from said ditch that he needed for the irrigation of the land in question wherever he needed it, sold, assigned and transferred to the plaintiff said water right as being an approved perpetual right to the use of the water upon the land of the plaintiff, and the plaintiff Bushnell, so relying on the acts and conduct of the company, purchased the said rights.

(2) That in an action in the district court of Larimer county in the year 1894, wherein the Colorado Milling & Elevator Company was plaintiff and the Larimer & Weld Irrigation Company was codefendant with all the original contract holders of the No. 10 ditch and their successors in interest, wherein it was sought to adjudicate the right to the use of water in the Cache la Poudre river as between the said defendant company and the said the Colorado Milling & Elevator Company, as well as all the original contract holders in No. 10 ditch with the said Eaton and their successors in interest, the said defendant, the Larimer & Weld Irrigation Company, in its own behalf, as well as on behalf

of the said original contract holders of the No. 10 ditch and their successors in interest, answered and alleged, among other things: "That during the year 1878 the defendant B. H. Eaton purchased said ditch or canal No. 10, together with all rights, title, interest, and privileges therein, and the appropriations thereof, for the purpose of enlarging and extending the said ditch and for the purpose of supplying defendants, including Henry T. Miller, with water for irrigation purposes and other beneficial uses, and upon the express consideration that the said persons above named as defendants and owners of land under and users of water from the said ditch or canal No. 10, have the privilege of conducting from said irrigation ditch a sufficient supply or quantity of water to irrigate their said lands; that all such rights were made perpetual and preferred, as against water rights thereafter granted and acquired in said canal; that the amount of water actually necessary to irrigate the said lands belonging to defendants, including Henry T. Miller and others for their beneficial uses, for which said water has been supplied, is much more than 19% cubic feet of water per second of time"—which said allegations were proved and admitted by the plaintiff in said proceeding, and judgment of dismissal as to said Henry T. Miller and the other holders of said No. 10 contracts was duly given and entered by said court on the 27th day of December, 1894, and which judgment is still in full force and effect, and the said plaintiff herein had actual notice of and participated in said controversy with the said Colorado Milling & Elevator Company, with full notice, knowledge, consent, and ratification of the said defendant, the Larimer & Weld Irrigation Company. That the plaintiff, relying upon the said admissions and conduct of the Larimer & Weld Irrigation Company in that proceeding, and which was then of record, and believing the same to be true, purchased the land and water right described in the complaint, and ever since has used the water from defendants' canal upon the belief and understanding that he had a preferred perpetual water right without restriction whatever in its use, as alleged and proved in said proceeding.

In the judgment rendered in the said cause of Bushnell v. Larimer & Weld Irrigation Co., the court found in favor of the plaintiff Bushnell and decreed that as between the plaintiff, Bushnell, and the defendant, the irrigation company, its successors and assigns, Bushnell's title to the use of water from the canal of the defendant irrigation company was held and adjudged to be the right conveyed and expressly described in and by the terms of the Eaton contract; and that the plaintiff Bushnell, his heirs and assigns, shall forever hold and enjoy the same as though the said contract had been executed between the said defendant company and the said plaintiff Bushnell. The court

further expressly decreed as follows: "And it is further ordered, adjudged, and decreed that the said plaintiff (Bushnell), his heirs and assigns, shall have the use and enjoyment of the headgate and the water from said canal as he has heretofore enjoyed the same with other No. 10 contract holders, in and from said defendant's canal, sufficient to irrigate the N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 8, township 7 north, range 68 west, and for domestic purposes, and that the said defendant company, its agents, attorneys, and employes, are forever restrained and enjoined from in any manner interfering with the water right of plaintiff as herein adjudicated and determined, and from interfering with him as to the amount and manner of diversion of water, agreeably to the terms of said contract, except that the said plaintiff, his heirs and assigns, shall be restrained in the amount of water used to the necessities for irrigation of the said land and for domestic purposes."

It is further alleged in the answer of Bushnell in the present case that the said decree has never been disturbed, appealed from, or reversed, and has at all times been in full force and effect, and that the matters and things litigated in the said action and adjudicated in said decree are the same matters and things which the said plaintiff seeks to have litigated and adjudicated in this action.

The defendant in error, plaintiff below in this case, demurred to the answer of the defendant Bushnell, which demurrer was sustained by the court. Plaintiff in error, Bushnell, electing to stand on his answer, the court rendered judgment against him in conformity with the prayer of the complaint, and which judgment is now before us for review.

From this synopsis of the pleadings in this case and the pleadings and judgment in the case of Bushnell v. Larimer & Weld Irrigation Co., it will be observed that both actions were in the same court; that the latter action terminated in a judgment and decree in favor of Bushnell and against the irrigation company; that at the commencement of this action the said decree was in full force and effect; that the parties in the former suit were identical with the parties in this suit; and that the matters and things there litigated are identically the same as are sought to be litigated in this proceeding.

[1] The answer of the plaintiff in error, if true, constituted a sufficient defense to the complaint of the defendant in error, for it unmistakably sets forth a former adjudication between the parties thereto of precisely the same matters involved in this proceeding.

[2] It is settled in this jurisdiction that a former adjudication is conclusive in a subsequent proceeding between the same parties as to every matter properly involved, and

which might have been raised and determined in it. Johnson v. Johnson, 20 Colo. 143, 86 Pac. 898; People ex rel. Reynolds v. Board of County Commissioners of Rio Grande County, 11 Colo. App. 124 & 136, 52 Pac. 748; Breeze v. Haley, 11 Colo. 351, 18 Pac. 551; City of Denver v. Lobenstein et al., 3 Colo. 216; Clark v. Knox et al., 32 Colo. 342, 76 Pac. 372; Montezuma Cattle Co. v. Dale, 16 Colo. App. 139, 63 Pac. 1058.

The answer of the plaintiff in error sets forth facts sufficient to sustain a plea of former adjudication of the matters complained of.

The judgment is reversed.

MUSSER, C. J., and GABBERT, J. concur.

PRICE v. LUCKY FOUR GOLD MINING CO.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. VENUE (§ 18*)—NATURE OF ACTION.

In an action in Pueblo county against a smelting and refining company for the value of ore alleged to have been sold and delivered to it in La Plata county, such company, on affidavits alleging that the ore was received from P. in La Plata county; that it came from mining property, title to which was claimed by both plaintiff and P.; that in consequence both claimed the right to the proceeds thereof; that certain actions were then pending in the courts of La Plata county to determine such title; and that defendant had no interest in the controversy except that it desired to pay the value of the ore to the party entitled thereto—moved to substitute P. as defendant upon payment of such value into court. Plaintiff stipulated that such substitution might be made, thus in effect agreeing that the statements of the affidavit were true, and the substitution was made. Held, that upon such substitution the action became one for conversion of ore by P. in the county of La Plata, where he resided, and should be tried in that county, under Code, § 29, providing that all cases other than those specified in preceding sections shall be tried in the county in which the defendants, or any of them, reside, and was not triable under the further provision of that section that actions on book accounts or for goods sold and delivered may be tried in the county where the plaintiff resides, or where the goods were sold.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 32; Dec. Dig. § 18.*]

2. VENUE (§ 77*)—CHANGE—WAIVER OF RIGHT.

A defendant did not waive his right to have the venue of an action changed to the county in which he resided by filing a demurrer to the complaint with his motion for the change.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. § 77.*]

Error to District Court, Pueblo County; C. S. Essex, Judge.

Action by the Lucky Four Gold Mining Company against the American Smelting & Refining Company, which interpleaded John M. Price, who was thereupon substituted as defendant. Judgment for plaintiff, and the substituted defendant brings error. Reversed with instructions.

McCloskey & Moody, of Durango, and Charles D. Bradley, of Pueblo, for plaintiff in error. Joseph Dye, of Pueblo, for defendant in error.

SCOTT, J. On the 29th day of December, 1911, the Lucky Four Gold Mining Company filed its complaint in the district court of Pueblo county against the American Smelting & Refining Company, alleging that on or about the 6th day of December, 1911, the defendant was and is indebted to the plaintiff in the sum of \$200 on account of gold, silver, and copper ore sold and delivered by the plaintiff to the defendant at Durango, Colo., in Denver & Rio Grande car No. 6034, and known as smelter lot No. 3549, and praying judgment for the amount claimed. On the 27th day of January, 1912, the defendant the American Smelting & Refining Company, acting under section 18 of the Civil Code, and in full compliance therewith, filed a motion for substitution of party defendant, and discharge of the defendant Smelting & Refining Company, together with a stipulation in relation thereto between the plaintiff and the smelting and refining company, defendant. This motion stated, in substance, that the ore in question was delivered to the defendant at Durango by one John M. Price; that its value was \$177.63, which sum the defendant was then holding; that the plaintiff has made and is making the demand upon the defendant for the value of the said ore, and that the said Price, prior to the institution of the suit, now and at all times since, has likewise made and still makes, demand upon the defendant for the value of the said ore, and that Price still claims that the said ore was his property, and that he is entitled to the value thereof; that the defendant has no interest in the controversy, except that it desires that the sum of money so held by it may go to the person or party entitled thereto, and tendered the said sum of money into court. This motion was supported by affidavit. The proper notice of the intention to file the said motion with a copy thereof was served upon Price at Durango, La Plata county. On the 7th day of March, 1912, the court entered an order granting said motion of substitution and the discharge of the American Smelting & Refining Company as defendant in the cause, and from liability to either the plaintiff or Price, and substituting Price as the party defendant. This order was to become effective upon the payment of the sum of money, so stated, into court. Price appeared by his attorney and excepted to the making and entering of the order of substitution and discharge. This objection was overruled. Price was then ruled to plead within 30 days and the plaintiff to plead within 30 days after service of a copy of defendant's pleading.

On April 6, 1912, the defendant Price filed his demurrer to the complaint of the plaintiff in the following language: "The defend-

ant John M. Price, in the above-entitled cause, by his attorneys McCloskey & Moody and C. D. Bradley, without waiving his right to an application for a change of venue herein, demurs to the complaint of the plaintiff in said action upon the following grounds, viz.: (1) That said complaint does not allege and state facts sufficient to constitute a cause of action against defendant." At the same time Price also filed his motion for a change of venue and upon the grounds as follows: "(1) That the county designated in the complaint herein namely the county of Pueblo, in said state of Colorado, is not the proper county in which, under the law, this action should be tried, such proper county being the said county of La Plata; (2) that this action, in so far as this defendant is concerned, if for anything, is for a pretended conversion, in the county of La Plata, and state aforesaid, of the ores mentioned in the complaint, and this defendant, at the time of the commencement of this action, and for a number of years prior thereto, was, and ever since the commencement of this action has been and now is, a citizen and resident of said county of La Plata, and service of summons, or service of any process whatever, in this action was not and has not been made upon this defendant, or any defendant in the case, in said county of Pueblo; (3) that this action, if maintained, will involve the question of the ownership of the Buckwheat lode mining claim, situated in the California mining district, in said county of La Plata, from which the ores mentioned in the complaint were mined and taken, and the determination of the interests of this defendant and others in said mining claim, and their right to occupy, possess, enjoy, and mine the same, and to have the ores taken therefrom, including the ores in question, as a prior valid mining location made upon the public mineral lands of the United States, held adversely to the plaintiff herein, and as against a pretended right thereto, or a portion thereof, by the plaintiff under and by virtue of a wrongful and pretended relocation and the filing of a pretended amended location certificate of its Lucky Four No. 2 lode claim, dated on or about October 23, 1911, and subsequent to the location of the said Buckwheat lode, whereby its said No. 2 lode claim was made to overlap a portion of the said Buckwheat lode, including a part of the ground from which said ore was taken."

This motion was supported by affidavits. While the demurrer and motion for change of venue was pending, and on the 12th day of October, 1912, the plaintiff, with leave of court, filed its amended complaint, differing from the original complaint only in that the amount claimed is \$177.63, and reciting that the American Smelting & Refining Company is a nonresident corporation doing business in the state of Colorado, and that since the bringing of the action the said company has

paid to the clerk of the district court of Pueblo county the said sum of \$177.63, which amount is the value of the gold, silver, and copper ore sold and delivered by the plaintiff to the defendant at Durango, Colo., on the 6th day of December, 1911. The substituted defendant Price was permitted to withdraw his demurrer to the supplemental complaint. The motion for change of venue was overruled, whereupon the defendant Price declined to plead further, and elected to stand upon his application for change of venue. The court thereupon rendered judgment in favor of the plaintiff, the Lucky Four Gold Mining Company. The only alleged error relied on, is the action of the court in declining to grant the change of venue.

It may be stated that there is no dispute but that at all times mentioned the Lucky Four Gold Mining Company was a Colorado corporation, with its place of residence at Pueblo, that the American Smelting & Refining Company was a foreign corporation authorized to do business in the state of Colorado, with its headquarters and business offices in the city of Denver, and that the plaintiff in error, John M. Price, was a resident and citizen of Durango in La Plata county, Colo., to which county the change of venue was asked.

The action was instituted in Pueblo county, service of summons was made on the American Smelting & Refining Company in the city and county of Denver, and service of notice of the motion for substitution and discharge was made on Price in La Plata county.

Within the time in which Price was ordered to plead he filed his motion for a change of venue to La Plata county.

[1] It will be observed that, in this motion for discharge and substitution by the American Smelting & Refining Company, and in the affidavits in support thereof, it was declared that the said company received the ores from John M. Price and not from plaintiffs, and that these ores came from mining property, title to which was claimed by both the defendant and Price, and in consequence both claimed the right to the proceeds thereof. Further, that in certain actions pending in the courts of La Plata county, this question of title was in process of litigation between Price and the plaintiff. These allegations were not disputed by the plaintiff, but on the contrary, it stipulated that such substitution, and for the reasons stated, should be ordered by the court. The plaintiff thus in effect agreed and the court must have necessarily found that the statements upon which such motion was based were true, else the order of substitution and discharge could not have been entered. Hence this action is in fact one for alleged wrongful conversion, occurring in La Plata county, where Price resided, and not one of account between the plaintiff and the Smelting & Refining Company, as alleged in the com-

plaint. For this reason the case does not come within the provision contained in section 29 of the Code, as contended by the plaintiff, that "actions on book accounts or for goods sold and delivered, may be tried in the county where the plaintiff resides, or in the county where the goods were sold," but does come clearly within that provision of section 29 of the Code, that "in all other cases the actions shall be tried in the county in which the defendants, or any of them may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county." Upon the entry of the order of substitution and discharge, Price became the sole defendant. The action there became one of alleged wrongful conversion of the ores of plaintiff by Price, and within the county of La Plata, where Price resided. Price was entitled, under the statute, to have this issue tried in the county of his residence. He filed his motion for a change of venue in apt time. His right thereto was absolute, and the funds so deposited must abide the judgment of the court.

The last expression of this court upon right to a change of venue is found in Woods Gold Mining Company v. Royston, 46 Colo. 191, 103 Pac. 291, where it was said: "It is altogether clear that, while the court acquired jurisdiction of the action by the service of summons upon defendant in Gunnison county, it was its imperative duty to change the place of trial to Chaffee county, upon the seasonable application of defendant therefor. It had no power in the premises further, or other, than to order the transfer to be made, and its trial of the case after the application was made, and its judgment, were in excess of its jurisdiction. This has been so often decided in this state that it would seem superfluous to cite authorities."

[2] But it is said that, even though the defendant in this case had such right, he waived it by filing his demurrer to the complaint. It has been decided by this court that in case where, after the overruling of defendant's motion for a change of venue, the parties thereafter voluntarily appeared and went to trial without objection, they re-invested the court with jurisdiction. Phoenix Inv. Co. v. Greger, 39 Colo. 195, 88 Pac. 1066. But no case has been called to our attention where it had been held that a defendant waives his statutory right in this particular by the filing of a demurrer.

The precise question was determined in the case of Smith v. Post, P. & P. Co., 17 Colo. App. 243, 68 Pac. 121, where the court said: "The mere entering of a general appearance and filing of a demurrer to the complaint, contemporaneous with his motion, should not defeat his right. The latter act has no bearing whatever upon his right to invoke the privilege allowed him by statute, and indicates no intention to waive it,

because the court has full jurisdiction, and, by virtue of the summons already served, he is compelled to appear and plead at some time, whether the place of trial is changed or not."

In the pending case the defendant Price filed his motion for a change of venue and his demurrer to the complaint at the same time, and within the period in which he had been ruled to plead. Beside, the demurrer in express terms declared that it was without waiver of defendant's right to his application for a change of venue.

The judgment is reversed, with instruction to enter an order granting the defendant's motion for a change of venue to La Plata county.

MUSSER, C. J., and GARRIGUES, J., concurring.

PARSONS et al. v. FT. MORGAN RESERVOIR & IRRIGATION CO. et al.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—ABANDONMENT.

The burden was on the one asserting it to establish the abandonment of priorities to ditch rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 152*)—IRRIGATION RIGHTS—ABANDONMENT—EVIDENCE.

The abandonment of priorities to ditch rights must be shown by clear and convincing evidence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

3. WATERS AND WATER COURSES (§ 151*)—IRRIGATION—"ABANDONMENT."

An abandonment of water rights consists of the act and intention, and mere nonuser, short of the period of limitations, is not sufficient to show abandonment, but nonuser for a considerable time, coupled with acts showing an intention to do so, may establish an abandonment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 155; Dec. Dig. § 151.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 12, 13; vol. 8, p. 7559.]

4. WATERS AND WATER COURSES (§ 151*)—IRRIGATION—ABANDONMENT OF RIGHTS.

To prevent an abandonment of irrigation rights, the user must be in good faith.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 155; Dec. Dig. § 151.*]

5. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—ACTIONS—SUFFICIENCY OF EVIDENCE—ABANDONMENT.

Evidence, in an action to have priorities in a water ditch adjudged to have been abandoned, held to sustain a finding that there had been an abandonment before an attempted use of the water in 1905.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

6. WATERS AND WATER COURSES (§ 151*)—IRRIGATION—ABANDONMENT OF RIGHTS—REVIVAL.

If water rights had been lost by abandonment, a subsequent attempt to use the water would not revive such rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 155; Dec. Dig. § 151.*]

7. WATERS AND WATER COURSES (§ 152*)—IRRIGATION—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to have priorities in ditch rights adjudged abandoned, held to show that the acts claimed to negative the abandonment were not done in good faith.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

Error to District Court, Morgan County; H. P. Burke, Judge.

Action by the Ft. Morgan Reservoir & Irrigation Company and others against F. B. Parsons and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

In the summer of 1911 the Ft. Morgan Reservoir & Irrigating Company and others brought an action against F. B. Parsons and others, the purpose of which was to have priorities awarded the Parsons ditch decreed abandoned. The defendants answered, putting in issue the material allegations of the complaint upon which the abandonment of the priorities in question was predicated. The cause was tried to the court and a decree rendered adjudging that the priorities involved were abandoned, and decreeing that the defendants be forever restrained and enjoined from diverting any water thereunder. The defendants bring the case here for review on error. The only question urged upon our attention which presents any merit is that the testimony is insufficient to sustain the judgment of the court.

In November, 1895, under statutory adjudication proceedings, the Parsons ditch was awarded priority No. 2, as of date January 1, 1871, for four cubic feet of water per second, and priority No. 46, for 48 cubic feet, as of date September 8, 1889. There is some conflict in the testimony as to the date when water was last diverted through the ditch for the purpose of irrigation; it being the contention on the part of the defendants that water was so diverted as late as 1897, and possibly 1898. There is testimony, however, to the effect that in 1895 a flood occurred in the river which destroyed the diverting dam and so injured the headgate and lowered the river channel that the ditch was not thereafter used. It also appears from the testimony that in 1898 Parsons, one of the owners of the ditch, constructed a dike across its mouth in order to prevent lands under the ditch from being flooded. It is clear from the testimony that after this date the ditch was not used for any purpose. It also appears that from this time, and possibly for some time prior, no work was done

upon the ditch; that it was broken in one or more places; that it had been filled in by the construction of roads across it—although Parsons testifies that he objected to the construction of one highway, and was told by the county commissioner, with whom he talked, that if the ditch was put in repair an opening through the fill would be made so as not to interfere with the flow of water in the ditch. There was also testimony on the part of the defendants to the effect that the owners of the Parsons ditch were not financially able to put it in repair, and that they endeavored to secure funds for this purpose or change the intake of the ditch to a point further up the river or construct another ditch, but were unsuccessful. About 1900, or the year following, Parsons and others commenced the construction of the Parsons and Bechtolt ditch, the headgate of which was some distance down the river from the Parsons headgate. On behalf of the defendants the testimony is that this ditch was intended to carry the water of the Parsons priorities, although its dimensions were such that it would not have been nearly sufficient for this purpose. Later it developed that the Parsons and Bechtolt ditch interfered with a ditch known as the Trowell, and that on account of this conflict the upper portion of the Parsons and Bechtolt ditch only was completed, and that it was thereafter abandoned and no water ever run through it.

The Parsons ditch was owned by the Parsons Irrigating Ditch Company. The charter of this company expired in 1910, and for some time prior to that date meetings of the stockholders were not held. To build the ditch money had been obtained from a Mr. More by pledging the greater portion of the stock as collateral. This occurred in 1890. In 1902 Mr. More advanced something like \$80 to assist in defending the water rights of the ditches in that locality, which were involved in litigation with ditches taking their supply of water further down the river. He testifies that this advance was made to protect his interest as pledgee of the stock. He also testified that he had informed the officers of the Platte and Beaver ditch that they had his permission to run the first Parsons priority through their ditch if they needed it. This was probably in 1901, 1902, and 1903. No price, however, was asked for the water, nor was there any consideration for its use, if in fact such diversion was made. According to the testimony of Parsons for the defendants, he diverted some of the water of the Parsons priorities through the Trowell ditch. This was during the years 1905, 1906, and 1907, and the diversion was for a period of about three days during each of these years, in volume equal to about the first Parsons priority. It also appears from the testimony that during these years, and perhaps for most of the time after the use of the Parsons ditch ceased, Parsons took water from the Platte and Beaver ditch be-

cause, as he said, it was cheaper than to repair the Parsons ditch.

The evidence discloses that the major portion of the lands owned by the Parsons people under the Parsons ditch had been sold under a trustee's deed in 1895, and that about 1909 defendant Parsons disposed of his land. About 1909 Stratton, one of the defendants, purchased the stock held by More. An attempt was then made by the owners of the Parsons ditch to resume the use of the priorities of the latter by diversion through other ditches. To this end application was made to the Lower Platte & Beaver Ditch Company, the directors of which agreed that the Parsons first priority might be so diverted, but it appears that the contract intended to evidence this arrangement was never executed. Similar arrangements were also attempted to be made with the Snyder Ditch & Reservoir Company respecting the second priority, but were never carried out. It does not appear that the Parsons priorities were to be used beneficially through either of these channels. In 1910 or 1911 an action was commenced by the holders of the Parsons stock, the purpose of which was to obtain a decree permitting a change in the point of diversion of the Parsons priorities, part to the Platte and Beaver and part to the Snyder ditch. This action was pending when the cause under consideration was commenced, and a decree had been rendered permitting the change prior to the date of the trial of the present action. The testimony also establishes that, prior to the date when More transferred his stock to Stratton, he had transferred four shares to Mrs. Parsons, the divorced wife of the defendant Parsons. The principal of the loan by More was between \$1,200 and \$1,400, no part of which was ever paid by the Parsons people; neither did they pay any interest thereon after 1893. Stratton paid More for his stock the sum of \$400 and obtained Mrs. Parsons' stock for the sum of \$100. What Stratton thus purchased represented nearly all the stock of the company. After the purchase, part of this stock Stratton transferred to Parsons, the consideration for which was his equitable interest in the Parsons ditch.

Allen & Webster, of Denver, for plaintiffs in error. Stephenson & Stephenson, of Ft. Morgan, for defendants in error.

GABBERT, J. (after stating the facts as above). [1, 2] The burden was upon the plaintiffs to establish abandonment, and, in order to sustain a finding that a water right has been abandoned, the testimony bearing on the subject should be clear and convincing.

[3] Abandonment consists of the two elements, act and intention; and nonuse alone of the water represented by decreed priorities, at least short of the period of the statute of limitations, is not sufficient to estab-

lish abandonment, but nonuse continued for a considerable length of time, coupled with other acts of a character tending to show an intention on the part of the owner not to resume or repossess himself of the water represented by priorities which he has ceased to use, may constitute an abandonment. *Alamosa Creek C. Co. v. Nelson*, 42 Colo. 140, 93 Pac. 1112; *White v. Nuckols*, 49 Colo. 170, 112 Pac. 329; *Green Valley Ditch Co. v. Frantz*, 54 Colo. 226, 129 Pac. 1006; *San Luis Valley I. District v. Town of Alamosa*, 135 Pac. 769; *O'Brien v. King*, 41 Colo. 487, 92 Pac. 945; *Beaver Brook R. & C. Co. v. St. Vrain R. & F. Co.*, 6 Colo. App. 130, 40 Pac. 1066; *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989; *Putnam v. Curtis*, 7 Colo. App. 437, 43 Pac. 1056; *Hall v. Lincoln*, 10 Colo. App. 360, 50 Pac. 1047; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Platte Valley I. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. 391.

The question necessary to determine is whether the evidence sustains the judgment when tested by these rules. The testimony unquestionably establishes that the Parsons ditch was abandoned in 1898, and probably as early as 1895 or 1896. No use of the priorities awarded the ditch was made through that channel after 1898, and from the testimony the trial court may well have concluded that the use of water through that ditch ceased in 1895 or 1896. In 1900 or the year following Parsons started to construct the Parsons and Bechtolt ditch, but water was never diverted through it and it was abandoned. In 1902 More advanced some money to assist in paying expenses connected with litigation between ditches in Morgan and Logan counties, but this advance was on his own account as pledgee of the Parsons ditch stock. In 1901, 1902, and 1903 he granted permission, so far as he had any authority, to run the first priority of the Parsons ditch through the Platte and Beaver ditch; but there was no consideration for this use. Parsons diverted some of the Parsons priorities through the Trowell ditch in 1905, 1906, and 1907, but in circumstances from which it is apparent that these diversions were a mere pretense to establish a use of water which he did not need, as he was taking water from another source.

[4-6] A use of water, in order to prevent an abandonment, must be in good faith; besides from the testimony it appears that before he commenced this use the water had not been used for at least seven years, and possibly not for ten. The Parsons ditch had been abandoned during all this period, and meetings of the stockholders had not been held for several years. From these circumstances it could be inferred that an abandonment had taken place before the attempt to use the water in 1905. If this were true, then the use in 1905 would not revive rights

which had been lost by abandonment. The same can be said of the efforts of Stratton in 1909, and besides it does not appear that the Parsons priorities were to be used beneficially through either the Platte and Beaver or the Snyder ditches. In 1895 the greater portion of the Parsons land was sold under a deed of trust, and about 1909 the plaintiff in error Parsons disposed of his land.

[7] In brief, the testimony bearing on the subject of abandonment, where there is any conflict, is sufficient to sustain the finding that the priorities involved were abandoned and, where there is no conflict, is of a character from which the conclusion can be deduced that the acts upon which the claim of nonabandonment was predicated were not in good faith and were but pretenses to evince an intention which in fact was not entertained. In these circumstances we are not justified in reversing the findings of fact upon which the trial court based its judgment. The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and BAILEY, J., concur.

LILYLANDS CANAL & RESERVOIR CO. v. WOOD.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. CORPORATIONS (§ 388*) — ORGANIZATION — COLLATERAL ATTACK—ILLEGAL ISSUANCE OF STOCK.

Even if the contract under which corporate stock was originally issued, which provided that the stockholder, in consideration of certain water claims and payment for part of the stock at par, should receive the entire issue, and pay for the remainder in the future, was void under Const. art. 15, § 9, prohibiting issuance of stock except for services or money actually received, the corporation could not assert its invalidity on that ground, in an equitable action by stockholders, if it could not restore the parties to their original status.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

2. CORPORATIONS (§ 388*)—STOCK — RIGHT TO VOTE—PERSONS ENTITLED.

Where a corporation for a consideration issued practically all of the original stock to W., under an agreement that he should pay for it at par as called for by the directors, and the corporation acted and received benefits under the contract, it cannot claim as against W.'s assignees that they are not entitled to vote the stock not entirely paid up, on the ground that the contract under which the original issue was made was void under Const. art. 15, § 9, prohibiting the issuance of stock except for services or money actually received.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

3. CORPORATIONS (§ 388*)—CONTRACTS — ESTOPPEL TO REPUDIATE.

A corporation cannot receive and retain benefits under a contract to which it is a party, and afterwards deny its legal effect.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1. CORPORATIONS (§ 88*)—SALE OF STOCK —
PASSING OF TITLE.

In absence of statute or charter requirement, corporate stock need not be paid for in cash at the time of its issuance in order to pass title to the purchaser; a subscriber being the owner when he binds himself to pay therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337-364, 425-428; Dec. Dig. § 88.*]

5. CORPORATIONS (§ 55*)—RIGHT OF STOCK-
HOLDERS—VOTING.

Under Rev. St. 1908, § 853, permitting stockholders or directors to make such by-laws as they deemed proper, not inconsistent with law, and section 865, permitting generally each stockholder to vote in person or by proxy, a by-law could not be adopted which provided that only such stock as was paid in full should vote at stockholders' meetings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 152; Dec. Dig. § 55.*]

Error to District Court, Montrose County; Sprigg Shackelford, Judge.

Suit by Lucy F. Wood, for herself and others, against the Lilylands Canal & Reservoir Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Sherman & Sherman, of Montrose, for plaintiff in error. John Gray, of Montrose, and Morrison & De Soto, of Denver, for defendant in error.

BAILEY, J. Lucy F. Wood, for herself and others in like interest, brought suit in the district court of Montrose county, against the Lilylands Canal & Reservoir Company, to have certain amendments, increasing the capital stock of the company and enlarging its objects and purposes, declared void and their enforcement enjoined. The cause was tried by Phillip W. Mothersill, Esq., referee, who reported findings of both law and fact, upon which judgment was entered for plaintiff as prayed, and the defendant brings the cause here for review.

It is unnecessary for the purposes of this opinion to rehearse in detail the manifold claims and contentions of the parties. The only serious fact conflict is found in the charges of fraud and conspiracy, concerning which the referee found that there was no evidence to charge the plaintiff and others alike interested. The findings of fact by the referee are supported by the evidence, were favorable to the contentions of the plaintiff and will not be disturbed. A brief summary of the history of the controversy and a statement of the issues follows.

In March, 1906, plaintiff, Lucy F. Wood, with C. A. Wood, her husband, and I. D. McFadden, incorporated under the laws of this state the Lilylands Canal & Reservoir Company, for the purposes suggested by its name, with a capital stock of 100,000 shares of the par value of \$1 each, and were named as its first board of directors. At the time of the organization of the company, neither the incorporators nor those who after-

ward became its stockholders owned any land, but there was a body of government land open to entry, upon which those interested in the company afterward made filings. Mr. Wood had theretofore initiated proper proceedings to acquire water rights, locate reservoir sites and ditches, to provide a system by which these lands could be irrigated. At a meeting of the board of directors on May 17th of that year, I. D. McFadden was chosen president, Lucy F. Wood vice president, Elsie W. Wood secretary and treasurer, and C. A. Wood superintendent. Thirty shares of the capital stock at par was issued to each McFadden, Lucy F. Wood and C. A. Wood for cash. At this meeting the incorporators undertook to formulate and adopt some plan by which the company would be able to raise money to construct ditches and reservoirs, so as to divert water and carry it to the lands in question for irrigation. The plan was for Wood to turn over to the company the claims which he had initiated for water rights, reservoir and ditch sites, and with this in view he submitted the following proposal at that meeting, which was accepted by the votes of the other two directors:

"To the Lilylands Canal & Reservoir Co.

"In consideration for all rights and title in the Lilylands Ditch & Reservoirs, now on file in the office of the State Engineer at Denver, Colo., and in the Co. Clerk of San Miguel Co., Colo., I hereby agree to accept twenty five thousand shares of the capital stock of your company and I hereby agree to pay all just claims against the rights so transferred up to March 8, 1906.

"In consideration of the acceptance by your company of the above proposal I hereby agree to purchase seventy four thousand nine hundred and ten shares of your company's capital stock at the price of one dollar, cash, per share to be paid for as called by the directors of said company, not exceeding two per cent. in any one month. The certificate for the entire amount to be issued to me, and I will deposit with the L. C. R. Co. certificates for 80,000 shares, the same to be held by the company as collateral security that I will make payment for the said certificates as per agreement; the certificates so paid for to be released and delivered back to me dollar for dollar as rapidly as redeemed.

"Signed this 17th day of May, 1906.

"C. A. Wood."

McFadden owned a one-half interest in the Wood rights. Stock was issued to Wood in conformity with the contract, 25,000 shares full paid, and 74,910 shares at \$1 each were charged to him upon the books of the company, and certificate No. 2 for 80,000 shares was thereupon returned by him to the company, to be thereafter issued on his order as paid for at par, in conformity with

the terms of the contract. On the same day Wood assigned one-half of that certificate to McFadden, and new certificates issued for 40,000 shares each, the old certificate was canceled, and appropriate entries were made upon the company books debiting the one account and crediting the other. It appears that there was a bona fide attempt to thus launch the company and dispose of and finally deliver stock out of the 74,910 shares as the company should receive cash, or its equivalent, therefor. As soon as the organization was complete, sales of stock began to be made in small blocks, desert filings on government land were made, and after the lapse of about three years and a half from the date of the organization of the company practically \$65,000, from all sources had been paid in cash to it for stock out of the 74,910 shares, from the proceeds of which a large amount of construction work was done on the reservoir and ditch. Rights in this stock became scattered among scores of actual settlers on land irrigated by water obtained and diverted through the system Wood had initiated and turned over to the company. During all of this time the validity of none of the stock issued under the Wood proposal had been questioned, and every share of it had been allowed to vote at all prior stockholders' meetings. This stock was divided and subdivided, falling into the hands of various purchasers, and in each instance appropriate debits and credits were recorded on the books, the old certificates canceled and new ones issued. Plaintiff became in due course the assignee of some of these shares. On September 21, 1909, the management of the company having passed into new hands, the board of directors adopted a by-law providing, in substance, that no stockholder should be permitted to vote or represent, at a stockholders' meeting, any stock of the company that was not full paid and issued by the secretary of the company. At a stockholders' meeting on the following day a proposed amendment to the articles of incorporation, increasing the capital from 100,000 shares to 150,000 shares, par value unchanged, was voted upon and declared adopted. At this meeting shares of stock to the total number of 21,068, charged upon the books to the plaintiff and others in like interest, were denied the right to vote. At a subsequent stockholders' meeting, November 3d next thereafter, the same number of shares, and probably the identical ones, were again excluded from voting upon a proposed amendment purporting to enlarge and extend the objects and purposes of the company, which was also declared adopted. The contention is that the shares so excluded were wrongfully denied the right to vote. If this is true, then the purported amendments did not receive a vote of two-thirds of all stock of the company "then subscribed and in good faith outstanding," as required by sec-

tion 882, Revised Statutes 1908, and were not in fact lawfully adopted. We quote from the referee's report:

"That at said meeting [November 3, 1909] the officers of the company held that there were outstanding and entitled to vote on said amendment only 68,177 shares of stock; that shares of stock in said company amounting to 21,068 standing in the names of various parties were refused the right to be voted on the question of said amendment; that the number of shares voted for said amendment was 48,377; and that the stock allowed to vote was considered full paid.

"That besides the 6,874 shares standing in the name of C. A. Wood which he was refused the right to vote on said amendments the following is the list of persons, the number of shares standing in their names respectively, the date when acquired and the amounts paid by each on the shares not allowed to vote on said amendments."

Then follows the list, aggregating 14,194 shares, with a credit of \$4,434.16 paid thereon. A similar finding was made as to the meeting of September 21, 1909. The court, upon the findings of the referee, declared the amendments void, enjoined the company from issuing any shares in excess of the original capital, from exercising the additional power granted by the second purported amendment, and from selling, renting and disposing of water to the lands of persons not holding stock under the original issue of 100,000 shares.

The main defense is that the incorporators entered into a conspiracy in the original formation of the company, to secure to themselves without consideration its total capital stock and then sell it to innocent third parties at greatly advanced prices, to their own profit and not for the benefit of the company. A reversal of the judgment is sought on the ground that the stock issued to Wood under his proposal, 99,910 shares, practically the entire capital of the company, is void under section 9, article 15, of the Constitution, which reads:

"No corporation shall issue stock or bonds, except for labor done, service performed, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void."

[1] The substance of this contention, if sound and enforced, would nullify every share of stock of this company, not only those of which complaint is made, but the entire issue, except 90 shares, for the balance was all issued under the Wood proposal. If a part of this stock is void because the original issue is illegal, then it is all void. If the contract upon which the original issue is based is to be held invalid as to a part of the stock, it must be so held as to all of it; and unless the company is able to restore parties to their original status, which it manifestly cannot now do, the con-

tract should be upheld and enforced, at least against the company's complaint. The defense urged is nothing more or less than a collateral attack upon the very existence of the company. It is offered in an equitable action brought by some of the stockholders seeking to redress alleged wrongs, perpetrated by the company in excluding them from participation in the conduct of its internal affairs. Even if relief such as this defense suggests were proper in a proceeding like this, no court would be warranted, upon this record, in declaring that the stock issued pursuant to the Wood contract was not issued upon valuable and adequate consideration, or that the transaction was fraudulent. It is at least manifest that the company itself has not been thereby imposed upon or misled.

[2] The plaintiff contends that by assent to, acquiescence in and acceptance of benefits from the contract now sought to be repudiated, the company is estopped to question its validity. It appears from the minutes of a meeting of the board of directors held May 1, 1908, that Wood and McFadden released to the company all claims to reversions upon or default in payment of assessments on stock sold by them to other parties, and also assigned to it their contracts for stock sales, and that the company accepted the same with the benefits arising therefrom. The record shows that these benefits were of large value. Several thousand shares of stock reverted to the company through defaulted assessments, and this stock is shown by the record to have largely increased in value, being worth two or three times par. The record also shows that the company, upon the stock thus issued, received a large sum of money, a portion at least of which was paid on account of the stock which was excluded from voting upon the amendments in question. While it may be true, as argued, that this stock was not the unqualified property of the subsequent purchasers, still the right to finally acquire it, under the terms of the Wood contract, had vested in them, and the company having accepted and acted under that contract is not now in position to withhold from such purchasers the power to exercise the rights thus acquired. They were in effect subscribers to the stock, having succeeded to the rights of Wood under the contract.

[3] It must be borne in mind that the defendant in this case is the company itself. No individual stockholder or creditor is here complaining. If there were, an entirely different situation would be presented and different questions would arise. The company accepted the Wood proposal, treated it as a valid and binding subscription, issued stock on it, reaped large benefits therefrom, built some four or five miles of ditch through proceeds derived from it, and now, after purchasers have acquired rights under that contract, seeks to have a court of equity de-

clare certain of those rights void because the entire original issue was illegal. In seeking this relief there is no pretense that the company has in any way been damaged. Since the company recognized the Wood contract, acted under it and confessedly received substantial profits from it, it should not now be heard to say that the contract was void from its inception. It is settled, not only here but everywhere, that a corporation may not acquire and retain benefits under a contract to which it is a party and then deny its legal effect. *Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *Mulford v. Torrey Co.*, 45 Colo. 81, 100 Pac. 596; *Water Works Co. v. Holme*, 49 Colo. 412, 113 Pac. 501; 10 Cyc., pages 1067-1068, note 33, and cases cited in Cyc. Annotations 1913, page 1154. It is equally true that a corporation may not, under such circumstances, maintain a suit to have such contract set aside and annulled, and thus destroy the rights of holders of stock acquired under it in good faith and for value. No more can it successfully defend against the suit of a subscriber to stock brought to secure his rights under such contract on the ground that it is illegal and void.

Defendant cites *Old Dominion Copper M. & S. Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314, in support of the contention that the issue of 25,000 shares of its stock for the property rights of Wood, under the contract, was a fraudulent transaction because the rights conveyed thereunder were of comparatively little value. In our view of this case it is unnecessary to consider or determine this question, for the company is, as already indicated, in no position to urge it. Research has led to a consideration of a companion case to the one above referred to, namely, *Old Dominion Copper M. & S. Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025. The defendants in these cases were joint tortfeasors, living in Massachusetts and New York respectively. The Massachusetts decision was rendered by a bare majority of the court, and was accompanied by very able and convincing dissenting opinions. The particular proposition involved in the Massachusetts case, and to which it is here cited, was likewise controlling in the New York case, which was finally disposed of by a conclusion in direct conflict with that of the Massachusetts court, by the unanimous opinion of the United States Supreme Court. This latter decision was on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree of the Circuit Court for the Southern District of New York, sustaining a demurrer to, and dismissing, a bill brought by the corporation to rescind a sale to it of property belonging to the organizers and promoters of the company at a price which gave them an enormous profit. The facts and circumstances in the case at bar are strikingly similar to those upon which that decision rests, one of which

is that when the various transactions of which complaint is made in both cases took place, all of the then existing stockholders were participants. In that opinion it was said:

"The argument for the petitioner is that all would admit that the promoters (assuming the English phrase to be well applied) stood in a fiduciary relation to it, if, when the transaction took place, there were members who were not informed of the profits made and who did not acquiesce, and that the same obligation of good faith extends down to the time of the later subscriptions, which it was the promoters' plan to obtain. It is an argument that has commanded the assent of at least one court, and is stated at length in the decision. But the courts do not agree. There is no authority binding upon us and in point. The general observations in *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, were obiter, and do not dispose of the case. Without spending time upon the many dicta that were quoted to us, we shall endeavor to weigh the considerations on one side and the other afresh.

"The difficulty that meets the petitioner at the outset is that it has assented to the transaction with the full knowledge of the facts. * * * The contract had been made and the property delivered on July 11th and 12th when Bigelow, Lewisohn and some other members of the syndicate held all the outstanding stock, and it is alleged in terms that the sales were consummated before the vote of July 18th to offer stock to the public, had been passed. * * * It is difficult, without inventing new and qualifying established doctrines, to go behind the fact that the corporation remains one and the same after once it really exists. When, as here, after it really exists, it consents, we at least shall require stronger equities than are shown by this bill to allow it to renew its claim at a later date because its internal constitution has changed. * * * If we should undertake to look through fiction to facts, it appears to us that substantial justice would not be accomplished, but rather a great injustice done, if the corporation were allowed to disregard its previous assent in order to charge a single member with the whole results of a transaction to which $\frac{13}{15}$ of its stock were parties, for the benefit of the guilty, if there was guilt in any one, and the innocent alike." 3 Cook on Corporations, 6th Ed., § 729, p. 2386.

So here, the defendant company, with full knowledge of the entire situation, having accepted the contract as valid, received and retained benefits accruing from it, is estopped in this connection to attack the legality of the transaction. The *Lewisohn Case*, supra, having been decided on facts and circumstances so closely analogous to those in the case at bar, is direct authority for our conclusion here, that the defendant company

cannot be heard to say that the contract under consideration is a nullity.

[5] The controversy is therefore narrowed to a single question: Was the stock of plaintiff and others in like interest, though not fully paid for, wrongfully excluded from voting upon the proposed amendments submitted at the September and November meetings?

This proposition is discussed in the case of *Water Works Co. v. Holme*, supra, as follows:

"Our statutes seem to recognize that an accepted subscriber to the capital stock of a corporation becomes a stockholder by the mere act of subscription, regardless of whether the subscription is paid or not. Section 241 of the Gen. Stats. 1883, and, as it was amended, section 480, Mills' Ann. Stats., section 850, Rev. Stats. '08, provides, among other things, that subscriptions shall be made payable to the corporation in such installments as may be determined by the directors; that an action may be maintained to recover any installment due and unpaid for 20 days after demand therefor, and, speaking with reference to a written demand upon the delinquent, the section does not describe him as a subscriber, but as a delinquent stockholder. The same section provides that the proceeds of any sale, over the amount due on the shares sold, shall be paid to the delinquent stockholder. No installment may have been paid, yet, under this section, the delinquent stockholder would be entitled to the proceeds of the sale over the amount necessary to pay his subscription. It might well be asked, if he was not the owner of the shares, why should this surplus be paid to him? Section 486, Mills' Ann. Stats., section 873, Rev. Stats. '08, says that each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him. This section seems to recognize a subscriber who has not paid his subscription as a stockholder. In the light of these statutes, were it necessary to hold that an accepted subscriber to the capital stock is a stockholder, the following authorities, which say that the effect of an ordinary accepted subscription to the capital stock of the corporation makes the subscriber a stockholder and it is not necessary that he should have paid for his stock, would be worthy of consideration: *A. & S. C. R. Co. v. Hill*, 20 Or. 177 [25 Pac. 379]; 1 *Thomp. Corp.*, sec. 1139; *Wheeler v. Millar*, supra, 90 N. Y. 353; *Mitchell v. Beckman*, 64 Cal. 117 [28 Pac. 110]; *Schaeffer v. Mo.*, etc., *Ins. Co.*, 46 Mo. 248; *The W. & M. R. Co. v. Dwyer*, 49 Iowa, 121."

The general rule is also stated in that opinion to the effect that where a sale of personal property is made on credit, unless a different intention is shown by agreement or otherwise, the property in the goods passes to the buyer on delivery, and, in absence

of delivery, the property may pass, except as to third persons, although the seller retains the right of possession until the price is paid. 35 Cyc. 323.

In *A. R. L. T. & Co. v. F. L. & T. Co.*, 13 Colo. 587, 22 Pac. 954, the court said:

"Such contracts (of subscription), when based upon a consideration, and enforceable, constitute the sole test by which the question can be determined whether a person claiming to be a stockholder is such in fact. There must be mutuality. The stockholder must be in a position to enforce his rights, and compel the corporation to recognize him as a stockholder. The corporation must be able to enforce the subscription agreement."

And in 10 Cyc., at page 390, the rule is stated as follows:

"Whenever the subscriber pays, or obligates himself to pay, he is the owner of stock in the company. It is the payment, or the obligation to pay, that makes him a shareholder, with all the rights of one, if the certificate were not issued at all."

2. *Clark and Marshall, Private Corporations*, sec. 383, says:

"In the absence of an express charter or statutory requirement, the stock of a corporation need not be paid in in cash at the time of its organization, or within any particular time after its organization, but assessments or calls may be made upon the subscribers, as the money is needed. Neither payment nor the issue of a certificate is necessary, in the absence of an express provision, to make one a stockholder with all the rights and subject to all the liabilities of a stockholder."

The conclusions of the referee on this branch of the case correctly state the law applicable to the facts. They are, in effect, that the promise of Wood to pay the company \$1 cash per share for 74,910 shares in installments as called for by the directors, but not to exceed two per cent. per month, and the issuance to Wood of such shares, undoubtedly created an enforceable contract as between the company and Wood and between creditors and Wood; that the assignments from Wood to other parties were subject to payment to the company of certain designated sums as called for by the company; that the assignees obtained the same rights relative to the stock assigned as Wood had; that Wood was entitled to vote the stock standing in his name prior to assignment, and consequently his assignees were entitled to vote the stock assigned to them, for which they had paid or were bound to pay, so long as their rights had not been cut off through forfeiture for failure to pay assessments, or in some other lawful way.

[8] It was not within the power of the company to declare through a by-law that only such stock as had been full paid should be represented and allowed to vote at stock-

holders' meetings. Such embargo upon the stock was unwarranted, and is in that respect in conflict with our statutes and the decisions upon the subject. Sections 853 and 865, Revised Statutes 1908; *People's Bank v. Superior Court*, 104 Cal. 649, 38 Pac. 452, 29 L. R. A. 844, 43 Am. St. Rep. 147; and 2 Cook on Corporations, 6th Ed., § 622.

The record discloses no equities in favor of the defendant company worthy of consideration. The judgment is right, and is affirmed.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

LAFFEY v. PEOPLE.

(Supreme Court of Colorado. Oct. 6, 1913. Rehearing Denied Dec. 1, 1913.)

1. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTION TO SUPPORT RULING.

Where no reason for overruling a motion to quash was given, it will be presumed on appeal that the court acted upon a valid existing reason.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

2. INDICTMENT AND INFORMATION (§ 196*)—TRIAL—WAIVER OF IRREGULARITIES—PLEA TO MERITS.

Objections that no lawful preliminary examination was had, and that there was no affidavit verifying the information, or upon which it was or could be based, went merely to matters of procedure and were irregularities and not jurisdictional, so that they could not be waived, but were waived by the filing of a plea to the merits before motion to quash.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 628-635; Dec. Dig. § 196.*]

3. CRIMINAL LAW (§ 99*)—FILING OF INFORMATION—JURISDICTION.

The filing of an information in the district court by the district attorney gives that court jurisdiction of the offense charged.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 196, 197; Dec. Dig. § 99.*]

En Banc. Error to District Court, Clear Creek County; Charles McCall, Judge.

Peter Laffey was convicted of rape, and he brings error. Affirmed.

Cæsar A. Roberts and John J. White, both of Denver, for plaintiff in error. Fred Farrar, Atty. Gen., and Frank C. West and Norton Montgomery, Asst. Attys. Gen., for the State.

BAILEY, J. On September 23rd, 1911, plaintiff in error was examined before the county court of Clear Creek County, on a sworn complaint for the statutory crime of rape. An order was entered, upon a finding of probable cause, as upon preliminary examination, binding the defendant over to the district court to answer such charge. The record of the county court proceedings was duly certified to the district court, and on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

December 4th next thereafter the District Attorney filed an information there against the defendant, based on the county court order and record. The defendant, appearing in person and by counsel, was arraigned on that day and entered a plea of not guilty, and the case was set down for trial for December 14th, 1911. On this latter date, with the plea of not guilty still pending, and without leave of court, defendant interposed a motion to quash the information on the ground, among others, that no lawful preliminary examination had been had, because the county court was without jurisdiction to hold one or bind the defendant over to answer to the district court; and because no affidavit was filed verifying the information, or upon which the information was or could be based. This motion was overruled. A jury was impaneled, the defendant tried, found guilty, and sentenced to imprisonment in the state penitentiary. He prosecutes this writ of error.

[1, 2] Whatever merit there may be in the defendant's motion, the defects against which the motion was directed were waived when a plea of not guilty was entered without first seeking to correct such defects. No reason for overruling the motion is given, but if a valid one existed it will be presumed that the court acted upon it. The motion came too late and was properly overruled, as the defendant by plea to the merits had waived the objections which he later urged. The questions raised by the motion go to matters of procedure, questions of informalities and irregularities, not to the sufficiency of the information. The information properly charged the offense. The objections urged were of a character which, if properly interposed in apt time, entitled the defendant to have the defects in the proceedings corrected, but such defects were not jurisdictional in the sense that they could not be waived. *Taylor v. People*, 21 Colo. 426, 42 Pac. 652. The filing of the information in the district court by the District Attorney gave that tribunal jurisdiction of the offense. *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119. Objections to matters of procedure and form must be taken advantage of before plea to the merits, or if afterwards, only when such plea has been withdrawn by leave of court.

In *Bergdahl v. People*, 27 Colo. 307, 61 Pac. 228, this court, upon the proposition now under consideration, had this to say:

"The failure to properly verify an information is not one which affects its sufficiency. It is required to be verified as desig-

nated by sections 1432b and 1432h, 3 Mills' Ann. Stats. These are provisions which are intended to and do comply with section 7, article 2 of our Bill of Rights, which, in substance, declares that no warrant to seize any person shall issue unless probable cause therefor is made to appear by oath or affirmation reduced to writing. This right, however, is one which may be waived, and unless properly presented below, cannot be raised in this court."

[3] In *Taylor v. People*, supra, it is said:

"Neither a motion to quash, nor other pleading attacking the information upon any ground, was filed by the defendant; but, on the contrary, he entered his plea of not guilty, and went to trial upon the merits. If there was no preliminary examination (as to which we are not advised by anything in the record), it was the duty of the defendant, at the proper time and in the proper proceeding, to show that fact to the district court, and the record should disclose the existence of the alleged defect in jurisdiction; and if, as matter of fact, there was no preliminary examination, and the affidavit required by section 8 had not been filed in the district court, it was likewise the duty of the defendant in an appropriate way to call the attention of the district court to the absence of the necessary affidavit; but as the defendant entirely neglected to avail himself of his proper remedy at the appropriate time, it is too late for him to be heard with respect thereto in this court, even if there be merit in his contention."

That the entry of a plea of not guilty waived the defects against which the motion was directed is supported by ample authority. In *State v. Clark*, 4 Idaho, 7, 35 Pac. 710, it is said:

"A motion to quash an information, on the ground that the court had no jurisdiction to try the defendant, for the reason that the law had not been complied with in the arrest and preliminary examination of the defendant, must be made before plea or trial, or the same is waived."

State v. Collins, 4 Idaho, 184, 38 Pac. 38, reaffirms this doctrine. And to the same effect are *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693; *Johnson v. State*, 134 Ala. 54, 32 South. 1013; *Joy v. State*, 14 Ind. 139; and *West v. State*, 48 Ind. 483.

Other errors are assigned, but the argument of counsel is directed alone to the alleged error in overruling the motion to quash the information. The defendant's rights in this respect were waived. The judgment of the district court is affirmed.

**PEOPLE ex rel. AMMONS, Governor, v.
KENEHAN, Auditor of State.**

(Supreme Court of Colorado. Nov. 20, 1913.)

**1. STATES (§ 137*)—EXPENSES—CLAIMS
AGAINST STATE.**

Under Rev. St. of 1908, § 4409, fixing the pay of the militia, and providing for their expenses when in service, claims for the pay and expenses of the militia when called out by the Governor to suppress riots are claims against the state, for which certificates should be issued by the Auditor, under section 6239, unless there has been an appropriation therefor.

[Ed. Note.—For other cases, see States, Cent. Dig. § 134; Dec. Dig. § 137.*]

**2. STATES (§ 137*)—CLAIMS AGAINST—"AP-
PROPRIATION."**

Rev. St. 1908, § 4409, providing for the compensation of the militia and for the payment of necessary expenses out of the general fund of the state, is not an "appropriation" measure within the purview of Const. art. 5, § 33, declaring that no money shall be paid out of the treasury except by appropriations made by law, for the amount to be paid is wholly indefinite, and the statute only designates the fund out of which payment is made, and hence, under section 6233, providing that, in all cases where the laws recognize a claim for money against the state, the Auditor shall, when the claim has been approved by the Governor and Attorney General, give the claimant a certificate of the amount thereof, the State Auditor is bound to audit the claims and issue the claimant's certificates.

[Ed. Note.—For other cases, see States, Cent. Dig. § 134; Dec. Dig. § 137.*]

For other definitions, see Words and Phrases, vol. 1, pp. 471-473; vol. 8, p. 7579.]

**3. MANDAMUS (§ 164*)—DEFENSES—CHANGE
IN THEORY OF DEFENSE.**

In mandamus to compel the State Auditor to audit claims and issue certificates, in accordance with Rev. St. § 6239, to pay the militia, that official, having justified his refusal on the ground that the issuance of the certificates was illegal, cannot thereafter claim that he is ready to proceed under the statute as expeditiously as his time will permit.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 844-860; Dec. Dig. § 164.*]

**4. COURTS (§ 207*)—STATE COURTS—COLORADO
—SUPREME COURT—MANDAMUS.**

The Supreme Court has jurisdiction of an original proceeding in mandamus to compel the State Auditor to issue certificates to defray the expenses and compensation of the militia called out to suppress riots; the question being one of a public nature, and affecting the people of the entire state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 521; Dec. Dig. § 207.*]

**5. MANDAMUS (§ 147*)—MAINTENANCE—IN-
TEREST.**

Where the State Auditor refused to audit claims and issue certificates to defray the expenses of the militia called out by the Governor to suppress riots, the Governor has sufficient interest to maintain mandamus, for Const. art. 4, § 2, declares that the Supreme Court executive power shall be vested in the Governor, who shall see that the laws are faithfully executed, and the Governor as the commander in chief of the militia is charged with the duty of supplying it with subsistence and paying the men.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 288; Dec. Dig. § 147.*]

**6. MANDAMUS (§ 147*)—MAINTENANCE—IN-
TEREST.**

Const. art. 4, § 1, in naming the officers constituting the executive department of the state, headed by the Governor, includes the Auditor. Rev. St. 1908, § 6239, provides that, in all cases where the laws recognize a claim against the state, and no appropriation has been made, the Auditor shall audit and adjust the same, and, when it shall have been approved by the Governor and Attorney General, he shall give the claimant a certificate of the amount thereof. Held that, where the Auditor wrongfully refused to audit claims for the subsistence and payment of the militia, the Governor had sufficient interest to compel his action by mandamus, having the general supervision of the executive department; this being particularly true as the certificates to be issued by the Auditor and approved by the Governor are to be submitted to the General Assembly.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 288; Dec. Dig. § 147.*]

En Banc. Original petition by the People, on the relation of Elias M. Ammons, as Governor, for a writ of mandamus against Rody Kenehan, as State Auditor. Peremptory writ issued.

Fred Farrar, Atty. Gen., Francis E. Bouck, Deputy Atty. Gen., and Norton Montgomery, Asst. Atty. Gen., for petitioner. William H. Malone and William H. Scofield, both of Denver, for respondent.

MUSSER, C. J. By permission of this court, there was filed by the Attorney General a petition entitled "The People of the State of Colorado, on the Relation of Elias M. Ammons, as Governor of the State of Colorado, v. Rody Kenehan, as Auditor of State," for an original writ of mandamus. Upon the filing of the petition, an order was made for the issuance of an alternative writ directed to the Auditor. In this alternative writ it was alleged that the relator is the Governor, charged by the Constitution and laws with the duty of enforcing the laws and maintaining the peace of the state; that he is the commander in chief of the military forces, and by the Constitution and laws vested with the power of calling out the military forces to execute the laws and preserve good order in the state; that the respondent is the Auditor; that there arose in the counties of Huerfano and Las Animas a condition of great violence and lawlessness, growing in force and extent until it was beyond the control of the peace officers of these counties; that property was destroyed, human life deliberately and violently taken, and that the sheriffs of the aforesaid counties repeatedly informed the relator of their inability to restore law and order, and appealed to him as chief executive for assistance in executing the laws and suppressing violence; that thereupon the relator investigated the conditions existing in the said counties, and, deeming that the situation so demanded, issued an executive order to the Adjutant General, authorizing and directing

him to call into service and hold in readiness for immediate mobilization and action, and to mobilize, as many of the members of the National Guard of the state, in and near the Arkansas Valley, as may be necessary to maintain peace and good order in said counties; that thereafter, finding that conditions demanded further action, the relator, with the approval of the Attorney General made and issued to the Adjutant General an order directing that officer to order out and assume command of such troops of the National Guard as, in his judgment, might be necessary to restore and maintain peace and order in said counties, and to enforce obedience to the Constitution and laws of the state; that pursuant to the said orders parts of the military forces of the state were prepared, mobilized, and placed and kept in the field for the purpose of executing the laws and preserving and restoring peace and order in the said counties, and that, in the judgment of the relator, such action was and is necessary to the preservation of the laws and maintaining peace and order in the state; that the indebtedness incurred for expenses necessarily caused by these military movements includes the pay rolls of officers and members of the National Guard of the state, the necessary transportation, medical attendance and supplies, quarters, and subsistence, for which numerous claims for money exist against the state, and that no funds are available for the payment of the same; that the respondent has declared and still declares that he will not issue any certificates of indebtedness for and on account of any of the said claims unless ordered by a court so to do; that he has refused and still refuses to audit or adjust certain of said claims, though the same have been presented to and examined by him; that, among the claims which the Auditor refuses to audit and adjust, was the pay roll of Company A of the Second Regiment of the National Guard; that the pay roll contains the claims of the officers and men of that company, at the statutory rate of compensation, and that the same is true and correct and entitled to allowance by the Auditor; that, unless the lawful expense of the military forces called out by the Governor be promptly met by the audit and adjustment of the claims arising therefrom and by the issuance of certificates of indebtedness therefor, the executive branch of the state government will be irretrievably weakened, and the integrity and sovereignty of the state imperiled and impaired, the military forces demoralized, and anarchy substituted for the execution of the laws; that the refusal and delay of the Auditor was regardless of both the rights of the claimants and of the necessities of the state; that the unsettled conditions in the counties referred to still continue and may continue for a long period to come, and in the judgment of the Governor, it will be necessary for some time to keep mili-

tary forces in the field for the purpose of executing the laws and restoring and maintaining peace and good order throughout the state; that certificates of indebtedness can be negotiated at par if promptly issued; that, if the respondent persists in his present refusal and delay, the state government will not only be weakened and endangered but the faith and credit of the state will be jeopardized, and it will be impossible for the state to obtain services or commodities except at a much higher price, if at all, than would otherwise be the case, and large sums of money will consequently be lost to the state and uselessly wasted, unless this court shall see fit to command respondent to do his duty. The claims for money now existing against the state for the pay roll of Company A, and to various individuals and firms for transportation, subsistence, and supplies necessary, are set out, and it is alleged that the said claims are just and correct, and that the Attorney General and Governor have at all times stood ready, and they now stand ready, to approve of each and all of them and of all other just claims for money heretofore or hereafter arising because of the military operations had for the purpose of executing the laws and restoring and maintaining the peace and good order of the state. It is alleged that the Governor has no plain, speedy, or adequate remedy in the ordinary course of law, and that the exigencies of the case require immediate and final action by this court through the extraordinary process of mandamus.

The alternative writ required the Auditor to proceed forthwith promptly, and without unnecessary delay, to audit and adjust the claims described in said petition as well as all other claims that may be presented for audit and adjustment in connection with the use and movement of the military forces as set forth, and, when such claims have been found to be correct, and when they have been approved by the Governor and by the Attorney General, to issue promptly, and without unnecessary delay, certificates of indebtedness therefor, or to show cause, on a day named, why he should not do so.

To this alternative writ, the respondent made return. In the opinion of the court this return is not such as to put in issue any of the material facts alleged which are necessary to a determination of the questions involved. Such allegations of the return as it may be necessary to specifically mention will be noticed at the proper time in this opinion. The return in effect is a demurrer to the alternative writ, and was in effect so treated by the respondent in the oral argument and in his brief.

This action is brought to compel the Auditor to act in and to proceed with the discharge of his duties as set forth in section 6239, Rev. Stat. 1908, which, so far as is material to this case, is as follows: "In all cases where the laws recognize a claim for

money against the state, and no appropriations shall have been made by law to pay the same, the Auditor shall audit and adjust the same, and when the said claim shall have been approved by the Governor and Attorney General, he shall give the claimant a certificate of the amount thereof, under his official seal if demanded, and shall report the same to the General Assembly, with as little delay as possible, giving a statement in tabular form of the number, date of issue, and amount of each certificate, and for what purpose issued."

[1] Under this section, if a claim is one which the laws recognize as a claim for money against the state, and no appropriation has been made to pay such claim, it is then the duty of the Auditor to act and to proceed with the discharge of his duties as set forth in the section. The first question to be determined is, Are the claims which have been presented to the Auditor for audit and adjustment under that section such as are recognized as claims for money against the state? Second, If they are such claims, has any appropriation been made by law to pay them?

Section 4409, Rev. Stat. 1908, is as follows: "Officers and enlisted men when serving under the orders of the Governor or of a sheriff, mayor or judge, to prevent violation of the laws of the state, or to prevent or suppress riot or insurrection or to repel or prevent invasion, shall, until such time as other provision is made for the payment for the services rendered, receive pay out of the general fund of the state at the following rates: All commissioned officers shall receive the same pay as is paid to the United States army officers of like grade, less 20 per cent. Sergeant majors, quartermaster sergeants and hospital stewards shall be paid the sum of two dollars and forty cents per day for the first twenty days' service: First Sergeants and acting hospital stewards, two dollars and thirty cents per day for the first twenty days' service: Sergeants, two dollars and twenty cents per day for the first twenty days' service: Corporals, two dollars and ten cents per day for the first twenty days' service, and privates two dollars per day for the first twenty days' service. After twenty days' service one dollar less per day for each of the above mentioned non-commissioned officers and privates. The necessary transportation, medical attendance and supplies, quarters and subsistence, shall also be provided for them and a reasonable allowance shall also be made for animals necessarily used."

[2] The claims mentioned in the alternative writ are claims for the pay of officers and enlisted men serving in the field, under the orders of the Governor, to prevent violation of the laws of the state, and to prevent or suppress riot, and claims for transportation, supplies, and subsistence for such officers and men so engaged. It is plain that

these claims are such as are recognized by law, to wit, the very section last above quoted, as claims for money against the state. This much is conceded in the return of the Auditor. It is, however, contended by him that an appropriation has been made by law to pay such claims, and, as is evident from his return and brief, this contention is the real reason for his refusal to proceed in the discharge of his duties under section 6239. If no appropriation has been made out of which these claims may be paid, then we take it from the return and brief of the Auditor he concedes that he should proceed in the discharge of his duties as outlined in that section. The contention is that section 4409, quoted above, makes a continuing appropriation of so much of the general fund of the state as may be necessary to pay claims of the character of those under consideration. If by that section an appropriation has been made out of which the claims may be paid, then the Auditor is justified in his refusal to proceed under section 6239. On the other hand, if that section does not make an appropriation for the purpose of paying such claims, the Auditor is not justified in refusing to proceed, for there is no other law or section passed by the General Assembly or anything in the Constitution making an appropriation for the purpose of paying such claims.

Section 33 of article 5 of the Constitution provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." This section needs no construction. It construes itself. No exception is made whatever, nor is there anything in the Constitution to be read in connection with that section that will permit any money to be paid out of the treasury except upon appropriations made by law and on warrant. This much must also be taken from the return and brief as conceded by the Auditor. If we examine section 4409, by which the Auditor contends an appropriation was made out of which these claims may be paid, it is found that there is no limit to the amount of money which may be paid to the officers and enlisted men of the militia and for the necessary transportation, medical attendance, supplies, quarters, and subsistence. It may be \$10,000, or it may be \$1,000,000, so far as that section is concerned. It may be a part of the general fund, or all of the general fund. The mere fact that pay for the officers and enlisted men is fixed for one day does not fix the amount that may be expended for the purposes contemplated by section 4409. How many days are the officers and men to be paid for? How many officers and men will there be to pay? How much is to be paid out for transportation, medical attendance, supplies, and subsistence? There is nothing in the section or in any other law of this state that answers these questions. There is noth-

ing from which any designated amount can be computed as having been set aside for the purposes mentioned in the section.

The amount which may be thus expended in military operations is left by the section altogether indefinite and uncertain. In *Institute, etc., v. Henderson*, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398, several acts of the General Assembly were before the court. The one provided bounties for the destruction of wolves, coyotes, bears, and mountain lions. Another provided a premium for planting trees. And still another provided a premium for digging up loco or poison weed. The acts provided how and from what fund the bounties were to be paid, and fixed the amount to be paid for the destruction of each of the animals, for the planting of 100 trees, and the amount for each pound of weed dug up. While the court decided the case upon other grounds, it said that it was doubtful if these bounty statutes complied with the clause of the Constitution requiring an appropriation for the payment of money. In *Ingram v. Colgan*, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221, the remarks of this court, in 18 Colo., relative to permitting the disbursement of an indefinite amount of money, as was contemplated by the bounty acts, were quoted with approval, and in that case the California court held that the bounty act did not make an appropriation. The act provided that \$5 should be paid out of the general fund of the state treasury to any person who should kill or destroy a coyote. The court said that the fund from which the bounties were to be paid was explicitly designated; but the amount of money in the general fund devoted to the payment of these bounties was not specified. The court said that the language of the act lacked the first essential to an official appropriation, and that was to fix the amount that should be paid for bounties. In *State v. Moore*, 50 Neb. 88, on page 96, 69 N. W. 373, on page 376, 61 Am. St. Rep. 538 the court, after a long discussion of the history of appropriations and the meaning of the word "appropriate," said: "Having in view the origin and history of appropriations as well as the general lexicographic meaning of the word, to 'appropriate' is to set apart from the public revenue a certain sum of money for a specified object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other."

The Nebraska court had under consideration a statute providing for the payment of a bounty of a certain amount a pound upon each pound of sugar manufactured, and providing that, when any claim arose under the act, the Secretary of State should approve the same, and certify it to the Auditor, who should draw a warrant upon the treasurer for the amount due thereon. The court held that the act did not make an appropriation.

In *Ristine v. State*, 20 Ind. 328, the court

had under consideration an act relating to the payment of interest upon the state debt. The Constitution of Indiana had a provision similar to ours, that no money should be paid from the treasury except in pursuance of appropriations made by law. After a discussion of the history of appropriations, the court said: "Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the Legislature given at the proper time, and in legal form, to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state."

In Nevada there was an act that provided that it was the duty of county commissioners, in any county in which public arms, accoutrements, or military stores were had or should thereafter be received for the use of the militia, to provide a suitable and safe armory, and that all claims for the expense of procuring and maintaining armories should be audited and approved by the board of military auditors, and presented to the state comptroller, who should draw his warrant upon the state treasurer for the amount, and, upon presentation of the warrant, the state treasurer should pay the same out of the general fund. Such expenses were limited to not exceed \$75 per month for any company. In *State v. La Grave*, 23 Nev. 25, 41 Pac. 1075, 62 Am. St. Rep. 764, it was contended that fixing the maximum amount to be paid each company and directing the comptroller to draw his warrant and the treasurer to pay it constituted an appropriation; but the court said: "These matters alone do not accomplish that end. To constitute an appropriation there must be money placed in the fund applicable to the designated purpose. The word 'appropriate' means to allot, assign, set apart or apply to a particular use or purpose. An appropriation in the sense of the Constitution means the setting apart a portion of the public funds for a public purpose." And on page 27 of 23 Nev., page 1076 of 41 Pac. (62 Am. St. Rep. 764), the court said: "Under existing facts it is improbable that the provisions of the statute were intended as an appropriation, because the number of military companies that could have received its benefits was indefinite and uncertain." And the court held that no appropriation was made.

In *Clayton v. Berry*, 27 Ark. 129, it appears that there was in the Constitution of Arkansas a provision similar to ours, making necessary an appropriation, and the court said: "The expression 'appropriated by law' means the act of the Legislature setting apart, or assigning to a particular use, a certain sum of money to be used in the payment of debts or dues from the state to its creditors."

In *McCauley v. Brooks*, 16 Cal. 11, it is said: "To an appropriation within the mean-

ing of the Constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid."

It is to be observed that each of the foregoing definitions includes a designation of a certain amount as being set apart, allotted, or assigned for a specified purpose, as a requisite to constitute an appropriation. Special emphasis is laid upon the necessity of fixing a specific amount in an appropriation in the case of *Leddy v. Cornell*, 52 Colo. 189, 120 Pac. 153, 38 L. R. A. (N. S.) 918, Ann. Cas. 1913C, 1304, wherein this court said: "By no process of reasoning can it be held that the words of the act above quoted, considered in the light of the whole act, show a clear, or any, purpose on the part of the Legislature to create a continuing appropriation. Something more than a mere duty to pay must be shown. The act itself does not fix the specific amount which the secretary is to receive, but merely places a limit beyond which no Legislature in the future may go, until the act is amended, in making appropriations for its payment. No definite amount as salary is fixed by the act, and the Legislature was without information as to what it might be. Indeed, the commission is not directed by the statute to appoint a secretary at all, but has power to do so should there be occasion. A secretary might never have been appointed, and a salary might never have been required. In view of these facts, how can it fairly be said that the Legislature created a continuing appropriation? The situation being thus uncertain, at the time the act was passed, as to the amount of the salary, or as to whether there would ever be necessity for a salary, under the authorities cited it will not be assumed that a continuing appropriation by the Legislature was created to cover its payment."

This court, while upholding the doctrine of continuing appropriations in *Re Continuing Appropriations*, 18 Colo. 192, 32 Pac. 272, said: "When such appropriations are for the whole, or for a definite part, of a certain special fund, we are of the opinion that they furnish sufficient authority for the disbursement of such fund."

The case of *Sweeney v. Commonwealth*, 118 Ky. 912, 82 S. W. 639, is cited by respondent as supporting his contention. That decision does not appear to be based on any constitutional provision requiring appropriations for the payment of money. The decision is based solely on the terms of a statute. Indeed, the court says that the cases from Indiana, Arkansas, and California which we have cited above, and which were made under constitutional provisions like ours, were not applicable in the Kentucky case. If that was so, then that case is not applicable here.

[3] It is claimed in the brief of the Auditor that in his return he denied that he refused to audit and adjust the claims, and alleged that he would do so as expeditiously as his

time would permit. The substance of the allegation in the alternative writ is that he has refused to proceed under section 6239. In his return and in his brief he has taken the position that it is not his duty and that it would be unlawful for him to proceed under that section. He will not be permitted to take these inconsistent positions to enable him to escape the order of a court, if such order should be made. He cannot be heard to say that it is not his duty and that it would be unlawful for him to proceed under that section, and, at the same time, assert that he is ready and willing to proceed thereunder as expeditiously as his time will permit. His real position is that he will not even commence to act under section 6239, because, as he asserts, that section is not applicable. Under such circumstances, there is no question before us about what discretion he may have after he proceeds to act under that section. His position is a refusal to act thereunder at all. With this, his real position, plainly in view, there can be no question of the right and authority of the court to order him to act, if it is his duty so to do.

Inasmuch as it appears from what has been said that the claims are such as are recognized by the laws of this state, and that no appropriation has been made by law to pay the same, it is the plain duty of the Auditor to proceed therewith under that section.

[4] It is the contention of the respondent that this is not a case that will warrant this court in exercising the original jurisdiction given it by the Constitution. The case of *Wheeler v. Northern Colorado Irrigation Co.*, 9 Colo. 248, 11 Pac. 103, is referred to as denying the right of the court to assume jurisdiction in this case. We think, on the contrary, that that case makes it the imperative duty of this court to exercise its original jurisdiction. In that case it is said, speaking with reference to the original writs which the Constitution empowers this court to issue: "We believe that original jurisdiction of the writs mentioned, except in cases presenting some special or peculiar exigency, should not be here assumed, save where the interest of the state at large is directly involved; where its sovereignty is violated, or the liberty of its citizens menaced; where the usurpation or the illegal use of its prerogatives or franchises is the principal, and not a collateral, question." And on page 256 of 9 Colo., page 107 of 11 Pac., it is said: "Cases of which this court should take original cognizance, directly involving, as in general they must, questions of public right, should be brought in the name of the people. The state or the public being the main party in interest, although individual advantage may be gained, the person instituting the proceeding should appear as relator. It is also eminently fitting that such causes be inaugurated before this court by the At-

torney General, or with his consent, or, at least, that the refusal of that officer to act be shown. But we do not declare such consent or refusal absolutely necessary. If the main object of the proceeding is to vindicate a public right, to protect the interest of the state in its sovereign character, to prevent the illegal use of a public franchise as against the people generally, or a considerable portion thereof, or if it be to subserve the public interest in any of the other matters heretofore mentioned, a citizen interested could probably institute the proceeding in the name of the people without consulting the Attorney General."

It is thus seen that, when a case involves a question of a public nature, one that affects the whole state, or its government, or the administration of its affairs as this one does, then unquestionably it is the duty of this court to assume original jurisdiction, and to issue such writs as it is empowered to do for the purpose of giving the relief demanded. It is not necessary to enter upon any lengthy discussion of the public nature and character of the matters involved in this action. It affects directly the military arm of the government in the field. The peace and order of the state are at stake. The whole state is interested in having peace and good order preserved within its entire borders. That this is a case of publici juris cannot be denied.

[5, 6] The contention is also made that the Governor is not the real party in interest, that he is not beneficially interested, and that therefore this action cannot be maintained. It is true that private interests of claimants are involved; but the paramount interest is the interest of the state. It involves the pay for its military and the maintenance thereof in times of disorder and violence. The Governor is the commander in chief of this military, and is charged with the duty of supplying it with subsistence, and in paying the men as the statute provides. Our Constitution, in section 2 of article 4, says: "The supreme executive power of the state shall be vested in the Governor, who shall take care that the laws be faithfully executed." Section 1 of article 4 names the officers constituting the executive department of the state, headed by the Governor, and including among others the Auditor. As it is the express duty of the Governor to see that the

laws be faithfully executed and to perform the other duties mentioned, who is more directly interested in seeing that the officers of the executive department, of which he is the supreme head, shall execute the duties imposed upon them by law, when the performance of those duties is necessary before the Governor can properly discharge the duties imposed upon him? Furthermore, it is the duty of the Governor, under this very section 6239, to act upon these claims after they have been audited and adjusted by the Auditor. How can he perform his duty in this behalf, unless the Auditor performs his? Surely he has the right to call to his aid the power of a court under such circumstances as exist here. In 26 Cyc. at page 398, it is said: "State officers may bring mandamus to compel the performance of official duties falling under their supervision, or the performance of which is necessary to enable them to perform their duties."

Furthermore, these claims, when audited and adjusted by the Auditor and approved by the Attorney General and Governor, must be reported to the General Assembly, and the General Assembly should then provide for their payment. The adjustment by the Auditor and the approval by the Governor and Attorney General will be evidence to the General Assembly of the justness of these claims at a time, perhaps, when the evidence concerning them has been lost or cannot be readily found. The General Assembly has thus provided a means by which these claims may be passed upon by certain officers of the state when the time of their accrual is recent and the evidence concerning them is fresh. Here is a duty devolving upon these three officers of the executive department, which they owe not only to the people of the state but to the General Assembly itself. This is a law of the state. It was, no doubt, the intention of the General Assembly that the law be executed, and there is no one more interested as an official to see that this law is executed for the benefit of the General Assembly than the Governor, upon whom is cast the duty of seeing that all laws are executed.

Thus it has been seen that it is the plain duty of the Auditor to proceed with these claims as provided in section 6239.

Let the alternative writ be made peremptory.

COLORADO MORTGAGE & INVESTMENT CO., Limited, v. GIACOMINI.

(Supreme Court of Colorado. June 2, 1913.
On Petition for Rehearing, Dec. 1, 1913.)

**1. LANDLORD AND TENANT (§ 125*)—SUIT-
ABleness OF PREMISES—WARRANTY.**

In the absence of fraud, false representations, or deceit as between landlord and tenant, and without any express warranty or covenant to repair, there is no implied contract that the premises are fit for habitation or for the particular use intended, that they are safe for use, or that they shall continue fit for the purposes for which they were demised.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 441-443; Dec. Dig. § 125.*]

**2. LANDLORD AND TENANT (§ 167*)—HOTEL—
DEFECTIVE ELEVATOR—INJURY TO GUEST—
SEMI-PUBLIC PLACE.**

Defendant company owned a four-story hotel, furnished and equipped with modern facilities, including a passenger elevator, which was the only feasible means of reaching the upper floors. The investment company rented the hotel and facilities to C., with knowledge that the elevator was defective and liable to "creep," the lease providing that he should keep the elevator in good condition and pay one-half the cost of accident insurance, covering accidents in connection therewith, the landlord agreeing to pay one-half the cost of keeping it in repair, reserving the right to enter and inspect the premises, and, if not satisfactory, to terminate the lease. *Held*, that the building and its equipment was a semipublic place, and that defendant company was liable for injuries sustained to a guest owing to the nonrepair of defects in the elevator, existing when the lease was made.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

**3. LANDLORD AND TENANT (§ 167*)—HOTELS—
DEFECTIVE APPLIANCES—NUISANCE.**

Where a hotel and equipment, including an elevator, were leased to an operating tenant at a time when the landlord knew that the elevator was the only feasible means of reaching the upper floors, the lessor's act in renting the premises without remedying dangerous defects in the elevator amounted to the maintenance of a nuisance on the premises, sufficient to charge it with liability for injuries to a guest resulting from such defect.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

**4. LANDLORD AND TENANT (§ 167*)—RENTED
PREMISES—DANGEROUS APPLIANCES—NEG-
LIGENCE.**

Where a landlord rented a hotel with a defective elevator installed therein, the question of the landlord's negligence depended on whether the elevator was dangerous and unsafe when used for the purposes and in the ordinary manner intended, and not on whether it was safe and harmless when let alone, or whether it was possible to operate it without accident.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

**5. LANDLORD AND TENANT (§ 167*)—HOTEL—
DANGEROUS APPLIANCES—DEFECTIVE ELE-
VATOR—INJURIES TO GUEST—PROXIMATE
CAUSE—CONCURRING NEGLIGENCE.**

Defendant landlord leased a hotel building and its equipment, including a defective elevator, to be operated by the tenant. The defect

was such that when the car was left stationary it was liable to creep up from the floor at which it was left. The elevator well was located in a part of the lobby which was not properly lighted. Plaintiff, a guest of the hotel, having been called to the lobby, rode down in the car. The pilot left the car, with the door open, to attend to other duties, and plaintiff, on returning to the elevator, not noticing that the car had crept up in the meantime, walked into the elevator well, and fell to the basement, and was injured. *Held*, that the negligence of the landlord in permitting the elevator to be and remain in a defective condition was a proximate cause of plaintiff's injuries, concurring with the negligence of the pilot in leaving the car unattended with the door ajar, and that defendant was therefore liable, notwithstanding the negligence of the pilot, who was the servant of the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

**6. LANDLORD AND TENANT (§ 167*)—DEFEC-
TIVE APPLIANCES—ANTICIPATED OR FORE-
SEEN RESULTS.**

Where a hotel guest was injured by reason of a defect in the elevator, it was not essential to establish actionable negligence that the particular accident should have been anticipated or foreseen, or that it should be anticipated that an accident would occur in the particular manner of the one in question, but it was sufficient if a person of ordinary prudence would have anticipated that in the operation of the elevator with the existing defects an accident was liable to happen.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.*]

On Rehearing.

**7. LANDLORD AND TENANT (§ 169*)—HOTELS
—DEFECTIVE ELEVATOR—EVIDENCE.**

In an action against a landlord for injuries to a guest of the tenant operating the leased premises as a hotel, by reason of a defect in the elevator, evidence *held* to warrant a finding that the defect existed at the time of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 169.*]

Appeal from District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by Margaret Giacomini against the Colorado Mortgage & Investment Company, Limited, and another. Judgment for plaintiff, and defendant named appeals. Affirmed, and rehearing denied.

This action was instituted by the appellee against P. W. Copeland and the appellant to recover damages sustained by her upon June 27, 1908, occasioned by her falling down the elevator shaft in the Columbia Hotel, situate in the city of Denver. It is alleged that the accident was caused by the negligence of the defendants in permitting the elevator and appurtenances thereto to be and remain out of repair. Judgment was in her favor against both defendants in the sum of \$10,000. The appellant brings the case here on appeal.

The appellant was the owner of the hotel, its furniture and fixtures. It was being operated under a written lease by its codefendant, P. W. Copeland. This lease was for the term of one year, commencing Novem-

ber 1, 1907. It calls for the Columbia Hotel situate on the corner of Seventeenth and Market streets, East Denver, together with the furniture, fixtures, machinery, cooking utensils, beds, bedding, etc., as enumerated in a schedule, excepting from the lease certain storerooms fronting on Seventeenth street occupied by others. The lease indicates that the property was rented fully furnished for a hotel. It provided that the lessor should not be required to bear any expenses for supplies of any kind, nor for heating, lighting, or repairing, nor for repairs to furniture, fixtures, or utensils, nor for any other purposes except taxes, insurance, and water rent; that the lessee would keep the elevator and all other machinery in good order, and, in addition to the rent, pay to the first party annually, when due, one-half the costs of accident insurance policies, covering accidents in connection with the elevator; that the lessor reserved the right at all times to enter and inspect the premises, and if, in its judgment, the premises, furniture, fixtures, machinery, and all other equipments were not being properly cared for, or the business not being managed in a manner satisfactory, it had the right to terminate the lease by giving 10 days' notice previous to the end of any calendar month; that the lessee agreed to keep the interior of the hotel in repair and good order, including all articles therein, and in case the articles should wear out, become broken or damaged, to replace them; that all articles placed in the hotel in replacement of any mentioned in the schedule should be the property of the lessor; that if the property became untenable by reason of fire, or otherwise, the rents should cease until the premises were rebuilt, but nothing should be construed to compel the lessor to build or repair in case of destruction, unless it so desired. Another clause reads: "It is agreed by the parties hereto that all expenses for repairs to boilers, elevators or pumps shall be borne equally by both." It is shown that at the time of the accident the appellant had a \$5,000 insurance policy in force, protecting it against accidents caused by this elevator.

The hotel fronts upon Seventeenth street, one of the main thoroughfares of the city between the Union Depot and the main portion of the business district, being about three blocks from the depot. It has four stories and a basement, and contains about 100 sleeping rooms. The elevator is situate in the main office or lobby, about 30 feet from the front entrance. It is back of the business office. There is a porch in front of this room. The light in the daytime comes from the front of this room, and that which reflects down from the fourth story of the building through a skylight in the top of the elevator shaft. The elevator cage has a top or tight roof. Upon account of these facts the light in that portion of this room is not good, and is always poor in the elevator shaft at this

floor. One former employé testified: "To be able to see around and see what you are doing the lights have to be lit in the office in the afternoon. * * * If it was not a bright day and the lights were not lit it was almost impossible at that time of day to read a name on a package while in the elevator at that floor." Another witness says: "Never light enough in the elevator to read a newspaper." There were no lights lit at the time of the accident. According to the evidence of the plaintiff's witnesses the elevator was out of repair at the time of the execution of the lease, and thus continued up to the time of the accident. The printed abstract of the record is so meager that it is nearly impossible to get an intelligent idea of the condition of the elevator therefrom; but, as we understand it, the substance of these defects was in its machinery which caused leaking of the cups in the main valves, or the packing in the piston leaking, on a wearing of the cups or the valves, some of which created a rumbling noise and that upon account of these defects the elevator cage, after being properly stopped, when left alone, would creep (that is move slowly), upon account of its leaky condition, in order to counteract the leaking in the cups, valves, or piston. The ceiling of the elevator cage had originally been fitted for an electric light, but prior to the execution of this lease it had been dismantled or disconnected, so that there was no wire connecting it with the light plant. It was impossible, without having this condition repaired, to have an electric light within the cage. There was evidence to show that all these conditions were in existence at the time of the execution of this lease, and were known, or, in the exercise of reasonable care ought to have been known, to the lessor, and to the lessee at that time or soon thereafter, but regardless of this they were allowed to thus continue up to the time of the accident.

Upon June 28, 1908, the appellee (who lives at Sterling, Colo.) came to Denver with her mother. They stopped at this hotel, where she was assigned to a room upon the second floor. Between 4 and 5 o'clock upon the afternoon of June 27th the elevator boy came to the second floor and informed her that she was wanted at the telephone, which was situate upon the ground floor. She went to the elevator, and was taken, by the boy who carried the message, to the first floor, where, upon leaving the elevator, she immediately went to the telephone booth and conducted a very short conversation with her brother, who was holding the line. She immediately went back to the elevator to be taken to the second floor. Finding the door open, and it being, as she says, "quite shadowy there," she assumed that the elevator was as she had left it but a moment or two before, and walked into what proved to be vacant space, falling to the cement basement about 12 feet below, and receiving serious and permanent

injuries, for which the damages were awarded.

The young man in charge of the elevator testified, that before bringing the plaintiff down he had received a call for drinks to be secured at the bar; that after stopping the elevator at the first floor, when the plaintiff got out, he heard a bell ring, and, presuming it was a second call for the drinks, he followed her out of the elevator, going to the bar to get the drinks, intending to return at once, which he did; that he thinks he left the door of the elevator open; that the drinks were immediately furnished him, but just as he came out of the bar into the main office where the elevator was situate, he observed the plaintiff entering the door, and saw her fall. She also testified that her eyesight was not perfect, although reasonably good for all ordinary purposes; that she was then 28 years old; that when she returned to the elevator she found the door open, looked in, and thought that the elevator was standing there, and that the pilot was inside, but did not make an investigation to establish this latter fact before entering. At the time she entered the door, according to the testimony of her witnesses, the elevator cage, upon account of its defective condition, had crept upwards and the bottom of the cage was then some six or seven feet higher than this floor. She was between 5 feet 2 inches and 5 feet 5 inches in height, and did not come in contact with the cage when she entered the door. The elevator boy testified that the duties allotted to him by Mr. Copeland were not limited to running the elevator, but he was required to answer bell calls, carry water to the rooms, drinks, etc., and otherwise to wait upon the guests; that these latter duties were not usually required of elevator boys in hotels where he had formerly worked; that there was a lock to the door of the elevator shaft upon this floor, but he did not have a key to it; that he usually left the elevator doors open when answering calls; that in case he closed this door it became fastened, and it was then necessary to get a knife, blotter, or some other narrow instrument and slip it through the crack and raise the latch, and the door could then be pushed open from the outside. Mr. Copeland testified that the duties required of his elevator pilots were not limited to running the elevator, but that they were required to perform certain other services usually belonging to bellboys.

William J. Miles, of Denver, for appellant.
Allen & Webster, of Denver, for appellee.

HILL, J. (after stating the facts as above). The assignments of error present two questions: First, whether under the facts disclosed the appellant can in any event be held liable for the damages to the plaintiff, occasioned in whole or in part by the defective condition of the elevator; and, second, if so,

was its defective condition the proximate cause of the injury?

[1] We have been furnished with many citations of authorities upon the first question. The conflict among some of them cannot be reconciled. The great mass of the cases appears to recognize certain well-defined legal principles. The first is that as between the landlord and tenant, when there is no fraud, or false representations, or deceit, and in the absence of an express warranty or covenant to repair, there is no implied contract that the premises are suitable or fit for habitation, or for the particular use intended, or that they are safe for use, or that they shall continue fit for the purposes for which they were demised. These general rules have been recognized and followed in this jurisdiction. *Davidson v. Fischer*, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 267; *Thum v. Rhodes*, 12 Colo. App. 245, 55 Pac. 264.

[2] There are certain exceptions, however, to the rules exempting the owner from liability for injuries to third persons caused by defective conditions in leased premises. The cases recognizing these exceptions hold that where the property is leased for public or semipublic purposes, and at the time is not safe for the purposes intended, or when there is a dangerous condition on the premises which is in the nature of a nuisance, and the owner knew, or by the exercise of reasonable diligence ought to have known, of such conditions, he cannot evade liability to a third person for damages resulting from such conditions, but it is his duty to make such property reasonably safe for the purposes intended, or to discontinue the conditions which are in the nature of a nuisance, as the case may be.

In *Stenberg v. Willcox*, 96 Tenn. 163, 33 S. W. 917, 34 L. R. A. 615, it was held: "Where unsafe premises are leased, to be used as a boarding house, the lessor, if he knew the unsafe condition of the premises, or could have known it by the exercise of reasonable care and diligence, is liable to the lessee's guest or boarder who has sustained personal injuries as the result of such unsafe condition of the premises." The injury was occasioned by the falling of a defective back porch. It appears that the lessee knew the condition of the porch at the time he rented the premises, and claimed that the lessor promised to put it in good repair. However, the case was disposed of upon the theory that where the landlord leased premises in a dangerous and unsafe condition, when he knew, or by the exercise of reasonable diligence and care might have known, of such unsafe condition, and the boarder did not know of such unsafe condition and could not have known of it by the exercise of reasonable diligence and care, the landlord was liable, and not upon any contract relations between the landlord and tenant of which the boarder

may have known nothing, and to which she was not a party. The contention was made that the tenant alone should be held liable; that if the plaintiff was a guest or boarder of the tenant, then the tenant, and not the owner, must be held liable for such injuries, even though the defect existed when the lease was made, on the theory that such person would never have suffered injury from the defects if she had not entered the premises, and such entry was not made at either the request or invitation of the owner, but upon the invitation of the tenant who held himself out to the public as the keeper of a boarding or lodging house. In response to this argument the writer of the opinion, at page 165 of 96 Tenn., at page 917 of 33 S. W. (34 L. R. A. 615), says: "The language is substantially the same as in *Shearman & Red. on Negligence*, § 711; but the same author says in the same section: 'If the landlord lets the premises for a purpose which he knows, or ought to know, it to be unfit for, knowing that strangers will be invited there, it has been held that he is liable to them.' And the same author says (section 709): 'Even the entire surrender of control by the landlord does not relieve him from liability to third persons for defects which existed in the premises when he parted with the control, not even if the tenant had agreed to make repairs,' etc. It clearly appears by the proof in this case that the defendant knew the premises were to be used as a boarding house, recommended it for this purpose, and urged its location near the Union Depot as a desirable feature for this purpose." This matter was again gone over by the Supreme Court of Tennessee in *Willcox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761, where this same doctrine was again approved, and many cases cited in support of their former position.

In *Copley v. Balle*, 9 Kan. App. 465, 60 Pac. 656, it was held that the owner of property having a dangerous excavation thereon, known to him when he leased it to another to be run as a hotel and restaurant, without making reasonable provision for the protection of its patrons from falling into said excavation, is liable for the damages resulting therefrom. At page 467 of 9 Kan. App., at page 656 of 60 Pac., the court said: "The evidence in this case warranted the jury in finding that the plaintiff in error was negligent in leasing the property to be used for a public purpose without providing for the protection of patrons from the danger of injuries by reason of the excavation thereon." As authority for this statement the court cites *Edwards v. N. Y. & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659, which is a leading case upon this subject, in which, after announcing the doctrine heretofore recognized, the court said: "Therefore, if any responsibility in this case attaches to the defendant, it cannot be based upon any contract obligation, but must rest entirely upon its delictum.

If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which will, in many cases, impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But where the landlord has created no nuisance, and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other delictum which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes liability upon him for injury to the person or property of any one who may lawfully be upon the premises using them for the purposes for which they were demised. If one builds a house for public amusements or entertainments, and lets it for those purposes, knowing that it is so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the persons injured through his carelessness. And this rule of responsibility goes far enough for the protection of lessees and of the public generally. * * * It imposes liability upon the landlord for his delictum, and the tenant is also liable, not only for his negligence, but also upon the authority of the case of *Francis v. Cockrell*, by virtue of an implied contract which he makes with all the persons whom, for a compensation, he invites or induces to enter his building to witness public entertainments given therein by him or under his supervision." In this case the building was leased for public exhibitions; held, that the lessee had changed the conditions under which it was expected by the lessor that it would be managed, for which reason he was not liable; but, had it been used for the purposes and in the manner contemplated under the terms of the contract, and it was then demonstrated that it was unfit for these purposes, he would have been held for the damages sustained. Four members of the court

were of the opinion that he should be held under conditions as disclosed.

In *Reichenbacher v. Pahmeyer*, 8 Ill. App. 217, it was held that when a landlord rents premises in a ruinous and dangerous condition, and an injury results therefrom to a third person, the landlord is liable; that suffering premises to be constructed or to become in a dangerous and unsafe condition is a nuisance, and if the landlord demises the premises in that condition, he is liable for injuries resulting therefrom to third persons lawfully upon the premises. In this case the owner leased a building for a hotel in which was a public barroom. The chandelier in the barroom was in a defective and dangerous condition, known to the landlord at the time of the execution of the lease, but was not apparent to an observer. The plaintiff, an employé of the lessee, was injured by the falling of this chandelier. The court, at page 218 of 8 Ill. App., said: "A nuisance is anything that unlawfully worketh hurt, inconvenience, or damage (3 Bl. Com. 216), and it may result from nonfeasance or negligence as well as from misfeasance or malfeasance (Wood on Nuisances, c. 1). It is said in *Shearman & Redfield on Negligence*, § 56: 'The rule seems to be that if the injury results from the negligence of the owner either in constructing or upholding the property, he is responsible, but that he is not in general responsible for the negligence of the tenant in the use of the house.' Wharton on Negligence, § 727a, and Wood on Nuisances, § 141. It is also, no doubt, true that in the leasing of premises there is no implied warranty that they are fit for a particular use, and that liability, if any, in this class of cases does not spring from contract, but must be predicated upon the negligent act or omission of the landlord, the same being the proximate cause of the injury, in reference to a matter where it was his duty to use ordinary care out of respect to the rights of others liable to be thereby directly involved, and for an injury thus arising a recovery may be had where there is no such contributory negligence on the part of the plaintiff as would bar the remedy in other actions for negligence."

In *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731, the owner of a building erected for rent had constructed it so imperfectly that it was incapable of supporting the burden imposed upon it by the business for which it was intended; it suddenly fell, injuring a laborer employed by the lessee through no carelessness of his. The owner was held for the damages sustained.

In *Swords v. Edgar et al.*, 59 N. Y. 28, 17 Am. Rep. 295, the owner of a pier leased it while in an unsafe condition. During the continuance of the lease the plaintiff's intestate, who, by reason of his occupation, was lawfully using the pier, was injured by the pier giving way upon account of its defective construction. The owner was held

liable. After an exhaustive review of the authorities it was said that suffering the pier to be in such a state as to become dangerous to those lawfully using it was the creation of a nuisance, and the lessor was liable if he created the nuisance and demised the premises in that condition, and was receiving a benefit therefrom in the way of rent, or otherwise, at the time of the injury.

In *Todd v. Flight*, 99 English Common-Law Reports, 377, it was held that if the landlord rented premises in a ruinous and dangerous condition, resulting in an injury to a third person, he must respond. After examining and analyzing a number of cases, the court said: "These cases are authorities for saying that, if the wrong causing the damage arises from the nonfeasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases."

In *Nugent v. B. C. & M. Railroad*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, damages were awarded to a railroad brakeman, an employé of the lessee, for personal injuries occasioned by reason of the negligent construction of the lessor's station house, which was then in the possession of the lessee. The owner attempted there, as here, to defend upon account of its lease. The plea was held not well taken. The opinion states that the common law imposed upon the lessor a duty to the public, independent of contract and coextensive with its lawful use, to keep its road and its appurtenances in a reasonably safe and proper condition. It is also said that the action was *ex delicto* for an injury caused by a neglect of duty created by law, and that privity is not essential to the maintenance of an action of tort therefor. At page 77 of 80 Me., at page 802 of 12 Atl. (6 Am. St. Rep. 151), the court said: "We are also of opinion that the defendant is liable, under the rule which governs the responsibility of a lessor of demised premises for their condition. For it is settled law, that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity, to persons lawfully upon them; for by the letting for profit he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a nonfeasance." Numerous cases are cited to support this position when applied to a private nuisance or a semipublic place.

In *Joyce v. Martin*, 15 R. I. 558, 10 Atl. 620, defendant was the owner of a defective wharf, which was used in connection with a place of public resort. He leased both, knowing the defect, to his codefendant, who was then ignorant of it, but who continued

to use both after learning about it. In an action for damages to the plaintiff, who had been injured by the defect, it was held that the lessor and lessee were jointly liable. This case likewise cites many authorities to support its conclusion.

In *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159, the action was by a minor for damages sustained by him by the death of his parents, who were drowned by reason of the defectiveness of a wharf in possession of the defendant's tenant. The instruction complained of was "that if they found that the defendant was the owner of the wharf, and that he rented it out to a tenant, and *that at the time of the renting the wharf was unsafe, and defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and that the accident happened in consequence of such condition, the plaintiff was entitled to recover.*" The instruction was held good. The court cited *Owings v. Jones*, 9 Md. 108, where the following rule was approved: "Where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable for injuries resulting from such nuisance." Continuing, on page 337 of 66 Md., on page 700 of 7 Atl. (59 Am. Rep. 159), the court said: "A wharf, furnishing the only mode of ingress and egress to a summer resort, where crowds were invited to come, if in an unsafe and dangerous condition is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition, or having by the exercise of any reasonable care the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors."

In *Patterson v. Jos. Schlitz Brewing Co.*, 16 S. D. 33, 91 N. W. 336, it was held that "the owner of a building, who negligently allows it to become a nuisance before he leases it, is liable for injury to an employé of the tenant from its fall after he leases it, though he does not covenant in the lease to repair, and in such case it is immaterial whether it was leased for a dwelling or otherwise." With reference to the liability of the owner for injuries to persons caused by defective and unsafe buildings, at page 45 of 16 S. D., at page 339 of 91 N. W., the court said: "The following rule may be regarded as settled: If when let, the premises are in a condition dangerous to the public, or with a nuisance thereon, the owner may be liable to strangers for the injuries resulting from such condition or nuisance if he had notice of the dangerous condition of the building, or could, by the exercise of ordinary care and diligence, have ascertained its dangerous condition. By renting the

premises and receiving rent therefor he is to be regarded as authorizing the continuance of the nuisance."

This principle is recognized and stated in *Metzger v. Schultz*, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. Rep. 323, where it is said: "It is also the general rule that the occupier of lands is *prima facie* responsible for any nuisance maintained thereon, and not the owner. But to this rule there are several well defined exceptions. The owner is responsible if he creates a nuisance and maintains it. He is responsible if he creates a nuisance and then demises the premises with the nuisance thereon, although he is out of possession. He is liable if a nuisance was erected on the land by a prior owner or by a stranger, and he knowingly maintains or continues it. He is liable if he demised the premises and covenanted to keep them in repair, and omits to repair, thereby creating a nuisance. He is liable if he demise the premises to be used as a nuisance, or to be used in any way so that a nuisance will necessarily be created. * * * If a landlord demise his property, the law requires him to know its condition at the time he accepts a tenant. The rights of others are frequently involved by the condition in which the premises are maintained. Any person who conducts upon his premises any dangerous business, or has thereon any dangerous machinery or substance, not in themselves unlawful, is in duty bound to exercise reasonable care and vigilance to see that no harm comes to others in consequence thereof. But the landlord is not an insurer. There are many businesses, machinery, and appliances not nuisances *per se*, that are attended with danger. When the landlord has exercised reasonable care in respect thereto, he is exonerated from liability."

The same rule is recognized in *Burner v. Higman & Skinner Co.*, 127 Iowa, 590, at page 588, 103 N. W. 802, at page 805, which involved liability in the operation of a freight elevator. The court said: "As this was a freight elevator, they were not bound to the highest degree of care, but were required to use ordinary and reasonable care in protecting and lighting this elevator well or shaft, so that persons rightfully upon the premises might not be injured thereby. Had they retained no control over the elevator, there would have been no liability, in the absence of a showing that at the time they leased the premises there was a nuisance, of which they had knowledge, and which it was their duty to abate. But as landlords they had the right to lease their premises in their then condition, and there was no covenant, either express or implied, to repair, or to keep the premises free from danger, except to the public in general. They could not, of course, by leasing the premises absolve themselves from any duty they owed to the public; but, as to private individuals who came upon the property by invitation of the

tenants, they were under no duty, save as they retained control over the elevator shaft or well." Then follow citations of authorities, after which the court said: "The cases are not harmonious on these propositions, but, in most of those holding to a contrary view, the premises were devoted to a public or semipublic purpose, of which the lessor had notice, and were not put to merely private uses, as was the building in this case. Most of the authorities may be harmonized when this distinction is kept in mind. If the premises are devoted to public or semipublic purposes, or if there be a duty owing to the public in general, the landlord cannot absolve himself from liability by leasing them to a tenant, for he is under an affirmative duty, which he cannot so delegate to another as that failure of that other to repair makes him, and him alone, responsible for the injury."

The latest case we have found upon the subject is that of *Bailey v. Kelly*, 86 Kan. 911, 122 Pac. 1027, 39 L. R. A. (N. S.) 378; a girl 16 years of age was drowned in a cistern; she was a servant of the tenant. The defective condition of the cistern was known by both landlord and tenant, although unknown to the servant. It was held that where a nuisance dangerous to life is created by the owner on his premises, or through his negligence is suffered to remain there, he cannot, by leasing the property to another, avoid his own liability to a person who is rightfully upon the premises, and who, without fault, is injured by reason of such nuisance; that this liability extends to a servant of the tenant, notwithstanding the tenant, by reason of his own fault, or neglect, or knowledge of the danger, could not have maintained an action against the owner for an injury suffered by himself. The opinion discloses a very careful research of the authorities pro and con upon the subject, and particularly the phase of the case by which the landlord sought to escape liability because the deceased was a servant of the tenant, under the general rule announced in 24 Cyc. p. 1119, which is that the right to recover against the landlord by a subtenant, guest, or servant of the tenant is the same as the tenant's right would be had the accident happened to him, but he can have no greater claim against the landlord than the tenant himself would have under like circumstances. After a review of the cases upon this subject, the Kansas court was of opinion that the action was *ex delicto*, and the conclusion reached was that the doctrine of *caveat emptor* was not applicable to the servant of the tenant.

Other cases which adhere to the principle announced in the foregoing concerning leased premises for public or semipublic purposes are: *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Wendell v.*

Baxter, 78 Mass. (12 Gray) 494; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788.

By citing and quoting from the above authorities we do not wish to be understood as approving all the declarations announced therein; we have referred to them for the purpose of disclosing the recognition of certain well-defined legal principles concerning this class of cases, and, when applied to modern conditions, to, in part, make our deductions therefrom and apply them to the facts of this case.

A four-story hotel containing an office and lobby, a dining room, about 100 sleeping rooms, passenger elevator, and other modern facilities, furnished, and doing a general hotel business, situate upon one of the principal streets between the Union Depot and the main business district of a city like Denver, when leased for hotel purposes, is unquestionably a semipublic place. We cannot concede that this question is debatable. It is unquestionably as much a public place as is a private pier. This was fully recognized in *Swords v. Edgar*, 59 N. Y., wherein, at page 31 (17 Am. Rep. 295), it is said: "We think it is clear that the intestate was lawfully upon the south half of the pier. It may be that it was not a public place or highway in the fullest sense of those terms. It was, indeed, private property to a certain degree. * * * Though private property, it was held as such for public objects. There is an implied license to vessels upon navigable waters to enter and occupy piers built into or lying adjacent to such waters, in the manner and for the purposes contemplated by their erection. The keeping of such a pier is likened to the keeping of an inn; and a general license is given to all persons to occupy it for lawful and accustomed purposes." See, also, *Wendell v. Baxter*, 78 Mass. 494.

We are of opinion, that this hotel comes under the rules announced in the authorities as applicable to semipublic places, and the rules applicable to patrons or guests of such semipublic places are likewise applicable to the paid guests of this hotel, and the rule announced in volume 24, Cyc. 1119, and the cases cited by the appellant which limit the right of the subtenant, guest, or servant of the tenant as against the landlord to no greater claim than the tenant would have under like circumstances, is not applicable to the paid guest of this hotel. It being a semipublic place is a potent reason for one of the exceptions to the general rule, and places the guest more in the category of a stranger, rather than in the shoes of the tenant who is operating the hotel under a lease. It does not appeal to reason to say that one who comes into a strange city during his travels, and enters a public hotel, without any knowledge of its ownership, its leases or conditions governing its control, and is there injured by reason of a dangerous condition existing

therein at the time it was leased, should be deprived of recovery because perhaps the day before the owner had leased the hotel to an insolvent person. What reason can there be for holding that such a stranger should occupy the same position as the lessee and be bound by the same limitations? He does not know the lessee, nor even know there is a lessee, much less does he know anything about the arrangements between the lessor and the lessee, and the duties involved upon each under the terms of the lease. The owner of the building (as in this case) has maintained it as a hotel, rents it as a hotel, in this case fully furnished for such purpose. He knows that the place is to hold out an invitation to the public to enter therein. More than that, when he leases for that purpose he leases for a purpose which gives a general license to all persons to enter the same for lawful and accustomed purposes. His profit is indirectly derived from the custom derived from the travelling public. If it were a crime to hold out an invitation to the public to enter it as a hotel, or otherwise, directly or indirectly solicit or secure guests therefor as a hotel, the appellant would unquestionably be guilty of aiding and abetting the commission of the crime, if not in fact be a party thereto. It follows that if, when let, the elevator was in a defective condition which was dangerous to the guests when used for the purposes intended, and this fact was known, or, in the exercise of reasonable diligence ought to have been known by the appellant, it is liable to the paid guests of the hotel, when in the exercise of ordinary care, for injuries resulting to them upon account of such defective condition.

Under the circumstances as disclosed by the terms of this lease, if material, it might be proper to assume that the appellant was of this view itself until this accident happened. Its lease provides that the lessee shall keep the elevator in good condition and also pay one-half the cost of accident insurance covering accidents in connection with the elevator. The lessor agreed to pay one-half the cost of keeping it in repair, and reserved the right to enter and inspect the premises, and if not satisfactory to terminate the lease. It kept a \$5,000 accident policy in force for its protection, but regardless of these facts concerning its intentions and the steps it took for its protection, which are probably immaterial, as its liability to this appellee is limited to what the law imposes, such liability cannot be escaped by its contract with the lessee to keep the property in repair. *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Nugent v. B. C. M. R. Co.*, 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Burner v. Higman & Skinner*, 127 Iowa, 580, 103 N. W. 802; *Albert v. State*, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159.

In order not to be misunderstood concerning the liability which attaches to this land-

lord, upon account of the defective condition of the property at the time of the accident, we call attention to the fact that we are only considering the defective conditions which were in existence at the time of the execution of the lease, and thereafter continued up to the time of the accident. By instruction No. 5 the jury were told, if, at any time between November 1, 1907 (which was the date of the lease) and the date of the accident, the elevator was put in a condition of proper repair for ever so short a time, that no verdict could properly be rendered against this appellant, although they should further believe from the evidence that the elevator was out of repair at the time of the accident to plaintiff, and that such accident was caused by such lack of repair. By this instruction it will be observed that no liability was placed upon the landlord for conditions which might come into existence after the giving of the lease, but limited its liability to injuries caused by defective conditions in existence at the time it turned the property over to the tenant.

[3] We are not impressed with the appellant's contention that the elevator was in no respect dangerous, and that under no circumstances could it, or any acts pertaining to it, become in the nature of a private nuisance, for the reason, though out of repair and dangerous when being operated, that when let alone and kept closed it was harmless and could injure no one, and that it was possible to operate it in its then condition without causing an accident. At the time of the execution of this lease it was understood by the landlord that it was to be used as a passenger elevator. It was the only practical means for the transportation of the guests to their rooms on the three upper floors. Under such circumstances, the negligence of the appellant in omitting to place it in repair is in the nature of a nuisance. Volume 21, Am. & Eng. Ency. of Law (2d Ed.) p. 701; volume 29, Cyc. 1188; *Wood on Nuisances* (3d Ed.) § 127. See, also, *Hill v. President & Trustees of Taulatin A. & P. U.*, 61 Or. 190, 121 Pac. 901, and cases therein cited.

[4] As we understand the rule pertaining to liability when applied to articles of this kind, it is: Whether it was dangerous and unsafe when used for the purposes and in the ordinary manner intended, and not whether it was safe and harmless when let alone or possible to operate it without an accident. Volume 29, Cyc. 1152; *Wood on Nuisances* (3d Ed.) c. 1; *Owings v. Jones*, 9 Md. 108; *Rich v. Basterfield*, 56 E. C. L. 784; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Burner v. Higman & Skinner*, 127 Iowa, 580, 103 N. W. 802.

[5] It is claimed that the proximate cause of the accident was the negligence of the lessee in failing to keep the elevator entrance closed or guarded during the absence of the pilot, and not the defective condition

of the elevator. We think it was both. This question has been settled in this jurisdiction. In Colorado Mortgage & Investment Company v. Rees, 21 Colo. 435, it was held that where an injury is the result of the combined negligence of the defendant and the negligent or wrongful act of a third person, for which neither plaintiff nor defendant is responsible, the defendant is liable when the injury would not have occurred except for his negligence. This principle is applicable here. The negligence of the landlord was the cause of the defective condition of the elevator, it being out of repair in having no lighting system, although such was necessary upon account of its location, and also the defective condition of its machinery, which caused it to creep when left alone. The negligence of the lessee, Mr. Copeland, through his servant, was in leaving the door open; neither the appellant nor the appellee was responsible for this act. The injury was the result of the combined negligence of both the lessor and the lessee. This is apparent for the reason that had the lessee, through his agent, closed and fastened the door upon leaving the elevator, the accident would not have occurred. Upon the other hand, had the elevator been in proper repair so that it would have remained at the entrance where the pilot left it, and had not crept upward as it did, upon account of its defective condition, the accident could not have happened, and had the cage's lighting system been in repair and a light been turned on, it is quite probable that the accident would not have occurred. We are thus confronted with the fact that the accident had to be the result of these combined acts of negligence of both the landlord and tenant, for without either the landlord would not have happened. The case last cited was for damages upon account of injuries occasioned by stepping into an elevator shaft when the door was open and the cage not there. The lock to the door was out of repair, so that it could be opened from the outside. The defendant sought to show that the door had not been left open by the elevator pilot, but had been opened by a boy by the name of Thorne, who had no connection with the property. It was held that such an act on his part would not constitute an efficient intervening cause that would relieve the defendant from liability; that if the boy had opened the door, his act, coupled with defendant's negligence, constituted the combined and concurrent causes of the injury. Upon this theory the court approved an instruction to the jury which reads as follows: "The jury are instructed that if they find from the evidence that the defendant negligently failed to provide and maintain proper and secure fastenings to its elevator door, and by reason thereof the door was open at the time of the alleged accident, and that while so open and while the elevator was in the upper part of the building, the plaintiff, while in the exer-

cise of ordinary care, fell into the elevator shaft and was injured, and if such accident was reasonably to have been apprehended from the condition of the elevator door and its fastenings, and of insufficient and inadequate light, then the plaintiff will be entitled to recover a verdict at your hands for such damages as he may have sustained. And under such circumstances it is wholly immaterial whether such door was opened by some third person or not, provided that such accident could not have happened but for the negligence of the defendant in keeping and maintaining the fastening to its elevator door." To support this position the court quotes from Shearman & Redfield on Negligence (section 10) as follows: "Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time." The appellant makes no complaint concerning instructions, but seeks to distinguish this case from the former one, by reason of the fact that here a lessee was in possession. It is claimed that it was his duty to keep the door shut when the pilot was absent from the cage, and that the landlord had the right to assume he would perform the ordinary duties required of him in this respect. This line of argument pertaining to the duty of others was considered in the former case in which the suggestion presented itself, that the landlord had a right to assume that trespassers, boys, or bystanders, in the performance of their proper duties, would let the elevator door alone and not open it when the cage was not at that floor. The court held that this was not a defense, but that it was incumbent upon the landlord to have the door in such a condition so that such an accident could not happen in this manner. In commenting upon this question, at page 444, the court said: "It was the duty of defendant, in operating the elevator in question, to exercise the utmost care and diligence, and to provide and maintain proper and secure fastenings to the doors opening into the elevatorway that could not be opened or controlled from the outside. Therefore the court was correct in saying that it was 'wholly immaterial whether such door was opened by some third person or not, provided that such accident could not have happened but for the negligence of the defendant in keeping and maintaining the fastenings to its elevator door,' for, had it performed its duty in the premises, such interference by a third party would have been impossible; hence its negligence necessarily concurred in and constituted

an essential factor in causing the injury." We think the latter part of this declaration specially applicable here. Had this landlord performed its duty in placing the elevator in repair, the negligent act of the pilot in leaving the door open, if as a matter of law it was negligence, could not have occasioned the injury; hence, the landlord's negligence necessarily concurred in and constituted an essential factor in causing the injury.

The rule announced in *Union Gold Mining Co. v. Crawford*, 29 Colo. 511, 69 Pac. 600, concerning the actions of a tenant in this respect, is in point. The company had leased the different levels of its mines. The lessees delivered their ore to the company at the shaft, who hoisted it to the surface. A person working for the company at the bottom of the shaft was injured by an ore car escaping from an employé of a lessee in one of the levels and falling down the shaft. The tracks on which the ore cars ran were laid with too much grade, and no barrier was placed at the shaft to stop the cars and prevent them from running into the shaft. It was shown they were in the same condition when turned over to the lessee as when the injury occurred. It was held that the company was responsible for the condition of the level, and was liable for injuries caused by its negligence in maintaining the track with an excessive grade, and in not providing a sufficient barrier to stop the cars at the shaft. The same contention was made there as here that, assuming the company to have been negligent in causing these conditions, it was not the proximate cause of the injury; that the act which caused the injury was that of the independent contractor or lessee, but the court held otherwise, and at page 522 of 29 Colo., at page 604 of 69 Pac., said: "The most ordinary foresight and prudence, it would seem to us, would have dictated some suitable protection at the mouth of the level. The most cautious man might lose control of a loaded car in a level such as the fourth level of this mine, and there was a breach of the positive duty of the company in not guarding against such an occurrence." The car had escaped from the employé of the lessee, and while it is true the jury found that he was unable to prevent its escape by the exercise of ordinary care, the court, in holding that the escape of the car was not the proximate cause of the injury, cites with approval *Colorado Mortgage & Investment Company v. Rees*, 21 Colo. 435, 42 Pac. 42, and also *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, which we think support our conclusion concerning the proximate cause of the injury.

This question was again under consideration in *Tanner v. Harper*, 32 Colo. 156, 75 Pac. 404, where it was alleged that the injury was caused by defendant's negligence in the manner of operating their mine and the defective condition of its appliances. It was shown that the injury was occasioned by the

negligent act of a coemployé, coupled with a defective condition of certain appliances, concerning which question, at page 163 of 32 Colo., at page 406 of 75 Pac., the court says: "The jury having necessarily determined that the defendants were negligent, and that plaintiff was not guilty of contributory negligence, the question of the negligence of the trammer is practically eliminated. In the order of events the injury was caused by the grossly culpable negligence of the trammer, but if the defendants had taken the proper precautions to keep the truck from falling into the shaft in the circumstances it did, the injury would not have happened; so that the sole cause of the plaintiff's injury was not the negligence of the trammer in handling the car, but the result of the concurrent negligence of the defendants in failing to exercise a reasonable degree of care to prevent the car from being precipitated into the shaft when left standing upon the track. When the injury of an employé by a coemployé would not have happened except for the negligence of the common employer, the latter is responsible for the injury. *Cone v. Del., L. & W. R. Co.*, 81 N. Y. 206 [37 Am. Rep. 491]; *Sherman v. Menominee R. & L. Co.*, 72 Wis. 122 [39 N. W. 365, 1 L. R. A. 173]; *D. & R. G. Ry. Co. v. Sipes*, 26 Colo. 17 [55 Pac. 1093]; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700 [1 Sup. Ct. 493, 27 L. Ed. 266]; *Shearman & Redfield on Negligence*, § 10; quoted with approval in *C. M. & I. Co. v. Rees*, 21 Colo. 435 [42 Pac. 42]."

Our Court of Appeals has had occasion to consider this question. In *City of Denver v. Johnson*, 8 Colo. App. 384, 46 Pac. 621, it was held, as stated in the syllabus: "Where several concurring acts or conditions of things—one of them, the wrongful act or omission of the defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission."

[6] It is claimed that, assuming the elevator was out of repair, and that the accident would not have happened except for such conditions, that was not such an accident as reasonably might have been foreseen or anticipated; that though the cage did creep when left alone after being properly stopped, and that no arrangements were made for lighting it, the landlord was not bound to anticipate that the tenant would not keep a pilot in it when being used, but that it had the right to assume that he would, for which reason it cannot be held. In commenting upon this question in the *Rees Case*, supra, at page 445 of 21 Colo., at page 45 of 42 Pac., the court quotes with approval the following: "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-

doer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

In *Lane v. Atlantic Works*, 111 Mass. 136, from which the foregoing quotation is taken, it is also said: "The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen."

In volume 13 Cyc. at page 25, in note 54 with many authorities cited to support it, it is said: "Where the effect could reasonably have been foreseen, and where in the usual course of events it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences."

In volume 21, Am. & Eng. Ency. of Law (2d Ed.) at page 491, it is said: "An act or omission may yet be negligent and of a nature to charge a defendant with liability, although no injuries would have been sustained but for some intervening cause, if the occurrence of the latter might have been anticipated."

By these declarations we do not understand it is meant that the particular accident should have been anticipated or foreseen, or that it should be anticipated that an accident should occur in this particular manner, but when applied to the facts of this case the rule is that, if it was to be expected, or could reasonably have been foreseen by a person of ordinary foresight and prudence that in the operation of a passenger elevator in the condition which the plaintiff's witnesses say this one was it would be the cause of an accident, the liability is then established so far as this phrase of the matter is concerned. As said by this court in *Clifford v. Denver, South Park & Pacific Railroad*, 9 Colo. at page 338, 12 Pac. at page 221: "The principle above stated does not declare that the damage or injury *must* have resulted, or even that it must have been anticipated, in the particular case under consideration. On the contrary, it has been well said 'that the consequences of negligence are almost invariably surprises.' The expression 'reasonable expectation,' frequently used in this connection, is said to mean 'an expectation that some such disaster as that under investigation will occur *on the long run* from a series of such negligences as those with which the defendant is charged.' Whart. Neg. §§ 77, 78, and cases cited." This language is appli-

cable here. This particular accident was unquestionably a surprise. Most accidents usually are. We do not think the appellant had the right to turn this elevator over in such a defective condition, as disclosed by the plaintiff's witnesses, under the assumption that in its then condition it would be managed in such a manner as to prevent all accidents. 'Tis true, it could have been kept closed and not used at all. This would have avoided the probability of any accident, but it was understood it would be used as a passenger elevator for the hotel. Under such circumstances it is beyond the limits of common understanding to believe that the door where the cage is then stationed will, at all times, be closed when the elevator pilot is not standing within the cage, but the contrary ought to have been foreseen and anticipated by any person of ordinary foresight and prudence. Such a condition is certainly not beyond reasonable expectations. It was unquestionably not a circumstance of an extraordinary nature, but was one which reasonably ought to have been foreseen and anticipated.

It is claimed that the evidence did not exclude the possibility of the car being out of place from causes other than the one alleged; also that the evidence discloses that there were causes which might have caused the elevator to creep other than its being out of repair. The appellant was given full opportunity to present this line of testimony to the jury. They made their findings under instructions concerning which no complaint has been made. There is evidence to support them; under such circumstances it is not the province of this court to disturb the verdict of the jury.

Perceiving no prejudicial error, the judgment is affirmed.

Affirmed.

MUSSER, C. J., and GABBERT, J., concur.

On Petition for Rehearing.

[7] Counsel earnestly contend that there is absolutely no evidence to sustain the contention that the elevator was out of repair and in an unsafe condition at the time of the execution of the lease; that the jury, the trial judge, and this court are all wrong in assuming that there is an iota of testimony to thus show. For this reason we have re-read the evidence in order to ascertain if there is an entire lack of competent testimony upon this subject. The lease was for the term of one year, commencing November 1, 1907. The accident occurred June 27, 1908. The trial was in November, 1909. The witness Frank A. Linton testified, in substance, that he had been a resident of Denver for about eight years; that he worked in this hotel about six years; that he worked there during the years 1907 and 1908, and had occasion to observe the action of this elevator; that during this

period it would creep up and down just according to the way you would pull on the cable; that the air would get out; that it would move one way or the other without anybody being there; that it did this in 1907 and 1908; that he could not give the exact dates, but that it never worked properly at all times the whole time he was there; that sometimes it would stand right on the level of the floor, and then again it would creep up; that when he worked at the desk he had occasion to see it creeping, sometimes once or twice through the day; that the elevator was out of order while he worked there at different times off and on; that during all of the year 1907 it was in the condition above described; that they packed it once, but the packing did not fit right, and it got out of order; that he did not know the exact date it was packed, but it was after this accident, possibly three or four weeks; that the elevator was back about 30 feet from the front of the building and back of the office; that there was a wire mesh or netting on the outside of the elevator; that there was a wooden porch in front of the building on account of which, at about 4 o'clock in the afternoon and thereafter, it was so dark you could not read a paper in the elevator; that there was no provision for connection of the electric light in the elevator cage.

Olaf Nelson testified, in substance, that he had been an employé in this hotel since September, 1894; that he was still there at the time of the trial, and was there during 1907 and 1908; that during this period he was familiar with this elevator; that he ran it sometimes; that it had crept more or less since he came to the hotel; that he noticed it more in the last four or five years; that when he pulled it to a stop and went away it would creep quite often; that two or three times a day when the boy left the elevator he had seen it up even with the floor, sometimes six inches or a foot more, sometimes up to his head, and that he had seen it up to the second floor; that he did not know of any particular change during the period he was there; that he came nearly having an accident with it; that when he pulled it (the elevator) to a stop and went away it would creep, but if he stood there and balanced it and saw that it stood still it would not creep very much; that he could not swear that it would not creep, but that he could swear that it did creep; that there was no light in the elevator.

Dan Dougherty testified that he was an experienced elevator operator; that he was the elevator pilot when the accident occurred; that it was an old hydraulic elevator; that at the time of the accident it was so dark he could not read the address on a letter or package on the inside of the cage; that the elevator could not be depended upon; that it was in such a condition that he never knew at any time when he left it whether

it was going to stand without creeping or not; that when he set it the way it would be supposed to stand to stop, it would hold it in place as he went away; that lots of times he would go back and the elevator would be halfway up to the other floor; that he would set it, and it would probably stand for a few minutes; that sometimes it would stop after it had crept a few feet; that it was never the same; that you could not tell by the place in which you put the cable in advance whether it was going to move or not; that when he adjusted the cable to the very best of his experience it would creep; that just before the accident, before leaving the elevator, he fixed it so that it was standing for the time being; that when he then left he did not touch the ropes; that when he returned, which was in a minute or a minute and a half, the bottom of the elevator was near the second floor.

Jesse C. Brockway, a witness upon behalf of the defendant, testified that he was the engineer in charge of the engines in this building, and likewise had supervision over the elevator; that he was there on the 1st of November, 1907, and continued up to and after the 27th day of June, 1908. In cross-examination he testified that the last time it was packed was in January, 1908; that he thought that it had not been packed before that for something in the neighborhood of three years, and then it was packed by Nock and Garside, the manufacturers of the elevator; that he, the witness, had not packed it since the time Nock and Garside packed it in the first place.

G. S. Tears, an engineer with 11 years' experience in the handling of elevators, testified that if the cups on the valve leaked or were worn out the water would pass by and cause the car to creep; that the piston in a cylinder proper is packed with square hydraulic or flat packing; if that is leaking the car will creep, but that if both the conditions above referred to are perfect in the piston and the valve, a cage will not creep; that the more the valve is out of repair or the piston out of repair it will accelerate the quickness with which a car will creep; that when the machinery is out of repair, if the pilot will drop down below and work up a little, sometimes he will get it stationed so that puts it in the reverse, as you might say; that it will then balance on the leaking, but that this cannot be depended upon; but that if the piston and the valve are in perfect condition and not leaking, if a car is brought to a standstill so that it is perfectly motionless, it will not start of its own volition.

Martin H. Collin, another experienced engineer, gave similar testimony.

It is not the province of this court to supersede the functions of the jury. From the foregoing synopsis of the testimony of these witnesses it is self-evident that there is competent testimony upon which the jury

might be justified in finding, as they did, that this elevator was out of repair at the time of the execution of the lease upon November 1, 1907, and at that time was unsafe for use for the purposes intended. Whether these witnesses are to be believed was for the jury to determine.

The petition for rehearing is denied.

COLORADO MORTGAGE & INVESTMENT CO., Limited, v. GIACOMINI.

(Supreme Court of Colorado. June 2, 1913.
On Petition for Rehearing, Dec. 1, 1913.)

Appeal from District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by William B. Giacomini against the Colorado Mortgage & Investment Company, Limited, and another. Judgment for plaintiff, and defendant Mortgage & Investment Company appeals. Affirmed, and rehearing denied.

William J. Miles, of Denver, for appellant. Allen & Webster, of Denver, for appellee.

HILL, J. This action was instituted by the appellee against the appellant and P. W. Copeland, to recover damages for expenses incurred by him for medical treatment, nursing and other assistance furnished to his wife, Margaret Giacomini, and for the loss of her services as a housewife, and for the loss of her society, care, and comfort as a wife, occasioned by her falling down the elevator shaft in the Columbia Hotel situate in the city of Denver. It is alleged that the accident was caused by the negligence of the defendants in permitting the elevator and appurtenances thereto to be and remain out of repair. Judgment was in his favor against this appellant in the sum of \$6,000; it brings the case here on appeal.

The questions of law presented are identical with those in case No. 7126 (136 Pac. 1039), which was an action by the wife against these same parties. The injuries were very serious and permanent. The expenses to this appellee were shown to have been quite heavy. It is unnecessary to state in detail the extent of these injuries; it is sufficient to say that no complaint is made concerning the amount of the verdict.

For the reasons stated in the other opinion, the judgment is affirmed.

Affirmed.

MUSSER, C. J., and GABBERT, J., concur.

On Petition for Rehearing.

Counsel earnestly contend that there is no evidence to sustain the allegation that the elevator was out of repair and in an unsafe condition at the time of the execution of the lease. The testimony upon this question is the same as that in No. 7126. In addition there was other testimony in this case which covered the matter more fully and in detail. The evidence discloses, if the witnesses are to be believed, that the elevator was out of repair and unsafe for use for the purposes intended at the time of the execution of the lease upon November 1, 1907.

The petition for rehearing is denied.

McAFEE v. McAFEE'S ESTATE.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 256*)—CLAIM AGAINST ESTATE—APPEAL—TRIAL DE NOVO.

On appeal to the district court from the county court's allowance in part of a claim

against an estate, trial in the district court should be in all respects a trial de novo.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 850-856, 860-863, 910-919; Dec. Dig. § 256.*]

2. EXECUTORS AND ADMINISTRATORS (§ 256*)—CLAIM AGAINST ESTATE—QUESTION FOR JURY—AMOUNT.

In the trial in the district court on appeal from the county court of a claim against an estate for care of the decedent before his death, the question of the amount to which claimant was entitled should have been submitted to the jury; and it was error to instruct that he could not recover more than was allowed him in the county court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 850-856, 860-863, 910-919; Dec. Dig. § 256.*]

Error to District Court, Weld County; H. P. Burke, Judge.

An action by Adeline McAfee against the Estate of Joseph McAfee. Judgment for defendant, and plaintiff brings error. Reversed.

Mrs. McAfee filed a claim in the sum of \$1,500 in the county court against the estate of Joseph McAfee, deceased. The claim was for the value of services rendered by her in caring for the decedent before his death. The county court allowed her claim in the sum of \$300, from which judgment she appealed to the district court. In the latter tribunal the case came on for trial before a jury. At the conclusion of the testimony on the part of the claimant the court directed the jury to return a verdict in the sum of \$300. From the testimony it appears that for more than six years previous to his death the decedent was afflicted with a loathsome and contagious disease; that he was mentally incompetent, and that his condition required that he be constantly cared for. One Joseph Mitchell had been appointed conservator of his estate. In this capacity he employed Mrs. McAfee to take care of his ward, and paid her, from time to time, sums ranging from \$25 to \$50 per month, and agreed to pay her out of the estate, if funds were available, such additional sum, which, with the amount paid, would reasonably compensate her for her services. It appears from the testimony that the claimant faithfully cared for the deceased for a period of about six years; that his condition was such that he required constant attention, and was so afflicted, both physically and mentally, as to render him exceedingly repulsive and difficult to care for. It also appears from the testimony that the services rendered by claimant were worth far more than the sums actually paid her by the conservator, and in excess of the sum of \$300. The court directed the verdict upon the theory that as the county court had allowed the claim in the sum of \$300, the district court was without authority to permit the allowance of any greater sum.

Miller, Barnd & Williams, of Lafayette, for plaintiff in error. V. E. Keyes, of Greeley, for defendant in error.

GABBERT, J. (after stating the facts as above). [1, 2] The testimony on behalf of the claimant tended to establish an agreement with the conservator for such compensation, in addition to the sums paid, as would reasonably compensate her for the services rendered. It also tended to establish that her services were worth far more than the sums paid, and much in excess of the amount which the court directed the jury to return. The trial in the district court should have been in all respects *de novo*, and the question of the amount to which the claimant was entitled should have been submitted to the jury for determination.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Judgment reversed.

MUSSER, C. J., and HILL, J., concur.

DENVER & R. G. R. CO. v. SHAW.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. JUSTICES OF THE PEACE (§ 173*)—APPEAL.

The theory on which the case was tried in justice's court must be ascertained on appeal from the proceedings at the trial; there being no written pleadings in a justice's action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 660-664; Dec. Dig. § 173.*]

2. RAILROADS (§ 434*)—INJURIES TO STOCK—APPEAL—THEORY OF TRIAL.

In an action against a railroad company in justice's court for injury to stock, plaintiff testified that the right of way was fenced June 13, 1902, and was damaged by wind, and that his colts got out through the damaged part and were injured by trains, and also testified that he gave the company notice within six months, which notice provided, "This notice is given under and by the provisions of section 3713c, Mills' Annotated Statutes of Colorado," which is section 6 of Laws 1902, p. 26, effective June 13, 1902. The court instructed that it was defendant's duty to fence its track with a fence sufficient to prevent stock from getting on the road and to repair such fence, and further required a finding of the six months' notice of injury, and it appeared that 8 per cent. interest was also allowed on the recovery as is permitted by section 7 of such act. *Held*, that the case was tried under Laws 1902, and hence a judgment for plaintiff cannot be sustained; such statute having been declared unconstitutional.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1545, 1546; Dec. Dig. § 434.*]

Error to El Paso County Court; John E. Little, Judge.

Action by W. D. Shaw against the Denver & Rio Grande Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. N. Clark and J. G. McMurphy, both of Denver, for plaintiff in error. Frank J. Baker, of Colorado Springs, for defendant in error.

GARRIGUES, J. 1. This action is for the value of a colt killed by defendant's train November 26, 1908. The case was commenced and tried in a justice court, where the jury found for the plaintiff. On appeal to the county court, plaintiff again obtained a judgment, and the company brings the case here on error.

The Legislature in 1902, at a special session, passed an act in relation to fencing railroads which, if valid, went into effect June 13, 1902. See Session Laws 1902, p. 23. We have twice declared this act unconstitutional. *Denver Co. v. Moss*, 50 Colo. 282, 115 Pac. 696; *C. & S. Co. v. King*, 51 Colo. 181, 116 Pac. 142. The only question before us is whether the case was brought, tried, and recovery had under this act. If it was, the judgment will have to be reversed for the reasons given in the former opinions.

[1, 2] 2. Being a justice case, there are no written pleadings, and we ascertain plaintiff's theory of his case from the proceedings on the trial. The railroad ran through plaintiff's pasture. He testified the right of way was fenced June 13, 1902 (which is the date the fencing act was supposed to have gone into effect), and continued to be fenced; that he had three colts in the pasture; that the fence was damaged by the wind blowing timber on it and the colts got onto the right of way, through the right of way fence, where the top wire was down; that about dusk a neighbor phoned him his colts were out; he drove two of them back and the next morning found the third in a mangled condition by the side of the track 50 or 100 feet from where the fence was damaged; that he notified the company within six months, as provided by section 6 of the act, which notice contained the following clause: "This notice is given under and by the provisions of section 3713c, Mills' Annotated Statutes of Colorado." Section 6, Act of 1902, p. 26, S. L. 1902.

The court instructed the jury this was an action against the company to recover damages for the killing of a colt, and that the burden of proof rested upon plaintiff. It then gave instructions 2 and 3, as follows:

"(2) You are instructed that it was the duty of the defendant to fence its track, at the place of the killing of the colt in question, with a fence sufficient to prevent stock from getting on defendant's railroad and to keep such fence in repairs.

"(3) You are instructed that if you find from the evidence that the plaintiff was the owner, or the assignee of the owner, of the colt in question at the time of the commencement of this action, and that the defendant owned and operated its railroad tracks

through the Roby ranch in El Paso county on the 13th day of June, 1902, and at all times since said date, and that on or about the 26th day of November, 1908, it failed to keep in repair a suitable fence on each side of its tracks to prevent stock from getting on its tracks at said place, and that by reason thereof the colt in question got onto the tracks of the defendant and was killed by one of defendant's trains, as alleged, and that thereafter, and within six months from the date of said killing, plaintiff gave notice to defendant, under oath, of said killing and made a demand on the defendant for the value of said colt, then you should find the issues herein joined in favor of the plaintiff; otherwise you should find in favor of the defendant."

Appellee in his brief states that the verdict, which was for \$188.60, was presumably arrived at by the jury finding the colt to be worth \$175, the value placed upon it by the plaintiff, and \$13.60 interest on that amount at 8 per cent. per annum. Section 7 of the act of 1902 provides for interest, and, unless the action was based on that statute, plaintiff would not be entitled to recover it.

In consideration of the foregoing, we think the conclusion is irresistible that the case was brought and tried under the unconstitutional act, and the judgment must be reversed.

Reversed.

MUSSER, C. J., and SCOTT, J., concur.

WHITE et al. v. BOWER et al.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. WILLS (§ 116*)—EXECUTION—COMPETENCY OF ATTESTING WITNESSES—"CREDIBLE WITNESS."

Under Rev. St. 1908, § 7071, requiring wills to be attested by two or more credible witnesses, "credible" meaning competent to testify to its execution, and section 7074, declaring that a bequest to a subscribing witness void unless attested by a sufficient number of other competent witnesses, the wife of a beneficiary under a will was competent to witness its execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1710, 1711.]

2. WILLS (§ 116*)—EXECUTION—COMPETENCY OF ATTESTING WITNESSES.

Under Rev. St. 1908, § 7071, requiring a will to be attested by two or more credible witnesses, the competency of attesting witnesses must be determined by the statute law relating to competency of witnesses and not by the common law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.*]

3. WILLS (§ 116*)—COMPETENCY—INTEREST.

Laws 1883, p. 289, expressly and entirely removes all disability in witnesses from testifying on account of interest, so that, if the wife of a beneficiary under a will had any interest, it did not disqualify her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.*]

4. WILLS (§ 116*)—HUSBAND AND WIFE.

Under Rev. St. 1908, § 7274, providing that a wife shall not be examined for or against her husband without his consent, a married woman who attested a will under which her husband was a beneficiary, and which he was seeking to establish, might testify for the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.*]

5. WILLS (§ 116*)—COMPETENCY OF ATTESTING WITNESSES—EFFECT.

Rev. St. 1908, § 7074, provides that, where a will leaves any interest to a subscribing witness, it shall be invalid, unless it is attested by a sufficient number of other competent witnesses, and Rev. St. 1908, §§ 4181-4191, makes a legacy to a husband his own property separate from that of his wife. *Held*, that the wife of a beneficiary who attested a will had no such interest thereunder as would forfeit the interest of the husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Proceedings for the probate of the will of Darwin W. White, deceased, contested by George H. White and others. From a judgment in the District Court on appeal from the County Court admitting the will to probate, contestants bring error. Affirmed.

Frank D. Taggart, Carle Whitehead, and Albert L. Vogl, all of Denver, for plaintiffs in error. Doud & Fowler, of Denver, for defendants in error.

GARRIGUES, J. 1. October 29, 1909, Darwin W. White attempted to execute his last will and testament, wherein he bequeathed parts of his estate to one Clarence E. Bower. The two witnesses to the will were A. J. Fowler and Mrs. Catharine C. Bower; the latter being the wife of Clarence E. Bower, a legatee under the will. On the decease of Darwin W. White, the will was admitted to probate in the county court, where a contest was filed, and an appeal taken to the district court, where the judgment was again in favor of proponents, admitting the will to probate, and contestants bring the case here on error.

The apparent purpose of this action is to defeat the establishing the will on the ground that one of the two attesting witnesses was the wife of a beneficiary, and therefore incompetent to witness its execution, and, if incompetent, then the document was not subscribed by two credible witnesses within the meaning of the statutes, and, for that reason, void. It was stipulated that the question in the case to be determined is whether, under the above state of facts, Catharine C. Bower was a competent witness to the will, and, in the event she was, whether the legacy of her husband, Clarence E. Bower, should be forfeited on account of her being one of the two subscribing witnesses.

[1] 2. Upon the question of the instrument being void because not properly attested, the statute regarding the execution of

wills (R. S. 1908, § 7071) provides that all wills shall be attested by two or more credible witnesses. A "credible witness," in the sense here used, means a competent witness under the law to testify to its execution. Was Mrs. Bower competent or incompetent to witness the will? In the event she was incompetent, it is void because not executed by two witnesses. If she was competent, it is not void. The same statute (section 7074) provides that, if a will leaves a subscribing witness any interest, such interest shall be void unless it is attested by a sufficient number of other competent witnesses. We think, from the intent and effect of this statute, Bower himself would have been a competent witness to the will, though it left him a legacy, but that it would have been void as to his interest unless it was properly attested by other witnesses. If, for the sake of the argument, we concede such a unity of interest between Bower and his wife, as to constitute her a legatee under the statute, the only statutory inhibition on that account, against her attesting the instrument, is that the statute forfeits the legacy. It does not declare the will void. The interest willed Bower was the only one involved, and, if the statute would but have declared it void in case he attested the will, then the court should not, on account of their oneness of interest, declare it void because she attested it. We are not saying the will left her any interest, or that she had any; but, if she had, it was the identical interest he possessed, and the only effect of her subscribing the will would be to render his legacy void—not the will. If the will would not, on account of his interest, have been void had he been a subscribing witness instead of his wife, then it cannot be void on account of the identical interest, because she is the subscribing witness. She, on account of the marriage, would not be rendered incompetent as a subscribing witness in such a case by facts that would not disqualify him.

[2] 3. It is claimed that at common law Mrs. Bower would have been incompetent to testify in court, at the time she witnessed the will, to the facts which she then attested: First, on account of interest; and, second, on account of public policy. And it is argued that by virtue of section 8, c. 104, Gen. Laws 1877, this common-law disability is still in force in Colorado. We do not agree with this contention. Competency of attest-

ing witnesses to wills must be tested by the general law relating to competency of witnesses as provided by the statute, and not by the common law. The test is whether, under the statute, she would have been a competent witness in court, at the time of attesting the will, to testify to the facts of its execution. This question is quite thoroughly discussed in *Butler v. Phillips*, 38 Colo. 389, and, while the subject-matter here involved is different from that case, we think from analogy the same rules and principles apply.

[3] The act of 1883 (page 289, Sess. Laws 1883) entirely removes all disability, so far as this case is concerned, in witnesses from testifying on account of interest; so, if Mrs. Bower had any interest, it did not disqualify her from attesting the will.

[4] 4. Upon the subject of public policy, our statute (section 7274, R. S. 1908) provides that the wife shall not be examined for or against her husband without his consent and vice versa. This statute contains the only limitation on the ground of public policy, and is controlling on the subject, and not the common law. Bower was beneficially interested in the will and was seeking to establish it. His wife, with his consent, was testifying for, and not against, him.

[5] 5. The will having been attested by two competent witnesses, the remaining question is: Is the legacy it gives Bower void on account of his wife's interest arising from the marital relations? Had she any beneficial interest in the legacy left her husband by the will? Under our statute (chapter 90, R. S. 1908, p. 1054) the legacy given Bower by the will is his, separate and distinct from his wife's property. In law they are distinct persons, having individual property rights, and may hold separate estates. This legacy is Bower's separate property, and his wife has no direct or certain interest in it. In *re Holt's Will*, 56 Minn. 33, 57 N. W. 219, 22 L. R. A. 481, 45 Am. St. Rep. 434; *Gamble v. Butcher*, 87 Tex. 643, 30 S. W. 861.

We therefore conclude that Catharine C. Bower was a competent witness to attest this will, that it is valid, and that she has no such interest in the document as will impose upon her husband a forfeiture of his legacy because she witnessed its execution.

Judgment affirmed.

MUSSER, C. J., and SCOTT, J., concur.

DAVIS v. WRIGHT.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. REFERENCE (§ 101*)—REPORT—VACATING.

Where, in an action for a partnership accounting, the referee ordered to take testimony reported that the condition of the accounts was so incomplete and unsatisfactory that he excluded the accounts from consideration, the court properly set the report aside and ordered another reference.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

2. APPEAL AND ERROR (§ 931*)—OBJECTION—FINDINGS—SPECIFIC OBJECTIONS.

It must be presumed that the court, in setting aside a referee's report in partnership accounting proceedings, had pointed out to it the specific objections to the several items in dispute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

3. APPEAL AND ERROR (§§ 989, 1018*)—FINDINGS—REPORT OF REFEREE.

While, in a proceeding for a partnership accounting, the Supreme Court may review the referee's report and judgment because of insufficiency of the evidence to support them, it is not its province to review in detail numerous items of account.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3897, 4006, 4007; Dec. Dig. §§ 989, 1018.*]

Error to District Court, Mesa County; Sprigg Shackelford, Judge.

Action by D. B. Wright against Alfred H. Davis. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 23 Colo. App. 384, 129 Pac. 524.

A. H. Davis, of Ashland, and T. M. Morrow, of Denver, for plaintiff in error. Fry & Welsh, of Grand Junction, for defendant in error.

SCOTT, J. This is an action for an accounting and dissolution of partnership. The plaintiff below, D. B. Wright, and the defendant, Alfred H. Davis, on the 26th day of November, 1906, formed a partnership for the purpose of conducting a mercantile business. The business continued until the 16th day of June, 1907, when the plaintiff Wright, with the consent of the defendant Davis, sold his interest in the business to one C. A. Glaze. Under the terms of the partnership, each partner was to contribute an equal amount to the enterprise. The defendant Davis was not to contribute any of his time, but Wright was to give his entire time and have full charge of the conduct and management of the business at a stipulated monthly salary to be paid out of the business; the profits and losses to be equally shared. At the time of the sale by the plaintiff to Glaze, it was estimated that Davis was indebted to Wright for money contributed to the enterprise in the sum of \$946.50. Davis gave his note to Wright for this amount, payable in four months from the date thereof, with interest. But

the parties at the time signed a stipulation to the effect that the note was given with the express understanding that the parties had not finally settled their business nor the accounts thereof, and that if there was error in the estimate it was still to be corrected notwithstanding the note. This note and no part of it was ever paid.

Wright in his complaint asks for a judgment against Davis for \$2,365.41, alleged to be due him upon the matters and things involved, while in his answer and cross-complaint Davis prays for \$787.98 as due him.

By agreement of parties the court appointed Walter S. Sullivan as referee to take testimony in the case and to report his findings of law and fact. The referee made a report which does not seem to throw any light upon the subject and in which he says that "the books of account kept by plaintiff Wright are not just, true, and correct books of account and are not admissible in evidence as such." He submitted also a report made to him by H. B. Jones whom he engaged for the purpose of examining the accounts of the concern, which report concluded with the statement that: "In conclusion, I would say that I am unable to give you any information of any consequence from these books, as they are given to me." The referee recommended that the case be dismissed with equal division of the costs. Upon motion of the plaintiff, the court set aside this report and again referred the matter to the same referee for a rehearing. This action of the court is one of the assignments of error.

[1] When it is considered that the referee did not take any testimony in relation to the accounts, the condition of which he declares was so incomplete and unsatisfactory as to make any conclusion uncertain and unreliable, and for such reason excluded the accounts from consideration at all, it will be seen that he did not perform the service required of him by the reference. How an accounting of the business of such a partnership can be had by excluding the books and accounts thereof from consideration is not apparent. The court, then, did the only thing, which in justice and reason it could do, when it set aside such report and ordered another reference. Sullivan was continued as referee but later resigned. Upon objection to such resignation by the defendant Davis, Sullivan continued to act.

The order of the court making the second reference included the following: "The referee is directed to make a report to the court in answer to the following questions: (1) How much was contributed by each member of the firm of D. B. Wright & Co. to their business? (2) How much was received by the firm during its existence? (3) How much was expended by the firm in the course of their business? (4) How much profit or loss was made or sustained by the firm? It is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

further ordered that the parties to this cause shall have the privilege of introducing evidence before the referee on the question of the condition of the books, papers, and accounts of the firm to show whether such books, papers, and accounts are in such condition that any intelligent report of the business of the firm can be made therefrom."

Two accountants for each party were examined and testified as to the accounts, and much other testimony was introduced before the referee, including the evidence of the parties to the suit. Indeed, the record is a very lengthy one, consisting of more than 1,700 folios, chiefly dealing with the accounts of the partnership and testimony in relation thereto.

The referee reported in detail the findings of fact required by the court. He also found that Wright had put into the business the sum of \$1,695.08 more than did Davis, and that one-half of this sum, or \$847.54, was therefore due from Davis to Wright. Also that Davis owed to Wright one-half of the latter's salary, or \$300 on that item, and one-half of Davis' grocery bill due the firm, or \$135.37, making a total due from Davis to Wright of \$1,282.91, and recommended that judgment be rendered accordingly. The court overruled the motion of the plaintiff in error, Davis, to set aside the second report of the referee and rendered judgment in favor of Wright against Davis in the sum recommended, and dissolving the partnership. There were no disputed questions of law, and the objections of the defendant to the findings and report of the referee upon which the judgment was based are in substance that the evidence does not sustain the report.

The referee had the accounts and the witnesses before him. He was therefore in much better position to judge of the credibility of the witnesses and regularity and validity of the accounts than is this court.

[2] It must be presumed that the court had the reasons for the specific objections to each of the several items in dispute pointed out to him upon the hearing of the motion to set aside the findings and report and was therefore in a better position to judge of the regularity and sufficiency of these.

[3] It is true that, in a case of the character, this court may go behind the report and judgment because of insufficiency of the evidence, but in this instance it does not appear from the case presented that it would be justified in so doing or that justice would be the better served thereby. It is true that, if specific and clear error was pointed out as to the allowance or refusal to allow any one or more of the items involved, the case would be different, but we do not find such to be the fact.

The firm appears to have transacted business to the extent of about \$45,000, and it is not the province of this court to enter upon a detailed review and accounting of the numerous and varied items involved.

Neither the competency nor the integrity of the referee is questioned. He was assisted by four supposedly competent accountants, selected by the parties, and the whole proceeding was reviewed by the trial court.

Under these circumstances the judgment must be and is affirmed.

MUSSER, C. J., and GARRIGUES, J.
concur.

GEORGE FISHBAUGH, Inc. v. BEELER et al.

(Supreme Court of Arizona. Dec. 16, 1913.)

1. CORPORATIONS (§ 411*)—PERSON RECEIVING PAYMENT—OFFICER OF CORPORATION.

In the absence of agreement, payment to an officer of a corporation in his individual capacity, or the rendition of services or furnishing of materials to him in such capacity, is not a payment to the corporation, especially when pleaded as an offset to negotiable paper owned by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1650-1653; Dec. Dig. § 411.*]

2. CORPORATIONS (§ 425*)—ESTOPPEL BY CONDUCT.

If "F., incorporated," knew that F., as an individual, agreed with the makers of a note and mortgage to the corporation that they should make payments thereon to F. personally by furnishing services and materials, the corporation would be estopped from denying that such services and materials were received in payment of its note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701, 1706; Dec. Dig. § 425.*]

3. APPEAL AND ERROR (§ 236*)—OBJECTION BELOW—NECESSITY.

Plaintiff, in an action on notes and to foreclose a mortgage, cannot claim that the answer did not allege with sufficient particularity the items of payment set up with the amounts and dates, where he did not move to correct such defect by making the answer more definite.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1384, 1385; Dec. Dig. § 236.*]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by George Fishbaugh, Incorporated, against John Beeler and another. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Wupperman & Wupperman, of Yuma, for appellant. Fred L. Ingraham and Thos. D. Molloy, both of Yuma, for appellees.

ROSS, J. Suit on two notes and to foreclose mortgage securities executed in favor of George Fishbaugh by appellees, dated March 24, 1908, and August 31, 1908, for \$1,500 and \$1,000, respectively, due three years from dates, bearing 10 per cent. interest. Notes indorsed March 18, 1909, and before due, by payee Fishbaugh to George Fishbaugh, Incorporated, plaintiff and appellant herein.

Defendants, appellees, admit the execution of notes and mortgages and corporate capacity of appellant, and deny all allegations of complaint not specifically admitted; allege that notes and mortgages were given for future advances to be made, and that only \$970 was paid them on first note, and only \$375 on second note, and that appellant corporation took notes with full and actual knowledge of deficiencies in consideration paid by George Fishbaugh; allege that George Fishbaugh, original payee of notes, and who was also president and sole manager of appellant cor-

poration, made an agreement with appellants to accept and apply on said notes in payment certain services and materials, at their reasonable value, to be performed and furnished by appellee, and that said corporation had actual notice of all things done by its president and sole manager, and that Fishbaugh had actual notice of all things done by the corporation, that services and material were furnished George Fishbaugh under said agreement of the reasonable value of \$2,248.92, giving items of service and material; allege one cash payment September, 1909, to Fishbaugh in the sum of \$161.

Appellant corporation moved that defense of payment be stricken as being redundant, uncertain, immaterial, and irrelevant, for the reason, as we gather, that payments to Fishbaugh, payee, after notes were assigned to Fishbaugh, Incorporated, and before due, could not be applied in satisfaction of notes; also demurred for same reason, and that answer failed to state a defense, and denied payments as set forth in answer.

Motion to strike was disallowed, and demurrers overruled. The case was tried to the court without a jury, and judgment entered that appellant take nothing, and appellees have their costs. Appeal from judgment and order overruling motion for new trial.

[1] Ordinarily payments made to an officer of a corporation in his individual capacity, or services rendered him or material furnished him in such capacity, may not be charged against the corporation, and this is especially true when pleaded as an offset to negotiable paper owned and held by the corporation. This, in the absence of any agreement by the corporation, is the rule.

[2] But it is pleaded in the answer that the corporation appellant had actual notice of the agreement between its president and appellees that any payments made to Fishbaugh and services and material rendered and furnished him would be applied on the notes. If George Fishbaugh, Incorporated, had full knowledge that George Fishbaugh, as an individual, had made such an agreement, and that appellees were actually making payments as agreed to George Fishbaugh, the latter being the sole manager of the corporation, it would seem that the corporation would be estopped from denying the binding effect of such agreement, and bound by its terms in so far as fulfilled before a disavowal of the contract. The immaturity of the notes in such circumstances does not affect the situation. There is no legal reason why the corporation could not substitute Fishbaugh for its debtor, and through him collect the amount of the notes found to be due, rather than proceed directly against the appellees. That is the effect of the agreement as pleaded in the answer, and we think the court correctly ruled on the motion to strike and demurrers.

[3] Complaint is made that the answer did

not set forth with sufficient particularity the items of offset, with amounts and dates. If the answer was defective in this respect, it could have been corrected by a motion to make more definite and certain. No such motion was made.

Several assignments are based on the findings as made by the court; but they are directed more to the form and minor inaccuracies of the findings than to their substance. Based upon proper and legal evidence, the court found that appellees had received from Fishbaugh on the two notes only the sum of \$1,799.75, instead of their face value of \$2,500; that they had paid Fishbaugh in cash, services, and material the sum of \$2,396.92.

The evidence discloses that the George Fishbaugh, Incorporated, was George Fishbaugh's alter ego or other self, that it was incorporated by him to assist some of his poor relatives, and that he had indorsed the notes sued on to the corporation for "love and affection." It also shows credits allowed on notes by the appellant after they were assigned, thereby demonstrating clearly that the question was not one of authority and power in George Fishbaugh to bind the corporation, but a dispute between Fishbaugh and appellees as to the amount of credit that should be given. There is a sharp conflict in the evidence as to the credits appellees should have. The trial court found against appellant's contention, and we do not feel justified in disturbing that finding.

Judgment affirmed.

FRANKLIN, C. J., concurs.

CUNNINGHAM, J. (specially concurring). Plaintiff assigns as error the order of the court denying his motion to strike the special answers, and in overruling its demurrer thereto, for the reason the answers attacked do not set forth any defense to the cause of action. Paragraph 1301, Rev. St. Ariz. 1901, is cited and referred to in the pleading of plaintiff as authority for the motions and demurrers. Paragraph 1301 provides: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration before due." The plaintiff contends that it is the holder as assignee of the notes which were transferred to it in good faith and upon good consideration before due, and that the notes are negotiable. It further contends that the answers set up defenses existing at the time of or before notice of the assignment, and therefore such answers are not defenses to the action. The first defense attacks the amount of consideration received by the defendants, and alleges: "The plaintiff corporation took said promissory notes with full and actual

knowledge of defects and deficiencies in the amounts of the consideration actually paid and delivered by said George Fishbaugh to defendants therefor." Paragraph 3357, Rev. St. Ariz. 1901, protects the holder of negotiable instruments, who has received notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, only to the extent of the amount theretofore paid by him—the holder of such instrument having such notice will be deemed a holder in due course only to that extent. The corporation by the answer is admitted to be a holder in due course upon the condition that, at the time the notes were assigned to it, it had no notice of any infirmity in the instruments or defects in the titles thereto of George Fishbaugh, the person negotiating them, except that George Fishbaugh had not advanced upon the note for \$1,500 a sum exceeding \$970, and on the note for \$1,000 he had not advanced a sum exceeding \$375. Those sums were the amounts actually payable thereon, and the corporation was a holder in due course to that extent only. Paragraph 3355, Rev. St. Ariz. 1901.

With full and actual knowledge at the time plaintiff took the notes, it could not avoid the defenses set up; the facts appearing upon the trial. The court did not err in denying the motion, nor in overruling the demurrer.

The second and fourth defenses are likewise attacked by motions and demurrers. The second defense in the answer avers that George Fishbaugh, the original payee of the notes in suit, at all times therein mentioned "was the president and sole manager of the plaintiff corporation, and the said George Fishbaugh, in consideration of the payments and performances of the services and the furnishing of the materials hereinafter set out and mentioned, promised and agreed, for and on behalf of said plaintiff corporation, to credit the amounts of said payments and the reasonable value and agreed price of the said services and materials upon said promissory notes, and to credit such amounts upon the amounts, if any, due thereon." The answer then alleges that defendants paid \$161 in September, 1909, and that defendant J. H. Beeler thereafter performed services and furnished material, setting out the items and value, which aggregate \$2,250.92. Defendants allege that no credits were given them for the money paid, or for the services rendered and material furnished. It is then alleged "that at all times since the organization in March, 1909, of George Fishbaugh, Incorporated, a corporation, the said George Fishbaugh has been president and sole manager of the said corporation, and that the said corporation has had actual notice of all things done by the said George Fishbaugh, and the said George Fishbaugh has had actual notice of all things done by the said corporation, since its organization." The

fourth defense is designated a set-off, and is in all material respects the same as the second defense. The motions to strike were denied, and the demurrers were overruled, of which orders plaintiff complains, for the reason that plaintiff claims the answer does not interpose any defense to the complaint. The answers are not models of perfection; but to give them a fair, reasonable interpretation, to which they are entitled, they clearly set forth a contract made between the plaintiff, as the holder of the notes, and the maker of the notes touching the manner and character of the payments that shall discharge the notes. No consideration is alleged to have passed for the making of this contract; but it is alleged that defendants fully performed their part of the agreement. Such performance would bind the corporation to perform its part of the contract even though before the defendants performed the contract was not enforceable for lack of consideration in making it. I know of no rule of law that prohibits the holder of a negotiable promissory note, which has been transferred to him in due course, and the maker of such note from making a contract that provides for the payment of such note in some other manner or in some different commodity from that specified in the note. Where such contract is made between the holder and the maker, and the maker performs that contract upon his part, he is entitled to have the note discharged, provided it has not been transferred to another holder who is protected from such defense, which is not claimed here.

The answer with reasonable certainty pleads such a contract and its performance by the defendants, and no error was committed by the court in denying the motions to strike, nor in overruling the demurrers.

The trial court upon conflicting evidence found for the defendants. That finding ought not be disturbed. No reversible error appearing, I concur in the order affirming the judgment.

DAHMER v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Montana. Oct. 25, 1913.)

1. NEGLIGENCE (§ 83*)—INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE—APPLICATION OF "LAST CLEAR CHANCE" DOCTRINE.

The last clear chance rule applies only where a person or his property is by his own act exposed to injury at the hands of defendant, and where defendant after discovering such situation fails to use ordinary care to avert the injury, and does not apply where the peril was not, though by the exercise of ordinary care it might have been, discovered in time to avert the injury, nor does it apply where the person injured was not negligent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

For other definitions, see Words and Phrases, vol. 5, p. 4006.]

2. RAILROADS (§ 274*)—INJURIES TO PERSONS ON TRACK—DUTY TO STOP.

Where a person was knocked from a station platform, where he had gone to meet an incoming passenger, by a blow from some unknown person, in front of an approaching train, those in charge of the train, if they discovered his peril while it was still within their power by the exercise of ordinary care to stop the train, were bound to do so.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-872; Dec. Dig. § 274.*]

3. RAILROADS (§ 274*)—OPERATION OF TRAINS—DUTY TO KEEP LOOKOUT.

A railway company is bound to use special care and watchfulness at points upon or near its track and at its open stations where the presence of persons, especially in considerable numbers, may reasonably be anticipated, especially where the approach to a station is such that those endeavoring to reach or leave trains or go to the station to transact business expose themselves to the same danger from trains as at highway crossings, and the rule applies whenever the presence of persons may be reasonably anticipated, whether they have business relations with the company or not, and even though they are technically trespassers.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-872; Dec. Dig. § 274.*]

4. RAILROADS (§ 218*)—OPERATION OF TRAINS—THROUGH TRAINS.

Railway companies may run through trains without stopping except at principal stations, if they make suitable provision by other trains running at reasonable intervals for the accommodation of travelers, and are not bound to bring home to the public notice of their rules designating the stations at which trains will stop, but persons desiring to know when and where such trains stop must inquire for information from the company's agents and conduct themselves accordingly.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 715; Dec. Dig. § 218.*]

5. RAILROADS (§ 274*)—OPERATION OF TRAINS—DUTY TO KEEP LOOKOUT.

The engineer of a through passenger train not scheduled to stop at a remote station, which it passed at an early hour in the morning and where it could not reasonably be anticipated that persons would be, was under no more obligation to keep a lookout than in the open country or at any other place where persons are not expected to be.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-872; Dec. Dig. § 274.*]

6. RAILROADS (§ 398*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a person knocked from a station platform in front of an approaching train, not scheduled to stop at that station, in the middle of the night, evidence held insufficient to show that the engineer discovered plaintiff's presence on the track in time to have avoided injuring him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. § 398.*]

7. RAILROADS (§ 376*)—INJURIES TO PERSONS ON TRACK—DUTY TO STOP.

An engineer was not bound to stop a train, though he saw a person who had been thrown on the track where he was entirely clear of the track, except one foot, which he would have gotten off had it not caught on a piece of wire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by John Dahmer against the Northern Pacific Railway Company and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed and remanded.

W. M. Johnston, of Billings, and Gunn & Rasch, of Helena, for appellants. H. C. Crippen, of Billings, and Walsh, Nolan & Scallon, of Helena, for respondent.

BRANTLY, C. J. A jury having returned a verdict for damages against the defendants for a personal injury alleged to have been inflicted upon plaintiff through their negligence, they have appealed from the judgment entered thereon and an order denying them a new trial. The accident occurred at Huntley, a small village in Yellowstone county, at the junction of the Chicago, Burlington & Quincy Railway with that of the defendant railway company. Both roads extend east and west through the village, the companies making use of the same depot or station, the track of the defendant company, with platform for the receipt of freight and the accommodation of passengers, being on the side toward the north, that of the other company on the side toward the south. Immediately north of the defendant company's track is a driveway of ordinary width, and persons going to or coming from the station on that side are compelled to cross the driveway and the track. For the accommodation of those who approach the station on foot, the defendant company has provided a gravel or cinder path extending from the principal street of the village to the north line of the railway. From the end of the path the waiting room, which is at the west end of the station building, is reached by going directly south to the east end of the platform and thence west, or by going southwest to the platform to a point in front of the door opening into the waiting room. These lines of travel are used indifferently. The evidence does not disclose how those who come and go by conveyances reach the station, but there is some basis for the inference that they must alight at the driveway and gain the station by crossing the track. So far as the record shows, access to it can be gained only in the way stated. At the time of the accident the plaintiff was temporarily in the village of Huntley on business and was stopping at a hotel north of the station. On the evening before it occurred he was expecting his mother to arrive on a train designated as No. 4, due from the west at about 8 o'clock. He ascertained, however, that No. 4, being several hours late, would not arrive until after midnight. He was also expecting to meet a business acquaintance who he claimed was to arrive on a train designated as No. 3, from the east, which was due at 1:18

o'clock. Accordingly, he went to the station some 15 or 20 minutes after midnight. Having found that No. 4 would not arrive until some 2½ hours later, he remained awaiting the arrival of No. 3. As this train approached, he stood on the east end of the platform observing it. When it was yet at a distance of 800 or 900 feet from the station, some one dealt him from behind a heavy blow upon the head from which he staggered and fell from the platform upon the rails, being for the moment "partially stunned." While he was in the act of crawling off the track toward the north, the train came upon him, inflicting such injuries that he thereby suffered the loss of both feet. To this narrative may be added the statement of the plaintiff as to his situation at the moment he was caught by the train: That in his effort to escape he had gotten clear of the rail except his right foot, and that as he was drawing it over it was caught by a piece of wire lying near the rail, which caused a delay of a few seconds—a sufficient time to allow the wheels to catch him. The left foot, he stated, must have been drawn under the wheels as he was rolled over by the impact of the wheels with his right foot. That this account is probably correct finds support in the fact that, on the following morning, witnesses who went to look over the ground found a wire lying near the north rail along the side of the path leading from the platform where the plaintiff was picked up after the train had passed, and also by the fact that his right foot was crushed at the ankle, whereas his left foot was crushed at the instep.

The complaint alleges that the defendant company was guilty of negligence in permitting the wire to remain where it was, inasmuch as it must have known that the wire was there and that it was a source of danger to persons going to and from the station. But during the trial the issues in this behalf were eliminated from the case. The specific charge upon which recovery was had is the following: "That the said defendant McDonough, so acting as engineer as aforesaid, in the exercise of reasonable care and diligence, could have seen plaintiff so upon said track, as aforesaid, and plaintiff alleges, on information and belief, that the said McDonough did see him on said track as aforesaid, in seasonable time to have stopped said locomotive and train so as to avoid striking plaintiff, but the defendant company, acting through the said McDonough as engineer, and the said defendant McDonough, wholly failed and neglected to stop said locomotive engine and train, and carelessly and negligently drove and ran said locomotive engine and train upon and over said plaintiff, so on said track as aforesaid, thereby crushing both of his feet to such an extent that it became necessary to amputate the same, which was thereafter done."

[1] Counsel for defendants open the argument in their brief with the following statement: "The question is presented on this appeal whether a liability for damages exists under the doctrine of 'last clear chance,' where a person is injured upon a railroad track, at a place where he has no right to be and where his presence could not be reasonably expected or anticipated, because of the failure of the engineer in charge of the train to discover such person's position and peril upon the track in time sufficient to stop the train and avoid injuring him." Assuming the position that plaintiff was a trespasser upon the defendant company's track, and that the evidence fails to show that the engineer actually discovered his presence there, they insist that the trial court should have directed a verdict for the defendants, because the duty to adopt any precaution to avoid injuring the plaintiff did not arise. They thus rely upon the rule of the last clear chance. Counsel for plaintiff insist that this rule has no application to the case, but that the plaintiff, having gone to the station to meet his mother, and having remained there to meet his friend who was to arrive on train No. 3, he was there rightfully because there upon the invitation of the defendant company, and hence that under the rule that it is the duty of a railway company to anticipate the presence of persons about its stations when a train is arriving, including those who go to meet an incoming passenger as well as those who accompany a departing one, and to exercise ordinary care for their safety, the engineer was under obligation to keep a constant lookout to discover plaintiff's position and thus to avoid injuring him. They also argue that the evidence shows conclusively that the engineer must actually have discovered the peril of plaintiff in time to stop the train, and hence that the defendants are liable even under the rule invoked by counsel. The court was of the opinion that the rule of the last clear chance is applicable, as is shown by the following instruction which discloses the theory of the charge submitted: "You are instructed that in this case if the engineer discovered, or in the exercise of reasonable diligence could have discovered, the position of the plaintiff on the track, if you find that he was upon the track in the manner in which he says he was, and it was apparent to the engineer that the plaintiff could not escape from the track so as to avoid being run over, the duty became imperative upon him to use all reasonable care to avoid running over the plaintiff or injuring him, and if he did not do so, and the plaintiff was injured, then the defendants, under such circumstances, would be liable for the injuries inflicted."

Counsel find no fault with the statement of the rule as embodied in the instruction. It may be remarked, however, that the rule is limited in its application to those cases

only in which the plaintiff, or the person injured, or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. 1 Thompson on Negligence, § 228. A case calling for its application embodies three elements, viz.: (1) The exposed condition brought about by the negligence of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property some other duty imposed by law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered. It is nothing more than a qualification, by way of exception, to the general rule that negligence on the part of plaintiff which proximately contributes to his injury will bar his recovery. So the rule is understood and applied by the courts generally. *Davies v. Mann*, 10 M. & W. 546; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 38 L. Ed. 485; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75, 8 Am. Rep. 663; *Northern Central Ry. Co. v. Price*, 29 Md. 420, 96 Am. Dec. 545; *Vicksburg, etc., Ry. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Cullen v. Railroad Co.*, 8 App. D. C. 69; *Western Md. Ry. Co. v. Kehoe*, 83 Md. 434, 35 Atl. 90; *Omaha St. Ry. Co. v. Cameron*, 43 Neb. 297, 61 N. W. 606. See, also, 1 Thompson on Negligence, § 238; 2 Thompson on Negligence, § 1735. This court recognized and applied the rule in *Egan v. Montana Central Ry. Co.*, 24 Mont. 573, 63 Pac. 831; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373; and *Neary v. Northern Pacific Ry. Co.*, 37 Mont. 461, 97 Pac. 944, 19 L. R. A. (N. S.) 446. In the course of the argument in the opinion in the last case, in stating the qualification of the general rule, it was said: "The general rule that one's own negligence in such case precludes recovery is subject to the qualification that, where the defendant has discovered, or should have discovered, the peril of the plaintiff's or deceased's position, and it is apparent that he cannot escape therefrom or for any reason does not make an effort to do so, the duty becomes imperative for the defendant to use all reasonable care to avoid the injury; and, if this is not done, he becomes liable, notwithstanding the negligence of the injured

party." The expression "or should have discovered," as used in this passage, seems to have been understood by some members of the profession in this state to imply an obligation on the part of the defendant to maintain a lookout at all times, to discover any one who may be in a position of peril, as well as to exercise due care thereafter to avoid injuring him, and that by an omission of this duty liability would arise for any injury caused thereby. The use of the expression was unfortunate, and perhaps justifies the doubt entertained as to the application this court would make thereafter of the qualification of the general rule; but a careful reading of the opinion does not, we think, justify any other conclusion than that the statement was intended to include those cases in which the actual discovery of the peril is a just inference from the evidence, though denied by the defendant, as well as those cases in which the discovery is admitted or not denied, and liability is sought to be avoided on other grounds. Doubtless, in formulating the instruction in this case, the trial court was laboring under the uncertainty induced by the statement of the rule as there made. But be this as it may, it has no application unless all of the elements heretofore enumerated appear in the case. It has no application to this case, because there was no antecedent negligence on the part of plaintiff.

[2, 3] A person, however, may be put in a position of peril by circumstances for which he is not responsible, and for this reason is not chargeable with antecedent negligence. To illustrate: Thugs may beat into insensibility and rob a man near a railroad. To destroy the evidence of their crime, they place their victim upon the track so that he may be killed by a passing train. It cannot reasonably be anticipated that any one will be upon the track at that place; yet, if those in charge of a train discover his situation, it at once becomes their duty to exercise such care as they may under the circumstances to avoid injuring him. If they discover him while it is still within their power, by the exercise of ordinary care, to stop the train, they must do so, under the penalty of making themselves and their employer liable. The plaintiff in this case was on the track without his own fault; yet to say that the engineer, though seeing his peril, was not bound to exercise such care as he could to avoid injuring him, is equivalent to saying that the engineer was at liberty to take his life because he was so unfortunate as to have been forced from his place of safety on the platform, upon the track, by the blow which he received from behind. In such a case the obligation to exercise reasonable care to avoid injury must be observed. Of course, if the defendant company was under obligation to keep a lookout at Huntley station, then, under the rule for which counsel for plaintiff contend, the question is not

whether the engineer did discover plaintiff's position in time to avert the injury, but whether under the circumstances he ought to have discovered it. We think the weight of authority gives support to the rule that a railway company is bound to use special care and watchfulness at points upon or near its track and at its open stations where the presence of persons, especially in considerable numbers, may reasonably be anticipated. On this subject Mr. Thompson says: "At such places the railway company is bound to anticipate the presence of persons on the track, to keep a reasonable lookout for them, to give warning signals, such as will apprise them of the danger of an approaching train, to moderate the speed of its train so as to enable them to escape injury; and a failure of duty in this respect will make the railway company liable to any person thereby injured, subject, of course, to the qualification that his contributory negligence may bar a recovery." 2 Thompson on Negligence, § 1726. It is a matter of common knowledge that at such places persons often do not fully appreciate the dangers incident to the coming and going of trains, or that they grow careless and inattentive to such an extent that they unconsciously fall into danger. It is also true that when, as in this case, the approach to a station is such that its use by those endeavoring to reach or leave trains, or to go there to transact business with the company's agents, may expose themselves to the same danger from the moving of trains as is encountered at highway crossings. Therefore a rule which requires the railway company to keep a lookout when its trains are approaching such places is humane and conservative of human life. Such a rule finds recognition in the following cases: *Thomas v. Chicago, Milwaukee & St. Paul Ry.*, 103 Iowa, 649, 72 N. W. 783, 39 L. R. A. 399; *Eppstein v. Missouri Pac. R. Co.*, 197 Mo. 720, 94 S. W. 967; *Chesapeake & Ohio R. Co. v. Nipp*, 125 Ky. 49, 100 S. W. 246; *Johnson v. Louisville & N. R. Co.*, 122 Ky. 487, 91 S. W. 707; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361; *Fleming v. Louisville & N. R. Co.*, 106 Tenn. 374, 61 S. W. 58; *Texas M. R. Co. v. Crowder*, 25 Tex. Civ. App. 536, 64 S. W. 90; *Chesapeake & Ohio R. Co. v. Rogers*, 100 Va. 324, 41 S. E. 732; *Brackett, Adm'r, v. Louisville & N. R. Co. (Ky.)*, 111 S. W. 710, 19 L. R. A. (N. S.) 558. See, also, note to *Martin v. Hughes Coal Creek Co.*, 41 L. R. A. (N. S.) 267; *Palmer v. Oregon Short Line Ry. Co.*, 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229. The rule includes all persons at places where their presence may be reasonably anticipated, whether they have business relations with the railway company or not; and, while those who go upon the premises of the company by invitation to transact business with it are technically trespassers if they get upon the track at places away from the crossings provided for them, nevertheless the company cannot be permit-

ted wholly to omit all precautions for their safety. Whether or not the railway company is bound to keep a lookout at any time depends upon the circumstances of the particular case.

[4, 5] This brings us to the question whether the evidence from any point of view is sufficient to charge the defendant. Neither of the trains designated as No. 3 and No. 4 was scheduled to stop at Huntley. Both were through trains. This fact seems to have been generally known. Whether the plaintiff knew that train No. 4 would not stop, the evidence does not disclose; he was informed, however, that train No. 3 would not stop. The only reason he had for thinking the contrary was that he had a telephone message from his friend that the latter would arrive on that train. Not having been informed by any agent of the company that the train would stop, he had no reason to think that it would. His presence at the time, then, was not by invitation of the company. In order to meet the demands of present-day conditions, railway companies may run through trains consisting wholly of Pullman cars, provided they make suitable provision to accommodate persons who do not care to use such trains by other trains running at reasonable intervals. *Doherty v. Northern Pacific Ry. Co.*, 43 Mont. 294, 115 Pac. 401, 36 L. R. A. (N. S.) 1139. For the same reason, and under like restrictions, they may run through trains without stopping except at principal stations. In such cases it is not incumbent upon them to bring home to the public notice of their rules designating the stations at which their trains will stop in order to take on or discharge passengers. Persons desiring to know when and where such trains stop are under obligation to inquire for information from the agents of the company and to conduct themselves accordingly. The duty to keep a lookout in passing stations at remote and out of the way places, if it arises, is to be measured by the character of such places, the time of the day or night when they are reached, and other like circumstances; and if, as in this case, the station is one which is passed at an early hour in the morning when it cannot reasonably be anticipated that persons are present to become passengers or to engage in the transaction of business with the agents of the company, the company is under no more obligation to keep a lookout than it is in the open country or at any other place where persons are not expected to be. Of course, the company may not relax the care and vigilance necessary to the safety of its passengers. The obligations in this behalf, however, do not require it to keep a lookout for those who chance to be in the way of its trains at places where their presence cannot reasonably be anticipated, whether they are technically trespassers or not.

[6, 7] Under the circumstances disclosed here, there was no obligation to keep a look-

out. Nor do we think that the evidence justifies the conclusion that the engineer discovered the position of plaintiff. According to the testimony of defendant McDonough, as he approached the station his duty under the rules of the company required him to observe the semaphore for signals and the switch lights in order to determine whether the track was clear. This duty continued until he had passed the station. He stated that as he approached the station, having reduced the speed of his train to 25 miles per hour, he was observing the semaphore above and beyond the station for signals; that he was also observing the switch light at the junction of the track with that of the Chicago, Burlington & Quincy Railway, which was also beyond the station, incidentally watching the line of track as it was disclosed by the headlight; and that he did not discover any object upon the track at all. There was evidence to the effect that the body of a man lying on the track could be distinguished as such probably from a distance of 350 to 400 feet, a space amply sufficient to give the engineer time in which to stop the train when going at the rate of 25 miles an hour. Whether a person crossing the track in the position in which plaintiff was could be seen, to quote the words of an experienced engineer who was examined by the plaintiff, "would depend on whether or not a man's vision was directed away from the rail for an instant. It could be seen between 500 and 600 feet if he was looking at nothing else, and would accordingly see the object." The witness stated further: "If the engineer's attention was called to the object, as he drew nearer to it, he could discern something as to what it was. At a distance of 400 feet the object would have to move quite a little; something so that it would draw his attention. It would have to move enough so that he could see what it was. He would have to get within 200 or 300 feet of it to see whether it was a dog or a person. At a distance of 300 feet the light would be of such a character that if he saw the object he could tell whether it was a dog or a person. If a man's vision caught that object, I would say he could tell what it was within 200 or 300 feet of it." This witness also stated that supposing the plaintiff had gotten his body entirely off the rail, except his right foot, whether the engineer could see the foot would depend "a whole lot" upon the nature of the place, "whether the end of the ties stuck above the ground, * * * whether it was a smooth place, * * * whether or not there was a dip," and whether or not he got a glimpse of it by reason of its movement. It may be added that the condition of vegetation along the track, if there was in fact any there, the shadows cast by the light, and other similar conditions, might have been considered as affecting the opinion expressed by the witness if they had been called to his attention. What the conditions

actually were the evidence does not disclose. Taking into consideration the fact that the engineer was not required to keep a lookout for persons on the track, that his attention was necessarily directed to the semaphore and the junction lights, that as soon as the plaintiff fell upon the track he hastened as rapidly as he could to crawl across it, and that at the moment of the collision his right foot only was over the line, the qualified opinion of this witness and one other who gave similar testimony was not, we think, evidence sufficient to justify the conclusion that the engineer saw the plaintiff at all. Besides, if plaintiff's own account of his situation is to be accepted as true, the engineer, though he saw plaintiff's foot upon the rail, was not bound to make an effort to stop the train; for he could not anticipate that anything would then interfere to prevent plaintiff from getting entirely clear of the track before the train would reach him.

The district court should have directed a verdict for the defendant. The judgment and order are accordingly reversed, and the cause is remanded for a new trial.

Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

BARNARD REALTY CO. v. CITY OF BUTTE.

(Supreme Court of Montana. Oct. 15, 1913.
On Rehearing, Dec. 11, 1913.)

1. MUNICIPAL CORPORATIONS (§ 654*) — STREETS—PRESCRIPTION—BURDEN OF PROOF.

In a suit to quiet title, where defendant city claimed that it had acquired the property as a street by adverse possession, it assumed the burden of establishing this right by showing every element necessary to its title.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. § 654.*]

2. MUNICIPAL CORPORATIONS (§ 654*) — STREETS—ESTABLISHMENT BY PRESCRIPTION — BURDEN OF PROOF.

Where a municipality claimed land as a highway because of its adverse occupancy for a period equal to that of limitations, it has the burden of showing the definite date when its occupancy of the land and work upon it as a highway began.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. § 654.*]

3. HIGHWAYS (§ 1*)—ESTABLISHMENT — PRESCRIPTION—TIME REQUIRED—EXTENT OF USE — "ONE OR MORE PERSONS."

Rev. Codes, §§ 1337, 1340, respectively, declare that all highways, roads, streets, and alleys laid out by the public or now used in travel are public highways, and that a highway so laid out, worked, and used shall not be vacated, until so ordered by the board of county commissioners, but that no route of travel used by one or more persons over another's land shall hereafter become a public road by use, until so declared by the board of county commissioners or by dedication by the owner. Held that, after the enactment of these statutes, the public use of land for

a highway could never ripen into adverse title unless it was so declared by the county commissioners; the expression "one or more persons" being equivalent to any number of persons and therefore necessarily as broad in its meaning as "the public."

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

4. MUNICIPAL CORPORATIONS (§ 648*) — STREETS—ACQUISITION BY PRESCRIPTION.

Rev. Codes, §§ 1337, 1340, declaring that all highways, roads, streets, and alleys now used by the public are public highways, and that no route of travel used by one or more persons over another's land shall hereafter become a public road by use until so declared by the board of county commissioners, apply to streets in a municipality, even though section 3259 makes them subject to the control of municipal authorities, and require such a declaration by the officials of the municipality having authority corresponding to that of the board of county commissioners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 648.*]

On Rehearing.

5. MUNICIPAL CORPORATIONS (§ 648*) — STREETS — PRESCRIPTION — STATUTES—IMPLIED REPEAL.

Rev. Codes, §§ 1337, 1340, providing that title to a street cannot be acquired by use until so declared by the county commissioners, although establishing a rule of public policy as to municipalities, do not repeal sections 3212, 3213, 3259, 3466, 3479, and 3480, relating to the power of the authorities of municipalities to establish, open, widen, and vacate streets.

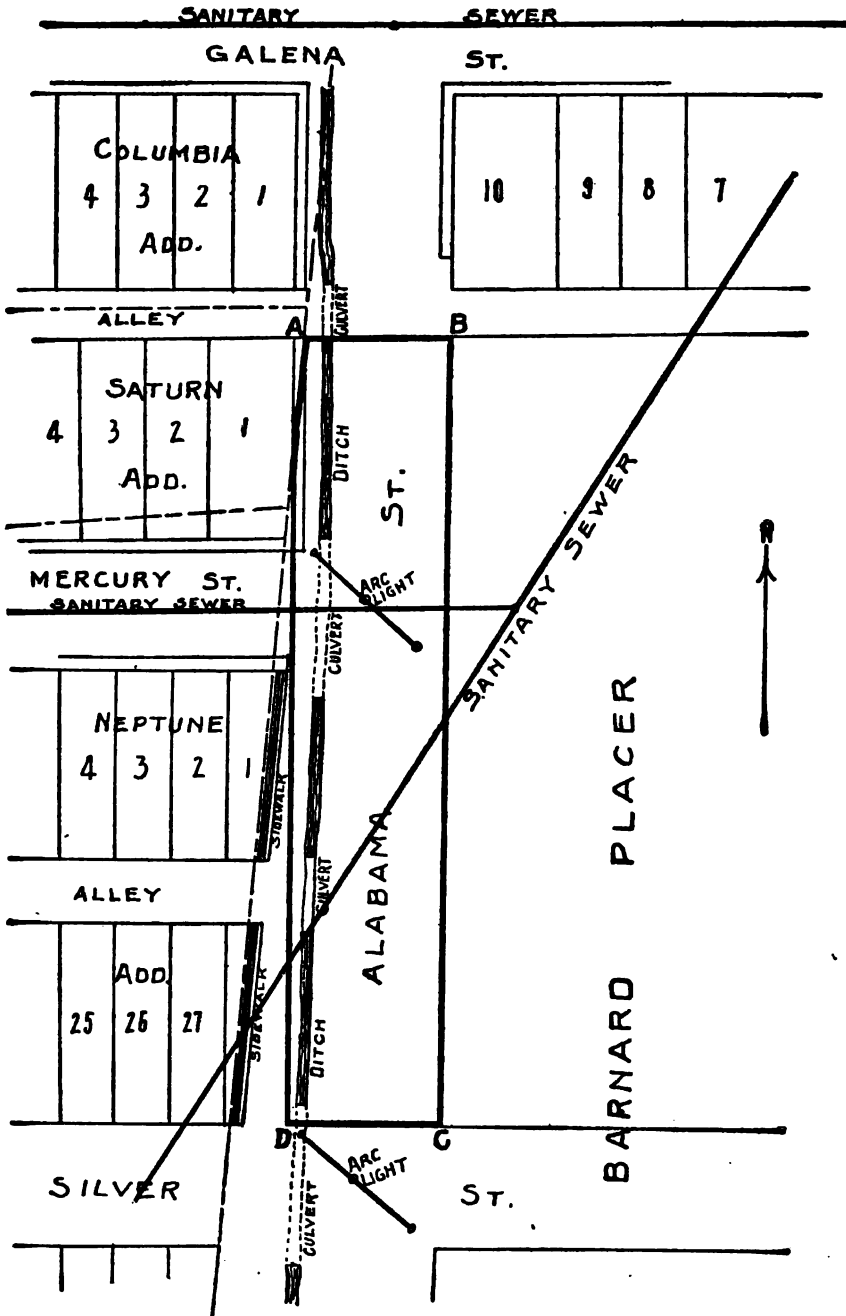
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 648.*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by the Barnard Realty Company, a corporation, against the City of Butte. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

El B. Howell and El M. Lamb, both of Butte, for appellant. Alex Mackel, Wm. F. Davis, John A. Smith, N. A. Rotering, and H. L. Maury, all of Butte, for respondent.

BRANTLY, C. J. The plaintiff brought this action on July 19, 1911, to obtain a decree quieting its title to the property described in the complaint, which is situated within the corporate limits of the city of Butte and consists of a strip of land extending from the south line of the alley immediately south of Galena street to the north line of Silver street. Its boundaries are indicated on the subjoined diagram by the heavy lines inclosing the area A, B, C, D, a part of the area designated as the Barnard placer; the dotted line being the western boundary of the latter. The question involved is whether the described area is a part of Alabama street. The defendant, admitting that the record title is in plaintiff, pleaded as a defense that for the full period of ten years prior to the bringing of the action it had been in the open, notorious, uninterrupted, exclusive, and adverse possession of the disputed area and used



the same as a public street, and was therefore the owner of an easement over it for a public street. The district court found the issues in favor of the defendant and entered a decree accordingly. The plaintiff has appealed from the decree and an order denying its motion for a new trial.

Counsel have made many assignments of error in their brief; but, since the only substantial argument made is confined to the assignment that the evidence is insufficient to sustain the findings, we shall deem the other

assignments waived and devote our attention to the single question thus submitted.

The evidence introduced by the defendant tends to establish the following:

The area shown on the diagram to the north of the alley and east of the dotted line was originally a part of the Barnard placer. In the year 1889 Barnard, the owner, caused it to be subdivided into blocks and lots and made it an addition to the city. The portion of this area north of the south line of the alley was thus formally dedicated to the use

of the public, presumably as an extension of Alabama street from the north. The dedication apparently included also the extension of the alley to the east. The area to the west of the dotted line from Galena street south is embraced in three distinct additions made to the city by other persons at about the same date; the portion north of the alley being a part of the Columbia addition, that between the alley and Mercury street a part of the Saturn addition, and that further south a part of the Neptune addition. All the portions of these areas designated as streets and alleys up to the dotted line were thus formally dedicated to public use. The rest of the Barnard placer east of the dotted line has been uninclosed and accessible to public travel. The fractional lots lying west of the line have been held and sold by the respective plat owners as fractional lots; the plaintiff and its predecessor having at all times refused to sell any portion of the area between the dotted line and the west line of the disputed area. Many of the lots in the Saturn and Neptune additions are now occupied by dwellings, some of which were erected more than ten years prior to the bringing of this action, and others of them within ten years. One of these, situated on lot 1 in the Saturn addition at the corner marked "A," fronts to the east. A narrow sidewalk constructed of boards extends from the north line of Silver street along the course of the dotted line to the south line of Mercury street. This has been constructed from time to time by owners of lots bordering on the Barnard placer to facilitate access toward Galena street from the south, but without permission of plaintiff or its predecessor. Extending north from Mercury street there is a sidewalk which follows the direction of the east line of the Saturn addition and encroaches slightly upon the disputed area. It does not appear who constructed this. During the year 1905 the area designated as Silver street east of the dotted line was, as a result of negotiations had with Barnard, opened as a public street and has since been graded and used as such. These negotiations had no relation to an extension of Alabama street; the purpose entertained by the city apparently being only to extend Silver street to the east to accommodate the residents along it toward the west.

Some time subsequent to the beginning of the year 1901 a ditch theretofore constructed along the west side of the dedicated portion of Alabama street and probably across the alley was extended south to and across Silver street. This was done by men employed by the street commissioner of the city and at the expense of the city; the purpose being to divert the surface water which tended to follow the natural slope of the country toward Missoula gulch on the east and prevent it from cutting up the surface of the roadway toward the south and obstructing travel

in that direction. At that time there were two lines of travel well defined, one on the east side of the line of the ditch and the other west of it; the one or the other being used according as it suited the convenience of the traveler. Later culverts were constructed at the points indicated on the diagram to facilitate access to the streets and alleys toward the west. Prior to 1889 placer mining operations were extended from Missoula gulch toward the west as far as the west line of the disputed area and north to about the south line of Mercury street, leaving the surface in such a condition, by reason of excavations and scattered debris, that travel over the area south to Silver street, though practical, was not convenient. The surface of this portion was leveled off by the city in 1905 and 1906. About the same time lines of wires were erected along the east and west sides of the disputed area to supply the residents to the west with light and telephone service. Arc lights were thereafter maintained by the city at Silver and Mercury streets. All of these improvements were made without the consent of the plaintiff, though its officers and agents had knowledge of them at the time. As a result, the area gradually assumed the appearance of an improved, much-traveled street.

Some time during the years subsequent to 1900 the city caused Mercury street to be graded. The grading operations stopped at the west boundary of the Barnard placer. The disputed area has never been made to conform to the grade established for that street. Later Silver street was graded throughout. Much evidence was introduced as to the character and amount of travel over the disputed area from the time the various additions were made to the city. If, however, the testimony of defendant's witnesses be taken as uncontroverted and at its utmost worth, it does not tend to establish a definite, fixed line of travel over any part of the area prior to 1896. As late as that year there were no buildings toward the west. The area in that direction was unoccupied, and persons having occasion to travel south and west from Galena street, after reaching the alley, took that direction which best suited their convenience and did not usually follow any definite, fixed route. Gradually, as the lots in these additions became occupied during the subsequent years, travel was forced eastward until it finally followed uniformly the two lines parallel with the line of the ditch. This had been the condition only from a date not earlier than the year 1896. The date at which the ditch was constructed was fixed by the defendant's one witness who testified on the subject as in the summer of 1901, in June or July. The construction work occupied two or three days. One of plaintiff's witnesses, who was assistant city engineer from 1896 to 1906 and city engineer during 1908 and 1909 and was familiar with the streets of the city, stated that the ditch was

not constructed until 1907 or 1908. These were the only witnesses who undertook to fix a definite date at which the city authorities assumed to exercise control over the disputed area.

The district court did not make special findings but found generally for the defendant. It proceeded upon one of two theories, viz.: That the assumption of jurisdiction by the city authorities by the doing of this work was definitely shown by the first witness to have taken place more than ten years prior to the commencement of the action, and hence that the right by prescription had then already accrued; or that it was wholly immaterial when the city authorities assumed jurisdiction and that a mere user by the public for the statutory period of ten years was sufficient to establish the right. Without considering the testimony introduced by the plaintiff as to when the work was done, it seems clear that the defendant's evidence does not warrant any finding other than that it was commenced and finished during the last three days of July, 1901.

[1] Since the defendant relied exclusively upon a right acquired by adverse use, it assumed the burden of establishing this right by showing every element necessary to constitute its title. 1 Cyc. 1143.

[2] One of the elements was to fix, by direct or circumstantial evidence, a definite date at which the statute began to run. The statement of the witness left the court no basis for a conclusion as to any definite date within the extreme limits covered by the two months mentioned. It is clear, therefore, that the only conclusion the court could reach was that the work was not done until the last two or three days of July, because there was no basis for fixing any earlier time. The statute was, upon this theory, not put in motion earlier than July 28, 1901.

[3] This brings us to the question whether mere user by the public for the statutory period, without substantial recognition by the public authorities, is sufficient to establish a highway by prescription. The answer to this inquiry must, we think, be found by reference to the provisions contained in sections 1337 and 1340 of the Revised Codes. These are the following: "All highways, roads, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways." Section 1337. "A highway laid out and worked and used as provided in this act must not be vacated or cease to be a highway until so ordered by the board of county commissioners of the county in which said road may be located; and no route of travel used by one or more persons over another's land shall hereafter become a public road or byway (highway?) by use, or until so declared by the board of county commission-

ers, or by dedication by the owner of the land affected." Section 1340. These provisions were first enacted as sections 2600 and 2603 of the Political Code of 1895. Whatever may have been the rule touching the establishment of public highways by prescription prior to the date of their adoption, they declared what should be considered highways at the time of their enactment and how a highway might thereafter be established. By the first section all highways, roads, streets, alleys, etc., were declared public highways (1) which had been laid out or erected by the public (that is, by the public authorities and at public expense); (2) which were then traveled or used by the public; or (3) which had been laid out or erected by others (by private persons) and dedicated or abandoned to the public.

We are not now concerned with the question whether it was the intention of the Legislature to declare all roads then in use to be public highways, without reference to how long the use had continued or what the character of use had been. We think, however, as we said in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, that the intention was to declare those only to be public highways which had been established by the public authorities, or were recognized by them and used generally by the public, or which had become such by prescription or adverse use at the time the provision was enacted. Any other views would, in our opinion, render the legislation open to serious constitutional objection. Constitution, § 14, art. 3. Be this as it may, the second section clearly evinces the intention that no highway falling within the enumeration contained in the former section should be vacated except by the public authorities, and that no route of travel should thereafter become a public right until declared so by the public authorities or had been made so by dedication by the owner of the land affected. The term "now," as used in the first provision, clearly indicates the intention to leave intact such rights as the public had already acquired, and as clearly does the use of the term "hereafter," in the latter section, indicate an intention that rights of the same kind should not in the future be acquired except by the methods therein prescribed. The expression "one or more persons" can mean no more nor less than any number of persons, and therefore is necessarily as broad in its meaning as the term "public," employed to indicate the extent of the use mentioned in the first section. By these enactments the Legislature explicitly declared it to be the rule that after July 1, 1895, when the Codes went into effect, a highway could not be established by use unless the use should be accompanied by some action on the part of the public authorities having jurisdiction of the subject, tantamount to a declaration that the particular road was a public highway. The provisions were copied substantially from the Political

Code of California, where they appear as sections 2618 and 2621. We have not been referred to any decision by the Supreme Court of that state construing the latter section. In *Leverone v. Weakley*, 155 Cal. 395, 101 Pac. 304, cited by counsel, it was merely referred to as not in any wise in conflict with the theory that a highway may be established by an implied dedication of it by the owner of the land affected by it. No question of dedication is involved in this case. In North Dakota a statute contained the provision: "No road traveled or used by any one or more persons over another's land shall become a public highway by use." The Supreme Court of that state construed it as meaning that no highway could be established by prescription, after its enactment, unless the right had theretofore fully matured by lapse of time. *Walcott Township v. Skauge*, 6 N. D. 382, 71 N. W. 544; *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082. It will be noted, however, that the Dakota statute does not contain the clause found in our statute, viz., "until so declared by the board of county commissioners, or by dedication by the owner of the land affected;" hence we are not required to adopt in toto the construction given by the court to the Dakota statute; our own evidently meaning that use, coupled with a substantial recognition of its public character by the public authorities, is sufficient to put the statute in motion.

[4] But counsel insist that, under other provisions of the Code, the control of streets and other highways within the limits of a city or town is lodged exclusively in the city or town authorities, and hence that section 1340 has no application to this case. This argument proceeds upon the assumption that mention in this section of the board of county commissioners, which body has control of county roads only, excludes the notion that the Legislature intended that the provision should apply to streets in cities and towns. That the streets of these municipalities are subject to the control of the municipal authorities is true (section 3259, Rev. Codes). That the provision in question does not in terms refer to them is also true. But, taking sections 1337 and 1340 together, a legislative intention is clearly evinced to provide a general rule by which highways of every character may be established or vacated. The latter section has reference to those highways enumerated in the former, to streets, etc., as well as to county roads; and, though the only public authority mentioned is the board of county commissioners, it cannot be conceived that the Legislature by this reference alone intended that this board should thereafter have control of the streets of cities and towns, or that these should be established by methods other than those prescribed for the establishment of county roads.

Counsel also insist that the cases of Pope

v. Alexander, 36 Mont. 82, 92 Pac. 203, 565, and *Lockey v. City of Bozeman*, 42 Mont. 397, 113 Pac. 286, have definitely established the rule applicable to the condition of facts presented in this case, and that it is conclusive against the position assumed by the plaintiff. Each of these cases, however, involved rights which had been established and matured prior to the enactment of the provisions in question here. No reference was made in either of these cases to the provision found in section 1340, supra, nor was it cited or commented upon by counsel. The case of *State v. Auchard*, supra, also involved a right which was alleged to have become matured prior to July 1, 1895. In the case at bar for the first time has the provision been invoked rendering a determination of its meaning and application necessary. Neither was it referred to in the case of *Montana Ore Pur. Co. v. Boston & Mont., etc., Co.*, 25 Mont. 427, 65 Pac. 420. That case was decided upon the controversy as presented by counsel. If the provisions of the statute had been invoked by the defendant, it would have been a conclusive answer to the plaintiff's contention, irrespective of the question actually decided.

During the oral argument counsel for plaintiff suggested that the answer is wholly insufficient to present the issue of adverse use by the public in that it asserts title in the city to the right of way claimed. The conclusion we have reached renders it unnecessary to notice this contention. Moreover, the question involved is not discussed in the printed argument.

The decree and order are reversed, and the cause is remanded to the district court for a new trial.

HOLLOWAY and SANNER, JJ., concur.

On Rehearing.

BRANTLY, C. J. [6] In their petition for a rehearing filed by counsel for defendant in this case, it is said that the original opinion has left it uncertain whether or not the several provisions of the Revised Codes (sections 3212, 3213, 3259, 3466, 3479, and 3480), relating to the power of the authorities of incorporated cities and towns to establish, open, widen, and vacate streets, are still in force. Counsel quote from the opinion the following: "But taking sections 1337 and 1340 together, a legislative intention is clearly evinced to provide the general rule by which highways of every character may be established or vacated"—and then proceed to argue that, if this passage is taken literally, it implies that hereafter the streets of cities and towns will be exclusively under the control of the boards of county commissioners. The passage, read in connection with what is said elsewhere in the opinion, is not susceptible of any such interpretation. The act of 1903, of which sections 1337 and 1340

are a part, applies to county roads only. This is made clear by reference to its title. The same may be said of the chapter of the Political Code of 1895 from which these sections were taken. While this is true, we think the Legislature, in declaring that travel by one or more persons over a given route outside of an incorporated city or town is not in itself, in the absence of an assumption of jurisdiction by the board of county commissioners by some definite action, sufficient to constitute adverse use of it as a highway, impliedly declared also that use of a street or alley within the limits of an incorporated city or town shall not be deemed adverse until jurisdiction has been assumed by definite action by the city or town authorities; and that in either case a highway once established cannot be vacated except by an order of the public authorities having jurisdiction over it.

Rehearing denied.

HOLLOWAY and SANNER, JJ., concur.

GRORUD v. LOSSL et al

(Supreme Court of Montana. Dec. 2, 1913.)

1. CORPORATIONS (§ 432*)—PERSONS LIABLE.

Where the president of a mercantile corporation and of a stage corporation, who had delivered checks on behalf of each company to a railroad and express agent to cover freight and express charges, had such agent arrested and prosecuted, charged with larceny as bailee of moneys belonging to the mercantile corporation, there was no presumption that in doing so he was acting for the stage corporation, though a few of the checks which the agent had not accounted for were drawn upon its account.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

2. CORPORATIONS (§ 493*)—ACTIONS—PERSONS LIABLE.

An action for malicious prosecution will lie against a corporation, as well as against a natural person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1904; Dec. Dig. § 493.*]

3. CORPORATIONS (§ 423*)—OFFICERS AND AGENTS—LIABILITY FOR ACTS.

Where an agent of a corporation, in the discharge of his duties and within the apparent scope of his authority, does an act from which a third person suffers injury, the corporation is liable for the damages flowing therefrom, even though the agent may have failed in his duty to the principal, or disobeyed his instructions; and, if the act is prompted by fraudulent or malicious motives, the agent's fraud or malice is imputable to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1692-1695; Dec. Dig. § 423.*]

4. CORPORATIONS (§ 432*)—ACTIONS—PERSONS LIABLE.

Where the president of a corporation procured the arrest and prosecution of a person

for larceny as bailee of such corporation's property, the presumption arose that he was acting for the corporation so as to make it liable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

5. MALICIOUS PROSECUTION (§ 32*)—ACTIONS—BURDEN OF PROOF.

While the plaintiff, in an action for malicious prosecution, must prove both the want of probable cause and malice to make a prima facie case, the jury may infer malice from proof of the want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 67, 68; Dec. Dig. § 32.*]

6. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.

In an action for malicious prosecution, where the evidence as to probable cause was conflicting, and the district court in the exercise of its discretion denied the motion for a new trial, the Supreme Court would not undertake to pass upon the credibility of the evidence with the inferences which the jury might be justified in drawing therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3878, 3948-3950; Dec. Dig. § 1005.*]

7. MALICIOUS PROSECUTION (§ 21*)—DEFENSES—ADVICE OF COUNSEL.

That defendant acted in good faith and upon the advice of counsel learned in the law, after fully and fairly laying the case before him, is a complete defense to an action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40-44; Dec. Dig. § 21.*]

8. APPEAL AND ERROR (§ 1033*)—REVIEW—ERRORS FAVORABLE TO APPELLANT.

In an action for malicious prosecution, instructions, that if defendant caused the arrest and imprisonment of plaintiff without probable cause and maliciously, to find for plaintiff, and that if plaintiff was arrested and imprisoned by defendant upon mere guess, or if the proceedings against him were commenced recklessly and without exercising the care and caution necessary to justify a prudent man in commencing a criminal prosecution against another, that the arrest and imprisonment were without probable cause, though erroneous, as requiring proof of an arrest and imprisonment, and though these are unnecessary in actions for malicious prosecution, were favorable to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4062-4062; Dec. Dig. § 1033.*]

9. FALSE IMPRISONMENT (§ 3*)—"MALICIOUS PROSECUTION"—DISTINCTION.

Where an arrest and imprisonment are brought about by legal process, but the prosecution is instituted and carried on maliciously and without probable cause, it constitutes "malicious prosecution;" but if the arrest and imprisonment are accomplished without legal process, it is false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 2; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2657-2661; vol. 8, p. 7660; vol. 5, pp. 4309, 4310.]

10. FALSE IMPRISONMENT (§ 4*)—ELEMENTS—MALICE.

An arrest and imprisonment without legal process gives a right of action for false imprisonment, whether prompted by malice or not.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 16; Dec. Dig. § 4.*]

11. MALICIOUS PROSECUTION (§ 7*)—NECESSITY OF ARREST AND IMPRISONMENT.

It is not necessary to a cause of action for malicious prosecution that plaintiff should have been arrested, imprisoned, or held to bail; it being sufficient if he was maliciously and without probable cause vexed and harassed by a criminal prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 7, 9, 10; Dec. Dig. § 7.*]

12. MALICIOUS PROSECUTION (§ 52*)—PLEADING—MENTAL SUFFERING.

In an action for malicious prosecution, damages were recoverable from mental anxiety and suffering, though the complainant did not specially allege such damages, since mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 100; Dec. Dig. § 52.*]

13. MALICIOUS PROSECUTION (§ 24*)—SUFFICIENCY OF EVIDENCE—PROBABLE CAUSE.

In an action for malicious prosecution, plaintiff's discharge in the prosecution, claimed to have been maliciously instituted, after a full investigation of all the facts within the knowledge of the prosecuting witness, if not prima facie evidence, is at least some evidence of want of probable cause; and hence an instruction that such discharge could be considered only as evidence that the prosecution had terminated was properly refused.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49-55; Dec. Dig. § 24.*]

14. MALICIOUS PROSECUTION (§ 34*)—TERMINATION OF PROSECUTION—NECESSITY.

In an action for malicious prosecution, it must appear, by admissions in the pleadings or by the proof, that the prosecution on account of which plaintiff is suing is at an end.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 70; Dec. Dig. § 34.*]

15. PLEADING (§ 376*)—ISSUES.

Where the complaint, in an action for malicious prosecution, alleged, and the answer admitted, that the prosecution in question terminated by plaintiff's discharge, it was not necessary to prove that fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by A. A. Grorud against J. P. Lossi and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed in part, and reversed in part.

Jos. C. Smith, of Dillon, and Breen & Jones, of Butte, for appellants. B. K. Wheeler, M. F. Canning, and P. E. Geagan, all of Butte, for respondent.

BRANTLY, C. J. Action for damages for malicious prosecution. The plaintiff had verdict and judgment. The defendants have ap-

pealed from the judgment and an order denying their motion for a new trial.

On behalf of the defendants the contention is made that the court erred in denying their separate motions for nonsuit, because it was not shown that either of the corporations authorized or had any connection with the prosecution on account of which this action was brought, and because the evidence failed to disclose that Lossi acted without probable cause. The contention is also made that the evidence is insufficient to justify the verdict, and that the court committed prejudicial error in charging the jury.

The prosecution of plaintiff arose out of the following circumstances: For the 22 months prior to June 12, 1911, the plaintiff had been employed at Divide, in Silver Bow county, as the agent of the Oregon Short Line Railway Company and also of the American Express Company. The defendant J. P. Lossi Company was, during the same time, engaged in a general merchandise business at Wisdom and Dewey, some distance to the west of the line of railway, in Beaverhead county. The Divide & Gibbonsville Stage Company was engaged in the transportation of freight and passengers from Divide to Wisdom and other points to the west. J. P. Lossi was the president and manager of both corporations, and controlled their business. Goods purchased by the merchandise corporation was received at Divide and conveyed by the other corporation to Wisdom and Dewey. To provide for the payment of freight and express charges, the defendant Lossi would, from time to time, send to the plaintiff checks drawn in favor of the railway or express company—oftener in favor of the former—upon the bank at which the deposits of the defendant corporations were kept, usually amounting to \$150 at a time. In some instances a single check for this amount was sent, in others two or three checks aggregating this amount, and in others the amount would be larger, according to the amount of the charges to be met at the particular time. The sums thus sent covered also the compensation of plaintiff for the accommodation extended to the defendant corporations. This was fixed at \$15 per month. The plaintiff kept an account of the transactions between himself and the defendant corporations. In making his monthly remittances to the accounting officers of the railway and express companies, he would send the checks, which were accepted by these companies as cash, and collected in due course from defendant's bank. At the end of each month plaintiff remitted to Lossi a statement, which was supposed to contain a list of all the checks received by him on account of either of the defendant corporations, as well as of the items of charges in favor of the railway and express companies. Usually this statement showed a balance in favor of the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fendant corporations. This course of business was pursued for the 22 months during which the plaintiff was employed. During the early months of 1911 defendant Lossi, upon an examination of the accounts of the defendant corporations, discovered that, out of the whole number of checks received by the plaintiff, the latter had failed to account for several, the aggregate amount of which he did not then know exactly. The amount was then thought by him to be more than \$1,000. Thereupon, after consultation with the county attorney of Silver Bow county, he caused the arrest of the plaintiff on a charge of larceny as bailee of moneys belonging to the J. P. Lossi Company to the amount of \$1,000. The arrest was made on June 12, 1911, on a warrant issued upon a complaint filed with a justice of the peace. Plaintiff was held until he was admitted to bail. At a preliminary hearing thereafter had by the justice, the plaintiff was discharged.

At the trial plaintiff testified that during the time he was acting as agent for the defendant corporations, the defendant Lossi frequently had need of various sums in cash to be used by him personally, or in connection with the business of the corporation, that it was inconvenient for him to obtain it from the bank, which was at Deer Lodge in Powell county, and that he would on such an occasion draw a check against the account of one or the other of the defendant corporations in favor of the railway or express company, and have plaintiff advance the amount of it in cash out of the funds in his hands belonging to the company to which it was made payable. These checks he said were not included in his monthly statements because they had no connection with the payment of freight and express charges, and hence were properly omitted. There were in all 26 of such checks not accounted for. The aggregate amount of them was \$2,000. Most of them had been drawn against the account of the J. P. Lossi Company. There was some testimony which corroborated these statements. The claim of Lossi was that all of the checks sent by him were intended to meet freight and express charges, that he never asked for nor received any accommodation from plaintiff in the way of cash advanced upon checks, and that plaintiff appropriated to his own use the amount of the checks omitted from the statement, trusting that Lossi or the accountants of the corporations would not discover his thefts. The evidence introduced by the defendants tended to show that there was substantial foundation for this claim, but the jury refused to accept it.

[1-4] 1. We think the court erred in denying the motion of the Divide & Gibbonsville Stage Company. Though the defendant Lossi was its president and manager, it was not suggested by anything in the evidence that it had any connection with the prosecution of the plaintiff, or that Lossi instituted the

prosecution in its behalf. It is settled law that an action for malicious prosecution will lie against a corporation as well as against a natural person. *Weaver v. Montana C. Ry. Co.*, 20 Mont. 163, 50 Pac. 414; *Pennsylvania Co. v. Weddle*, 100 Ind. 139; *Boogher v. Life Ass'n of America*, 75 Mo. 319, 42 Am. Rep. 413; *Reed v. Home Savings Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Williams v. Planters' Ins. Co.*, 57 Miss. 759, 34 Am. Rep. 494; *Carter v. Howe Machine Co.*, 51 Md. 290, 34 Am. Rep. 311; *Goodspeed v. East Had-dam Bank*, 22 Conn. 530, 58 Am. Dec. 439. By the great weight of authority it is also the rule that when an agent of a corporation in the course of the discharge of duties intrusted to him by it, and within the apparent scope of his authority, does an act from which a third person suffers injury, the corporation also is liable for the damages flowing therefrom, even though the agent may have failed in his duty to the principal, or may have disobeyed his instructions. *Rand v. Butte El. Ry. Co.*, 40 Mont. 398, 107 Pac. 87; *Golden v. Northern Pac. Ry. Co.*, 39 Mont. 435, 104 Pac. 549, 84 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886; *Callahan v. Chicago, etc., Ry. Co.*, 47 Mont. 401, 133 Pac. 687; *Weaver v. Montana C. Ry. Co.*, supra. If the act is prompted by fraudulent or malicious motives, the fraud or malice of the agent is imputable to the corporation. *Reed v. Home Savings Bank*, supra; *Vance v. Erie Ry. Co.*, 32 N. J. Law, 334, 90 Am. Dec. 665; *Wheless v. Second Nat. Bank*, 1 Baxt. (Tenn.) 409, 25 Am. Rep. 783; *Carter v. Howe Machine Co.*, supra; *Williams v. Planters' Ins. Co.*, supra; *P. W. & B. Ry. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73. The prosecution having been instituted by Lossi on behalf of the mercantile corporation—that is, to bring the plaintiff to justice for the alleged larceny of its funds—the presumption does not attach that he was acting for the stage company also, although he was its president, and although it appeared incidentally in the evidence that a few of the checks not accounted for were drawn upon its account. It was no more responsible for the prosecution than would have been any other corporation of which Lossi happened to be president and manager. The situation with reference to the other corporation is entirely different. Upon the face of the proceedings the presumption arises that Lossi was acting for it, for the subject of the larceny was its property, and as its president and manager, he was the proper person to institute the prosecution in its behalf.

[5] The motion of Lossi was properly denied. At the close of plaintiff's case the evidence tended to support the claim of plaintiff that he had cashed the checks, not accounted for in his monthly settlements, solely for the accommodation of the defendant. If this was the fact—and for the purposes of the motion it was to be accepted as a fact—the prosecution was wholly without probable

cause. This condition of the evidence warranted an inference of malice, for all the authorities agree that, while the plaintiff must prove both the want of probable cause and malice in order to make a prima facie case, they also agree that when the absence of the former has been established, the presence of the latter may be inferred. *Martin v. Corscadden*, 84 Mont. 308, 86 Pac. 33. It being the office of the jury to draw this inference under proper instructions, the motion was properly denied.

[6, 7] 2. Counsel for defendants have devoted most of their printed argument to a discussion of the evidence, insisting earnestly that the explanation offered by the plaintiff as to why his monthly statements did not include the missing checks is so palpably improbable that it does not furnish any substantial support for the verdict, especially so in face of the denial by defendant Lossi that he ever obtained cash from the plaintiff for any purpose. Owing to the nature of the transactions between the plaintiff and the defendant, knowledge of them could not be had by others. Therefore, aside from the evidence showing that the prosecution had been terminated; that the defendant had consulted counsel before instituting it, and some circumstances corroborative of the conflicting stories told by the plaintiff and the defendant themselves—the jury were left to determine from these narratives alone where the right of the controversy lay. Of course, if the jury had accepted the story told by the defendant, the inevitable conclusion would have been that the plaintiff was guilty of the charge of larceny made against him, or, in any event, that the prosecution had not been instituted without probable cause. On the other hand, having accepted the story told by the plaintiff, with the legitimate inferences to be drawn from it, the jury were justified in concluding that the charge made was wholly without probable cause; and, having so concluded, they were at liberty to infer that in preferring the charge the defendant was prompted by malicious motives. And although in this character of action it is a complete defense that the defendant acted in good faith and upon the advice of counsel learned in the law, after fully and fairly laying the case before him, the court has no right and will not undertake to pass upon the credibility of the evidence with the inferences which the jury might be justified in drawing from it in this behalf. *Martin v. Corscadden*, supra; *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800; *Newell on Malicious Prosecution*, § 7. In exercising the discretion lodged in it by law, the district court accepted the verdict of the jury and denied the motion for a new trial. It is not within our power to interfere, even though upon an analysis of the evidence we might entertain the view that the defendant ought to have prevailed.

[8-11] 3. Instructions numbered 2 and 3

submitted to the jury, are the following:

"(2) If the jury believe from the evidence that the defendant caused the arrest and imprisonment of the plaintiff without probable cause and maliciously, as alleged in plaintiff's complaint, then they will find for the plaintiff, and may assess his damages, if any were sustained, at such sum as they think proper, from the facts and circumstances in the case, not exceeding the sum of \$49,760.

"(3) The court instructs the jury that if you believe that the plaintiff was arrested and imprisoned by the defendant upon mere guess, or that the proceedings taken against him were commenced recklessly, and without exercising that care and caution necessary to justify a prudent man in commencing a criminal prosecution against another, then I instruct you that the arrest and imprisonment was without probable cause."

Counsel insists that these instructions wrought prejudice to the defendants, because the issue being tried was whether the defendant had maliciously prosecuted the plaintiff, not whether he had maliciously caused plaintiff's arrest and imprisonment, and that the court unduly emphasized mere incidents of the prosecution. The distinction between malicious prosecution and false imprisonment is this: If the arrest and imprisonment are brought about by legal process, but the prosecution has been instituted and carried on maliciously and without probable cause, it is malicious prosecution. If the arrest and imprisonment have been accomplished without legal process, it is false imprisonment. *Colter v. Lower*, 35 Ind. 285, 0 Am. Rep. 735; *Herzog v. Graham*, 9 Lea (Tenn.) 152; 26 Cyc. 8. The latter is an unlawful violation of the personal liberty of another (Rev. Codes, § 8324), and is the subject of an action whether the wrongful act is prompted by malice or not. There is some diversity in the decisions on the subject, but the weight of authority seems to be in favor of the view that in an action for malicious prosecution it is not indispensable that the plaintiff show that he was arrested or imprisoned or was held to bail, and that it is sufficient to sustain the action if it appears that the plaintiff has maliciously and without probable cause been vexed and harassed by a criminal prosecution. Whether the action will lie for the malicious prosecution of a groundless civil suit we need not now consider. The evidence shows that the plaintiff suffered both arrest and technical imprisonment. In drawing the attention of the jury to these facts the court seemed to indicate an opinion that proof of them was indispensable. This was error, but was error in favor of the defendants rather than against them, and therefore was not prejudicial because it cast a greater burden upon the plaintiff than he was required to sustain. Furthermore, in view of other portions of the charge, wherein the court defined clear-

ly and correctly the rule of law applicable, we do not think the jury were misled.

[12] In instruction No. 4 the jury were told that if they found for the plaintiff they should award him damages in such an amount as would compensate him for the injury sustained, including loss of time, "his anxiety and suffering," etc. It is argued that since the complaint does not allege specially damages accruing from mental suffering, the instruction permitted the jury to consider an element of damage which was wholly without the issues. It is not clear what the court meant by the expression "anxiety and suffering," but upon the assumption that it refers to mental suffering, the contention is without merit. In such an action the plaintiff is entitled to recover general compensatory damages for whatever injury he has suffered as the natural and necessary result of the charge made against him by the defendant. Bodily pain and suffering are the natural result of bodily harm, and compensation for them comes under the head of general damages. So mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution upon a charge of an infamous crime, the very foundation of which is the indignity inflicted by it; special allegations on the subject are therefore unnecessary. *Shatto v. Crocker*, 87 Cal. 629, 25 Pac. 921; *Lytton v. Baird*, 95 Ind. 349; 13 Ency. Pl. & Pr. 452; 2 *Sutherland on Damages*, § 421.

[13-15] Counsel for the defendants requested the court to instruct the jury that the fact that the plaintiff had been discharged by the justice of the peace was not any evidence of a want of probable cause for the criminal prosecution, and could be considered by them only as evidence that the prosecution had terminated. The request was refused. Counsel insist that the refusal was prejudicial error, and cite *Martin v. Corscaden*, supra, as conclusive of their contention. The case is not in point. The court there held that the portion of the justice's docket containing a finding that the prosecution was groundless, and adjudging the costs against the prosecuting witness, was inadmissible because it was in effect a judgment upon the very question at issue, viz., whether the prosecution was without probable cause and malicious. This is not a holding that the discharge by the justice was not any evidence of a want of probable cause. It must appear by admissions in the pleadings, or from the plaintiff's evidence, that the prosecution on account of which he is suing for damages is at an end, otherwise he has failed to make out a case for the jury. The complaint in this case alleges, and the answer admits, that the proceeding before the justice terminated by a discharge of the plaintiff. The necessity for the introduction of evidence on the subject was therefore dispensed with.

The rule prevails in most jurisdictions that this fact, when shown, is prima facie evidence of a want of probable cause. *Plassan v. Louisiana Lottery Co.*, 84 La. Ann. 246; *Straus v. Young*, 36 Md. 246; *Frost v. Holland*, 75 Me. 108; *Madison v. Pennsylvania Ry. Co.*, 147 Pa. 509, 23 Atl. 764, 30 Am. St. Rep. 756; *Jones v. Finch*, 84 Va. 204, 4 S. E. 342; *Vinal v. Core*, 18 W. Va. 1; *Bigelow v. Sickles*, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25; *Fox v. Smith*, 26 R. I. 1; *Sharpe v. Johnston*, 76 Mo. 660; *Chapman v. Dodd*, 10 Minn. 350 (Gil. 277); 26 Cyc. 38. In *Davis v. McMillan*, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N. S.) 928, 113 Am. St. Rep. 586, 7 Ann. Cas. 854, the Supreme Court of Michigan disapproves the doctrine of these cases, and declares it to be the better view that the fact of the discharge by the justice, standing alone, is no evidence of a want of probable cause. We shall not at this time enter into a discussion of the merits of these different views. We are of the opinion that where, as in this case, the order of discharge has been made after a full investigation of all the facts within the knowledge of the prosecuting witness, it is some evidence at least that the prosecution was groundless. From this point of view the requests of the defendants were properly refused.

The one remaining assignment made by counsel we do not think of sufficient merit to demand special notice.

As to the *Divide & Gibbonsville Stage Company*, the judgment and order are reversed, and the district court is directed to dismiss the action. As to the other defendants, the judgment and order are affirmed.

HOLLOWAY and SANNER, JJ., concur.

J. ROSENBAUM GRAIN CO. v. HIGGINS.
(Supreme Court of Oklahoma. Nov. 25, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 773*)—BRIEF—NECESSITY.

Where counsel for plaintiff in error, in conformity with the rules of this court, has prepared, served, and filed a brief in support of his assignments of error, and there is no brief filed and no reason given for its absence on the part of defendant in error, this court is not required to search the record to find some theory upon which the judgment of the court below may be sustained; but where the brief filed by plaintiff in error appears reasonably to sustain his assignments of error, or some of them, the court may reverse the judgment in accordance with the petition of plaintiff in error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8104, 8108-8110; Dec. Dig. § 773.*]

2. CONTRACTS (§§ 29, 176*)—DETERMINATION OF EXISTENCE—CONSTRUCTION—QUESTION FOR COURT.

Where a transaction between two parties consists entirely of letters and telegrams, it is for the court to determine whether such corre-

spendence constitutes a contract; and where such correspondence contains no technical words or terms of art, and the effect thereof depends merely upon the construction and meaning of the instrument and not upon extrinsic facts and circumstances, the construction of the contract is wholly for the court and is not a question of fact to be determined by the jury.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 141-143, 767-770, 917, 956, 979, 1041, 1097, 1824, 1825; Dec. Dig. §§ 29, 176.*]

Error from County Court, Kiowa County; J. W. Mansell, Judge.

Action by the J. Rosenbaum Grain Company against J. H. Higgins. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Morse & Standeven, of Hobart, and SturGIS & Manatt, of Enid, for plaintiff in error.

HAYES, C. J. Plaintiff in error brought this action in the court below. The cause of action alleged in its petition in that court is based upon the following alleged facts: Plaintiff purchased from defendant six cars of wheat, which were to be shipped from Oklahoma to plaintiff at Ft. Worth and Galveston, in the state of Texas. All the purchases were made by telegram and confirmation by letters. The letters of confirmation, in accordance with which the wheat was shipped, provided that it was the agreement between the purchaser and seller that the weights and classification of the grain at destination should govern in the settlement between the parties, unless changed by mutual consent. At the time of making the shipments, defendant made drafts upon plaintiff covering said shipments, with bills of lading attached, which plaintiff paid, and took up the bills of lading. When the grain arrived and was weighed and classified at destination and the value thereof computed in accordance with the price agreed upon in the telegrams and letters of confirmation, it appeared that defendant had overdrawn on said cars to the amount of \$501.82. To cover this amount plaintiff brought this action.

Defendant, by his answer, denies that there was an agreement that the weights and classification at destination were to govern and alleges that the weighing and classification of the wheat at destination was fraudulently made, and that the amounts of the draft drawn by him upon plaintiff and paid by it were less than the value of the wheat at the price agreed upon in the contract of purchase, and by way of cross-petition asks for judgment against plaintiff in the amount of the alleged balance unpaid on the purchase price of said wheat. The trial in the court below resulted in a verdict and judgment in favor of defendant for the amount prayed for in his cross-petition.

[1] Plaintiff in error, within the time provided by the rules of this court, filed its brief;

but defendant in error has wholly failed to file any brief or to assign any reason for such failure. We have examined the brief of plaintiff in error, and it is apparent that some of its assignments have merit. Under this condition of the case, under the previous decisions of this court, we are authorized to reverse the cause without further examination of the record or the questions presented. *Missouri, K. & T. Ry. Co. v. Long*, 27 Okl. 458, 112 Pac. 991; *Flanagan et al. v. Davis et al.*, 27 Okl. 422, 112 Pac. 990; *School Dist. No. 39, Pottawatomie County, v. Shelton*, 28 Okl. 229, 109 Pac. 67, 138 Am. St. Rep. 962; *Buckner v. Oklahoma Nat. Bank of Shawnee et al.*, 25 Okl. 472, 106 Pac. 959; *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170.

[2] The petition alleges, and the evidence establishes, that the entire transaction between plaintiff and defendant, resulting in the purchase of the wheat, consisted of telegrams and letters. The trial court submitted an instruction to the jury whereby it authorized the jury to find whether there was a contract between the parties as to what weights and classification should control; and, in the event they should find there was no agreement between the parties relative thereto, then the custom in such matters among grain dealers would govern; and that it was the duty of the purchaser of the wheat on receipt of same, if the wheat did not come up to the standard of weights and grades as specified in the contract, to notify the seller of that fact and give him an opportunity to participate in the adjustment of the differences; and further charged that in the event the jury found that if there was no contract for the determination of the weights and grades, and that plaintiff accepted the wheat without notifying defendant of the character of the wheat and appropriated the same upon the contract, then the jury would be warranted in finding for the defendant.

As above stated, the evidence clearly establishes that the contracts of purchase were consummated solely by means of telegrams and letters; and it is apparent from reading these letters and telegrams that there was an agreement that the weights and classification of the wheat at destination should control in settlement between the parties under the contract. The giving of the foregoing instruction complained of, under the previous decisions of this court, was clearly error. Where a transaction between two parties consists entirely of letters and telegrams, it is for the court to determine whether such correspondence constitutes a contract; and where such correspondence contains no technical words or terms of art, and the effect thereof depends merely upon the construction and meaning of the instrument, and not upon extrinsic facts and circumstances, the construction of the contract is wholly for the court and is not a question of fact to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

determined by the jury. *American Jobbing Ass'n v. James*, 24 Okl. 480, 103 Pac. 870; *Culbertson v. Mann*, 30 Okl. 249, 120 Pac. 918; *Atwood v. Rose et al.*, 32 Okl. 355, 122 Pac. 929.

There are other specifications of error in plaintiff's brief which, from the statement contained in its brief, appear to have merit; but as these assignments cannot be satisfactorily considered without an examination of the record, and we are unaided by any brief on behalf of defendant pointing out such parts of the record affecting these assignments as may be favorable to him, and since for the reasons already suggested the cause must be reversed, we shall not consider the further assignments.

The judgment of the trial court is reversed, and the cause remanded. All the Justices concur.

BROWN-BEANE CO. et al. v. RUCKER et al.

(Supreme Court of Oklahoma. Jan. 21, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564*)—CASE-MADE—TIME FOR SERVICE.

A case-made not served within three days after the judgment sought to be reviewed is entered, or within the extension of time allowed by the court or judge, is void, and will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Rogers County; T. L. Brown, Judge.

Action by J. G. Rucker and another, co-partners, etc., against the Brown-Beane Company and others. Judgment for plaintiffs, and defendants bring error. Dismissed. See, also, 129 Pac. 1.

Biddison & Campbell, of Tulsa, for plaintiffs in error. John Q. Adams, of Claremore, and Randolph & Haver, of Tulsa, for defendants in error.

BREWER, C. This cause is appealed from the district court of Rogers county, and is brought for the purpose of reviewing an order of said court, wherein it denied a motion to dissolve a temporary injunction, and by order continued the same in full force and effect pending the final hearing of the cause.

The petition in error herein was filed in this court January 24, 1912, and on April 25, 1912, the defendants in error filed their motion to strike the case-made from the files, and to dismiss the appeal. One of the reasons assigned for dismissing the appeal is "because said case-made shows that it was not served upon the defendants in error within

the time fixed by the order of the court." The motion to dismiss the appeal must be sustained upon the above ground.

From the case-made it appears that the order and judgment of the court complained of was rendered on December 28, 1911, and further shows that on said date the plaintiffs in error were allowed ten days in which to make and serve case-made for appeal to the Supreme Court. The case-made appears to have been served on the defendants in error on January 6, 1912. The date of the service of the case-made as stated is shown by the certificate of the attorney for plaintiffs in error, and also by an acceptance of service by the attorneys for defendants in error; the record fails to show any order of the court further extending the time. Therefore it follows that the case-made was not served within the ten days allowed by the order of the court. This is jurisdictional, and for the reasons stated, following the decisions of this court, the case-made is a nullity, and the appeal should be dismissed. *Haynes et al. v. Smith*, 29 Okl. 703, 119 Pac. 246; *Thompson et al. v. Fulton*, 29 Okl. 700, 119 Pac. 244; *Devault et al. v. Merchants' Exchange Co.*, 22 Okl. 624, 98 Pac. 342; *Bettis v. Cargile et al.*, 23 Okl. 301, 100 Pac. 436; *Bray v. Bray*, 25 Okl. 71, 105 Pac. 200; *Carr v. Thompson et al.*, 27 Okl. 7, 110 Pac. 667; *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388; *Lankford v. Wallace*, 26 Okl. 857, 110 Pac. 672.

It is so ordered.

PER CURIAM. Adopted in whole.

FT. SMITH & W. R. CO. v. WINSTON.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

EVIDENCE (§ 471*)—OWNERSHIP OF PERSONALTY—COMPETENCY OF WITNESS.

Ownership of personal property is ordinarily a simple fact, to which a witness, having requisite knowledge, can testify directly, and a question as to who is the owner of personal property involved in an action where such question involves a fact within the knowledge of a witness, and not an expression of opinion upon facts proven, is admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

Error from the County Court, Hughes County; P. W. Gardner, Judge.

Action by W. W. Winston against the Ft. Smith & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

C. E. & H. P. Warner, of Ft. Smith, Ark., for plaintiff in error. Crump & Skinner, of Holdenville, for defendant in error.

HAYES, O. J. This action was begun in the court below by defendant in error, hereinafter called plaintiff, against plaintiff in error, hereinafter called defendant or the

railway company, to recover the value of 1,546 first-class railroad ties and 113 second-class railroad ties in the total sum of \$505.02. It was the contention of plaintiff that plaintiff either had the ties cut and paid therefor, or bought them from those who cut them, and had them piled along the right of way of defendant for the purpose of selling them; that in the month of January, 1910, defendant, without any knowledge or consent of plaintiff, took the ties, and hauled them away. Under its general denial, defendant contended as its defense in the trial of the case that it bought the ties from one McAdams, and that McAdams bought them from one Buchanan, and that Buchanan was then the owner and in possession thereof. The jury, under instructions of the court to which no complaint is made, found for plaintiff.

The only alleged error urged for reversal of the cause is the action of the court in rejecting certain evidence. Plaintiff testified to his ownership of the ties, and that he had never sold same. Before the case proceeded to trial, defendant moved the court for a continuance, on the ground that one R. F. McAdams, a material witness in behalf of defendant, was absent. The material facts to which the motion for continuance alleged the absent witness would testify were that he (McAdams) sold the ties involved to defendant, and that defendant had paid him for same; that he had bought said ties from Buchanan, and paid him therefor; that at the time he bought them from Buchanan he (Buchanan) had the ties in his possession, and was the sole and only owner of same; and that plaintiff did not at that time or at any time thereafter own said ties, or have any interest in same. To avoid a continuance, plaintiff admitted that, if the absent witness was present, he would testify to the foregoing facts. When this evidence was offered upon the trial, an objection thereto was sustained. It is the contention of defendant in error that no error was committed by the trial court in sustaining said objection, because the offered evidence constituted a conclusion of the witness, rather than a statement of any facts, in that it was offered for the purpose of establishing the fact of ownership of the ties.

This court, in *Jantzen v. German Emanuel Baptist Church*, 27 Okl. 473, 112 Pac. 1127, which was an action of replevin, held that ownership of personal property is ordinarily a simple fact, to which a witness can testify directly, and, in an action of replevin, a question as to who is the owner of the property involved, where such question involves a fact clearly within the knowledge of the witness, and not an expression of an opinion upon the facts proven, is admissible. The foregoing case is reported, also, in 24 Ann. Cas. 659, with an extensive note, wherein the

author of the note states that the foregoing rule is supported by the weight of authority.

This court, quoting from *Steiner v. Trantum*, 98 Ala. 315, 13 South. 365, in the *Jantzen* Case, said: "Ownership of personal property is a fact to which a witness may testify. On cross-examination such witness can be required to state the particular facts on which the claim of ownership rests."

The rejected evidence was material upon an issue of defense, to support which defendant had no other evidence, and the rejection of this evidence was prejudicial error, for which the cause must be reversed. All the Justices concur.

FIFTH AVE. LIBRARY SOCIETY v. PHILLIPS.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 91*)—BURDEN OF PROOF.

Ordinarily the burden of proof as to any particular fact rests upon the party asserting such fact.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 113; Dec. Dig. § 91.*]

2. SALES (§ 439*)—ACTION FOR PRICE—WARRANTY—BURDEN OF PROOF.

Ordinarily, where a party relies upon a breach of warranty, the burden rests upon him to show not only the warranty, but the breach thereof.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1258-1260; Dec. Dig. § 439.*]

3. SALES (§ 439*)—ACTION FOR PRICE—AFFIRMATIVE DEFENSE—BREACH OF WARRANTY—BURDEN OF PROOF.

Where a party executes a written order for a set of books, which is not subject to countermand, but which provides, "If books are not as represented by prospectus and agent, order is void," and the books ordered are shipped to and received by the ordering party, held, in a suit afterwards brought to recover a balance due on the books, it is not necessary for the plaintiff to aver and prove, as a condition precedent to a recovery for the purchase price, that the books were as represented by the agent.

(b) If they were not up to the representation of the agent, it is defensive matter to be averred and proven by the defendant.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1258-1260; Dec. Dig. § 439.*]

Commissioners' Opinion, Division No. 2 Error from County Court, Canadian County; W. A. Maurer, Judge.

Action by the Fifth Avenue Library Society against D. B. Phillips. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

W. M. Wallace, of El Reno, for plaintiff in error. Lucius Babcock, of El Reno, for defendant in error.

BREWER, C. The plaintiff in error, as plaintiff below, sued the defendant in error, as defendant, for a balance alleged to be due on the purchase price of a certain 25-volume set of books, alleging that the same

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had been sold, delivered, and accepted under the terms of a certain written order therefor, and which is as follows:

City, Yukon, Okla. 7/26, 1907.

Fifth Avenue Library Society, 114 Fifth Ave., New York—Gentlemen: Please deliver to me one set ReRaisance Edition de loze of 'The Ridpath Library of Universal Literature' in Twenty-Five volumes bound in Three-Quarter Leather Gilt top, for which I agree to pay you \$69.80, payable as follows: \$15.00 down and \$15.00 each month thereafter until the full amount is paid, default of which renders the whole amount due. The title to said books does not pass to me until they are paid for in full. I understand this order is not subject to countermand or cancellation. If books not as represented by prospectus and agent order is void. No agreement is valid other than embodied in this contract.

[Subscriber's Signature] D. B. Phillips.

Subscriber's occupation, M. Banking.

" business address,

" residence, Yukon, Okla.

Deliver books at " "

Paid to salesman on account, Fifteen.

Date, 1907.

Salesman, T. P. Levack.

The defendant admitted the execution of the writing and the receipt of the books, and then averred, as a defense to any liability thereunder, that the books were not of the kind and character as represented to him by the agent, that said agent had represented said books to be a general encyclopedia and equal to any standard encyclopedia, and that they were not of such character. Defendant then avers that, upon receipt of the books and examination of the same, he offered to return them to plaintiff upon condition that his advance payment of \$15 be restored to him.

When the case was reached in the county court, where it had been lodged on appeal from a justice of the peace court, the question was raised as to where the burden of proof should be placed. The court held that the burden of proof was on the plaintiff, and that it was required to show that the set of books delivered were as represented by the prospectus and agent. The plaintiff objected to this ruling, refused to assume the burden of proof on this point, and the cause was dismissed for failure to prosecute. Whether or not this ruling was correct is the only question before us.

The admissions of the answer relieved the plaintiff of the burden of proof, unless it was necessary that plaintiff aver and prove, as a condition precedent to recovery, that the books delivered to defendant were as represented by the prospectus and agent. Unless such averment and proof were conditions precedent, a prima facie case was admitted by the answer, and, in the absence of any proof, plaintiff would prevail.

[1-3] Ordinarily the burden of proof as to any particular fact rests upon the party asserting such fact. Jones on Evidence, 181. The defendant having averred a breach of warranty in this case, the state of the pleadings put the burden on him, unless we should treat his averments as surplage, and hold

that the plaintiff in a suit on the contract was required to aver and prove as a condition precedent to recovery that the books came up to the agent's representations. We do not think, under the contract and circumstances of this case, that such was required of plaintiff. We think this was defensive matter, and that the defendant so concluded properly, when, without attack upon the petition, it was set up affirmatively in the answer.

In *Buckstaff v. Russell Co.*, 151 U. S. 626, 14 Sup. Ct. 448, 38 L. Ed. 294, a somewhat similar situation was involved, and the court say: "But these were matters to be disclosed in the defense of the action, and need not have been made the subject of specific allegations in the petition. It was not necessary to allege in the petition that the engine, boilers, and pumps were ascertained by the defendants to work to their entire satisfaction. It was sufficient to allege the delivery of the articles, and the expiration of the time limited in the contract for the payments. In respect to the guaranty of the plaintiff that the engines, boilers, and pumps would work, and that the engines would furnish the stipulated amount of horse power, and be as economical of fuel and as durable as a Corliss noncondensing engine, it need only be said that those were, also, matters to be alleged and proved by defendants in support of their counterclaim."

In *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848, it was held, in a suit on a contract for the sale of "first-class flour barrels," that it was not necessary to allege in the complaint that the barrels were of the kind named in the contract. The court say: "This was not an action for breach of the executory contract. The plaintiff did not complain of a refusal to receive the barrels. If, while the contract was executory, the stipulation in question amounted to mere description of the kind and quality of the goods to be sold, the existence of which quality would be a condition precedent to the obligation of the buyer to accept, it was not necessary to allege its performance by him, for the reason that the sale had been consummated by delivery and change of ownership in the goods, and his action was one to recover the price. If the stipulation should be regarded as an engagement on the part of the seller, which would survive the consummation of the executory contract of sale and constitute a warranty, then it was a collateral undertaking; its object being to furnish a remedy to the buyer which he would not have under the contract to which it was collateral, and, in an action to recover the price, it was for the buyer to set up a breach of it, and it did not devolve upon the seller in his action to recover the contract price, to specially allege performance of the collateral undertaking." See, also, 19 Ency. P. & P. 32; *Griswold v. Scott*, 13 Ga. 210.

In this case the contract for the purchase

of the books when made was executory; had the books been forwarded under its terms, and defendant had refused to accept them, and a suit had been brought for damages for the breach in refusing the books, it would have been necessary to aver and prove that the books were in all things such as described in the contract, thus showing a reason why the failure to accept was actionable. But the books in this case had been delivered and accepted by the defendant, thus completing the contract, and the suit was for the balance due on the purchase price. If, in fact, after accepting the books, they were found to be not up to the representations of the prospectus and agent, the defendant could elect either to keep them notwithstanding such fact and pay for them, or to seasonably rescind the sale, as was attempted, in which case it was incumbent on the defendant to aver and prove his right to rescind.

Ordinarily the burden of proof is on the party relying on a breach of warranty to show not only the warranty, but the breach thereof. 35 Cyc. 457, and notes 23 and 24, as extended in 1913 annotations, at page 3574; Spaulding Mfg. Co. v. Hollday, 32 Okl. 823, 124 Pac. 35.

This leads us to conclude that the burden was on the defendant, and that the court erred in holding otherwise to the substantial injury of plaintiff.

This must result in a reversal and remand of the case.

PER CURIAM. Adopted in whole.

FARM LAND MORTGAGE CO. et al. v. WILDE.

(Supreme Court of Oklahoma. Oct. 14, 1913.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 151*)—PERFORMANCE OF CONTRACT—WARRANTY DEED.

Where a copartnership contracts to convey to another by its warranty deed a certain tract of land the title to which at the time is vested in some third party, the procuring of the conveyance of the land by such third party with his warranty will not answer the requirements. The party who is to receive the deed is entitled to have the warranty of him who agreed to convey as a further security of title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 298-303; Dec. Dig. § 151.*]

2. VENDOR AND PURCHASER (§ 137*)—CONTRACTS—BINDING EFFECT OF PROVISION.

The courts generally hold that parties have the right to make any contract which is not unlawful nor against public policy. They have the right to provide for an arbitrator whose decisions, in the absence of fraud, shall be final. They have the right, in making a contract for the sale of land, to make an attorney or any one else exclusive and final judge as to whether or not the title is defective. In such case, the courts are inclined to leave the parties to abide by the contract as they have made it, and not to make a different one.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 260; Dec. Dig. § 137.*]

3. VENDOR AND PURCHASER (§ 341*)—RECOVERY OF PURCHASE MONEY—DIRECTION OF VERDICT.

Where a copartnership contracts to convey real estate by its warranty, such title to be pronounced perfect by an attorney selected by the party who is to receive the deed, and further contracts that in the event of failure to do these things it will return the money previously paid, then in a suit to recover back the amount paid for failure to do such things, and the proof shows a failure, and there is no evidence to the contrary, it is not error to direct a verdict for the return of the amount paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by J. C. Wilde against the Farm Land Mortgage Company, a copartnership, and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Benj. F. Rice and Thos. D. Lyons, both of Tulsa, for plaintiffs in error. Hutchings & German and Allen & Nichols, all of Muskogee, for defendant in error.

HARRISON, C. This action was begun in the superior court of Muskogee county, October 19, 1909, by John L. Wilde against the Farm Land Mortgage Company, a copartnership consisting of Carl Anderson, Seth Ely, and J. E. Tomlinson, on a contract for purchase of real estate. The plaintiff alleged, in substance, that on August 14, 1909, he entered into a written contract with defendant for the purchase of certain tracts of real estate, aggregating 560 acres, situated in McIntosh county. The contract was attached to and made a part of the petition, and provided that the agreed purchase price should be \$14,000, \$3,000 of which was to be paid in hand, and was paid at the time of the execution of the contract, the balance to be paid on delivery of deed and abstract showing perfect title, same to be delivered on or about October 10, 1909. It provided further, that the first party (the company) was to furnish an abstract of title down to date, showing perfect title free of all valid liens, and to give warranty deed. It provided, further, that such abstract was to be passed upon by a resident lawyer of Oklahoma, to be selected by the second party, Wilde, and further provided that in case the first party be unable to furnish the deed and abstract showing perfect title as set forth in the contract, then the first party should repay to the second party all payments made on the contract, same to constitute full settlement of all claims of either party to the contract. For failure on the part of the company to furnish such abstract and its refusal to repay the \$3,000, plaintiff instituted this action for the recovery of the \$3,000, interest and costs. Defendant answered, admitting the allegation of copartnership of the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pany and the entering into the contract, but alleged that in the description of the various subdivisions of land in the contract a certain 40 acres, to wit, the S. W. quarter of section 8, township 10, range 17, was by mutual mistake included in the contract, whereas the intent of the parties to the contract was not to include such 40-acre tract, that defendant company had contracted to convey only 520 acres, and did not contract to convey the 40 acres in question, and that plaintiff so understood the contract at the time it was entered into. The answer further alleged that defendant had performed all the conditions required of it, but that plaintiff had refused to pay the balance due under said contract, upon the ground that defendants had refused to convey title to the said 40-acre tract in question. Defendant also alleged damages in the sum of \$7,000, and prayed judgment for \$4,000 in addition to the \$3,000 already received. The issues being thus joined, the cause was tried in January, 1911, resulting in a peremptory instruction in favor of plaintiff for the sum of \$3,332.50. From such judgment the mortgage company appeals.

[1] Numerous assignments of error are made by plaintiff in error, but the decisive issue involved in the case is whether the company, under the terms of the written contract, tendered to Wilde the character of deed contemplated in the contract, together with an abstract showing perfect title to the land. A proper determination of this issue does not require a determination of the question whether the extra 40 acres was included in the contract or not. The record shows that no deed from the company to Wilde was ever tendered to the remaining portion of the land. The record shows that Anderson, one of the members of the copartnership, had procured deeds to himself for 520 acres of the land, and that he tendered a deed from himself and his wife to such tracts to Wilde, through his attorney Allen. But this was not the contract. The contract was that the company should make Wilde a warranty deed to the land, and Wilde may have been justified in preferring a warranty from the company rather than a warranty from Anderson and his wife, or from the individual members of the company. This was the warranty he had contracted for and agreed to pay his money for, and which under the law he had a right to demand: "Where one party agrees to convey to another by warranty deed a certain tract of land, the legal title to which is vested in a third person, the procuring of the conveyance of the land by such third person with his warranty will not answer its requirements. The party who was to receive the deed is entitled to have the personal covenants of him who agreed to convey as a further security for his title." 1 Warvelle on Vendors, § 347. Crabtree v. Levings, 53 Ill. 526; Rudd v. Savelli, 44 Ark. 145; McMurry v. Fletcher, 24 Kan.

574; Ruffner v. McConnell, 17 Ill. 212, 63 Am. Dec. 364.

[2] And aside from this, the contract provided "said abstract to be passed upon by a resident lawyer of Oklahoma, employed by second party." This clause does not necessarily imply that such lawyer was to be the attorney of Wilde any more than he was to be the attorney of the company. It might imply that he was to be paid by Wilde, but it does specifically state "said abstract to be passed upon by a resident lawyer of Oklahoma," and this necessarily implies that such lawyer should have authority and was bound in honor to reject same unless it showed a perfect title. The lawyer claimed in his testimony that at the time the abstract was presented to him for examination it disclosed a defective title, in that it showed that the deed from certain allottees to a portion of the land, which at that time required the approval of the Secretary of the Interior, had not been so approved, that it also showed that the probate proceedings in reference to certain minor heirs, through whom the title to other portions of the land was to come, was also defective, and also pointed out other defects and irregularities in the probate proceedings which, in his judgment, rendered the title bad, and that for such reasons he rejected the title. This provision of the contract that the title should be passed upon by a resident attorney was entered into by both parties to the contract. Either party had the right to rely upon the judgment and opinion of such lawyer. "The courts generally hold that parties have the right to make any contract which is not unlawful nor against public policy. They have the right to provide for an arbitrator, whose decision, in the absence of fraud, shall be final. They have the right, in making a contract for the sale of lands, to make an attorney or any one else exclusive and final judge as to whether or not the title is defective. In such case the courts are inclined to leave the parties to abide by the contract as they have made it, and not to make a different one." Simmons v. Zimmerman, 144 Cal. 264, 79 Pac. 452, 1 Ann. Cas. 850. Also Brown v. Foster, 18 Am. Rep. 463; Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 351; Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446; Goodrich v. Van Nortwick, 43 Ill. 445; Goodwine v. Kelley, 33 Ind. App. 57, 70 N. E. 834; Silsby Mfg. Co. v. Town of Chico (C. C.) 24 Fed. 894; Wood Reaping & Mowing Mach. Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57. The company having failed in these two essential provisions of the contract, and having contracted that in event of failure to do these things it would return the money paid, we see no reason why it should not be required to do so, nor error in the court's requiring it to do so. These were the considerations which Wilde contracted to pay his money for—a title warranted by the company

and pronounced perfect by an attorney upon whose judgment he relied.

[3] There being no evidence that these things were done, we see no error on the part of the court in directing a verdict for the return of the money.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

GRAHAM et al. v. ATWOOD.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 671*)—CASE-MADE—SUFFICIENCY—EVIDENCE.

Where consideration of the assignments of error require an examination of the evidence, and the case-made does not contain an affirmative recital that it contains "all the evidence" introduced at the trial, no questions for review are presented by such assignments.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

2. APPEAL AND ERROR (§ 638*)—CASE-MADE—CERTIFICATE.

The signature of the trial judge to the certificate settling a case-made not being attested by the seal of the court, and the case-made not having been filed with the papers in the case, as required by section 5242 of Rev. Laws 1910, no questions for review are presented by such record, and the appeal should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2785, 2786; Dec. Dig. § 638.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Garvin County; W. B. Mitchell, Judge.

Action by G. A. Atwood against Will Graham and others on an account for labor performed and board and lodging of certain laborers. Judgment for plaintiff, and defendants bring error. Dismissed.

Jas. S. Twyford and Giddings & Giddings, all of Oklahoma City, for plaintiffs in error. Thompson & Patterson, of Pauls Valley, for defendant in error.

GALBRAITH, C. Two reasons appear why the record in this case presents no question for review.

[1] First. The errors assigned in the main require an examination of the evidence introduced at the trial in the court below. The case-made contains no recital that it contains "all the evidence" introduced at the trial, and an examination of it shows affirmatively that it does not contain all the evidence. It appears that a certain written statement of account and certain time checks that were material in establishing the amount of the plaintiff's claim, and which were introduced in evidence, have not been incorporated in the case-made. Waltham Piano Co. v. Wolcott, 135 Pac. 339.

[2] Second. The case-made is not sufficiently authenticated. The certificate of the

trial judge to the case-made bears date of April 20, 1911; but the seal of the court is not attached thereto, nor does it appear that the case-made was filed with the papers in the case, as required by section 5242, Rev. Laws, 1910. Stallard v. Knapp, 9 Okl. 591, 60 Pac. 234; Marple v. Farmers' & Merchants' Bank, 28 Okl. 810, 115 Pac. 1124; Brooks et al. v. United Mine Workers of America, 128 Pac. 236; Oklahoma City v. McKean, 135 Pac. 19; Harmon v. McCormack, 135 Pac. 1052, handed down October 14, 1913, and not yet officially reported.

It follows that the appeal should be dismissed.

PER CURIAM. Adopted in whole.

J. W. RIPPY & SON v. ART WALL PAPER MILLS.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. CONTRACTS (§ 117*)—RESTRAINT OF TRADE.

An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

2. CONTRACTS (§ 116*)—RESTRAINT OF TRADE.

A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it, will not be held to be in restraint of trade and commerce merely because its operation might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

3. SALES (§ 52*)—ACTION FOR PRICE—BURDEN OF PROOF.

In a suit for a balance due for goods under the terms of a written contract, where the answer admits the execution of the contract and the receipt of the goods at the price claimed, and defends on the grounds that the contract is illegal and unenforceable, and was procured through fraud, the burden of proof is on the defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

4. EVIDENCE (§ 441*)—WRITTEN CONTRACT—MERGER OF ORAL NEGOTIATIONS.

All prior and contemporaneous oral negotiations are merged into a written contract finally entered into, and which fully covers the subject-matter of such negotiations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by the Art Wall Paper Mills against J. W. Rippy & Son. Judgment for plaintiff, and defendant brings error. Affirmed.

M. Fulton, of Oklahoma City, for plaintiff in error. E. G. McAdams, of Oklahoma City, for defendant in error.

BREWER, C. The Art Wall Paper Mills, a corporation of Dallas, Tex., brought this suit in the district court against J. W. Rify & Son, a copartnership, to recover the purchase price of certain goods, wares, and merchandise, sold and delivered in pursuance to a certain written contract executed by the parties. We will hereafter refer to the parties as they were called in the trial court. The case was tried to a jury, and a verdict returned in favor of the plaintiffs. The defendants, plaintiffs in error here, bring up the case on case-made, and in their brief seem to rely upon the following alleged errors: First. Overruling defendant's demurrer to the petition. Second. Placing the burden of proof upon the defendant. Third. The exclusion of evidence offered by defendant.

[1, 2] 1. The defendants claim that plaintiff's petition is demurrable for the reason that the suit is based upon a certain written contract or trade agreement attached to and made a part of the petition, and which it is alleged shows upon its face that it is an agreement in restraint of trade and commerce, and is therefore void; and, that being void, the plaintiff cannot recover for the goods sold and delivered in pursuance of its terms. The portion of the agreement which it is claimed has the above effect is a provision inserted in it requiring the defendants to handle only the wall papers manufactured and kept for sale by plaintiff during the life of the contract, which was from April 5th to January 5th following. In other words, that the defendants agreed that for the limited period of time named in the contract they would buy all their wall papers from the plaintiff. We do not believe that this agreement has the effect contended for. It is not pointed out, and from a reading of the contract we do not believe it can be pointed out, wherein this contract has the effect of restraining trade, or competition in trade, so as to bring it within the denunciation of the law. The plaintiffs are wholesale dealers in wall paper, and had traveling salesmen in Oklahoma and Indian Territory at the time this contract was made in 1904. The defendants are retail dealers in Oklahoma City. In return for defendant's agreement that for a certain period of time they would buy their wall paper exclusively from plaintiff, and would keep in stock a complete line of the same, the reciprocal agreement was made by plaintiff that its traveling salesmen, in the two territories named, would send their "stock fill in orders" to be filled from defendant's stock, and for which sales they received the profits. If plaintiff was going to give defendants the benefit of certain sales made by its traveling salesmen from samples of its line of papers in stock, it certainly was not

unreasonable to require defendants to carry, for the time being, only its line of papers. It seems to us that the effect of this agreement, when all of its terms are considered, is to promote and foster the trade of both parties, rather than otherwise. The contract does not undertake to fix the price at which defendants might sell the goods. It does not restrict the plaintiff from selling its goods to others, nor does it restrict either party from selling goods to any other person or class of persons. The parties themselves are not competitors, nor does the contract affect the competitors of defendants, nor can we see wherein it could injuriously affect the public. We think these views find ample support in the authorities.

An agreement of a retailer to buy a particular line of goods exclusively from a certain manufacturer thereof, for a limited period of time, and confined to a particular locality, in consideration of other covenants therein of mutual advantage to the parties, and when otherwise unobjectionable under the law, is not invalid because in restraint of trade. *Threlkeld v. Steward*, 24 Okl. 403, 103 Pac. 630, 138 Am. St. Rep. 888; *Trentman v. Wahrenburg et al.*, 80 Ind. App. 304, 65 N. E. 1057; *Brown v. Rounsavell*, 78 Ill. 589; *Live Stock Ass'n v. Levy*, 54 N. Y. Super. Ct. 32; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Olmstead v. Distilling & C. F. Co. (C. C.)* 77 Fed. 265; *Arnold Bros. v. Kreutzer & Wasm*, 67 Iowa, 214, 25 N. W. 138; *Kronschabel-Smith Co. v. Kronschnabel*, 87 Minn. 230, 91 N. W. 892.

A contract between individuals, the main purpose and effect of which is to promote, advance, and increase the business of those making it will not be held to be in restraint of trade and commerce merely because its operations might possibly, in some slight or theoretical way, incidentally and indirectly restrict such trade and commerce. This view is fully sustained by the Supreme Court of the United States in various decisions.

In *Anderson et al. v. United States* 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, it is said: "Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith v. Alabama*, 124 U. S. 465,

473, 8 Sup. Ct. 564, 31 L. Ed. 508, 510, 1 Interst. Com. R. 804: "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefor void."

In *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689, Judge Sanborn, after discussing contracts and agreements which would constitute a combination or conspiracy in restraint of trade adds: "If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who made and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation." And cites to support the statement the following authorities: "*Hopkins v. U. S.*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. U. S.*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. Chemical Co. v. Provident Chemical Co. (C. C.)* 64 Fed. 946; *California Steam Navigation Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Schwalm v. Holmes*, 49 Cal. 665; *In re Green (C. C.)* 52 Fed. 104, 115-117; *In re Grice (C. C.)* 79 Fed. 627, 644; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832; *State v. Goodwill* [33 W. Va. 179] 10 S. E. 285, 286, 6 L. R. A. 621, 25 Am. St. Rep. 863; *People v. Gillson*, 109 N. Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; *Butchers' Union Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 755, 4 Sup. Ct. 652, 28 L. Ed. 585; *Welch v. Phelps & Bigelow Windmill Co.* [89 Tex. 653] 36 S. W. 71; *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427 [56 L.

R. A. 709]; *Walsh v. Dwight* [40 App. Div. 513] 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589; *Noyes on Intercompany Relations*, § 388, p. 563."

[3] 2. The court correctly placed the burden of proof upon the defendants. The plaintiff sued for a balance due for goods sold under a contract, setting out the contract and a complete verified statement of account, showing debits and credits and balance due. The defendant admitted the execution of the contract, the receipt of the goods, and also referred in the answer to the contract and invoices, but claimed an additional credit of a few dollars. The answer then averred matter tending to avoid liability for payment for the goods received, because of the alleged illegality of the contract and fraud in procuring the same. The plaintiff then in open court conceded the additional credits claimed, and remitted the same. This left the attack upon the validity of an admitted contract as the only issue. The defendants had the burden of proof upon them to sustain the issues thus tendered.

[4] 3. The evidence, which it is contended the court erred in refusing to admit, was intended to cover several different contentions. It is only referred to in the brief by general statements of counsel, in the main, and is not brought into the brief. We have gone into the record, however, and made some search, and find that the real complaint is in the rejection of oral evidence, clearly intended to either vary, modify, contradict, enlarge, or destroy the plain and unambiguous meaning of the written contract. For instance, evidence was offered and refused that during the prior and contemporaneous negotiations terminating in the written contract it was agreed that plaintiff would not sell its goods to any other dealer in Oklahoma and Indian Territory; there was no hint of such an agreement in the writing which the parties formally executed, and it very fully defined the rights and duties of both parties. The expressed purpose of the evidence was to so ingraft by oral evidence onto a written contract, legal and valid and in no sense immoral or against public policy, a new and foreign meaning, so as to render the contract when so enlarged invalid as against public policy, to the end that the law would then strike down the contract when so enlarged, affording defendants a means of escape from liability. This evidence was properly rejected, and the same may be said of the rulings on the other rejected evidence.

The jury passed on the evidence, and its verdict was approved by the trial court. To our minds the verdict was right.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

**BOARD OF MEDICAL EXAMINERS OF
OKLAHOMA et al. v. GULLEY.**

(Supreme Court of Oklahoma. Oct. 14, 1913.)

(Syllabus by the Court.)

1. MANDAMUS (§ 154*) — PETITION — SUFFICIENCY.

A petition in mandamus to be sufficient, when challenged by demurrer, must contain allegations of fact which, taken as true, affirmatively show that the person sought to be mandamusd is under the clear legal duty of doing the thing it is sought to compel him to do.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

2. MANDAMUS (§ 154*) — PETITION — PHYSICIANS AND SURGEONS.

Petition examined, and held insufficient.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

3. PHYSICIANS AND SURGEONS (§ 5*) — RIGHT TO LICENSE WITHOUT EXAMINATION.

Under section 39, art. 5, Williams' Const., a physician who had been practicing medicine in Oklahoma Territory under a territorial license is not entitled, as a matter of right, to registration since statehood without examination, where it is shown that on September 12, 1907, the territorial Supreme Court had affirmed the decision of the district court, in a suit brought by the territory, canceling and annulling the territorial license under which such physician had been practicing on the grounds of fraud and deceit in procuring the same, and no other license had been issued him.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 5; Dec. Dig. § 5.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Mandamus by Calvin D. Gulley against the Board of Medical Examiners of the State of Oklahoma and others. A demurrer to the petition was overruled, and defendants bring error. Reversed.

Chas. West, of Oklahoma City, for plaintiffs in error. John A. Remy, of Guthrie, for defendant in error.

BREWER, C. This is a suit in mandamus to compel the state medical board to issue a license to the plaintiff below, Calvin D. Gulley, to practice the profession of medicine. The summary of what the petition states for cause of action, as set out by the Attorney General, and which plaintiff admits is substantially correct, follows: "This action was begun by the defendant in error on April 28, 1910, by filing his petition in the district court of Oklahoma county, in which he alleged: That he was then and had been for a period of more than 19 years a practicing physician, and a resident of the territory of Oklahoma and the state of Oklahoma for more than 9 years. That by act of the first state Legislature a state board of medical examiners was created. That for more than 6 years prior to the enactment of said law and the organization of said board he was a practicing physician in the territory of Oklahoma. That on the 7th day of November,

1896, he was graduated and received a diploma from the Independent Medical College of Chicago, Ill., and also graduated from the Metropolitan Medical College of Chicago, Ill., on October 12, 1899. That no charges were made against him except in a proceeding which resulted in a decision by the Supreme Court of the territory of Oklahoma on September 12, 1907, affirming a decision of the district court of Logan county, revoking the license theretofore issued to him to practice medicine in the territory of Oklahoma by the territorial board of health of said territory of Oklahoma. That since statehood the Oklahoma state board of medical examiners have licensed other physicians from the same schools of medicine from which the plaintiff (defendant in error) was graduated, which physicians held the same credentials as those held by him (Gulley). That he made application to said board for a license, which was refused. That at the same legislative session at which the act creating said state board of medical examiners was passed there was also passed a resolution directing said state board of medical examiners to correct any injustice that may have been done any applicant of any school of medicine, and to restore to practice any one who, by mistake or otherwise, had been deprived of the right to practice his or her profession, without further cost or examination, and that all physicians who had been granted license to practice medicine previous to statehood, regardless of school or schools, should be placed upon an equal footing with the graduates of the same school, who had been granted a license by the state board of health, or the board of medical examiners, which resolution was approved by the Governor. That subsequent to the passage of such resolution he again applied to the state board of medical examiners for a license to practice medicine, but that defendants again refused and still refuse to grant said license. The petition concluded with a prayer for mandate directing the officers and members of said board to execute, issue, and deliver to the plaintiff (defendant in error) a license permitting him to engage in the practice of medicine, and for costs and other proper relief."

A demurrer to the petition was interposed, setting up the following grounds: "First. That this court has no jurisdiction of the person of the defendants. Second. That this court has no jurisdiction of the subject of the action. Third. That the plaintiff has no legal capacity to sue. Fourth. That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants, or any one of them."

This demurrer was overruled, and the defendants below, electing to stand on the same, have appealed to this court on the question of the sufficiency of the petition in mandamus.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1-3] We can still further boil down the averments of the petition, when measuring its charging portions, to see if the plaintiff is entitled, as a matter of legal right, to have the court compel the board to issue him a license. To obtain such relief, it must appear affirmatively that, under the facts pleaded and the law, it was the legal duty of the board to license him. His averments amount to this: (1) That for more than six years prior to the passage of the act of 1907-08 creating the medical board he was a practicing physician in Oklahoma Territory. (2) That he is a graduate of Independent Medical College of Chicago and the Metropolitan Medical College of Chicago. (3) That the only charges theretofore made against him resulted in the cancellation of his license by the territorial Supreme Court September 12, 1907. (4) That the board has licensed other practitioners who graduated from the same schools from which he graduated. (5) That he made application for a license, and was refused. (6) That he has some right (not very clearly defined) under a concurrent resolution of the Legislature of 1907-08. This allegation charges that an injustice has been done him (presumably by the court's decision referred to).

For the plaintiff to succeed, it must appear from the facts stated in the petition that he is entitled to registration and a license to practice medicine; the question of examination as to proficiency is not in this case. We are merely asked to declare, taking the facts stated as true, that the board was under the unqualified and imperative legal duty of issuing him a license.

First. Section 39, art. 5 (section 101, Williams' Const.), after providing for the creation of a board of health, says: "All physicians, * * * now legally registered and practicing in Oklahoma and Indian Territory shall be eligible to registration in the state of Oklahoma without examination or cost."

If Doctor Gulley was a legally registered physician at the time of the creation of the state, then he is entitled to registration without examination. Was he? By specific mention in his petition he brings into his case a decision of the territorial Supreme Court rendered September 12, 1907. Gulley v. Territory of Oklahoma, 19 Okl. 187, 91 Pac. 1037. In this case it is made to appear that on February 11, 1902, Dr. Gulley had been licensed to practice medicine under the law in force in the territory of Oklahoma at that time, and later the territory, through its Attorney General, brought suit in the Logan county district court, upon direction of the Governor, to have the license canceled and annulled on the ground that it had been obtained through fraud and deception. The court sustained the contention of the territory, and an appeal was prosecuted to the Supreme Court, where the cause was affirmed, which resulted in the annulment and cancellation of his license to practice medicine

in Oklahoma Territory. Inasmuch as the petition here makes no claim that after that judgment, and prior to statehood, he was again licensed, it is manifest that he can found no right to the relief sought under that provision of the Constitution, for the very simple reason that when statehood came he was not a legally registered and practicing physician.

The claim that plaintiff is entitled to registration because he is a graduate of, and held a diploma from, the Independent and the Metropolitan Medical Colleges of Chicago brings again into this case the decision of *Gulley v. Territory of Oklahoma*, supra. The basis and foundation of that suit was on the claim that these colleges were not legitimate medical schools, but were mere "diploma mills," that issued diplomas without a course of study, examination, etc., but merely for a financial consideration. On this point in the former case, the court, in the body of the opinion, say: "It is also contended that the evidence is insufficient to sustain the finding and judgment of the court below. In our opinion the evidence fully sustains the allegations of fraud and deception in the procurement of the license, and we think that no other reasonable or just conclusion could have been reached by the trial court. The record discloses a flagrant case of fraud, deception, and misrepresentation in the procurement of the license. And this is not all. The applicant knew, at the time he made his application and verified the same, under oath, that he was not a graduate of a reputable medical college, within the meaning of this statute. He knew that the pretended diploma which he held from the college was a mere sham and fraud, well calculated to mislead and deceive the territorial board of health. He knew that the obtaining of the diploma was a mere pretense and fraud, and he knew that the Supreme Court of the state of Illinois had, long prior to his application for license to practice in this territory, forfeited the charter of this pretended medical college, and declared 'that the corporation is a mere diploma mill, designed wholly for issuing diplomas to practice medicine, for a consideration, to persons wholly unqualified for such practice.'" See *Independent Med. College v. People ex rel.*, 182 Ill. 274, 55 N. E. 345.

Under the law in force in 1902, under which the license was originally issued to plaintiff, he was entitled to be registered if he "was a graduate of a medical college," and without examination. He was so licensed or registered on presenting the diploma, and, as has been seen, this license was canceled, because the institution he claimed to be a graduate of was not a "medical college." He sets up his graduation and diploma from this same institution as a basis for demanding, without further inquiry by examination, a license under the law in force when this suit was filed, which provides:

Section 4248, Comp. Laws 1909: "Every person before practicing medicine and surgery or any of the departments of medicine and surgery in this state, must have the credentials herein provided for. In order to procure such credentials, he must produce satisfactory evidence of good moral character and a diploma issued by some legally chartered medical school or college; the requirements of such medical school or college shall have been at the time of granting such diploma in no particular less than those prescribed by the American Association of Medical Colleges, or the Southern Association of Medical Colleges in that year in which the diploma was granted. Or he must show satisfactory evidence of having possessed such diploma or license from some legally constituted institution which grants medical and surgical licenses only on actual examinations, or satisfactory evidence of having possessed such license or diploma. He must accompany said diploma or license with an affidavit showing that he is the person therein named and that the diploma or license was procured in the regular course without fraud or misrepresentation of any kind, such affidavit to be taken before any person authorized to administer oaths. The same shall be attested under the hand and seal of such officer, if he have a seal. In addition to such affidavit, the board shall hear such information as in its discretion it may deem proper as to any of the matters embraced in said affidavits. If it should appear from the evidence that said affidavit is untrue in any particular, or if it should appear that the applicant is not of good moral character, the application must be rejected. * * *

The graduation and diplomas set up in this suit as a basis for demanding a license under the above law having been held fraudulent, and not coming from a medical college, in the former suit of plaintiff—this being the issue involved—that question was in that case finally settled. Those diplomas entitled him to nothing. Besides, even if there had been no former suit, the petition nowhere claims that the colleges mentioned meet the requirements or measure up to the standards required in the statute in force when this suit was brought and quoted above.

On the allegation that the board has licensed other practitioners who graduated from the same medical colleges he did, it is sufficient to say that such persons, for all we know and all the record shows, may have shown by examination that they possessed the necessary qualifications, and they may have held diplomas from some other college meeting the requirements of the law.

It is not entirely clear just what right plaintiff predicates on the concurrent resolution of the House and Senate referred to in the petition. It follows: "Whereas, it is claimed that by mistake or otherwise, injustice has been done physicians of certain

school or schools of medicine, in the administration of the territorial laws governing the admission of such physicians to practice their profession, as well as in the attempt to cancel the license or those previously admitted to practice: Therefore be it resolved by the House of Representatives, the Senate concurring therein, that the state board of health or medical examiners be, and is hereby empowered, authorized and directed to correct any such mistake or mistakes and right any injustices that may have been done any applicant of any school of medicine for admission to practice, and restore to practice any one who, by mistake or otherwise, has been deprived of the right to practice his or her profession, without further cost or examination; that all physicians who have been granted licenses previous to statehood, regardless of school or schools, shall be placed on equal footing with the graduates of the same school, who have been granted license by the state board of health or medical examiners. This resolution is to be in full force and effect from and after its passage and approval. Approved April 2, 1908." Laws 1907-08, p. 784.

It is not necessary to discuss or determine what legal effect the above resolution has, for, whether it has the force of law, or be merely advisory as expressing the legislative sentiment, it is not believed that it contains anything that can be said to confer on the plaintiff the legal right to registration. It might at first glance be argued that it affords a basis of support to the charge that other graduates of his college had been admitted, and therefore that he had, because of such fact, acquired the right of admission. But this result does not follow. The view we take of the resolution is that, where "school of medicine" is mentioned, it refer, not to a particular college or university in which medicine is taught, but to one of the great theories of medicine, such as allopathy, homoeopathy, eclectic, etc.

It is not shown that an injustice has been done him in the Supreme Court decision mentioned so as to found a claim thereon that he comes under the resolution. And certainly, if such were the claim, the facts showing the injustice would have to appear, and then the board would have to determine whether or not the contention was true, if, indeed, the decision of the Territorial Supreme Court could be set aside in such a way, which point it is unnecessary to discuss or decide. While the board is administrative and executive, and does not exercise judicial functions (*Jamieson v. State Board*, 35 Okl. 685, 130 Pac. 923), yet it has a discretion that it may exercise in the performance of many of its duties.

For the reasons given, the case should be reversed.

PER CURIAM. Adopted in whole.

DIEVERT et al., School Board of District No. 79, v. RAINEY et al.
(Supreme Court of Oklahoma. Nov. 25, 1913.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 773*)—BRIEF—FAILURE TO FILE.

Where the plaintiff in error has filed brief, as required by rule 7 of this court (95 Pac. vi), and the defendant in error fails to file brief, as required by such rule, or to offer any excuse for not doing so, the court will be justified in taking as confessed the errors assigned, to the extent of reversing the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 778.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Garfield County; Winsfield Scott, Judge.

Action by Lewis Dievert, Director, and others, composing the School Board of District No. 79, Garfield County, against George Rainey and another, on an injunction bond. Judgment for defendants, and plaintiffs bring error. Reversed.

O. D. Hubbell, of Enid, for plaintiffs in error.

GALBRAITH, C. In October, 1907, George Rainey instituted an action in the district court of Garfield county, Okl., against the plaintiffs in error, for an injunction, and secured a temporary injunction on executing a bond in the sum of \$300, conditioned to pay all costs or damages that the defendants might sustain by reason of the issuance of the injunction, in case the same was wrongfully obtained. The bond was executed by George Rainey, as principal, and George G. Emerick, as surety, and was approved by the clerk and filed in the district court of Garfield county on October 16, 1907. The instant case was an action commenced in the county court of Garfield county to recover damages on this injunction bond. The defendants in error, as defendants in that suit, interposed a general demurrer to the amended petition, which was by the court sustained. Plaintiffs excepted to the ruling of the court, and, electing to stand on their amended petition, refused to plead further, and judgment was entered against them, dismissing the action, and for costs. They have appealed to this court by petition in error and case-made.

The one assignment of error urged by plaintiffs in error is that the court erred in sustaining a general demurrer to the amended petition. The record was filed in this court on November 15, 1911. Plaintiffs in error's brief and argument was filed on May 9, 1912. The defendants in error have filed no brief, and have offered no excuse for not having done so. Rule 7 of this court requires the defendant in error, as well as the plaintiff in error, to file brief and argument,

but prescribes no penalty for failure to do so, except that it provides that: "In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment, in its discretion." The rule was announced by the Territorial Supreme Court that where the plaintiff in error has complied with the rule by filing brief and argument, and the defendant in error fails to do so, the court will take the defendant's failure to comply with the rule as a confession of the alleged error, at least so far as to warrant a reversal of the judgment. *Nettograph Machine Co. v. Brown*, 19 Okl. 77, 91 Pac. 849. This rule has been followed by the Supreme Court of the state in *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170; *Ellis v. Outler*, 25 Okl. 469, 106 Pac. 957; *Rudd v. Willson et al.*, 32 Okl. 85, 121 Pac. 252; *First National Bank of Tishomingo v. Blair*, 31 Okl. 562, 122 Pac. 527; *Clark v. First National Bank*, 36 Okl. 601, 129 Pac. 696. The brief and argument of the plaintiff in error seem reasonably to support the contention that the court erred in sustaining the demurrer to their petition. Under the rule announced in the above cases we feel justified in holding that this assignment of error is confessed by the defendants in error by reason of their failure to file a brief, at least to the extent of justifying an order reversing the order of the county court sustaining the demurrer.

We, therefore, hold that the judgment appealed from should be reversed, and the cause remanded to the county court of Garfield county for such further proceedings as may be proper.

PER CURIAM. Adopted in whole.

GILMER v. SCHOOL DIST. NO. 26, NOBLE COUNTY.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(*Syllabus by the Court.*)

EVIDENCE (§ 387*)—MINUTES OF ANNUAL SCHOOL MEETING—PAROL EVIDENCE.

Where a motion was made and carried at an annual school meeting, authorizing the district school officials to sell some piles of second-hand lumber, it is competent to show such action of the assembled voters by parol evidence, where the minutes fail to make any mention of the same, and where such minutes show on their face that they are a mere abstract or synopsis of what occurred at the meeting.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1698-1713; Dec. Dig. § 387.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Noble County; L. B. Robinson, Judge.

Action by School District No. 26, Noble County, Oklahoma, against L. A. Gilmer. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Henry S. Johnston, of Perry, for plaintiff in error. H. E. St. Clair, of Perry, for defendant in error.

BREWER, C. The defendant in error sued L. A. Gilmer in a justice of the peace court to recover \$13.25 for secondhand lumber alleged to have been sold to him by the district at public auction. It appears that a wind-storm wrecked a wooden school building so that it had to be torn down and a new one built, and the lumber in suit is a portion of the wreckage which was not used in the new building and which with other lumber of like character was sold by the district at a public auction on the school ground pursuant to proper advertisement. The case was tried in the county court without a jury, and judgment for the amount claimed was awarded against defendant Gilmer, who brings this appeal and relies on two propositions: First, that it was not shown that the school district officials were authorized to sell the property by the voters of the district. Second, that if there was authority to sell, the sale was illegal because defendant was a member of the school board.

1. The court found, and there is no doubt in our minds from reading the record, that the voters of this district assembled at the annual school meeting did authorize the district officials to wreck the old building and to use such of the old material as was practicable in the new one, and to dispose of the remainder; however, the minutes of the annual meeting are silent as to the disposition to be made of the old lumber. The minutes show that the schoolhouse was to be torn down and the old lumber piled up, and that a new house was to be built at the place. The court permitted a witness to testify that, on motion duly seconded at the school meeting, it was decided that the old lumber should be used in the new building so far as practicable, and that such as could not be used should be sold. The chairman of the meeting and others corroborated this evidence. So the point is this: Is it competent to show by parol that a certain affirmative action was taken by the assembled voters, of which no minute was made by the clerk? It is not sought to contradict any of the record that was made, but merely to show that an action was taken which the clerk failed to make any mention of at all. The minute made by the clerk appears on its face to be a mere brief abstract of what the clerk conceived to be the substance of the various things done at the meeting. Nothing like a report in full of the proceedings is attempted: The clerk on the stand stated that he merely tried to get down the substance of motions and the actions of the meeting as he understood them. In the case of *Rock Creek Township v. Coddington*, 42 Kan. 649, 22 Pac. 741, which seems to have been a very similar case to the one at bar, the syllabus reads: "Where only a brief abstract of the proceed-

ings of a township board is entered of record, and the question arises as to what the action of the board was, parol evidence is competent to supplement the record, and to show all its acts and proceedings." And in the body of the opinion, after discussing the matter somewhat, it is said: "We think it was competent to show by parol evidence the resolution which was adopted and also to show who was directed to purchase the material for the bridges. Neither the statute quoted nor any other renders any act or proceeding of the board void because it is not recorded, nor makes the record of the board the only evidence of their actions"—citing *Gillett v. Com'rs of Lyon Co.*, 18 Kan. 410; *Railroad Co. v. Tontz*, 29 Kan. 460; *Railroad Co. v. Com'rs of Stafford Co.*, 36 Kan. 121, 12 Pac. 593; *State ex rel. v. Com'rs of Pratt Co.*, 42 Kan. 641, 22 Pac. 722. The same may be said of the statute in the instant case (section 8087, Comp. Laws 1909), which provides that the clerk, if present, and if not any voter who may be selected, shall certify the proceedings of the district meeting, is no broader than the Kansas statute mentioned.

We believe, under the circumstances of this case, that it was competent to show that the action claimed was in fact taken, and that the clerk of the meeting failed to notice same in his minutes. These memoranda of the proceedings of an annual school meeting, which are to be made by the clerk of the district, if present, and if not by any other voter chosen by those assembled, cannot and ought not to have the same force and conclusive effect as court records, written agreements, etc., and while it is not permissible to contradict the record made, and if on its face it purports to be an accurate full report of the proceedings, it probably could not be explained by parol evidence, yet where on its face it is merely a crude abstract or synopsis of what transpired, we see no objection in permitting it to be clearly shown by parol that a thing was done and no mention made of it. As said in the case above, while it requires the authority of the voters for the performance of certain things, by the school officials, yet there is nothing in the law that requires the authority to be found in a record of the proceedings. It is the assent of the voters, properly expressed, that constitutes the authority. If it can be clearly shown that such authority was in fact conferred, and the clerk merely overlooked, or deemed it unimportant to mention the same, it seems, especially where the parties have acted upon such authority in good faith, that the mere omission of the clerk should not be allowed to render the action illegal.

The following authorities are more or less in point: *School Dist. No. 2 v. Clark*, 90 Mich. 435, 51 N. W. 529; *Indianapolis v. Imberry*, 17 Ind. 175; *School Dist. v. Atherton*, 12 Metc. (Mass.) 113; *Morgan v. Willey et al.*, 71 Iowa, 212, 32 N. W. 265; *Electric Co. v.*

Bd. Co. Com'rs, 81 Kan. 8, 106 Pac. 453; Austin v. Allen, 6 Wis. 134; Beach on Pub. Corp. vol. 2, § 1298.

2. On the second point, we deem it sufficient to say that the evidence to our minds fails to show that the defendant was a member of the school board at the time he bought the lumber. The defendant on the stand, when asked if he was present at the annual school meeting, replied that he was not; that if he had been there he would have presided, as at that time he was director. This is the only evidence tending to show that he was a member of the board, some months later, when he bought the lumber. Besides, it would seem that the defendant, having bought the lumber and carried it off, was estopped, when sued for its value, from asserting that it was illegal for him to become a purchaser. Shawnee Nat. Bank v. Purcell Sho. Gro. Co., 34 Okl. 34, 124 Pac. 603, 41 L. R. A. (N. S.) 494; Fremont County v. Warner, 7 Idaho, 367, 68 Pac. 106; Marshall v. Murphy, 5 Kan. App. 718, 46 Pac. 973; McKinnis v. Scottish Amer. Mtg. Co., 55 Kan. 259, 39 Pac. 1018.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

COUCH v. O'BRIEN.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. SALES (§ 114*)—RESCISSION OF CONTRACT—FRAUDULENT REPRESENTATIONS.

False and fraudulent representations as to the quality, character, and grade of personal property, made by the agent of a vendor for the purpose of inducing a sale, justify a rescission of the contract of sale by the vendee, providing steps to rescind are taken within a reasonable time after the discovery of the falsity of such representations.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 288; Dec. Dig. § 114.*]

2. SALES (§§ 40, 124, 126*) — RESCISSION OF CONTRACT—FRAUDULENT REPRESENTATIONS.

The purchaser of a piano, unacquainted with musical instruments and relying wholly upon the representations of the agent selling the same, and the character, grade, and quality of the piano being falsely and fraudulently represented to him, may rescind the contract, within a reasonable time after the discovery of the fraud that has been perpetrated upon him, by returning the piano to such agent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 79-83, 303-317; Dec. Dig. §§ 40, 124, 126.*]

3. SALES (§ 126*)—RESCISSION OF CONTRACT—REASONABLE TIME—QUESTION FOR COURT.

What is a reasonable time for taking steps to rescind is a question of law for the court to determine under the evidence in each particular case.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 313-317; Dec. Dig. § 126.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Marshall County; J. W. Faulkner, Judge.

Action by J. T. Couch against J. F. O'Brien to recover on two promissory notes. Judgment for defendant, and plaintiff brings error. Affirmed.

E. D. Slough, of Ardmore, for plaintiff in error. Wm. M. Franklin, of Madill, for defendant in error.

GALBRAITH, C. This action was originally filed in the justice court, and on appeal to the county court was tried to the court and a jury, and judgment rendered for the defendant, and the plaintiff prosecuted an appeal to this court by petition in error and case-made.

The action was based on two promissory notes for \$87.50 each, alleged to have been given as the balance of the purchase money on a piano sold by the plaintiff in error to the defendant in error. The defendant in error acknowledged the purchase of the piano and the execution of the notes, but contends that there was a failure of consideration, and that the contract of sale had been rescinded by him; that he was led to rescind by reason of the fraud and misrepresentations of the plaintiff's agent, made to him at the time of the sale; that he was not a musician and not familiar with musical instruments, and did not rely upon his own judgment in the purchase of the piano, but relied entirely upon the representations of the plaintiff's agent as to the quality and value of the piano; that it was represented to him that this was a first-class instrument and was of the value of \$500, and that on account of a special sale which the plaintiff was making it would be sold to him for \$300, and he believed such representations to be true, while, as a matter of fact, the same were false and were fraudulently made, and the piano was not new, although it had been newly varnished, but was a secondhand piano and had been through a fire and exposed to water and heat and was of an inferior quality, and was practically of little or no value whatever. When he discovered these facts, he rescinded the contract of sale by returning the piano to plaintiff's agent. The case was tried upon the issues thus made, and the jury found for the defendant, and gave him judgment for \$30, the cash payment he had made at the time of the purchase, and for costs.

The plaintiff in error assigns as error the overruling of his motion for new trial, and in this it is complained that the verdict is contrary to law and is not sustained by the evidence, and that the court erred in admitting certain evidence over the objection of the plaintiff in error, and also erred in the giving of an instruction to the jury. The instructions are not numbered as they should have been, but the one complained of is set out in full in the record and was attached to the motion for new trial. In this instruction the court told the jury, in substance, that if

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

they found from a fair preponderance of the testimony that the agent, Vaughn, fraudulently misrepresented the character and quality of the piano to the defendant, and told him that it was a standard instrument of the value of \$500, and ordinarily sold for that sum, and that the defendant was unfamiliar with pianos, but knew the agent, Vaughn, and had confidence in him and relied upon his statements as to the character and quality of the piano, and these representations were false, the defendant had a right to rescind the sale and return the instrument; that while ordinarily the law placed the duty upon the defendant to inspect the article he was buying, and to rely upon his own judgment, that if the defects were such that a man of ordinary prudence could not see and detect them readily, and he relied upon the representations of the plaintiff's agent as to the quality of the instrument, and these representations were false and fraudulent, and the piano was practically worthless, that he had a right to rescind. While this instruction is not technically correct, still the chief vice in it was a failure to state that it was the duty of the defendant, under the law, to take steps to rescind the contract promptly upon the discovery of the fraud that had been perpetrated upon him in the sale, still this defect in the instruction was cured by an instruction requested by the plaintiff given by the court, as follows: "Where a party wishes to rescind a contract, they must do so immediately upon the discovery of the defects complained of."

[1, 2] The law is well settled in this jurisdiction that false and fraudulent representations made to induce a sale are grounds for rescinding a contract of sale by the vendee. *National Bank of Anadarko v. Oldham*, 26 Okl. 139, 109 Pac. 75; *Robinson v. Roberts*, 20 Okl. 787, 95 Pac. 246.

[3] It is also held that a vendee wishing to rescind a contract of sale should return the article purchased to the vendor within a reasonable time; and it is also held that what is a reasonable time for rescinding a contract of sale, under the facts of each case, is a question of law for the court to determine. *Luger Furn. Co. v. Street*, 6 Okl. 312, 50 Pac. 125.

The testimony shows that the defendant discovered some defects in the piano within a few days after it had been delivered at his house, but that the material defects did not appear for some three, or four, or five weeks afterwards. He said: "I discovered it was cracking, and it showed to have been worked over and I notified Mr. Vaughn about it, and told him that it wasn't what it was represented to be. I said it wasn't what it was represented to be and I did not want it, and that it wasn't any account and I did not want it. Q. It began to crack and checker? A. Yes, looked like where you would put

paint on the hot side of a house, that is when I turned it back to him."

We have examined the instructions given to the jury by the court, and, as a whole, they seem to fairly state the law involved in the case. The one complained of, taken in connection with the other instruction given by the request of the plaintiff, cannot be said to be so clearly prejudicial as to justify the court in reversing the judgment appealed from.

The question of whether or not the representations made by the plaintiff's agent at the time of the sale of the piano were false and fraudulent was a question of fact that was properly submitted to the jury for determination. If they were made, as contended by the defendant in error, they were sufficient to authorize a rescission of the sale, providing, of course, the defendant in error acted with reasonable promptness in rescinding the contract after the discovery of the fraud that had been perpetrated upon him. The jury, by their verdict, determined this question in favor of the defendant in error. The court in denying the motion for a new trial passed upon the question of law as to whether or not the defendant in error had exercised the right to rescind within a reasonable time, as it was his duty to do under the law. There can be no serious question, from an examination of the testimony in the record, about there being sufficient evidence to sustain the findings of the jury. The rule is well settled in this jurisdiction that where questions of fact are submitted to the jury, under proper instructions, and there is evidence to support the finding, the verdict will not be set aside.

Complaint is made that the court erred in permitting the agent of the plaintiff to testify as to the price at which the piano had been consigned to the plaintiff by the general dealer, he testifying that the consignor had told him that it was invoiced to the agent at \$90. It seems that this was material testimony as affecting the issues of fraud involved in the case, and its admission was not error.

None of the assignments of error seem to be well taken. We see no good reason for disturbing the judgment appealed from, and therefore conclude that it should be affirmed.

PER CURIAM. Adopted in whole.

BONDIES v. BONDIES.

(Supreme Court of Oklahoma. Nov. 25, 1918.)

(Syllabus by the Court.)

DIVORCE (§ 324*)—SUPPORT OF CHILD—RIGHTS BETWEEN DIVORCED PARENTS.

Section 4367, Rev. Laws 1910: "A parent entitled to the custody of a child must give him education and support. * * *" Section 4377,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—69

Id.: "A parent is not bound to compensate the other parent * * * for the voluntary support of his child without an agreement for compensation." Where a mother is awarded custody of a minor child in a divorce proceeding, and the decree is silent as to the support of such child and the father has not agreed to do so, and the mother maintains and supports the child for a number of years and has made no effort to secure from the court granting the decree an order requiring the father to support such child, such support is voluntary, and she cannot recover from her former husband any sums in that behalf laid out and expended, but the father may be required to contribute to the support of such minor child from and after the commencement of an action for that purpose, and such action may be by motion or supplemental petition in the original proceeding, or by an independent suit.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 826; Dec. Dig. § 324.*]

Error from District Court, Bryan County; A. H. Ferguson, Judge.

Action by Helen Bondies against William Bondies. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

J. M. Crook, of Durant, for plaintiff in error. E. G. Senter, of Dallas, and Utterback, Hayes & MacDonald, of Durant, for defendant in error.

LOOFBOURROW, J. On January 6, 1911, defendant in error, Helen Bondies, commenced an action against William Bondies in the district court of Bryan county by filing a petition, alleging, in substance, as follows: "That Helen Bondies is a resident of Dallas county, Tex., and defendant, William Bondies, is a resident of Bryan county, Okla. That they were married in November, 1900. That as a result of said marriage the minor son, Walton Bondies, was born January 11, 1902. That they were divorced by decree of the district court of the Forty-Fourth judicial district of Texas in Dallas county on the 31st day of July, 1902. That in said decree the custody of said minor child, Walton Bondies, was awarded to the plaintiff. That since said time plaintiff has had the custody of said minor, and has borne the entire expense of his support and maintenance except a certain period that W. Porter, of Dallas, Tex., the father of the plaintiff, has furnished board and lodging to said child. That the defendant, William Bondies, has contributed, during said time, \$180 to the maintenance of said child. That with the exception of said small contribution by the said defendant, he has persistently refused to recognize the legal and moral claim of his son upon him for his support and maintenance, though he has, at all times, been well able to maintain him in comfort and provide for all of his necessities, and although he has often been by the plaintiff herein requested and importuned to aid in the support and maintenance of said child. That the plaintiff herein has reared said child, and has giv-

en him care and attention and clothing, and such other means as his circumstances in life demanded, and has supplied his needs and necessities during the period above stated. That the reasonable value of said support and maintenance is \$300 per year, or \$3,125 for said entire period. * * * And though the plaintiff has often been requested to pay and to contribute to said cause of the support and maintenance of his said minor son, he has absolutely refused and still refuses so to do, except as heretofore stated. That plaintiff is not as able to provide for said child as the defendant herein. Plaintiff further shows that said defendant has never shown any interest for the welfare, comfort, care, or maintenance of his said son, but has been totally indifferent toward him. Plaintiff prays judgment against the defendant for the sum of \$3,125 as compensation for the support and maintenance of said Walton Bondies, the said minor son of the parties, and to cover the expense and trouble incurred by her on said account. Plaintiff further asks that the court make an order requiring and commanding the defendant to pay over to the plaintiff on the first day of each month the sum of \$40 until the said Walton Bondies shall become of age, said \$40 per month to be for the use and benefit of said minor and to assist the said plaintiff in caring for and supporting and maintaining the said Walton Bondies during his minority. * * * To this petition plaintiff in error filed a demurrer, which the court overruled. Thereafter plaintiff in error filed an answer, in substance: First. A general denial, saving specific admissions. Second. The statute of limitations of Texas. Third. That he agreed to and did pay to the defendant in error in 1902 the sum of \$3,000 for the maintenance of said child, and that said funds have not been properly conserved; that defendant in error is now unable to raise, maintain, and educate said child; that plaintiff in error is ready, willing, and able to properly care for, maintain, and educate his son; that he has reached an age that requires the care and admonition of a father, etc.; and that the custody of the child be awarded to him. Further answering, defendant specially pleads the statute of limitations of Oklahoma. The defendant in error replied with a general denial, and further stated that at the time the decree of divorce was rendered awarding the custody of the child to the plaintiff, Helen Bondies, both of said parties were residents and citizens of the state of Texas and appeared in person and by attorneys in said cause; that Helen Bondies is entitled to retain the custody of said minor child until said judgment shall be modified or changed by the court which rendered it; that she has been ever since and is now a citizen of Dallas county, Tex. It is conceded that the decree of divorce was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

silent as to support and maintenance of the child. The defendant in error was called as a witness in her own behalf and her testimony constitutes all of the evidence in the case. A verdict was returned, and judgment entered in favor of the defendant in error for the sum of \$608, and from such judgment plaintiff in error appeals, and assigns as error: "First. The court erred in overruling the demurrer of the defendant that said petition does not state facts sufficient to constitute a cause of action. Second and third. The court erred in overruling the motion for new trial herein because the verdict therein was and is contrary to law, and in admitting, over the objection of the defendant, evidence prejudicial to the defendant, and which was incompetent, irrelevant, and immaterial. Fourth. Error in the second paragraph of the court's charge to the jury," which is as follows: "No. 2. It is the duty of the father of a minor child to give his child such support and education as is suitable to his circumstances and station in life, unless the father is unable to do so, then in that event the mother must assist him to the extent of her ability. In the case at bar, if you should find from a preponderance of the evidence that the plaintiff, Helen Bondies, has expended money in buying clothing, medicines, and paying doctor bills, and for washing, for tuition, and school books, and has devoted her own time to the care and training of the minor child of plaintiff and defendant to the extent that she has been unable to earn as much as she otherwise would have done, and you find that these matters were necessary for the proper care, attention, and maintenance of said child, then you will find in favor of the plaintiff in such amount or amounts as you believe from the testimony said expenditures and services were reasonably worth. It is the duty of the mother, where she has the care and custody of her child, to render it the usual and ordinary attention that a mother owes her child, and she would not be entitled to recover for the mere care and attention that every mother owes her child other than such amount or amounts as you may find, if any, that she has been pecuniarily deprived of by reason of her inability to earn the wages that she would have otherwise earned had she not the care and charge of the said child. If you should find for the plaintiff, you will fix her recovery at such an amount or amounts as you believe from the evidence that she is reasonably entitled to recover for the moneys expended by her and the services rendered as herein set forth, not exceeding the sum of \$300 per year, for and during the time since January 6, 1908, up until the present time."

Sections 4367, 4376, 4377, and 4968, Rev. Laws 1910, respectively, provide as follows:

"The parent entitled to the custody of a child must give him support and education

suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability."

"If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities and recover the reasonable value thereof from the parent."

"A parent is not bound to compensate the other parent or a relative for the voluntary support of his child without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause."

"When a divorce is granted, the court shall make provision for guardianship, custody, support and education of the minor children of the marriage, and may modify or change any order in this respect, whenever circumstances render such change proper, either before or after final judgment in the action."

When a decree of divorce is granted, awarding custody of the child to the mother, without any provision in the decree for the maintenance of the child, and in the absence of an express contract, a great many authorities hold that the mother can maintain an action against the father for money voluntarily paid by her for the child's support, and a great many authorities are to the contrary, but our statutes control in this case.

Sections 4367, 4376, and 4377, Rev. Laws 1910, came from California via Dakota, and have been construed by this court in the case of William Bondies v. W. Porter, 186 Pac. 417, handed down at the present term, involving support of the same minor child, W. Porter being the grandfather of said child, opinion by Justice Turner, in which it is held: "Where a divorce decree gave the custody of an infant child to the mother, her father, who voluntarily furnished necessities for the child while in her custody, in the absence of an agreement, cannot recover compensation therefor from the father of the child." Nor can a different rule apply merely because the defendant in error was formerly the wife of the plaintiff in error. When the decree was granted the husband and wife thereupon became single persons, and the relations and obligations to each other were the same as strangers, and the divorced wife, although having the custody of the child, stood in no more favorable position to recover in an action against the father for the past support of the child than a stranger.

In Kendall v. Kendall, 5 Kan. App. 688, 48 Pac. 940, section 605, Code of Kansas, being the same as section 4968, supra, the custody of children was awarded to the mother and silent as to their support. Later in the same case the mother filed a motion for the modification of the decree, and the district court thereupon made the following order: "That said defendant, George Kendall, pay

to the said plaintiff, Lizzie Kendall, in trust and for the support of said minor children, the sum of \$15 per month for each of said minors until each of them reaches 21 years of age, and that said payments date from the date of the decree," etc.—the payments due amounting to \$500 at the date of the modified decree. Upon appeal the court held that the trial court could require defendant to provide future support for the children, but payments must date from modified decree, and that the order for payment for past support was error. See, also, *Harris v. Harris*, 5 Kan. 46; *Hampton v. Allee*, 56 Kan. 461, 43 Pac. 779; *Chandler v. Dye*, 37 Kan. 765, 15 Pac. 925.

The statutes of New York contain provisions similar to our own, and in *Washburn v. Catlin*, 97 N. Y. 623, the trial court made an order requiring defendant to pay the expenses incurred during previous nine years, but on appeal the same was modified, restricting such payment to the expenses incurred subsequent to filing petition. See, also, *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *McKay v. McKay*, 125 Cal. 65, 57 Pac. 679; *McKay v. Superior Court*, etc., 120 Cal. 143, 52 Pac. 147, 40 L. R. A. 585.

The provisions of section 4968, supra, are in their nature prospective, and the court is limited to the "custody, support and education" which the children are subsequently to receive under the court's direction, and until the court has made some order requiring the father to support and maintain the child, there can be no liability on his part, for sections 4367 and 4376, supra, limit the duty of support to "the parent entitled to the custody or to the parent who has the child under his charge." And section 4377, supra, expressly provides that "a parent is not bound to compensate the other parent for the voluntary support of his child without an agreement for compensation." The court has power to make such orders for the future maintenance of minor children under petition, or by motion in the action after final decree has been entered, and the rule is practically uniform where the similarity exists in the statutes.

In *Holt v. Holt*, 23 Okl. at page 648, 102 Pac. at page 187, Mr. Justice Dunn, after quoting the Oklahoma statute, said: "Under this statute we entertain no doubt that any change or modification, or any order in reference to the child, should be made on motion in the original action."

At any time after the divorce was obtained, the mother could have applied to the court that granted the decree for an order requiring the father to contribute to the support of the child, and that court had full power and authority to make any order that the safety and well-being of the child might require. Section 2871, Rev. Statutes of Texas 1895, is very similar to section 4968, Rev. Laws of Okl. 1910. Having failed to avail herself of this remedy, her support of the

child must be deemed to have been voluntary up to the time of the commencement of this action.

The question now arises as to whether or not a separate action may be maintained against the father for the present and future support of his minor child, or is it imperative that the mother proceed in the original action wherein the decree was granted? It is unquestionably the duty of the father to provide reasonably for the maintenance of his minor child when the mother is unable to do so, and we do not understand that this liability is in any way affected by the fact that the custody of said child may have been taken away from him by the decree of a court of competent jurisdiction. This primary obligation arises from his natural headship of the family, and upon his being, by nature, and the present constitution of society, responsible for the welfare and protection of his own offspring. Children cannot be deprived of their rights on account of the dissensions of their parents, to which they are not parties. As was said by Chancellor Kent: "Wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person." Under the Oklahoma and similar statutes, courts are given great latitude with reference to orders concerning the children of divorced parents, and the principal object to be attained is that which will protect and secure the welfare and best interests of the children. Hence the clause in section 4968, supra, that "whenever circumstances render such change proper either before or after final judgment in the action, * * * the court may modify or change any order in this respect." It appears from the reply in this case that the Texas court had jurisdiction of the subject-matter and of the persons of the parties to the action when the decree was granted, but it also appears that the husband is now a resident of the state of Oklahoma. We do not know whether he has property in the state of Texas which would be available for the enforcement of any order that that court might now make with reference to the support of the child, and assume that he has not. That court might, upon application, make an order for the support of the child, which would be binding upon the plaintiff in error, but the defendant in error might then have to bring an action upon such judgment in this state to enforce the same; since this court now has jurisdiction of the parties, no good reason can be suggested why this action should not be maintained, and the primary and humane result secured, to wit, the support and education of this child, suitable to his circumstances.

In *McKay v. McKay*, supra, the court said: "So far as the right of the wife to recover for past expenses incurred by her is involved, the principle is the same, whether the appli-

cation is made in an independent action, or through a motion in the original case." The principle is the same with reference to present and future support of the child. This question is referred to in the case of *Spencer v. Spencer*, 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N. S.) 851, 114 Am. St. Rep. 695, 7 Ann. Cas. 901, and notes.

In *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. Rep. 543, the decree made no order for the child's maintenance, and subsequently the mother commenced an action in another tribunal in another county of the same state. The court recognized the general doctrine that the plaintiff could have made application in the same cause and secured a modification of the decree, but held that an original action could be maintained for the same purpose, citing *Olney v. Watts*, 43 Ohio St. 499, 3 N. E. 354, and further stating: "The natural obligation resting upon him in the forum of the divorce would not become lifeless because its enforcement was not sought in the jurisdiction in which the divorce was granted."

In *Graham v. Graham*, 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N. S.) 1270, 12 Ann. Cas. 187, the parties, in 1897, in Arapahoe county, Colo., were divorced and decree awarded the custody of the three minor children to the wife, and further ordered payment of \$50 per month for the support of the minor children, limiting the amount to \$2,000. The father paid the mother \$50 per month up to and including December, 1900, in the aggregate sum of \$2,000. In June, 1903, the mother commenced an action against the father in Denver county, Colo., to recover money expended for the support and education of two of said minor children from the 1st day of January, 1901, and for the support and education of one of said minor children until he became of age, and for the allowance for further care and support of said minors. Judgment was entered for the plaintiff from the date of the commencement of the action, and for the future and further support of the minor children, the court in the opinion stating that the judgment in the divorce case did not determine the extent of the liability of the father; that the children were not parties to the action, and their rights were not concluded thereby, further holding that it was within the authority of the court granting the decree to modify the same as the changed circumstances of the parties might require; the effect of the decision being that a father may be compelled to support his minor children either by a motion to modify the decree in the original action, or in an independent action.

In his answer the plaintiff alleges that he paid the defendant the sum of \$3,000 for the maintenance of said child, etc., and that he is ready and willing and able to properly care for, maintain, and educate his son, and asks that the custody of the child be awarded

to him. There is no evidence tending to support the allegation as to the payment of the \$3,000 for the maintenance of the child, and if there had been, and the mother had failed to properly conserve the same, those facts would not alter the fact that the child at this time needs support and maintenance, nor relieve the parent from the legal responsibility of such support. The mother testified that the boy's father had never seen him until this case was tried, and on cross-examination admitted that the father had suggested that he be permitted to take the child and support him, and that that would necessitate the removal of the child from the state of Texas to Oklahoma. This was not an offer or a request to do so, but a mere suggestion; and such suggestion, together with the allegation in the answer, were evidently not made in good faith, but for the purpose of filling the heart of the mother with consternation, and of causing her to abandon this or any other action against him for the maintenance and support of the child. The general demurrer was properly overruled by the court because of the allegations in the petition which ask for an order requiring the plaintiff in error to pay the sum of \$40 per month for the support of said child.

The giving of the instruction No. 2 of the court was error, for the reason that it told the jury that the mother could recover from the father for money voluntarily paid in supporting and maintaining the child.

The judgment of the trial court is reversed, and the cause remanded for a new trial, with directions to proceed in accordance with this opinion.

HAYES, C. J., and TURNER and KANE, JJ., concur. WILLIAMS, J., absent and not sitting.

SOUTHWESTERN LAND CO. v. McCALLAM.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. CONTRACTS (§ 332*) — PUBLIC OFFER OF PRIZE—PETITION—ESSENTIAL ALLEGATIONS.

In an action to recover a prize which has been offered by defendant and which is to be paid pursuant to an award to be made by a jury selected under specific conditions set forth in the offer, it is essential that plaintiff allege either that such prize had been awarded as provided in the offer, or that such award, stating the facts, had been prevented by some fault of defendant.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.*]

2. CONTRACTS (§ 352*) — PUBLIC OFFER OF PRIZE—SUBMISSION OF ISSUES — CONFLICTING EVIDENCE.

And where plaintiff's right of recovery depends upon whether such award has been made under the conditions of the offer, and such fact is to be determined from conflicting testimony,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

it is error to refuse to submit such issue to the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1200, 1828; Dec. Dig. § 352.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Choctaw County; W. T. Glenn, Judge.

Action by Olivia McCallam against the Southwestern Land Company on a contract. Judgment for plaintiff, and defendant brings error. Reversed.

E. H. Foster, of Oklahoma City, and R. E. Stephenson, of Hugo, for plaintiff in error. B. D. Jordan, of Hugo, for defendant in error.

HARRISON, C. This cause was tried in the county court of Choctaw county in February, 1911, upon an appeal from a judgment rendered against the Southwestern Land Company in the justice court of said county. The suit was upon the following proposition or notice which was published in the newspaper, and which plaintiff accepted and brought suit as upon a contract, to wit:

"Exhibit A.

"\$100.00 in Gold to be Given Away.

"A free contest for the purchasers of lots in Frisco addition. The Southwestern Land Company has deposited in the Hugo National Bank \$100.00 in gold to be paid for the best article stating reasons why Hugo is going to be one of the largest cities in the new state of Oklahoma and why Frisco addition is sure to be the most desirable residence portion of Hugo.

"Frisco addition lots are sure to double in value within one year and you can make money by entering this contest whether you secure the \$100 in gold or not. If you do win the gold then you will be amply repaid for the time you put in thinking.

"This contest is open to all purchasers of lots in the Frisco addition and those who have made purchases previous to August 20th will be allowed thirty days from that date to submit any article they may desire to offer in the contest. Those who purchase hereafter will be allowed thirty days from date of purchase.

"On January 1st three disinterested persons shall be chosen by the majority of the purchasers present to decide who is entitled to the \$100 in gold and the money shall be promptly paid to the person who offers the best article according to the decision of the judges to be selected.

"This money will be paid to the purchaser who writes and delivers to us within thirty days after purchase is made, the best article not to contain more than three hundred words, giving reasons why Hugo should have a population of twenty-five thousand in five years and why Frisco addition is sure to al-

ways be the most desirable residence portion of the city.

"If you are familiar with Hugo's surroundings and will stop and think for a moment, you can clearly see why Hugo is sure to be one of the largest cities in the new state of Oklahoma and, if you do not know why Frisco addition is going to be the most desirable residence portion of Hugo, all you have to do to be convinced of this fact is to go out and look it over and then compare its advantages with other portions of Hugo.

"The excellent drainage, the productive soil, the beautiful shade trees, the abundance of pure soft water and the fresh pure air are a few of the many advantages to be taken into consideration when you go to build your home.

"Frisco addition lots are being sold on long terms and easy payments. Buy a lot and win \$100 in gold.

"The Southwestern Land Co.,
Hugo, I. T."

The foregoing notice was attached to and made part of the following bill of particulars: "That defendant, on or about the 20th day of August, 1907, published in the Choctaw County Chronicle, a newspaper published in the city of Hugo, an offer of \$100 for the best article written by any one giving reasons why Hugo should have a population of 25,000 within five years, and why the Frisco addition is sure to always be the most desirable residence portion of said city. The plaintiff wrote the only article, and complied with all the terms and conditions of said contract; that said article was delivered to defendant and accepted by it; that plaintiff has made demand on defendant for the payment of said \$100, but that said defendant has refused, and still refuses to pay the same. Wherefore plaintiff prays judgment against said defendant in said sum of \$100."

[1] Defendant demurred to the bill of particulars for failure to state a cause of action in that it failed to show that plaintiff had performed all of the conditions precedent to recovery. The demurrer was overruled because of the general allegation "that plaintiff wrote the only article and complied with all of the terms and conditions of said contract." The court's action in this regard is assigned as error; but, while the allegation may be too general and too indefinite to constitute good pleading, yet we think it might be held sufficient in this regard as against a general demurrer. However, the plaintiff's right of recovery on the contract sued upon must rest, not only on the fact that she had written the article and submitted it to the company, but that the \$100 gold prize had been awarded to her by a decision of three disinterested persons to be chosen as provided in paragraph 4 of the contract, or that, having performed all things incumbent upon her under the contract, she had been depriv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed of such decision by some fault of the company. The allegations in this regard we think are insufficient.

[2] Besides, in the trial of the case the defendant offered the following instructions which the court refused to give, to wit: "First. Unless you find that there was an appointment by the purchasers of three judges and that said article of plaintiff's was submitted to them for their judgment, then you will find for the defendant. Second. Unless you further find that the article claimed to have been written by plaintiff was submitted to judges appointed by the purchasers of lots in said addition, and unless you further find that said judges found said article to be the best written, then you will find for the defendant."

This was a material issue in order to determine plaintiff's right of recovery. She evidently had no right of recovery unless the prize had been awarded to her by a jury selected as provided in the contract. That is, unless such award or decision had been prevented by some fault of defendant, and this being a material issue to be determined by the jury from the evidence, inasmuch as such issue was not covered or presented to the jury by the court's charge, we think it was error to refuse the instructions offered.

In the case of *Trego v. Pennsylvania Academy of Fine Arts (Pa.)*, 3 Atl. 819, the identical question of pleading and issue of fact as to plaintiff's right of recovery were involved. In that case the court said: "The manifest meaning of the proposal is that prizes would be given in pursuance of awards, and not contrary thereto. The persons who shall compose the 'jury of awards' is stated in the offer. They were to constitute the tribunal to pass upon the merits of the paintings, and to decide to which prizes should be awarded. Unless so awarded by this jury, no prize was demandable."

We think that the issue of fact tendered by defendant in the offered instructions should have been submitted to the jury, and that the court erred in refusing to submit same.

The judgment is reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

RHOME MILLING CO. v. FARMERS' & MERCHANTS' NAT. BANK OF HOBART.

(Supreme Court of Oklahoma. Nov. 21, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 345*)—PERFECTING APPEAL—TIME.

By reason of section 6082, Comp. Laws 1909, this court cannot consider the question whether a district court erred in sustaining a demurrer to one of the counts of plaintiff's petition stating a separate cause of action, when the petition in error is filed in this court

more than one year after the ruling of the court was made sustaining such demurrer, notwithstanding the fact that the proceeding was begun within one year from the date of the order of the court overruling the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.*]

2. APPEAL AND ERROR (§ 260*)—EXCEPTION BELOW—RULING ON EVIDENCE.

A ruling of a trial court upon an objection to the introduction of certain evidence cannot be reviewed in this court on appeal, where no exception was taken to the ruling of the trial court upon such objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

3. APPEAL AND ERROR (§ 171*)—CHANGE OF THEORY.

A plaintiff in error, who proceeds upon one theory in the trial court, and loses, will not be permitted on appeal in this court to change front, and claim the right to recover upon some other theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

4. APPEAL AND ERROR (§ 757*)—BRIEF—INSTRUCTION.

Under rule 25 of this court (20 Okl. xii, 95 Pac. viii), where a party complains of the giving or refusal to give an instruction, he should set out in his brief in totidem verbis separately the instruction to which he objects. A general complaint that the court erred in giving or refusing an instruction, without complying with the foregoing rule, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

Error from County Court, Kiowa County; J. W. Mansell, Judge.

Action by the Rhome Milling Company against the Farmers' & Merchants' National Bank of Hobart. Judgment for defendant, and plaintiff brings error. Affirmed.

L. M. Keys, of Hobart, for plaintiff in error. Joseph H. Cline and George L. Zink, both of Hobart, for defendant in error.

HAYES, O. J. Plaintiff in error, hereinafter called plaintiff, instituted this suit in the court below against defendant in error, hereinafter called defendant, to recover the sum of \$452.70. The circumstances out of which this suit arose are substantially as follows: Plaintiff is a corporation, with its principal place of business in Rhome, Tex. Defendant is a national bank, located at Hobart in this state. John W. Dickson Grain Company is also a corporation of this state, and will hereafter be referred to as the Grain Company. During the latter part of the year 1908 the Grain Company made a contract with plaintiff, whereby it sold and agreed to convey and deliver to plaintiff a certain number of cars of wheat. During the latter part of September of said year the Grain Company shipped to plaintiff three cars of wheat, and drew draft therefor upon plaintiff, which was by plaintiff paid. Upon

the arrival of the wheat, plaintiff ascertained that it had become heated, and that the same had not been cleaned, and dried, and rendered marketable in accordance with its contract with the Grain Company. Because of these facts, plaintiff refused to receive the wheat, and drew a draft upon the Grain Company for the sum of \$2,534.37, which it had paid the Grain Company for the wheat, with bill of lading attached for the three cars of wheat. This draft, which was a demand draft, was made payable to the State National Bank of Ft. Worth, Tex. This bank forwarded this draft for collection to defendant. When one J. W. Malone, an officer of plaintiff, drew the draft, he requested that the sending bank transmit it to defendant for collection, and he wrote a memorandum upon the draft, or upon a slip accompanying the draft, as follows: "Ben, wire if your bank will protect this draft"—signed J. W. Malone. The person referred to in this statement was Ben Lovelace, the cashier of defendant bank. Upon receipt of the draft, it was presented by defendant to the Grain Company, which demanded three days of grace, and stated that the draft would be paid at that time. Thereupon, the cashier of defendant, Ben Lovelace, wired the State National Bank at Ft. Worth, the remitting bank, as follows: "Dixon draft, \$2,500 unpaid, but accepted"—signed Farmers' & Merchants' Bank. The draft was not paid upon the expiration of the three days of grace, but was at that time, to wit, on the 5th day of October, 1908, protested by defendant for nonpayment. When plaintiff received notice of the protest of the draft, it thereupon took possession of the three cars of wheat, and disposed of same to the best advantage possible, and gave the Grain Company credit for the net proceeds of the wheat in the sum of \$2,081.65. This action is brought to recover the difference between the net proceeds of the wheat and the amount of the draft drawn upon the Grain Company, payment of which the Grain Company refused.

In its amended petition, plaintiff sets up two separate causes of action against the defendant bank. In the first count it is sought to recover against the bank upon the theory that the telegram from defendant to the remitting bank constituted an agreement upon the part of the bank to pay to plaintiff the amount of such draft, and that, by reason of said agreement, the defendant bank was liable for the full amount of the draft, less the proceeds of the sale of the wheat. By the second count in its petition, plaintiff seeks to recover from defendant upon the theory that it had not exercised diligence, and had been negligent in presenting the draft to the Grain Company and demanding payment thereof. It alleges that on the 2d day of October the Grain Company owned and held upon the railway tracks near plaintiff's business in the state of Texas a large

amount of wheat, to wit, four cars, subject to plaintiff's suit in attachment, of sufficient value, if then seized and sold under plaintiff's attachment, to have fully paid the indebtedness of the Grain Company to plaintiff, that within the three days during which defendant held the draft before protesting same the Grain Company disposed of said wheat, and that said company was and is now wholly insolvent, and plaintiff is unable to collect from it the balance on the draft by not having been able to collect same by means of an attachment against said wheat. By reason of these facts, it alleges that it was damaged to the amount of said draft and protest fees, upon which it has credited the proceeds of the three cars of wheat referred to in the first count of its petition, leaving a balance on the damages sustained by it, the sum sought to be recovered in this action. To each count of its amended petition, defendant filed a demurrer, which was as to the first count sustained on July 12, 1909. No leave to amend was ever asked for or granted, and no amendment to the petition was filed subsequent to the action of the court upon the demurrer. The cause, however, afterwards, on January 21, 1911, proceeded to trial before a jury upon the issues raised under the second count of plaintiff's petition and defendant's answer thereto, resulting in a verdict and judgment in favor of defendant. To reverse this judgment, this appeal was filed in this court on August 29, 1911.

[1] The first specification of error set forth in plaintiff's brief and urged for reversal of the cause is that the court erred in sustaining defendant's demurrer to the first count of its amended petition and to the cause of action therein set forth. This action of the trial court, however, cannot be reviewed. At the time the order complained of was rendered, section 6082, Comp. Laws 1909, was in force, by which it is required that a proceeding to reverse a judgment or final order of a court in a civil action shall be commenced within one year after the rendition of the judgment or order complained of. More than two years elapsed after the trial court sustained said demurrer before this proceeding was instituted, and, under the previous decisions of this court, the court was without jurisdiction to review the order of the court sustaining said demurrer. *Holland v. Beaver*, 29 Okl. 115, 116 Pac. 766, Ann. Cas. 1913A, 814; *Reynolds v. Phipps et al.*, 31 Okl. 788, 123 Pac. 1125. See, also, *Blackwood v. Shaffer*, 44 Kan. 273, 24 Pac. 423, which is also controlling upon this question.

Referring to its second and third assignments of error, plaintiff complains of the action of the court in rejecting certain evidence. The evidence rejected and the substance thereof is not set forth in the brief as required by rule 25 (20 Okl. xii, 95 Pac. viii), nor is there any specification of error made

in its brief pertaining to such evidence as required by said rule. Reference is made to certain pages of the case-made; but, upon examination of those pages, the only objection we find made to the evidence therein contained was overruled by the court.

[2] As to the fourth assignment, it complains that the court erred in permitting the witness Ben Lovelace, cashier of defendant bank, to be asked the question, "I will ask you if you followed the instructions," which witness answered in the affirmative. The record discloses that this question was asked without objection. After it was answered, an objection was interposed; but no motion was made to strike the answer, and no exception was taken to the ruling of the court overruling the objection. The action of the court thereon, therefore, is not presented for review. *Dunham v. Holloway*, 3 Okl. 244, 41 Pac. 140; *Marion v. Territory*, 1 Okl. 217, 32 Pac. 116; *Capital Fire Ins. Co. v. Carroll*, 26 Okl. 286, 109 Pac. 535.

[3] The sixth specification of error is that the court erred in instructing the jury that, before it could find for the plaintiff, it must find from a preponderance of the evidence that at the time of the receipt of the telegram from defendant bank, and thereafter during the period elapsing between such time and the time when the notice of the protest of the draft was received by plaintiff, there was property belonging to the Grain Company within reach of the process of the court, available to plaintiff, by means of which plaintiff might attach and hold the same, and apply the same to the satisfaction of its indebtedness, and that, by the acts of defendant bank complained of, plaintiff was induced to and did forbear the enforcement of its claim and the realization thereof against such property of the Grain Company. Plaintiff complains that this instruction precludes it from recovering; if it should appear that a vigorous effort had been made at Hobart, the residence of defendant and of the Grain Company, on the date the draft was received by defendant bank, it might have resulted in the collection of said draft. No error was committed in giving this instruction, for plaintiff, in his petition, definitely specified the source of his damages, which was that, by delay in the presentation and protesting of the draft, plaintiff was prevented from enforcing his claim against the Grain Company by means of attachment against certain cars of wheat then located near the place of business of plaintiff and subject to attachment, and plaintiff alleges in his petition that the Grain Company was at that time and is now wholly insolvent. This was the theory upon which plaintiff presented its evidence to the court. There is no allegation in the petition and no effort made in the introduction of evidence to establish that plaintiff could have realized upon its claim against the Grain

Company during the delay between the receipt of the draft by defendant bank and the protest thereof by any other means than an attachment against the cars of wheat then located near the place of business of plaintiff, and the theory of the case for which he now contends seems to have been presented by it for the first time in this court. It is well settled that a party cannot proceed to trial of a case upon one theory, and, having lost, on appeal to this court try to prevail by changing and proceeding upon a different theory. *Duffy v. Scientific Compiling Dept.*, 30 Okl. 742, 120 Pac. 1088; *Checotah et al. v. Hardridge et al.*, 31 Okl. 742, 123 Pac. 846; *Harris v. First Nat. Bank of Bokchito*, 21 Okl. 189, 95 Pac. 781.

[4] The seventh assignment complains of an instruction given; but the instruction is not set out in the brief, as required by rule 25, and will not therefore be considered. *Lynn v. Jackson*, 26 Okl. 852, 110 Pac. 727; *Reynolds v. Hill*, 28 Okl. 533, 114 Pac. 1108; *Seaver v. Rullson*, 29 Okl. 123, 116 Pac. 802.

Finding no error in the record requiring a reversal of the cause, the judgment of the trial court is affirmed. All the Justices concur.

KIMBERLIN v. EPHRAIM.

(Supreme Court of Oklahoma. Oct. 14, 1913.
On Rehearing, Dec. 9, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1050*)—LIBEL AND SLANDER (§ 103*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for defamation, where defendant pleads the general issue, evidence that the plaintiff has a brother, not a party to the action or a witness, who is a fugitive from justice, is incompetent and not within the issues, but the admission of such testimony is not ground for reversal unless it clearly appears that the plaintiff was injured thereby.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050; * *Libel and Slander*, Cent. Dig. § 281; Dec. Dig. § 103.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for defamation, where plaintiff in direct examination was permitted, without objection, to show his family connection, so far as favorable, in order to aggravate his damages, and defendant on cross-examination was allowed, over objection, to show further family connection unfavorable in mitigation of damages, a verdict for the defendant will not be set aside, and a new trial ordered, since it does not appear that the plaintiff was injured by the admission of such testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

Error from District Court, Cleveland County; R. McMillan, Judge.

Action by Kemper Kimberlin against Frank Ephraim for damages on account of slander. Judgment for defendant, and plaintiff brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Ben F. Williams and F. B. Swank, both of Norman, for plaintiff in error. J. B. Dudley and John E. Luttrell, both of Norman, for defendant in error.

GALBRAITH, C. The plaintiff in error, a minor, commenced an action in the district court of Cleveland county, by his mother as next friend, against the defendant in error, for damages for defamation on account of certain false, malicious, and defamatory words alleged to have been spoken and published of and concerning him, as follows: "Kemper, did you steal my diamonds? Yes, you stole them, and I want you to tell me where they are.' Thereby charging the said Kemper Kimberlin with the crime of theft; that said statement was made to said Kemper Kimberlin in the public schoolhouse in the city of Norman, in Cleveland county, state of Oklahoma, and in the presence of a large number of students and other persons there assembled, whose names plaintiff is unable to allege at this time; that at the time said statement and charge was made by the said defendant, as aforesaid, he, the said defendant, without the consent and over the objections and protest of the said Kemper Kimberlin, by force and threats, forcibly thrust his hands into the pockets of the said Kemper Kimberlin and searched him, very much to the humiliation, mortification, and embarrassment of the plaintiff; that said statements were made orally and with the malicious intent and for the purpose on the part of the defendant to cause it to be said of and concerning the said Kemper Kimberlin, by other persons residing in Norman, Cleveland county, Okl., that he had been guilty of the crime of theft, and was grossly wanting in honor and uprightness, and was designated as a thief in said town, and with the malicious intent and for the purpose of causing it to be so believed of the said Kemper Kimberlin in the town of Norman, where he lives; alleging that said allegations were malicious and false, and were so known to be false by the defendant at the time they were made; alleging that the defendant is a man of great wealth and has a large business; and that his business and social standing is such that it gave great weight to his statements; and that the plaintiff has suffered great pain, anguish, and mortification on account of the shame and disgrace cast upon him in the community in which he lives." In an additional cause of action he alleges: "That on the 19th day of February, 1908, said defendant, falsely, maliciously caused to be published in the Daily Oklahoman, a newspaper published in the city of Oklahoma, county of Oklahoma, state of Oklahoma, same having a general circulation therein, an article the caption of which reads as follows: 'Norman thief takes jewels worth \$1,000.' That in causing said article to be published, the said defendant intended to have it understood by the general public in the

city of Norman, and state of Oklahoma, that the said Kemper Kimberlin was the person referred to in said article, and thereby charging said Kemper Kimberlin with the crime of theft." The defendant answered by a general denial. The cause was tried to the court and a jury, and a verdict rendered in favor of the defendant. The plaintiff brings the case here on petition in error and case made.

While many assignments are made in the petition in error, only two are argued in the brief, and the other assignments will, as a matter of course, be taken as waived. For convenience the assignments will be taken in reverse order to that in which they are presented in the brief.

A general exception was taken by the plaintiff in error to some 12 instructions of the court to the jury; but as this exception is general in form, under the rule established in this jurisdiction, it is not sufficient to justify this court in considering any particular instruction. *Eisminger v. Beman*, 32 Okl. 818, 124 Pac. 289, and cases there cited. For this reason the errors complained of in regard to the court's instructions cannot be reviewed.

[1] The other assignment urged by the plaintiff in error is that the court overruled his objection to certain questions asked the plaintiff by counsel for the defendant in error on his cross-examination, whereby he was compelled to answer that he had a brother, Zay Kimberlin, who was accused of cattle stealing, and who forfeited his bond, and was at the time of the trial a fugitive from justice. It is contended by the plaintiff in error that this evidence was irrelevant and without the issues, and its admission over his objection was reversible error. The defendant in error justifies the ruling of the court on the ground that the plaintiff had proved by another brother and the mother of the plaintiff, who had preceded him on the stand, that this brother who testified was engaged in the clothing business at Norman, and had brought out the same fact by this witness in his direct examination, and that the purpose of the evidence was to show the business connection of the plaintiff in order to aggravate his damages, and that, since the favorable family connection of the plaintiff had been brought out on direct examination, he was justified on cross-examination in showing other and further family connection unfavorable in mitigation of damages. It is clear that this evidence was irrelevant and without the issues of the case, since Zay Kimberlin, the fugitive, was not a party to or a witness in the case. But was the admission of this testimony such an error as would justify this court in reversing the case and remanding it for a new trial? The defendant, having pleaded the general denial, did not attempt to justify the alleged slander, but denied it.

It appears from the record that the court in its instructions told the jury as a matter of law that the words alleged to have been spoken of the plaintiff by the defendant were actionable per se. The jury by their verdict found, in effect, that the defendant did not speak, or cause to be published, the slanderous words as charged in the petition. If the verdict of the jury had been for the plaintiff, then it might be contended that the admission of the irrelevant testimony complained of might have influenced their verdict, and induced them to give a less amount in damages than they would have done if this testimony had been excluded, and it might then have been apparent that the plaintiff was injured by the ruling of the court complained of. But since the verdict was for the defendant, it does not appear that the plaintiff was injured by this testimony, and, if he was not injured by it, it is not ground for reversal, although it was error to admit it. It is not every error of this kind that will entitle the complaining party to a reversal. The Legislature has limited the power of the court in this regard. Section 4791 of the Civil Code (Rev. Laws 1910) reads: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." See, also, *Woodward v. Bingham*, 25 Okl. 400, 106 Pac. 843; *St. L. & S. F. R. Co. v. Houston*, 27 Okl. 719, 117 Pac. 184.

[2] The plaintiff had been permitted to show, without objection, that one of his brothers, Ezel Kimberlin, was engaged in the clothing business at Norman. This evidence, although admitted without objection, was also irrelevant. Did this justify the defendant in bringing out on cross-examination the fact that the plaintiff had another brother who was charged with theft and was a fugitive from justice? The position of counsel for defendant in error finds support in excellent authority. Mr. Wigmore, in his work on Evidence (volume 1, par. 15), discusses the question: "Does one inadmissibility justify or excuse another? If the one party offers an inadmissible fact which is received, may the opponent afterwards offer similar facts whose only claim to admission is that they negative or explain or counterbalance the prior inadmissible fact? * * * On this subject three different rules are found competing for recognition in the different jurisdictions. (1) The first is that the admission of inadmissible facts, without objection by the opponent, does not justify the opponent in rebutting by other inadmissible facts. This rule is represented by some English authority and by a respectable number of American jurisdictions. (2) At the other extreme is a rule which declares that in general precisely the contrary shall obtain, i. e., the opponent may resort to similar inadmissible

evidence. This rule has also ample authority, and is perhaps to be regarded as the orthodox English rule. (3) A third form of rule, intermediate between the other two, is that the opponent may reply with similar evidence whenever it is needed for removing an unfair prejudice which might otherwise have ensued from the original evidence, but in no other case. This seems to be the true significance of what may be called the Massachusetts rule. The source of these divergent views is apparent enough. By the courts adopting the first rule the emphasis is placed upon the circumstance that the opponent did not in the first instance object; hence his waiver of objection leaves him without ground for maintaining that the original evidence was a wrong which estops the original offeror from now objecting. By the courts adopting the second rule, on the other hand, the emphasis is placed upon the original party's voluntary action in offering the evidence, by which he virtually waives future objection to that class of facts. Both these circumstances of waiver are true; it is simply a question of relative emphasis; hence the contradictory views. But it may be noted that under the first rule, in most all the cases, the counter evidence had been rejected below, while under the second rule, in almost all the cases the counter evidence had been admitted below, i. e., the courts under both rules reached practically the same result in that they refused to disturb the ruling below. This points to the true rule, namely, that since each party is alike in the condition of *volenti non fit injuria*, neither can complain of a ruling either admitting or rejecting; a waiver being predicable of both. The matter is thus left in the hands of the trial court. Modify this in certain cases by conceding to the opponent, as of right, to use the curative counter evidence when a plain and unfair moral prejudice would otherwise have inured to him, and the rule will be sufficiently flexible."

The Supreme Court of Oklahoma Territory, early in its history, announced the rule that this question should be "left in the hands of the trial court," and its ruling should not be disturbed, unless manifest injury is shown to have resulted to the complaining party. *Watkins v. United States*, 5 Okl. 729, 50 Pac. 88; *Yingling v. Redwine*, 12 Okl. 64, 69 Pac. 810; *City of Guthrie v. Carey*, 15 Okl. 278, 81 Pac. 431; *Harrold v. Territory*, 18 Okl. 395, 89 Pac. 202, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818. This court has followed the same rule. "The improper admission or rejection of evidence, if not prejudicial to the party complaining is not ground for reversal." *City of Anadarko v. Argo*, 35 Okl. 115, 128 Pac. 500. See, also, *Mullen v. Thaxton*, 24 Okl. 643, 104 Pac. 359; *Diamond et al. v. Inter-Ocean News Paper Co.*, 29 Okl. 323, 116 Pac. 773; *St. Louis S. F. R. Co. v. Rushing*, 31 Okl. 231, 120

Pac. 973; M., K. & T. R. Co. v. Jones, 32 Okl. 9, 121 Pac. 623.

An examination of the entire record in this case shows that the trial court was particularly liberal toward the plaintiff in his rulings during the course of the trial, and since the questions in the case were principally questions of fact, and these were submitted to the jury for determination and by the jury found in favor of the defendant, we feel that the verdict and judgment of the trial court ought not be disturbed, and that the judgment appealed from ought to be affirmed.

On Rehearing.

The petition for rehearing in this case presents one point that has challenged the serious consideration of the court, namely, whether or not the exceptions to certain instructions of the trial court were properly taken; it having been held in the original opinion that these exceptions were general and not sufficient to bring the instructions up for consideration. In view of the doubt suggested as to the correctness of that holding, we have carefully considered the instructions complained of, as well as other instructions given, and have reached the conclusion that the same fairly state the law of the case under the issues and facts proved, and are convinced that the plaintiff in error had a fair trial before "a jury of his peers," and that the petition for a rehearing should be denied.

PER CURIAM. Adopted in whole.

CAHILL et al. v. PINE CREEK OIL CO. et al.
(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 78*)—PLEADING (§ 11*)—CONDITIONS PRECEDENT—OIL AND GAS LEASE.

In pleading the performance of conditions precedent in a contract, it is sufficient to state in substance that the party duly performed all the conditions on his part.

(a) The pleader is required to state the facts constituting the cause of action in ordinary and concise language.

(b) It is not proper practice to plead the evidence, and the action of the court in sustaining the motion to strike out the evidence, when pleaded, will not be disturbed on review in this court.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78;* Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

2. JUDGMENT ON THE PLEADINGS.

The petition having stated a cause of action, and judgment being rendered thereon in favor of the defendant against the plaintiff, and an exception being saved to such action of the trial court, held to constitute reversible error.

Error from District Court, Okmulgee County; Preston S. Davis, Judge.

Action by S. D. Cahill and others against the Pine Creek Oil Company and others.

Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

Mark L. Bozarth and Merwine & Newhouse, all of Okmulgee, for plaintiffs in error. Belford & Hiatt and Harlan Read, all of Okmulgee, for defendants in error.

WILLIAMS, J. Plaintiff's petition, omitting the caption and the prayer, is in words and figures as follows:

"(1) That on the 23d day of February, 1909, one Wright Thornburgh was the owner in fee simple of the following described real estate situated in Okmulgee county, Okl., and more particularly described as follows: The northeast quarter (N. E. $\frac{1}{4}$) of section thirty-five (35), township thirteen (13) north, range fourteen (14) east, containing one hundred and sixty acres of land, and as such owner, in fee simple, on said date, he, together with his wife, Anna C. Thornburgh, made, executed, acknowledged, and delivered to the said S. D. Cahill and O. H. Benedum an oil and gas lease on said real estate, a copy of which lease is hereto attached, marked 'Exhibit A.'

"(2) That in said lease the said Wright Thornburgh and his said wife did grant, demise, and let unto the said S. D. Cahill and O. H. Benedum all the oil and gas in and under said land, and also said tract of land, for the purpose of operating thereon for said oil and gas, and that said lessees were to have and to hold said real estate, for the term of five years from said date, and as much longer as oil and gas should be found in paying quantities thereon, not exceeding in the whole the term of twenty-five years, from said date.

"(3) That the consideration expressed in said lease was the sum of one dollar, and that said lessees were to pay said lessors in said lease the one-fifth of all the oil produced and saved from the aforesaid real estate, delivered into tank or pipe lines to said lessors' credit, and as further consideration for the execution and delivery of said lease, said lessors were to receive at the rate of \$150 a year for each gas well secured on said real estate, when utilized off said premises, and lessors were also required, as a part of the consideration thereof, to commence an oil and gas well on said real estate by the first day of March, 1909, and should use due diligence in the completion thereof.

"(4) That on said first day of March, 1909, as required by the terms of said lease, said lessees began the drilling of a well for oil on said real estate, and prosecuted the drilling thereof for oil and gas diligently until on or about the 11th day of June, 1909, when a depth of nineteen hundred and fifty (1,950) feet had been reached and the oil producing sands in that neighborhood had been reached and drilled through. The drilling of said well cost the said Cahill and Benedum the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sum of seven thousand (\$7,000) dollars. The oil producing sand in that locality was usually reached at a depth of about 17 hundred (1,700) feet.

"(5) That not having found oil or gas in said well in paying quantities, the said Cahill and Benedum, still remaining in possession of said real estate under the said lease until dispossessed thereof as herein-after alleged, in order to further develop said real estate for oil and gas, thereafter, on or about the 20th day of October, 1910, made and entered into a contract with the Field Oil Company, the owner of an oil and gas lease adjacent and contiguous to the real estate first above described, and under said contract the said Cahill and Benedum, with due diligence, drilled a well, which then and ever since has been producing oil in large quantities and is an oil well. The producing quantities are such as to make it of great value. Said oil well, last aforesaid, so drilled is located within three hundred feet of the line of the real estate first herein described and set forth and the lease of the said Cahill and Benedum, first herein alleged, at once, on the drilling of said well became and is of great value.

"(6) That on the 13th day of January, 1910, at 2:45 o'clock p. m., of said day, said lease so made and entered into between the said Cahill and said Benedum, and the said Thornburgh, was filed with the register of deeds of Okmulgee county, Okl., and was by him duly recorded in Book M 13A, at page 19, of the records in his office.

"(7) That said Wright Thornburgh, on or about the 24th day of February, 1911, after said lease had been so filed for record and recorded, and after said Cahill and Benedum had, after such great expense and trouble, drilled said first well, and had further paid out and expended large sums of money and had further employed a great deal of time and labor in developing their first lease herein by drilling said second oil well, thus making said first lease of exceeding great value, made, executed, acknowledged, and delivered a second oil and gas lease tax on the real estate first herein described to the defendant, the Pine Creek Oil Company, which was and is a domestic corporation, having its place of business in Okmulgee, Okl., and while the said Cahill and the said Benedum were in the possession of said real estate, said defendants, by force and arms and with violence took possession of said real estate, and it has, by force and arms, been holding possession thereof ever since, although at the time it took possession of said real estate it was notified by said Cahill and Benedum of the rights of the latter therein.

"(8) That immediately after so taking possession of said real estate, defendant began the drilling of an oil well thereon, and plaintiffs are informed and believe, and from such information and belief allege the fact to be, that said defendant, by said well so drilled

by it on said land, has found oil thereon in paying quantities, and which said well is producing large quantities of oil.

"(9) That on the 21st day of March, 1911, the said S. D. Cahill and O. H. Benedum, by an agreement in writing, a copy of which is hereto attached, marked 'Exhibit B,' executed, acknowledged, and delivered did grant, bargain, sell, transfer, and assign unto each of the said W. E. Reynolds and G. B. Harmon an undivided one-fourth interest in and to the oil and gas lease first herein described and alleged, paying therefor and receiving the consideration of one dollar and other valuable considerations.

"(10) That at the time of the making of the lease first herein described, and ever since, said lease was in full force and effect, and plaintiffs have at all times since performed each and every condition therein upon their part to be done and performed. Said second lease so made and delivered to the defendant is null and void and of no effect and is a cloud upon plaintiff's title to said land and the lease so made and assigned as aforesaid. Said defendant is about to and will, unless restrained from so doing by the court, drill other and further oil wells on said real estate to the further injury and detriment of plaintiffs. Defendant had, at all times during the occurrences alleged and set forth above herein, knowledge of plaintiff's rights in and to said lease and said real estate. A receiver herein is necessary to take charge of and protect said oil so produced, pending this suit."

The defendant, the Pine Creek Oil Company, moved to strike out of the petition the following: "That part of paragraph 4 of said petition contained in the following sentence, to wit: 'The drilling of said well cost the said Cahill and Benedum the sum of seven thousand dollars.' Also, all that part of the petition contained in paragraph 5 thereof. Also, all that portion of paragraph 7 of said petition contained in the following words, to wit: 'After said Cahill and Benedum had after such great expense and trouble drilled said first well, and had further paid out and expended large sums of money, and had further employed a great deal of time and labor in developing their first lease herein by drilling said second oil well, thus making said first lease of exceeding great value.'" The court sustained said motion to strike, and held that the petition did not state a cause of action.

[1, 2] In pleading the performance of conditions precedent in a contract, it is sufficient to state in substance that the party duly performed all the conditions on his part. *National Drill & Mfg. Co. v. Davis*, 29 Okl. 625, 120 Pac. 976; *Western Reciprocal Exchange v. Coon*, 134 Pac. 22; section 4773, Revised Laws of Oklahoma 1910.

The allegations in paragraph 10 were tantamount to averring that the plaintiffs had used due diligence in the completion of

said development undertaken by said contract. As to whether the sinking of the well on the adjacent tract proved or established the fact that the parties had made diligent search and operation in order to discover oil under the terms of said contract is a question of fact to be determined in the light of all the circumstances concerning the property and the prosecution of the work under the lease. *Heene v. South Penn Oil Co.*, 52 W. Va. 192, 43 S. E. 147.

The question of forfeiture is a question of fact to be determined just as any other fact, and the purpose for which the Pine Creek Oil Company leased the contiguous tract and sunk a well within 300 feet of the Thornburgh tract, if with a view of determining whether there was oil under the Thornburgh tract, and if there were such indications to again sink another well on said tract, these were matters to be considered in determining as to whether proper diligence was had. These facts could have been proved under the allegations of the petition after the motion to strike had been sustained.

The petition under the provision of our Code should state the facts constituting the cause of action in ordinary and concise language without repetition. Section 4737, Revised Laws of Oklahoma 1910. It is not good practice to plead the evidence, and it was not error to sustain the motion to strike; but it was error to enter judgment in favor of the defendants on plaintiffs' petition, for, after the motion to strike was sustained, the petition still stated a cause of action. The defendants should have been required to answer within a designated time, and after issue was joined to determine whether the said Cahill and Benedum and their associates had in good faith exercised diligence in the development of said land for oil and gas.

The cause is reversed and remanded, with instructions to set aside the judgment and grant a new trial and proceed in accordance with this opinion. All the Justices concur.

CRUMP et al. v. SADLER et al.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 326*) — RENT — WHEN PAYABLE.

Rent for use of agricultural lands, payable in a stipulated share of the crop grown thereon, is due and payable when the crop matures and is ready for harvesting or market.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1367-1378; Dec. Dig. § 326.*]

2. CHATTEL MORTGAGES (§ 138*) — RENT — WHEN PAYABLE.

In the trial of an action for rent by a landlord against a tenant, it is error to instruct the jury that the tenant has "a reasonable

time" to pay the rent after removal of part of the crop from the premises.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

3. LANDLORD AND TENANT (§ 328*) — RENT — PRIORITY OF LIENS.

The statutory lien for rent given a landlord on crops grown on agricultural lands, by section 3806, Rev. Laws 1910, is superior to a mortgage lien given by a tenant to a third party on such crops, and may be enforced by attachment without regard to such mortgage.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1388, 1390-1392, 1394; Dec. Dig. § 328.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Jefferson County; B. T. Price, Judge.

Action by D. C. Crump and another against R. L. Sadler and another for rent, and plaintiffs caused attachment to issue and the crops grown on the leased premises to be seized. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

Harper & Dillard, of Waurika, for plaintiffs in error. Bridges & Vertrees, of Waurika, for defendants in error.

GALBRAITH, C. D. C. Crump was the assignee of a rental contract entered into on the 22d day of December, 1910, whereby 60 acres of land, being part of the N. E. $\frac{1}{4}$ of section 2, township 8 S., range 7 W., in Jefferson county, Okla., were "demised and leased" to the defendant in error R. L. Sadler, for one year from that date. This lease provided that the land should be planted in cotton and that the lessee should "pay as rent money one-fourth of all the cotton grown thereon." It further provided that "the land that is not in cultivation shall be cleared of brush and might be planted to melons or any other crops that Sadler might wish," making no provision for the payment of rent for any of the land, except that which was to be planted to cotton. This lease was assigned to D. C. Crump on the day of its execution. August 7, 1911, Crump brought an action in the justice court of Wray township, Jefferson county, against Sadler for the recovery of the sum of \$165, alleged to be due as rent under said lease, and at the same time caused an attachment to be issued and the crops grown on the leased premises to be seized thereunder. The result of the trial of the cause in the justice court was in favor of the plaintiff for the full amount claimed and foreclosure of the attachment lien. An appeal was perfected to the county court, and when the cause was called for trial one W. R. Donagan, a mortgagee of Sadler's, was permitted by the court to file an interplea therein. Afterwards Donagan filed a motion to dissolve the attachment on the ground that he had a mortgage on the crops at the time the attachment was issued and served, and that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amount of his mortgage had not been paid to the county treasurer, or tendered or offered to him prior to the levy of the attachment. This motion was sustained by the court and exception saved by the plaintiff. The trial in the county court resulted in a judgment for the defendants, and an appeal was perfected to this court by Crump and S. R. Garner, who was made a party plaintiff in the county court on account of his having purchased an interest in the lease assigned to Crump.

[3] One of the errors assigned is the ruling of the trial court in dissolving the attachment. The theory upon which the court sustained this motion was that the interpleader had a mortgage on the property attached, and that the amount of the mortgage had not been paid to the county treasurer or a tender of the amount made to the mortgagee prior to the levy of the attachment, and on that account the attachment was void. This was error. The lease contract between Mrs. Hightower and Sadler clearly created the relation of landlord and tenant between the parties thereto, and, when Mrs. Hightower assigned her interest in this lease to Crump, the relation of landlord and tenant existed between Crump and Sadler. The statute (section 3808, Rev. L. 1910) gave Crump, as landlord, a lien on the crops grown upon the leased premises for the year 1911. This statute reads as follows: "Any rent due for farming land shall be a lien on the crop growing or made on the" leased "premises. Such lien may be enforced by action and attachment therein, as hereinafter provided." Although the mortgage from Sadler to Donagan bore the same date as the lease, to wit, December 22, 1910, and apparently was intended to cover the crops to be grown upon the leased premises, however, Sadler could not defeat the landlord's lien on the crops by the execution of this mortgage. The landlord's lien was superior to the mortgage lien. *Turner v. Wilcox*, 32 Okl. 58, 121 Pac. 658, 40 L. R. A. (N. S.) 498; *Tootie-Wheeler Merc. Co. v. Floyd*, 28 Okl. 308, 114 Pac. 259; *Greeley v. Greeley*, 12 Okl. 659, 73 Pac. 295. Section 3809 of the statute, Rev. L. 1910, authorized the attachment to issue if the conditions prescribed therein existed at the time of the commencement of the suit before the justice of the peace. The statute reads: "When any person who shall be liable to pay rent (whether the same be due or not, if it be due within one year thereafter, and whether the same be payable in money or other things) intends to remove, or is removing, or has, within thirty days, removed, his property, or his crops, or any part thereof, from the leased premises, the person to whom the rent is owing may commence an action, and upon making an affidavit stating the amount of rent for which such person is liable, and one or more of the above facts, and executing an undertaking as in other cases, an attachment

shall issue in the same manner and with the like effect as is provided by law in other actions."

[1, 2] Complaint is also made of paragraph 6 of the court's instruction to the jury, wherein the court told the jury that if the defendant removed any part of the crop from the premises without the consent of the landlord, and did not pay the rent "within a reasonable time," then the landlord had the right to sue and attach the crops. This is not the law, and the giving of this instruction was error. When rent is payable in a share of the crop grown on the leased premises, it is due when the product is mature and ready for market. The statute does not give the defendant a reasonable time to pay the rent, but prescribes that, if he shall remove any part of the crop from the leased premises without the consent of the landlord, then the landlord has the right to sue out an attachment and seize the crop.

Complaint is also made of another instruction of the court wherein the jury were told that, if the plaintiff by attachment seized the crops grown upon the leased premises, and thereby took it out of the power of the defendant to pay the rent, the plaintiff cannot complain, and in that event they should find for the defendant. This is not the law, and the giving of this instruction was error.

It appears from the written lease that no rent was provided for the land that might be planted to melons or any other crop other than cotton, and it also appears from the evidence that Sadler and Crump made an agreement subsequent to the assignment of the lease whereby rent was agreed upon for land that should be planted to melons. The court should have instructed the jury, as a matter of law, that the relations of landlord and tenant existed between Crump and Sadler, and should have told them that if, at the time of the commencement of the suit and the issuance of the writ of attachment, Sadler had removed any part of the crops from the leased premises, without the consent of the landlord, and without paying the rent then due or to become due, and such removal had occurred within 30 days from the commencement of the suit, then the attachment should be sustained, and that judgment should be given for the plaintiff for the amount of the rent that might be found owing, and sustaining the attachment to that extent. The jury should have been further instructed that the mortgage lien of the interpleader was inferior and subject to the plaintiff's landlord's lien on the crops grown on the leased premises.

On account of the foregoing errors, the judgment appealed from should be reversed, and the cause remanded to the county court of Jefferson county, and a new trial ordered.

PER CURIAM. Adopted in whole.

In re APPLICATION OF STATE TO ISSUE BONDS TO FUND INDEBTEDNESS.

(Supreme Court of Oklahoma. Nov. 22, 1913.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE—SUBSEQUENT APPEAL.

Decisions of appellate courts of this state, upon all questions of law involved in any case, are binding, not only on the lower court, but on the appellate court as well, in case of a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

2. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE—SUBSEQUENT APPEAL.

No different rule of construction will be applied to a proceeding under the statute to procure the issuance of funding bonds, where a protest or remonstrance is filed thereto, and issues thus framed, from that to be applied in ordinary cases.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

3. STATUTES (§ 276*) — REPEAL — EFFECT ON PENDING ACTION.

The omission of sections 372 to 381, Compiled Laws of 1909, from the Revised Laws of 1910 does not operate to abate a proceeding pending under said sections prior to the date when said Revised Laws of 1910 went into effect.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 371, 372; Dec. Dig. § 276.*]

Robertson, Special Judge, dissenting.

Error from District Court, Oklahoma County; John J. Carney, Judge.

Application by the State, acting by and through its Governor, Secretary of State, and State Treasurer, to determine the existence, character, and amount of its outstanding indebtedness, and to issue bonds to refund the same, and certain citizens appear and file a protest against the issuance of the bonds. Judgment was entered approving the bond issue, and certain protestants bring error. Affirmed.

See, also, 33 Okl. 797, 127 Pac. 1065.

C. W. Stringer, of Oklahoma City, for plaintiffs in error. Charles West, Atty. Gen., for defendant in error.

CAMPBELL, Special Justice. This is a proceeding instituted in the district court of Oklahoma county, by the Governor, Secretary of State, and State Treasurer, for the purpose of determining the existence, character, and amount of the legal outstanding warrant indebtedness of the state, and causing a statement thereof to be entered upon the records of the court, and to authorize and direct the issuance of funding bonds of the state, under the provisions of sections 372 to 381, inclusive, of Snyder's Compiled Laws of Oklahoma 1909. The proceeding was filed and notice given as required by the statute, and certain citizens of the state appeared and filed protests against the issuance of the

bonds. The trial court, originally treating such protests as demurrers to the application or petition, sustained the same. From the judgment, an appeal was taken to this court, and here the judgment of the trial court sustaining such demurrers was reversed, and the cause remanded for further proceedings; the opinion in the former appeal being reported in 33 Okl. 797, 127 Pac. 1065. After the case was remanded, the district court again heard and considered the matter, evidence being introduced in support of the application or petition. Judgment was duly entered, directing the issuance of funding bonds in the sum of \$2,907,122.19. A motion for new trial was filed and by the court overruled, and the case is again brought here on appeal by the parties filing one of the remonstrances or protests in the trial court. At the last hearing in the trial court, the officers of the state, making the application through the Attorney General, were permitted to amend the application by striking from the schedule of warrants originally submitted for funding certain warrants aggregating \$34,042.32, and by adding to said schedule certain other warrants not originally listed, and amounting to \$45,214.82, together with certain interest that had accrued upon the warrants as originally listed in the application filed. The case was tried in the lower court upon an agreed statement of facts and certain evidence introduced in open court, from all of which the trial court found that the total amount of outstanding indebtedness for the fiscal year ending June 30, 1911, would amount, on the 1st day of October, 1913, over and above the funds on hand to pay the same, to \$2,907,122.19.

[1, 2] It becomes important, at the outset, to determine just how far the decision of this case on this appeal is to be controlled by the decision on the previous appeal.

For convenience, we shall refer to the plaintiffs in error as the protestants.

The contention is made that the decision on the former appeal is not binding now on the court. This contention is based, in part, upon the argument that the case presents, not the elements of litigated rights, but is merely an ex parte proceeding on the part of the state, acting by certain of its officers, and that the duty of the court is largely ministerial, having some relation to the duty of an auditor of the claims sought to be funded. This position, in our judgment, is not sound. It is true, the controversy arose upon the application of the state for the determination of its outstanding indebtedness as a basis for issuing the bonds required to take up and cancel the warrants. No one was required by law to be personally served, or to answer the application, or to protest against the procedure in any way, and if no one had appeared within the time fixed by law and stated in the publication notice, it would not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have been a technical default, and the proceeding would have been, in that case, largely in the nature of an *ex parte* hearing. But persons interested have the right, under the statute, to be present. The statute does not say in express terms that interested persons have the right to be heard by any form of pleading in opposition to the issuance of the bonds as sought. The protestants, however, appeared and filed their pleading, and the trial court rightly, we think, entertained and passed on the matters put in issue thereby. As we view it, the proceeding, both in form and substance, possessed, from the time such pleading by protestants was filed, the essential characteristics and elements of an ordinary suit between contending parties, presented a real controversy, and one of much importance, not only to the parties actually before the court, but to the whole state as well as to the holders of the warrants for which the funding bonds were sought to be issued.

But, even if it be granted that the proceeding was *ex parte* the state, by its officers, as contended, no good reason, in fact no reason at all, is suggested why the application of the doctrine of the "law of the case" should be different therein from its application in an ordinary controverted law suit. No reason for applying a different rule in those *ex parte* matters which the courts are sometimes called upon by the law to pronounce judgment in occurs to us. On the contrary, it would seem of equal, if not greater, importance that, where the decisions and actions of ministerial or executive officers are required to be reviewed by the courts, and the judgment of the courts expressed upon the regularity and validity of such ministerial or executive decisions and actions before finally in force, such judgment, when once solemnly given, should be final and conclusive to the same extent that any other judgment is. If this were not so, a judgment reversing the lower court in a matter of the character stated would furnish no standard for the conduct of the proceedings before the trial court after remand, and the officers of the state, after procuring judgment of the court of last resort, would find themselves, in subsequent stages of the action, right where they started.

It is the rule of this state that the decisions of appellate courts upon all questions of law involved in any case are binding, not only on the lower court, but on the appellate court as well, in case of a subsequent appeal. *Atchison, Topeka & Santa Fé Ry. v. Baker*, 130 Pac. 577; *Oklahoma Gas & Electric Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758; *Chicago, R. I. & Pac. Ry. Co. v. Broe*, 23 Okl. 396, 100 Pac. 523; *Harding v. Gillett*, 25 Okl. 199, 107 Pac. 665; *State Bank of Waterloo v. Citizens' National Bank*, 26 Okl. 801, 110 Pac. 910; *First National Bank of Claremore v. C. M. Keys et al.*, 27 Okl. 704, 113 Pac. 715; *Harper v. Kelly*, 29 Okl.

809, 120 Pac. 293; *Harsha v. Richardson*, 33 Okl. 108, 125 Pac. 34. This rule is in harmony with authority from other jurisdictions, and seems, in fact, not to be seriously questioned anywhere. *Terre Haute v. Baker*, 4 Ind. App. 66, 30 N. E. 431; *Heldt v. Minor*, 113 Cal. 385, 45 Pac. 700; *City of Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321; *Standard Sewing Machine Co. v. Leslie*, 118 Fed. 557, 55 C. C. A. 323; *McKinney v. State*, 117 Ind. 26, 19 N. E. 613; *Willson v. Binford*, 81 Ind. 588.

The rule as stated, however, is subject to the exception that if, to follow the former decision would work gross or manifest injustice, it should be overruled. *A., T. & S. F. v. Baker*, 130 Pac. 577; *Okl., G. & E. Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758.

It follows that, unless gross or manifest injustice will result from allowing the former decision in this case to stand, that decision, in so far as it is applicable to the questions raised on the present appeal, will be treated as binding. The former decision was handed down on November 15, 1912, and we believe any lawyer, after an examination thereof, would be justified in advising his client that the warrants herein sought to be funded constitute a safe investment, and that it is not the policy of this state to allow its just obligations, contracted for necessary expenses of government, at any time to be dishonored. Confidence in the integrity of the state's obligations is a necessary conclusion from the opinion, as written, and that the business world has, to some extent, acted on that decision is, we think, a perfectly legitimate inference. If any person or concern has extended credit to the state for its current needs, or purchased any of these warrants in reliance upon the assurance that the law of the state would not permit the repudiation of such obligations, such person or concern would be injured by overruling the decision which fixed the law. In such a case the exact converse of the exception to the rule for application of "the law of the case," as above stated, would appear. We recognize fully that to issue these bonds will place upon the people the burden of some \$3,000,000, with interest, to be paid by taxation. Still it is shown, and in fact conceded, that the people who must pay this sum have received its equivalent in services and supplies actually necessary to the maintenance and conduct of the business of government—without which the state government could not be carried on at all. These warrants paid the officers, cared for the convicts, paid for food and clothing and treatment for the insane. These things have to be paid for from day to day, if the business of organized government is to continue, and there come times when only the stability of state credit will purchase supplies and procure the services necessary to their performance. We do not regard it as a gross or manifest injustice to the parties prosecuting

this appeal to require them and their property and their posterity to pay a share of the burden thus created. That the warrants in question are evidence of obligations, sound in every moral regard, is conceded here. The very foundation of the law is found in good morals, and it would do no violence to correct legal interpretation, in case of conflict between law and morals, to require the former to yield to the latter. The moral code is the foundation of the proper legal code, and the ideal system will never be reached until every expression of the law finds its response in sound moral principles.

The persons resisting the issuance of these bonds are, in a sense, representatives of the citizens of the state, for the decision here reached will affect all the people alike. We are not unmindful of the vast importance of the correct interpretation by the courts of the fundamental law, but we see nothing in the former decision that does violence to the safeguards the makers of the Constitution sought to throw around the people in the administration of public affairs. Treating the state as an individual, it is required, by the construction given in the former decision, to meet the necessary demands of its existence, and no more. There is nothing in that opinion that would form even an excuse on the part of the state's ministerial and executive agents for the exploitation of the people by expenditures, without their consent, of money for any enterprise in which said agents might conceive the state to be interested, and by following that interpretation we do not mean to furnish such an excuse.

Seeing no reason in this case to depart from the wise rule of construction stated, we declare here that it is the duty of the court, in disposing of the appeal, to apply the law as laid down in the former decision, so far as that decision adjudicates the questions now before the court. In doing this, it is not necessary to discuss again the reasons or the authorities by which a majority of the court was controlled in reaching the conclusions set forth in the former opinion. It is necessary, however, to apply the law as stated therein, and determine just how far it controls the controversy in its present state. It is interesting to note, since the former appeal in this case was decided, practically the same question, though arising in a little different manner, was before the Court of Appeals of the state of Kentucky in the case of *Rhea v. Newman*, 153 Ky. 604, 156 S. W. 154, in a proceeding involving the expenditure of moneys by the state, and the same conclusion was reached as in the former decision by this court.

As has been said in the former appeal, the protest filed against the issuance of the bonds was treated as a demurrer. It was held that the demurrer should have been overruled by the trial court. It becomes pertinent now to inquire whether or not the proceedings in the trial court, after the case

was remanded, were in substantial compliance with the law as laid down in the opinion of this court. If so, the trial court's judgment to that extent must be affirmed. *Okla., G. & E. Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758.

In pursuance of the order of this court, the trial court treated the petition or application as sufficient under the law, and heard evidence in its support. This evidence, and the stipulations of the parties, show that the warrants sought to be funded by substitution of bonds were all for services rendered and supplies furnished during the fiscal year ending June 30, 1911, and that all of said warrants were issued against actual existing appropriations. Certain warrants were shown to have been withdrawn from consideration because of doubt as to their validity, but as to this action the protestants have no right to complain. The court did not examine in detail every warrant proposed to be funded, but the evidence introduced was sufficient to support the finding and judgment that all the warrants offered were legal and valid, representing actual obligations of the state.

The proceedings of the state's officers in arranging the funding proceedings, and preparing the requisite preliminaries to the court's action, were shown to have been regular and in substantial compliance with the law. The evidence supports the allegations of the application or petition in every material regard, and is sufficient to sustain the judgment and findings of the trial court.

The first paragraph of the syllabus of the former opinion states the construction given to the section of the Constitution relied on by protestants as follows: "The limitations of section 23, art. 10, Williams' Constitution, were not intended to apply to that class of pecuniary obligations arising out of the ordinary necessary current expense of maintaining the state government, and which were in good faith intended to be paid, and were lawfully payable, out of the current yearly revenues, and other resources of the state, for the fiscal year within which such obligations were incurred." 33 Okl. 797, 127 Pac. 1065. It is clear from the record that the warrants in question come within the law as thus stated, and that the bonds should be allowed to issue in the place of such warrants, unless they must be stricken down for some other reason than that they are prohibited by the constitutional provision referred to. Inasmuch as section 23, article 10, of the Constitution, does not apply to indebtedness incurred for necessary current expenses of state government, it must follow, as a matter of course, that said section does not prohibit the issuance of obligations as evidence of expenses of that character. We have not overlooked the force of counsel's argument, to the effect that no revenue was in fact provided to meet these warrants, and that as a consequence they are illegal and

void, but it would be impossible to uphold that contention in the face of the declaration of law, as stated by the court on the former appeal. Inasmuch as we now hold that declaration to be binding on the court as the law of the case, it is apparent that the contention made cannot now be upheld. Indeed, it is frankly contended in the brief on file that this court was in error in holding that the issuance of warrants in excess of \$400,000, for the payment of which there were no funds on account of the failure in revenues, was not the creation of indebtedness, within the meaning of section 23, art. 10, of the Constitution. But a mere error in the holding made by an appellate court is not ground for overruling its decision in the same case on a subsequent appeal. In the absence of a showing of manifest or gross injustice on the subsequent appeal, such error is immaterial. *Ayer & Lord Tie Co. v. Commonwealth ex rel.* (Ky.) 85 S. W. 1096; *Tool Co. v. Champ Spring Co.*, 146 Mo. App. 1, 123 S. W. 513; *Jacobson v. U. S. Gypsum Co.*, 150 Iowa, 330, 130 N. W. 122; *Schmidt v. Beiseker*, 19 N. D. 35, 120 N. W. 1096; *Jeffery v. Osborne*, 145 Wis. 351, 129 N. W. 932; *New York Life Ins. Co. v. McIntosh* (Miss.) 46 South. 401; *Baum v. Hartmann*, 238 Ill. 519, 87 N. E. 334; *Evans v. Nail*, 7 Ga. App. 129, 66 S. E. 543; *Lewis v. Jones*, 97 Ark. 147, 133 S. W. 596.

Several "points for reversal not involved in the former appeal" are urged here. It is contended that the warrants in question are within the inhibition of section 23, art. 10, of the Constitution, and that no revenue has been legally provided with which to meet at least a large portion of such warrants. These contentions are disposed of by the former holding that section 23, art. 10, of the Constitution was not intended to apply to indebtedness of the character under consideration in this proceeding. That being true, there is no constitutional inhibition against the warrants or the bonds sought to be issued in their stead.

The contention that the proof was insufficient to show the validity of the warrants has already been disposed of, and requires no further treatment.

Certain warrants first presented to the lower court were withdrawn or disallowed, and it is contended that the bond issue, as ordered by the trial court, is void for the reason that the bonds do not cover the outstanding indebtedness of the state. Warrants so withdrawn were withdrawn by consent of the court, for the reason they were of doubtful validity. The court's judgment recites that the proof established the total warrant outstanding indebtedness of the state in the amount of the bonds ordered issued. We see no reason why persons not the holders of the warrants omitted or denied should be heard to complain of this finding. Certainly it was the duty of the court not to allow bonds to issue covering illegal or doubtful warrants.

It would seem that one of the strongest grounds for requiring the bond issue to be reviewed by the court would be in the nature of a precaution that all warrants of the illegal or doubtful class be eliminated from the bond issue.

[3] The only other contention made that requires consideration is to the effect that the statute under which this proceeding was brought was repealed on May 17, 1913, when the Revised and Annotated Laws of Oklahoma, generally referred to as the Harris-Day Code, took effect, and that such repeal operated to abate the proceeding. Sections 372 to 381 of the Compiled Laws of 1909 were not brought forward by the Harris-Day Compilation. Section 54, article 5, of the Constitution provides: "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute." This is certainly a proceeding begun prior to May 17, 1913. Sections 372 and 381, of the Compiled Laws of 1909, omitted from the Harris-Day Code, specifically gave the state, by its officers, the right to institute this proceeding, and when the protests or remonstrances were filed, the proceeding took on the nature of a litigated dispute, as has been observed. It affects, not only the immediate parties, but the holders of the warrants and the taxpayers as well, and it appears to be a proceeding begun, saved by the Constitution in the sections just quoted.

The adoption of the Harris-Day Code operated to repeal pre-existing sections omitted therefrom, but such repeal does not affect the validity of a proceeding of the character under consideration, as appears from the express terms of the adoption act. The saving provision is found in section 2, chapter 39, Session Laws 1911, the act by which the Harris-Day Code was adopted as the Revised Laws of the state. It is in the following language: "All general or public laws of the state of Oklahoma not contained in said revision are hereby repealed. Provided, that this act shall not be construed to repeal, or in any way affect any special or local laws, or any appropriation, special election, validating act or bond issue thereby authorized, nor to affect any pending proceeding or any existing rights or remedies, nor the running of the statute of limitations in force at the time of the approval of this act; but all such local and special laws, appropriations, special elections, validating acts, bond issues, pending proceedings, and existing rights and remedies shall continue and exist in all respects as if this act had not been passed; provided, further, that this act shall not be construed to repeal any act of the Legislature enacted subsequent to the adjournment of the extraordinary session of the Legislature which convened in January, 1910." This proceeding being one begun prior to the date when the

act of adoption went into effect, and being for the purpose of procuring an issue of bonds, it comes within the letter of the statute, as a proceeding begun and pending, as a necessary step in a bond issue authorized by the omitted act. The bond issue can only be saved by saving the proceeding provided for that purpose. It follows that the proceeding did not abate or become invalid by reason of the repeal of the statute under which it was begun prior to such repeal.

The judgment of the trial court is affirmed.

HAYES, C. J., and KANE and WILIAMS, JJ., being disqualified, the Governor appointed Messrs. J. B. A. ROBERTSON, P. D. BREWER, and R. M. CAMPBELL to sit in their places in the consideration of this case. TURNER, LOOFBURROW, and BREWER, JJ., concur. ROBERTSON, J., dissents.

ROBERTSON, Special Judge. I regret exceedingly the necessity that compels me to dissent from the conclusion reached by the other members of this court in this case. But, owing to the importance of the question involved, I feel that I would be remiss in my duty should I fail to express my views. This being a dissenting opinion, I shall be as brief as possible, and will give only a skeleton outline of the reasons which impel me to dissent.

The general rule set out and relied upon in the majority opinion that a decision of an appellate court upon all questions of law involved in any case decided by it is binding, not only upon the lower court thereafter, but upon the appellate court as well, is conceded, and its correctness is not in any wise questioned, but the rule has well-defined exceptions, among which is that, if by following the former decision gross or manifest injustice or wrong should follow, the decision will be ignored and not looked upon or considered as an authority. It is the application of this rule to the present case without regard to the exception noted that causes me to differ with the majority in reference to the conclusion reached by them. Whether by following the opinion in the former case gross injustice, or wrong, would ensue can only be determined by considering the result reached in the former case, and comparing it with what I conceive should have been the result.

Section 2, art. 10, of the Constitution, reads as follows: "The Legislature shall provide by law for an annual tax sufficient, with other resources, to defray the estimated ordinary expenses of the state for each fiscal year." This section of the Constitution has been duly vitalized by proper legislative enactment. Section 7621, Comp. Laws 1909; section 7449, Rev. Laws 1910. The duty of meeting the necessary expenses of maintaining the state government is a solemn and binding one, and the various Legislatures of

this state have not evinced any disposition to neglect the same, or to shift that responsibility to other shoulders; indeed the converse seems to be true, as shown by the amounts included in the various appropriation bills which have been enacted since statehood, and of which we take judicial notice. Nor does the necessary expense of maintaining the state government come within the constitutional debt-limiting provision of the Constitution. The framers of our organic law clearly had in mind occasions such as the present, when the regular revenue, on account of failure to collect, or for other reasons, would be insufficient to meet the current obligations of the state, and to obviate any such difficulty they provided by section 3 of article 10 of the Constitution that: "Whenever the expenses of any fiscal year shall exceed the income, the Legislature may provide for levying a tax for the ensuing fiscal year, which, with other resources, shall be sufficient to pay the deficiency, as well as the estimated ordinary expenses of the state for the ensuing year." As may be clearly seen, this section confers authority on the legislative branch of government to provide, in addition to the regular levy provided in section 2 of article 10, supra, for a sufficient levy to meet such outstanding obligations as may have been brought forward from the preceding year. Section 7621, Comp. Laws 1909 (section 7374, Rev. Laws 1910), shows clearly that the Legislature has fully met the requirements of the Constitution in this respect, and in addition said section provides and makes it the specific duty of certain state officials to ascertain the amount of unpaid expenses for the preceding year, as well as for the current year, in order that a proper estimate and levy may be made to meet them. The Constitution, however, makes provision for caring for these deficiencies in another way yet; i. e., in case the Legislature or the state officials fail or refuse to provide the additional levy mentioned in section 3, art. 10, supra. Thus section 23, art. 10, of the Constitution, provides: "The state may, to meet casual deficits or failure in revenues, or for expenses not provided for, contract debts; but such debts, direct and contingent, singly or in the aggregate, shall not, at any time, exceed four hundred thousand dollars, and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained or to repay the debts so contracted, and to no other purpose whatever." The debts thus provided for are to meet "casual deficits or failure in revenue or for debts not otherwise provided for," and may be contracted for in such manner as the Legislature may provide by statute. Article 1, chapter 8, Comp. Laws 1909, provides an ample and adequate remedy. The statute last referred to is now in full force and effect. The foregoing section of the Constitution is, without doubt, a lim-

itation of the power of the state to contract debts; "argument cannot take away the forceful meaning of the plain, unequivocal language therein used. If this was the only section of the organic law dealing with the limitation of the power of the state to contract debts, I should, without hesitation, say thus far shall we go and no further." And, as has been well said: "However great the need for revenues or grave the condition confronting the state, the power to raise revenues is vested in the Legislature and not in the courts; and, if there is no provision of law by which relief may be had from the present situation, then the legislative branch of our state government is confronted with a duty which should be discharged without delay, and without interference from or supervision by the courts." However, as I view the situation, there are other provisions of the Constitution, though not wholly satisfactory, being fraught with more or less delay and uncertainty, by which it is intended that such contingencies as the present situation may be met. For, as I view the law, while section 23 fixes a definite line of limitation upon the state as to the amount of debt it may contract, such limitation is intended to apply only to that particular means of incurring the debt; that is, only as a limitation of the amount of debt which may be contracted in this manner, and not as a limitation upon the amount which may be contracted by other means. For in case the necessity arises for the creating of a debt in excess of \$400,000, the Constitution provides for the passage of a law creating the debt, and providing the means of payment, by the Legislature.

Section 25, art. 10, of the Constitution, provides: "Except the debts specified in sections twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this state, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either House of the Legislature, the question shall be taken by yeas and nays, to be duly entered on the journals thereof, and shall be: 'Shall this bill pass, and ought the same to receive the sanction of the people?'"

Thus is seen by the foregoing section that provisions are made for every kind of debt except those mentioned in sections 23 and 24. Section 23 gives authority for the state to contract debts to the amount of \$400,000,

to meet casual deficits, or failure of revenues, or expenses not otherwise provided for, and section 24 authorizes the state to contract debts without limit for the purpose of defraying expenses incident to war, repel invasion, and suppress insurrection. With exception to the debts mentioned in these two sections, section 25 reserves to the people alone the power to create debts. Is it for the courts to say that this is a just and proper provision? Shall the courts prevent the exercise of this power by the usurpation of legislative functions? Shall the judicial arm of government, on the ground of expediency alone, usurp the prerogatives of the Legislature, or take from the people the rights they have specifically reserved to themselves in their organic law? If so, the majority opinion of the court is correct. But, to my mind, the language of the Constitution is so plain and so simple as will admit of no construction, and if it needs must be construed, then it should be done under and by the well-recognized rules of construction for organic instruments; no strained or far-fetched meaning should be given it.

As was said by Mr. Justice Lamar of the Supreme Court of the United States in *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060: "Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. * * * There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the

entire body of electors in a state, the most of whom are little disposed, even if they were able to, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."

In *People v. Purdy*, 2 Hill (N. Y.) 35, Mr. Justice Bronson, commenting on the dangers of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says: "In this way * * * the Constitution * * * is made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a mere dead letter; and that, too, where the language is so plain and explicit that it is impossible to make it mean more than one thing, unless we first lose sight of the instrument itself and * * * roam at large in the boundless field of speculation." I think the above is the rule of construction we are bound to follow, if any construction at all is needed; and hence, in the light of the foregoing sections, we may properly ask ourselves the question, Is the issuance of approximately \$3,000,000 of bonds, to take up an equal amount of the outstanding state warrants, the creation of a debt within the meaning of the sections hereinabove quoted? If so, then the state cannot exceed the \$400,000-limit fixed by section 23 by this refunding method. If it is a debt, then the only relief is by the Legislature through the medium of section 25, *supra*. If it is not a debt, then can the state, in this manner, go beyond such limit even to meet a casual deficit on account of the failure of revenues for any cause? Or would it be reasonable to say that by sections 23 and 25, construed together, casual deficits may be made up to the amount of \$400,000 by the methods sought in this proceeding, but when that amount is reached, further evidence of indebtedness shall be issued without the assent of the electors of the state, as provided by section 25 of the Constitution, *supra*. This to my mind is the only reasonable construction to be placed upon the constitutional provisions under consideration. As has been suggested by Hon. John B. Harrison, himself a member of the constitutional convention, in a paper on this subject, and whose views are in complete harmony with my own: "This conclusion is further borne out by the provisions of section 26 of the Constitution, which provides that no county, township, school district, or other political corporation or subdivision of the state shall be allowed to become indebted in any manner in any year in excess of the revenue provided for such year, without the assent of three-fifths of the electors voting on such question. Casual deficits in the affairs of municipal subdivisions shall not exceed the revenue provided for that year; while in the affairs of the state, they shall not exceed \$400,000 in

excess of the revenues. In other words, a municipal subdivision of the state is expressly limited in the amount of indebtedness it may incur for any year to the revenue provided for such year. But the expenses of the state being far greater and more complicated and more difficult of accurate ascertainment, the state is wisely given a margin of \$400,000 in excess of the revenues provided. But in neither case shall those fixed limitations be exceeded without a vote of the people on the question. In subdivisions of the state, the right is given to the voters of the municipality; in the state at large, such right is reserved to the electorate of the state, to be submitted by the Legislature. This thought runs through every revenue-raising and debt-limiting section of the Constitution. It is the one unbroken chain by which the entire revenue system is linked together as a comprehensible whole. To give it this meaning is to give it an effectual working force, which, though cumbersome in its operation, is nevertheless complete in itself. But to eliminate this thought is to strip it of its potency and render it a mere powerless, meaningless, incoherent rattle of words. This, in my judgment, should not be done. The inadequacy of the law to afford as speedy relief as is necessary under the present conditions is no fault of the courts. The functions of the court are to interpret and construe the law as it is found, and not to distort it to suit economical conditions or meet political expediences. I have studied the authorities which attempt to distinguish between debts and questions like the one confronting us. Some of them, it must be conceded, are models of ingenious argument, and elusive, nifty, drapery of thought, but, in my judgment, their proper abode is in the realms of theory rather than of reason. If there is a real logical distinction, then I must confess that my mind is too dull of perception, too finite in scope, to trace those infinite lines. I am unable to see the legal difference between a debt and an obligation which ought to be paid and no money with which to pay it. I cannot comprehend the legal distinction between a debt and an unpaid warrant drawn on a depleted treasury. I cannot differentiate between the significance of a debt and a deficit which must be met. And I am not unmindful of the argument that the people of the state assumed the solemn, legal, and moral obligation to maintain the state government and pay the expenses thereof. Nor have I overlooked the contention that the necessary running expenses of the state is not a debt within the debt-limiting provisions of most state Constitutions. Nor the argument that the issuance of bonds with which to meet unpaid outstanding warrants is not creating a debt, but merely changing the form thereof. But a concession of the full force of these arguments is a confession that the original unpaid warrants are a debt. Besides, it must be ob-

served that the provisions of our Constitution are peculiarly and cautiously worded. It provides in section 23, art. 10, that to meet casual deficits the state may contract debts to the amount of \$400,000. This, of course, is to be done according to the procedure provided by statute. But, whenever such deficit exceeds \$400,000, or whenever a debt for any purpose is sought to be contracted, the Legislature must pass a law creating such debt, and such law must be submitted to the voters of the state for sanction or rejection. This, in my judgment, is the procedure contemplated by the Constitution, and as herein stated, while it is cumbersome and tardy in granting relief, it is nevertheless the only procedure we have."

In view of the foregoing, how can we say that by following the rule announced in *Re Application of State to Issue Bonds to Fund Indebtedness*, 33 Okl. 797, 127 Pac. 1065, would not result in working a gross and manifest injustice to all the people of the state, and would not do violence to the plain provisions of our organic law? To me such a result is inevitable, and, this being true, this court ought not to be bound by that, or any other decision, which would work such an irreparable hardship and wrong. The application to fund should be denied.

HOLLOWAY v. McCORMICK et al.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION (§ 51*)—RIGHT TO INHERIT—UXORICIDE.

The power to declare the rule for the descent of property is vested in the Legislature; and where it has provided in plain and peremptory language that a husband shall inherit from his deceased wife, and no exception is made on account of criminal conduct, the court is not justified in reading into the statute a clause disinheriting a husband because he feloniously killed his intestate wife.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 133; Dec. Dig. § 51.*]

2. BASTARDS (§ 13*)—ACKNOWLEDGMENT OF PATERNITY—SUFFICIENCY.

A writing to constitute an acknowledgment of paternity within the meaning of section 8420 Rev. Laws 1910, must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

3. BASTARDS (§ 13*)—ACKNOWLEDGMENT OF PATERNITY—SUFFICIENCY.

This statute prescribes the kind of evidence necessary to establish the right of heirship to the father by his illegitimate offspring. The writing introduced in evidence, examined and held to be insufficient, as an acknowledgment, to fulfill the requirements of that portion of section 8420, Rev. Laws 1910, which reads as follows: "Every illegitimate child is an heir of the person who in writing, signed in the

presence of a competent witness, acknowledged himself to be the father of such child."

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 16, 17; Dec. Dig. § 13.*]

Commissioners' Opinion, Division No. 2. Appeal and Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by Joe McCormick and another against Robert Holloway, a minor, for partition of land. Judgment for plaintiffs, and defendant appeals, and the plaintiffs filed a cross-petition in error. Reversed and remanded.

Burford & Burford, of Guthrie, for plaintiff in error. J. B. Patterson and C. B. Conner, both of Okemah, for Joe McCormick. T. H. Wren, of Okemah, guardian ad litem, for defendant in error Luther McCormick.

GALBRAITH, C. This was an action in partition, commenced by Joe McCormick in the district court of Okfuskee county, against Robert Holloway, claiming that the plaintiff and defendant were each the owners of an undivided one-half interest in an allotment of land located in said county, which had been allotted to Lucinda McCormick, a freedwoman, who died in said county, intestate, on August 5, 1909, and prayed for a partition of the land between said owners. The defendant answered by his guardian, admitting that he was a minor under 19 years of age, and also that Lucinda McCormick died intestate, in Okfuskee county, Okl., on August 5, 1909, seised and possessed of an allotment of land, describing it, and admitted also that he was the sole and only surviving brother of Lucinda McCormick, deceased, and specifically denied the other allegations of the petition. For further answer the defendant alleged that Lucinda McCormick died intestate, as aforesaid, and was the owner in fee and possessed of an allotment of land, and also that she left no father or mother, or issue of her body, and left no brother or sister, except the defendant, and that the defendant was the only surviving relative of the deceased; that at the time of her death Lucinda McCormick was married to one Leonard McCormick, who was her lawful husband, and also that Leonard McCormick died on the same day as Lucinda McCormick, but denied that Leonard survived Lucinda, and alleged that the husband was survived by the wife, and that Leonard McCormick never became seised of any interest in her real estate, and that the plaintiff, Joe McCormick, who was the father of Leonard McCormick, did not inherit any part of said allotment, through his deceased son, and also setting out that one Luther McCormick, the infant son of Daisy Hamm, an illegitimate son of Leonard McCormick, deceased, claimed an interest in said real estate, and claimed to be an heir of his father, and asked that Luther McCormick be made a party

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to said action, and required to set up whatever claim or interest he might have in said lands, and further set out that on the 5th day of August, 1909, the said Leonard McCormick, deceased, willfully and feloniously murdered his wife, Lucinda McCormick, and on the same day committed suicide; that, even if the said Leonard McCormick did survive his wife, both he and those claiming through him thereby became incapable of enjoying any of the property of the said Lucinda McCormick, because of the murder aforesaid.

By proper proceeding Luther McCormick was made a party defendant in said action, and a guardian ad litem appointed for him, and an answer was duly filed, setting out that his father, Leonard McCormick, had in writing, and in the presence of a competent witness, duly acknowledged him as his son, and that he therefore inherited one-half of the allotment of Lucinda McCormick, deceased, or the part that his father inherited.

The new matter set out in the answers of the defendants was denied by reply. On the issues thus made the cause was submitted to the court for trial. The court found: "That on the 5th day of August, 1909, Leonard McCormick purposely shot and killed his wife, Lucinda McCormick; that said Lucinda McCormick died intestate on said date, without issue, leaving surviving her her husband, Leonard McCormick, and her brother, Robert Holloway, as her sole and only heirs at law; that said Lucinda McCormick, at the time of her death, was seised in fee simple of the following described lands, which said lands had been allotted to her in her own right as a freedwoman of the Creek Nation of Indians, to wit, the S. W. $\frac{1}{4}$ of section 20, township 12 N., range 8 E. and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 30, township 12 N., range 8 E. of the Indian Meridian, situate in Okfuskee county, Okl.; and that upon her death the said Robert Holloway and the said Leonard McCormick each inherited an undivided one-half interest in and to the said lands of which the said Lucinda McCormick died seised as above described. The court further finds that on the said 5th day of August, 1909, the said Leonard McCormick, immediately after taking the life of his wife, Lucinda McCormick, took his own life, then and there dying intestate, leaving surviving him his father, Joe McCormick, and his illegitimate son, Luther McCormick; that the mother of said Leonard McCormick died before the date on which said Leonard McCormick died; and that he left no issue surviving him other than said illegitimate child, Luther McCormick. The court further finds that on the 5th day of July, 1909, the said Leonard McCormick acknowledged in writing, signed in the presence of a competent witness, that he was the father of said Luther McCormick, and that, by reason of said acknowledgment of said Leonard McCormick, the said Luther

McCormick became the heir at law of the said Leonard McCormick, and, as such, inherited from said Leonard McCormick an undivided one-half interest in and to the lands above described." The court accordingly decreed that the plaintiff, Joe McCormick, take nothing by his suit, and that the defendants, Robert Holloway and Luther McCormick, were the joint owners of the land hereinabove described, and that each were the owners of an undivided one-half interest and entitled to share equally thereunder, and appointed three commissioners to make partition of the lands between the defendants. The defendant, Robert Holloway, excepted to that part of the decree giving Luther McCormick a one-half interest in the allotment, and perfected an appeal to this court. Joe McCormick excepted to the entire decree, and also perfected an appeal to this court, filing a cross-petition in error.

[1] It is contended by the plaintiff in error that a murderer cannot acquire title to property by his crime and hold it, nor can any one claiming under him; that although the legal title to one-half of the allotment of Lucinda McCormick passed, upon her death, to her husband, equity will treat him and those claiming under him as constructive trustees of the title, because of the unconscionable mode of its acquisition, and compel them to convey to the heirs of the deceased exclusive of the murderer. This contention is urged upon the court by ingenious argument, and finds some support in authority. However, none of the cases are exactly in point with the case at bar; they being cases construing a will, or those which concern the proceeds of insurance policies on the life of the murdered person, where the claimant was an active participant causing the death of the testator or insured. The statute of descent in force in 1909, at the time of the death of the allottee and her husband, provides (section 8984, Snyder's Stats.): "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court, and to the possession of any administrator appointed by that court for the purpose of administration." Section 8985 also provides: "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it descends to and must be distributed in the following manner."

It will be observed that the statute is general in its terms and makes no exception. The Supreme Court of Kansas said, in reply to a similar contention to that made by the plaintiff in error: "Although a theory cutting a murderer out of any benefit resulting from his crime appeals to the court's sense of justice, it cannot be overlooked that the Legislature has the power to declare a rule of descents; it has done so in language that is plain and peremptory, and no rule of in-

terpretation would justify the court in reading into the statute an exception or clause disinheriting those guilty of crime." *McAllister v. Fair*, 72 Kan. 540, 541, 84 Pac. 112, 115 (3 L. R. A. [N. S.] 728, 115 Am. St. Rep. 233, 7 Ann. Cas. 973). Chief Justice Johnson, speaking for the Supreme Court of Kansas in the case from which the above excerpt was taken, answers the argument of the plaintiff in error, advanced in support of his theory, so fully that we feel justified in making the following quotation from that opinion: "It is conceded that the statute is general and inclusive in its terms, but it is said to be inconceivable that the Legislature intended to give an estate to a husband who murdered his wife to obtain it. It is argued that the letter of a statute should not prevail over its sense and spirit, and that a literal interpretation of the statute in question would in effect be giving property as a reward for crime. It is said that the Legislature is presumed to have enacted the statute in question having in view the maxim of the common law that no man shall take advantage of his own wrong, or acquire property by his own crime, or use the law to accomplish his unlawful purposes, and therefore that the courts are justified in imputing a different intention to the Legislature and excepting murderers from the operation of the statute. These considerations would have great weight if there were ambiguity in the statute, or if it were the province of the court to settle the policy of the state with respect to the descent of property or as to the character and extent of punishment which should be inflicted for the commission of crime. That any one should be given property as the result of his crime is abhorrent to the mind of every right-thinking person, and is a strong reason why the lawmakers, in fixing the rules of inheritance and prescribing punishment for felonious homicide, should provide that no person shall inherit property from one whose life he has feloniously taken. A statute of this character has been enacted in at least one state. Iowa Code 1897, § 3386; *Kuhn v. Kuhn*, 125 Iowa, 449, 101 N. W. 151 [2 Ann. Cas. 657]. The horror and repulsion caused by such an atrocity, however, do not warrant the court in reading into a plain statutory provision an exception which the statute itself in no way suggests. If the statute were of doubtful meaning and open to two constructions, there might be room to infer that the Legislature intended the one which would be most reasonable and just in its application. As will be observed, however, the rule of inheritance is explicit, and the statute contains no hint that any one is to be excluded on account of misconduct or crime. In *Ayers v. Com'rs of Trego Co.*, 37 Kan. 240, 15 Pac. 229, the court was asked to read into a statute a meaning which its words did not import, and the reply was made: 'We have not the right to change the

statute where it is clear and free from ambiguity, by any judicial interpretation.'" *McAllister v. Fair*, supra.

It does not appear from the record that the husband, Leonard McCormick, murdered his wife for the purpose of securing her property. It does not appear that the desire to possess her property was in his mind or in any way induced the crime. It will be observed that the statute of descent makes nearness of relationship to the decedent, and not the character or conduct of the heir, the controlling factor as to the right of inheritance. The Criminal Code provides penalties for homicides and other crimes, and the loss of inheritable quality or the forfeiture of an estate is not among the penalties prescribed in the code. If we should hold that the loss of heirship and the forfeiture of an estate were a consequence of McCormick's crime, we would be compelled to ignore the legislative rule governing the descent of property, and would, in effect, impose a punishment for his crime in addition to that prescribed by the only body authorized to declare penalties for violations of law. Again, such construction of the statute is expressly forbidden by the Constitution of the state, which provides that "no conviction shall work a corruption of blood or forfeiture of estate." Article 2, § 15, Williams' Constitution of Oklahoma. We cannot so hold. Another reason why we could not hold that Leonard McCormick's crime in murdering his wife deprives him and his heirs of the right to inherit property from him or through him is that this court is committed to the contrary doctrine. In *De Graffenreid et al. v. Iowa Land & Trust Co.*, 20 Okl. 728, 95 Pac. 640, Mr. Justice Turner, speaking for the court, said: "But if it were true that he murdered her for the purpose of at once getting possession of her property by inheritance, we do not think that would disqualify him from inheriting. 14 Cyc. p. 61, says: 'By the weight of authority, in the absence of express provisions excluding from inheritance an heir murdering the intestate, the operation of the statute of descent is not affected by the fact that the ancestor was murdered by the heir apparent in order to obtain the inheritance at once, and therefore an heir who murders his ancestor in order that he may inherit the estate at once is not disqualified from taking.' (And authorities cited.) That being the rule, when the killing is done for the purpose of inheriting, it follows, a fortiori, that the same should be the rule when no such intention appears, and therefore we hold that Ben Reeves, because of the fact that he murdered his wife, Castella Brown, is not disqualified from inheriting from her under the Creek law of descent and distribution, and therefore the plaintiff in error, De Graffenreid, took, by his conveyance set forth in this cause, his entire interest in the allotment of said Castella Brown."

We conclude that the plaintiff in error obtained by the decree of the court below all he was entitled to, namely an undivided one-half interest in the estate of his deceased sister, Lucinda McCormick, and that his assignment of error must be overruled.

[2, 3] The questions presented by the cross-petition in error of Joe McCormick challenge the correctness of the finding and conclusion of the trial court that the deceased, Leonard McCormick, had made an acknowledgment in writing, in the presence of a competent witness, that he was the father of the defendant, Luther McCormick, and therefore constituted him his heir. It is contended that there is no evidence to sustain this finding of the court. The statute (Rev. Laws 1910, § 8420), reads: "Every illegitimate child is an heir of the person, who in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." At common law the illegitimate child had no inheritable blood. 2 Blackstone, 247. This statute is remedial in its nature and purpose. It confers upon this class of unfortunate equal rights of inheritance with legal heirs and prescribes the kind of evidence necessary to establish the right of nullius in filii to the heirship of the father. The right can only be established by the kind of evidence required by the statute. There must be an acknowledgment of paternity by the father made in writing and in the presence of a competent witness. The writing need not necessarily be made for this particular purpose, but an acknowledgment of paternity must be certain, clear, and unambiguous. In other words, the writing must be complete within itself, at least so far as the acknowledgment of paternity is concerned, and must not require aid from extraneous evidence as to this fact. *Lind v. Burke*, 56 Neb. 785, 77 N. W. 444; *Thomas v. Thomas*, 64 Neb. 581, 90 N. W. 630; *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 959; *Moore v. Flack*, 77 Neb. 52, 108 N. W. 143; *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40.

The writing relied upon by the defendant in error, and which the trial court held to be sufficient acknowledgment within the meaning of the statute, reads as follows: "Boley, Okl., July 5, 1909. Mrs. Daisy Hamm—Dear Friend: I will be over to Sapulpa some time this month to see you and Luther. Take good care of my boy. I will bring him some clothes when I come. I would send you some money to day but I am all in. Uncle Lige Walker the man that come with me over there is very low. D. M. kept your letter a week before he gave it to me. Kiss Luther for me from your old love. Leonard McCormick." The evidence shows that this writing was a letter produced at the trial by the mother of Luther McCormick, who testified that she received it by due course of mail while living at Sapulpa, Okl. She also testified that the signature to the letter was that of Leonard McCormick. The

party who wrote the letter testified that he wrote the same at the request of Leonard McCormick, who dictated the contents of the letter to him, and when the same had been written that Leonard McCormick, with his own hand, signed his name thereto. If the letter had been written by Leonard McCormick himself, and mailed as it was, there can be no question that it would not have been a sufficient acknowledgment within the terms of this statute. Thus the question arises: Can the accident that a third party wrote the body of the letter at the request of Leonard McCormick make it sufficient evidence of acknowledgment of paternity? The statute of Nebraska is practically the same as section 8420, above quoted. The Supreme Court of Nebraska say, in construing this statute, in *Lind v. Burke et al.*, supra: "We are satisfied that a writing, to fulfill the requirements of the law which we have quoted, must be at least one in which the paternity is directly, unequivocally, and unquestionably acknowledged. Whether it should go further than this, we have before stated, we need and do not now decide; but so much it must voice, to be of force, in the light of this view of the requisites of the evidence." Also, further on in that opinion, the court said: "It must not be forgotten, in this examination, that it is not because the person can be shown to be the offspring, or is in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence the writing must be, in and of itself, sufficient, unaided by extrinsic evidence, to establish the paternity."

The Nebraska court, in the latest case of *Thomas v. Thomas*, 64 Neb. 590, 90 N. W. 634, said: "No intention or desire that the child should become an heir seems needed if his father is pointed out by an acknowledgment of the paternity in the latter's own hand, signed in the presence of a competent witness. Neither does it seem that the court should add to this statute any requirement of delivery of this evidence, or that it be expressly mentioned that the child is illegitimate, or that the witness attest the writing. The statute might require all this, but by its terms does not."

In *Moore v. Flack*, supra, the facts are very similar to those in the instant case. The writing relied upon to constitute the acknowledgment was a letter written by the father to the mother, and the particular language used was "take good care of our boy and call him Thomas Moore, and I will give him a good start some day." The court held that this writing was "clearly insufficient" to constitute an acknowledgment of paternity within the statute.

The state of Minnesota also has a statute almost identical with that above quoted. In *Pederson v. Christofferson*, supra, the instrument relied upon as constituting the acknowledgment was a lease, and the language used was: "The said Hans Pederson hereby ac-

knowledges that he is the father to the said Mari Hansdatter (Ronning)." In discussing the statute, the court said, in part: "This statute was not intended for the benefit or relief of fathers of illegitimate children; but it was intended for the benefit and protection of such children and to mitigate in some measure the vicarious punishment imposed by the common law upon them for the sins of their fathers. It must, then, be liberally construed. It does not require the acknowledgment of fatherhood to be in any particular form, or that it should be made with any particular intent. The essential thing is the acknowledgment, the proof of which must be in writing, signed as the statute requires, which is silent as to the character or purpose of the instrument in which the acknowledgment is found. We cannot read into the statute by construction such omissions. The proof of the father's admission or acknowledgment must, however, be in writing, signed by him, in the presence of a competent witness, and it must by its terms clearly and specifically acknowledge the person therein named to be the child of the party signing the writing. This is necessary to avoid spurious claims of heirship. The decisions of other courts construing similar statutes are conflicting as to the form and character of the instrument of acknowledgment. This is a new question in this state, and we hold, upon principle and what seems to be the weight of judicial authority, that the statute does not require that the instrument, acknowledging the paternity of the child, must be made for the express purpose and in a separate instrument, but that it is a sufficient compliance with the statute if it be made in any written instrument, collateral or otherwise, signed by the party, in the presence of a competent witness, in which he clearly and specifically acknowledges that he is the father of the child. *Blythe v. Ayers*, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385; *Rohrer v. Muller*, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350; *Remy v. Municipality*, 11 La. Ann. 148; *Brown v. Iowa Legion of Honor*, 107 Iowa, 439, 78 N. W. 73. Exhibit B contains a clear and specific acknowledgment by Hans Pederson that he was the father of the contestant."

Under the rule announced in the above cases, the writing relied upon to constitute the acknowledgment of the paternity of Luther McCormick is clearly insufficient. "I will be over to Sapulpa some time this month to see you and Luther. Take good care of my boy. I will bring him some clothes when I come. I would send you some money to day but I am all in. * * * Kiss Luther for me from your old love." The court cannot take this writing by its four corners and say it "directly, unequivocally, and unquestionably" acknowledges that Leonard McCormick is the father of Luther McCormick. Extrinsic evidence is necessary to show that the indefinite,

ambiguous, and uncertain phrase, "my boy," used therein, even refers to Luther McCormick. This writing being the only evidence of the acknowledgment of paternity permitted by the statute, and it being insufficient, it follows that there was no evidence to sustain the finding of the trial court that Luther McCormick was the heir of Leonard McCormick and entitled to an undivided one-half interest in the allotment of Lucinda McCormick, and that the exception of the cross-petitioner, Joe McCormick, to such finding, must be sustained.

We conclude that the part of the decree finding that Luther McCormick inherited an undivided one-half interest in the lands of which Lucinda McCormick died seized must be vacated, and the cause remanded, with directions to enter a decree that Joe McCormick, the father, inherited from his son, Leonard McCormick, an undivided one-half interest in said estate, and for further proceeding not inconsistent with the foregoing views.

PER GURIAM. Adopted in whole.

RED RIVER VALLEY COTTON CO., Inc.,
v. J. W. STALCUP MERCANTILE CO.
(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 83*)—PROCESS—AMENDMENTS.

A summons in a justice court against a partnership, which does not show the individual name of each partner, is not a nullity, but is merely irregular, and may be cured by amendment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 264, 265; Dec. Dig. § 83.*]

2. JUSTICES OF THE PEACE (§ 174*)—APPEAL—APPEARANCE—WAIVER OF DEFECTS IN PROCESS.

In an action against a partnership in the firm name alone, where the pleadings show the individual names composing the firm, although the individuals are not personally served with summons, but voluntarily appear and join in a demurrer to the bill of particulars, on the ground that no cause of action is stated and that no one has been sued in the action, *held*, it is error to sustain such demurrer.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 665-693; Dec. Dig. § 174.*]

(Additional Syllabus by Editorial Staff.)

3. PARTNERSHIP (§ 63*)—DEFINITION AND NATURE.

Though a "partnership" is not a person, it is a legal entity under Rev. Laws 1910, §§ 4431-4474, and for some purposes is recognized as a quasi person having the powers and functions exercisable by one of the partners severally or all of them jointly. It may be a debtor or a creditor within the meaning of the statute.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 93; Dec. Dig. § 63.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

Commissioners' Opinion, Division No. 2. Error from County Court, Hughes County; H. H. Rogers, Special Judge.

Action by the Red River Valley Cotton Company, Incorporated, against the J. W. Stalcup Mercantile Company, a partnership, to recover an excess paid on cotton sold and delivered. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. M. Crook, of Durant, for plaintiff in error. Crump & Skinner and Walker & Fancher, all of Holdenville, for defendant in error.

GALBRAITH, C. The Red River Valley Cotton Company, a corporation, sued J. W. Stalcup Mercantile Company, a partnership, before a justice of the peace in Hughes county, to recover \$141.17 for money paid by mistake on certain cotton sold and delivered. From a judgment in favor of the plaintiff, the defendant appealed to the county court, where a trial was had resulting in a judgment for the defendants. A new trial was granted, but on a showing the county judge disqualified himself, and by agreement of parties Harry H. Rogers, a member of the bar of Hughes county, qualified as special judge to try said cause. The plaintiff amended his pleadings in the county court, and increased the amount of his claim to \$200. The cause was called for trial, and, after the witnesses had been sworn and the plaintiff had commenced the examination of his first witness, objection was made by the defendant to the introduction of further testimony on the ground that no one had been sued by the plaintiff. Whereupon, by permission of the court, the plaintiff was permitted to amend his bill of particulars by interlineation, alleging that "J. W. Stalcup Mercantile Company is a firm composed of J. W. Stalcup and Mollie Everidge." Whereupon a demurrer was interposed to the last amended petition upon the ground that said amended petition does not state a good and sufficient cause of action against J. W. Stalcup and Mollie Everidge, which was sustained; the court saying that in his opinion "this action cannot be maintained against J. W. Stalcup and Mollie Everidge for the reason that it would be an entirely new cause of action and have to be brought in a separate and distinct suit, and for the further reason that no summons was ever issued or served in this cause upon J. W. Stalcup and Mollie Everidge," and thereupon dismissed the suit and rendered judgment against the plaintiff for costs. To which action of the court the plaintiff excepted, and prosecutes an appeal to this court by petition in error and transcript.

From the foregoing statement it will appear that there is only one assignment of error presented on this appeal. The court below doubtless proceeded upon the theory that a partnership is not a separate and dis-

ting legal entity apart from the individuals composing the firm.

[3] Under the common law this view was correct, but under the statute such as articles 1 and 2 of chapter 56, Rev. L. 1910, a partnership is regarded as a legal entity apart from the individuals composing it. This view is well expressed by Supreme Court of Georgia in the first paragraph of the syllabi in *Drucker & Brothers v. Wellhouse & Sons*, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328, as follows: "Though a firm or partnership is not a person, it is a legal entity, and for some purposes is recognized as a quasi person having powers and functions exercisable by one of the partners severally or all of them jointly. It may be a debtor or a creditor within the meaning of a statutory enactment."

[1, 2] Plaintiff in its bill of particulars filed in the justice court made the J. W. Stalcup Mercantile Company, a firm composed of J. W. Stalcup and Mollie Everidge, defendant, and the summons issued therein "commanded to summons J. W. Stalcup Mercantile Company, a firm composed of J. W. Stalcup and Mollie Everidge," to appear and answer and was served upon "J. W. Stalcup of the J. W. Stalcup Mercantile Company." It appears, however, that J. W. Stalcup appeared in said cause and filed an affidavit for continuance, and that on appeal to the county court also filed an affidavit of prejudice of the regular county judge against him as a defendant in said cause, and that J. W. Stalcup and Mollie Everidge, members of the partnership composing the firm of J. W. Stalcup Mercantile Company, appeared in the county court and urged the demurrer against the plaintiff's bill of particulars on jurisdictional as well as nonjurisdictional grounds. From these facts it appears that they were in court just as effectively and just as completely as if they had been regularly summoned, and the trial court should have so treated them.

In the case of *Morse v. Barrows*, 37 Minn. 239, 33 N. W. 706, the defendant was sued and summoned as Jacob Barrows, while his true name was Chauncey W. Barrows. On the return day of the writ the defendant appeared specially and filed a plea of abatement showing his true name, and prayed a dismissal of the action. His plea was denied, and the plaintiff was permitted to amend his pleadings and correct the process by striking out the name of "Jacob" and inserting "Chauncey W." The Supreme Court of Minnesota said, in approving this action: "With the defendant before him for the purpose, the justice had authority to correct the error by causing the true name to be inserted in the writ (section 10, c. 65, Gen. St. 1878); and, the defendant having appeared before the justice to plead the misnomer, he was there for the purpose of whatever it was proper for the justice to do by reason thereof; for the purpose of

correcting the error, as the justice was authorized to do when the true name was discovered."

In *Bank v. Magee*, 20 N. Y. 355, it seems that Charles Cook was engaged in the banking business under the name of the "Bank of Havana," and commenced a suit in that name, and upon objection it was held that the error in bringing the suit in the name he had assumed for the transaction of his banking business was an error that might be corrected before or after judgment in furtherance of justice, and Judge Comstock said: "Mr. Cook has simply misnamed himself. He has taken the name which he uses in a particular business, and, quite irregularly has introduced himself to the courts by that name. This he should have not done. He ought to have sued in the surname * * * and the Christian name given in baptism, but I consider this a mere irregularity in procedure."

The statute (section 4790, Rev. L. 1910) is broad and liberal in its terms in permitting amendment in pleadings or process in the interest of justice, and the only particular limitation placed upon this power vested in the court is that the amendment does not substantially change the cause of action or defense. North Dakota has a statute identical with this, and in a case very similar to the case at bar the court said: "Defendant's contention is that the use of the partnership's name to designate the plaintiffs in the summons was a fatal irregularity, equivalent to an entire omission of the name of any plaintiff, and hence the summons was a nullity. It is true that the use of the partnership name as the only designation of plaintiffs was irregular. The summons was not, however, a nullity for that reason. The partnership name furnished the means of identifying the plaintiffs, and it cannot therefore be said that the firm name was the same as no name. It was merely an irregularity which could be waived by the defendant, if he failed to object, and could be cured by amendment. Encl. P. & Pr. vol. 15, p. 841, and notes; *Bank v. Magee*, 20 N. Y. 355; *Barber v. Smith*, 41 Mich. 138, 1 N. W. 992; *Johnson v. Smith, Morris* (Iowa) 106. The defendant was entitled to have the record disclose on its face the names of all the persons who composed the plaintiff firm. He was not, however, entitled to a dismissal of the action, unless the plaintiffs failed or declined to make the necessary amendment. It is provided by the Code of Civil Procedure (Rev. Codes 1899, § 5297) that any pleading, process, or proceeding may be amended 'by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect.' It is contrary to the policy of the Code of Civil Procedure to dismiss an action for mere irregularities of practice which can be remedied by amendment without prejudice to the

substantial rights of the parties. It cannot be pretended that the amendment allowed by the justice in this case would prejudice defendant's rights in the slightest degree. The provisions of the Code of Civil Procedure govern the proceedings in justice court so far as applicable, when the mode of procedure is not prescribed by the Justice Code. Rev. Code 1899, § 6625. There is nothing in the latter Code inconsistent with the observance by a justice of the provisions of section 5297." *W. F. Morgridge and F. E. Merrie, etc., v. Jacob Stoeffer*, 14 N. D. 430, at 432, 433, 104 N. W. 1112, 1113. Again in 4 N. D. 140, 59 N. W. 714, in the case of *Gans v. Beasley*, the first paragraph of the syllabus is as follows: "A summons, otherwise in due form, in which the defendants are designated only by their firm name, is irregular, but not absolutely void, and may be amended in the trial court so as to show the names of the partners. Such a summons, when issued, is sufficient to sustain an attachment." Mr. Justice Hayes, in referring to the above cases, said: "The reasoning and rule of these cases as to summons at the commencement of an action are equally applicable to a summons issued at the commencement of a proceeding in error. We should overrule the motion to dismiss and grant plaintiff in error leave to amend the summons in error by inserting therein the names of the individuals composing the partnership, if we were not compelled to sustain the motion upon other grounds." *Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co.*, 23 Okl. 833, 102 Pac. 712.

It was error in the trial court to sustain the demurrer to the amended petition, since the defendants were in court voluntarily, although they had not been regularly summoned, and the court had jurisdiction of their persons, and he should have overruled the demurrer, permitted the amendment requested by the plaintiff, and proceeded with the trial of the cause on its merits.

On account of these errors, the judgment appealed from should be reversed, and the cause remanded for further proceedings not inconsistent with the views above set out.

PER CURIAM. Adopted in whole.

MISSOURI, O. & G. RY. CO. v. BROWN.
(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 315*)—DEFENSE—ACTS OF INDEPENDENT CONTRACTOR.

A person cannot employ another person to do for him, as an independent contractor, an unlawful thing, and thus escape the consequences of the unlawful act when sued for damages occasioned thereby.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1241, 1244–1253, 1255, 1256; Dec. Dig. § 815.*]

2. DAMAGES (§ 112*)—MEASURE—DESTRUCTION OF CROP.

In a suit for damages for the destruction of a growing crop, such damages are to be estimated as of the time of the injury, and the measure to be applied is compensation for the value of the crops in the condition in which they were at the time of their destruction.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

3. DAMAGES (§ 112*)—MEASURE—GROWING CROP—DETERMINATION OF VALUE.

In arriving at the value of a growing crop, it is proper to show by evidence the probable yield under proper cultivation, and the value of such probable yield when matured, gathered, prepared, and ready for sale; also the probable cost of proper cultivation necessary to mature the crop, as well as the cost of its gathering, preparation, and transportation to market. The difference between such probable value in the market and the cost of finishing the cultivation, and gathering, preparing, and transportation to market will ordinarily represent the value at the time of loss with as much certainty as any other method.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

4. DAMAGES (§ 112*)—MEASURE—GROWING CROP—DETERMINATION OF VALUE.

The value of the labor bestowed on a growing crop in bringing it forward to the time of its wrongful destruction does not ordinarily afford either a sufficient or safe measure of the damages occasioned by its loss.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

5. RAILROADS (§ 113*)—INJURIES INCIDENT TO CONSTRUCTION—DAMAGE TO CROPS—ANIMALS.

In a suit for crop damage, wherein it is alleged that defendant railroad unlawfully entered upon the land, and tore down and destroyed the fencing, thus permitting animals to destroy the crops, and the evidence of plaintiff shows that defendant, through persons acting for it, did break plaintiff's fence, and enter upon lands of which he was in the rightful possession, and because of such breaking of and leaving down the fencing the crops were destroyed, a prima facie case is made; and in the absence of evidence upon the part of defendant that it had acquired in some way a right of way over the land, and thereby had a right to break and enter, a verdict for plaintiff will not be disturbed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 230, 351-357, 359-361, 363, 364; Dec. Dig. § 113.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Bryan County; J. L. Rappolee, Judge.

Action by Frank Brown against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Jones and J. C. Wilhoit, both of Muskogee, for plaintiff in error. J. M. Crook, of Durant, for defendant in error.

BREWER, C. The defendant in error brought suit in the court below against plaintiff in error, as defendant, alleging in substance that he was in the legal possession of certain farming lands (described), and that on or about the 1st day of May, 1910, the defendant unlawfully entered upon said

lands, destroyed and removed the fences inclosing said lands, and negligently left said lands and crops growing thereon subject to be destroyed by stock running at large in the neighborhood thereof; that on said date plaintiff had planted and had growing on said lands 25 acres of cotton; and that stock entered thereon, and totally destroyed the growing crop, which was of the value of \$125. The case was first tried in a justice of the peace court, where the plaintiff prevailed, and it was appealed to the county court, and plaintiff was awarded the full sum sued for. The railroad company, as plaintiff in error, appeals.

Plaintiff in error complains: (1) That the demurrer to the plaintiff's evidence should have been sustained. (2) That plaintiff failed to prove damage. (3) That the actionable wrong and resulting damage, if any are shown, are the result of the acts of an independent contractor.

We will discuss the points in the order named.

(1) The evidence shows that in the spring of 1910 the agents of the railroad came to plaintiff's farm, and cut a gap through the fencing, 75 or 100 feet wide, where the right of way entered, and also at the point where it left the farm; that these openings were left open, and through them cattle entered upon plaintiff's crops; that the plaintiff had broken up 25 acres of land, cross-harrowed it, listed it, and planted it to cotton with seed that cost 60 cents a bushel; at about the time the cotton plants commenced coming up that large numbers of cattle entered in and upon the land through these openings, and totally destroyed the young cotton, actually eating all of it up. Defendant offered evidence to show that, where the fencing was cut at the right of way, it had erected temporary wire gates across the same to protect the crops; but there was much evidence that the openings made by the defendant remained open, and that cattle roamed onto plaintiff's lands at will for a long period of time. There was no evidence received or offered to show that the railroad was the owner, through purchase or condemnation, of the right of way it appropriated through plaintiff's farm, or that it was entitled to possession, so as to give it the right to break and tear down the fencing.

The answer of the railroad was a general denial. The specific issue thus tendered was whether or not defendant "unlawfully entered in and upon said land, destroyed and removed the fences inclosing said land," etc., thus causing through such unlawful acts the destruction of plaintiff's crops.

(2) The evidence shows that the land belonged to Webb, and that plaintiff was a tenant in lawful and peaceable possession of the same, farming the land, and that defendant came, and through persons acting for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or under its authority, without plaintiff's knowledge, broke and destroyed the fences, and deprived plaintiff of the value of his cotton crop.

The secretary of the defendant corporation was on the witness stand, but gave no testimony tending to show that it had any right to enter upon this farm, and tear down and leave down the fencing surrounding this crop. We think plaintiff's proof sufficient to require the defendant to justify its acts by showing a right to break and destroy the fence. This it has not done, notwithstanding the fact that one of its general officers was on the witness stand, and, if defendant had procured a right of way through this land by purchase or condemnation, he certainly would have said something about it under the issue being tried.

[1] (2) The breaking of the fence and the exposure of the crops to the ravages of cattle being tortious, so far as the proof shows, the question of independent contractor cannot arise. A person cannot employ another to do for him, as an independent contractor, an unlawful thing, and thus escape the consequences of the unlawful act. 16 A. & E. Ency. of Law (2d Ed.) 203 (citing *Ellis v. Sheffield C. C. Co.*, 2 El. & Bl. 767; *Walker v. McMillan*, 6 Can. Sup. Ct. 241; *Barry v. Terkildsen*, 72 Cal. 254, 13 Pac. 667, 1 Am. St. Rep. 55; *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113; *Heidenwag v. Philadelphia*, 168 Pa. 72, 31 Atl. 1063).

(3) The contention that damages have not been legally shown rests upon the fact that plaintiff produced no witness who stated his opinion of the value of the growing cotton, in its then condition, at the time it was destroyed. The evidence of two witnesses showed that the breaking of the land was worth \$2, the cross-harrowing \$1.50, the bedding \$1, the planting with seed that cost 60 cents a bushel \$1 per acre, and that 25 acres of cotton just up was destroyed. Defendant produced a witness who estimated the value of these various items at an aggregate cost of about \$3 per acre. Under plaintiff's evidence the actual value of the labor in producing a stand of cotton was \$5.50 an acre, which, if sufficient evidence of value, aggregates a sum in excess of the verdict returned. Defendant's evidence would not have justified so large a verdict.

The plaintiff undertook to prove value, and asked this question: "What was the value per acre of that cotton at the time it was destroyed by cattle?" This question was objected to, and after that, without objection, both parties presented evidence of the cost of getting the crop in the condition it was in when destroyed. It seems to have been the idea of both sides that the value of the labor put on the crop would adequately represent the amount of damage in case the defendant was liable.

[2, 3] It is the general rule, as stated in *C. R. I. & P. Ry. Co. v. Johnson*, 25 Okl. 760,

107 Pac. 662, 27 L. R. A. (N. S.) 879, that "the damages are to be estimated as of the time of the injury, and that the measure thereof is compensation for the value of the crops in the condition in which they were at such time." In that case it is said: "It is permissible as a means of arriving at the value of a growing crop to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of its preparation and transportation to market; the difference between the value of the probable crop in the market and the expense of maturing and placing it there in most cases will give the value of the growing crop with as much certainty as can be attained by any other method." And in discussing the various ways of arriving at the value of a growing crop, the precise question presented here was in the mind of the court, but not necessary for decision. (Note *quære* in syllabus.) The court, however, in that case quotes from *Col. Con. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62, as follows: "But, in order to establish the value at the time of the destruction, courts are compelled to resort to several methods of computation, and either, or all combined, may afford a fair basis. One might be a year's rental value, with the cost of planting and bringing forward the crop until the time of its loss; another, what the crop would bring in its immature state at a sale; and a third, the proof of the average yield and the market value of crops of same kind planted and cared for in the same manner, less the cost of maturing, harvesting, and marketing. While neither would afford positive proof, they would all seem to be proper, and the only way by which a jury could get the necessary data upon which to base a verdict."

The above case seems to hold that the cost of bringing a crop forward to the time of its loss is permissible; but in *Chicago, etc., R. Co. v. Barnes*, 10 Ind. App. 460, 38 N. E. 428, this doctrine is squarely repudiated.

[4] In this state of the law we do not deem it wise to hold as a general proposition that the cost of bringing forward a crop to the time of its loss affords a proper measure of the damage for its wrongful destruction. The value of a growing crop at any certain period of its development depends upon its prospect of a yield and the probable value thereof, and many other factors may enter into and influence this prospect. Unusual and expensive labor may have been employed in preparing the ground for and bringing forward a crop; yet, through the vicissitudes of the weather, the ravages of insects, the failure to get a stand, or for many other reasons the value of the immature crop at the time of its loss may be in no way commensurate with the value of the labor bestowed upon it. On the other hand, a crop may be

brought forward to the time of its loss with very small cost, and yet favorable conditions may have so affected it that it at the time gives promise of an abundant and valuable harvest, out-reaching many times the expense theretofore put upon it. A general and ordinarily a just rule is clearly stated in *O. R. I. & P. Ry. v. Johnson*, supra, and quoted herein, and, while the varying conditions under which this question will arise require liberal treatment by the court to meet the situation, yet in the main it is far safer and wiser for litigants to proceed along the plain highway, and not trust themselves to by-paths that often lead into the confusion of the wilderness.

However, as stated heretofore, it is very clear that these parties adopted and tried this question upon the theory that the cost of the labor plaintiff had expended on this crop would adequately and properly measure his loss, if defendant was in any event liable to him therefor. Each side offered evidence pro and con as to this cost without objection from the other. If they were satisfied at the time to so measure the loss, they ought not now be allowed to reverse a case for an error they assisted in making. It would probably be only under rare circumstances where a growing crop would not be worth at least the labor expended upon it. This does not take into account rental value or prospective profits, and it must certainly be true that under ordinary circumstances there is some profit in husbandry above the actual cost of labor. It does not appear to us that an unjust verdict has been rendered, and, so believing, we will hold the parties to the theory upon which they tried the case.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

LEVY v. YARBROUGH et al.

(Supreme Court of Oklahoma. Nov. 25, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 94*)—AUTHORITY OF BROKER—CONTRACT OF SALE.

The mere listing of real estate with a broker for the purpose of procuring a purchaser thereof acceptable to the owner does not constitute authority in such broker to bind the owner by an executory contract of sale.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 136; Dec. Dig. § 94.*]

2. BROKERS (§ 94*)—AUTHORITY—CONTRACT OF SALE.

Before a real estate broker can bind the owner by an executory contract of sale, he must have specific authority so to do from the owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 136; Dec. Dig. § 94.*]

3. FRAUDS, STATUTE OF (§ 129*)—PAROL AGREEMENT—RIGHT TO ENFORCE.

A parol agreement for the sale of lands will be enforced by the courts where the vendee has paid the purchase price, and taken possession,

in good faith, of the premises with the knowledge and consent of the owner, and has made permanent improvements thereon.

(a) But the mere acceptance of the purchase price under an oral contract is not of itself sufficient to take the sale out of the statute of frauds.

(b) Nor will the fact that the owner orders an abstract of the property to be made take such case out of the statute.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by I. B. Levy against R. S. Yarbrough and others. Judgment for defendants, and plaintiff brings error. Affirmed.

G. A. Paul, of Oklahoma City, for plaintiff in error. John H. Wright and Clarence J. Blinn, both of Oklahoma City, for defendants in error.

BREWER, C. This suit is in the alternative for either a specific performance of a contract for the sale of certain lots, or for damages for failure to comply with such contract. The plaintiff in error, who was plaintiff in the trial court, and will be hereafter so designated, claims that he made a contract with a real estate firm for the purchase of certain lots upon certain terms, and that such contract was binding upon the defendants, and that it was their duty under the law to fulfill the same by a conveyance of the property. Plaintiff's first petition, filed June 15, 1909, asserted that the authority from the defendants to the real estate agents to sell the property was verbal. A demurrer was sustained. An amended petition filed July 24, 1909, did not materially change the averments of the first one, and, being attacked by demurrer, met the same fate. The second amended petition filed March 15, 1910, alleged that the defendants had authorized the real estate firm in writing to sell the land, but that defendants "neglected and forgot to place their signatures to * * * written agreement," etc. This petition was held insufficient, and on February 21, 1911, the plaintiff filed what he terms a supplemental petition, and this one was also held on May 13, 1911, to be insufficient as against a demurrer. The plaintiff, refusing to plead further, brings the case here; the sole point involved being the sufficiency of the allegations of the plea to support the action.

[1, 2] The petition involved here avers, in substance, merely that the defendants listed their property with the real estate agents by a personal application therefor, and stood by and saw the agents write out a listing card, upon which the agents placed their names, the property to be sold, and the amount of price wanted, and that this constituted an authority in writing in the real estate agents, and that thereafter the plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff made a written offer to buy the property from said agents, describing it, together with the consideration and the terms of payment, and that the said agents accepted said offer and signed the same at the bottom thereof. In describing the authority of the agents under the listing aforesaid, the plaintiff says: "That on and before the said 5th day of June, 1909, the said defendants, being desirous of selling said real estate, listed the same with one G. B. Stone Realty Co., of Oklahoma City, Okl., for the purpose of procuring a purchaser therefor, and by such listing the said defendants directed and authorized the said Stone Realty Company to act in the capacity of agent for the sale of said real estate at the price of \$7,875, upon such terms as suited the defendants." The plaintiff further alleged a ratification by the defendants of the contract of sale made with the agents. Without discussing in detail the allegation that the authority given the agents was in writing, we think it sufficient to say that the authority of the agents as alleged, even had it been in writing, was not sufficient authority in the agents to make for the defendants a binding contract of sale of the lots. The giving of an agent the authority to handle real estate, and to procure a purchaser for the same, falls far short, in our judgment, of authorizing such agent to make a binding contract of sale himself.

It will be observed that the averment says: That defendants listed the lots with the agent "*for the purpose of procuring a purchaser therefor*" to act as agent for defendants in the sale of the lots "*upon such terms as suited the defendants.*" In our judgment the allegations of the petition show no authority in the agent further than to procure a purchaser acceptable to the owners.

This question was before the Territorial Supreme Court in the case of Gault Lumber Co. v. Pyles et al., 19 Okl. 445, 92 Pac. 175, and in the body of the opinion, written for the court by Chief Justice Burford, it is said: "Nor do we think there was shown such a written authority of the agent to sell as will take the case out of the statute of frauds. An authority of an agent to sell real estate, in order to bind the owner by executory contract, must be specific and certain as to terms and description. Ordinarily, when property is placed in the hands of an agent to sell, the authority conferred is only held to be the authority to find a purchaser at a given price and submit the same to the owner, and not an authority to sell and bind the owner." And in the case of Weatherhead v. Eltinger, 78 Ohio St. 104, 84 N. E. 598, 17 L. R. A. (N. S.) 210, it is said by the Supreme Court of Ohio: "A real estate broker is without authority to execute a contract of sale which shall be binding upon one who places real estate in his hands for sale unless such authority is specially conferred." This Ohio case is reported in 17 L. R. A. (N. S.) 210, and the editor has appended thereto a very val-

uable note, practically covering this question, and in which a great number of authorities are collected sustaining the text. See, also, Carstens v. McReavy, 1 Wash. 359, 25 Pac. 471; Armstrong v. Oakley, 23 Wash. 122, 62 Pac. 499; Foss Inv. Co. v. Ater, 49 Wash. 446, 95 Pac. 1017; Hardinger v. Columbia, 50 Wash. 405, 97 Pac. 445; Hutchins v. Wertheimer, 51 Wash. 539, 99 Pac. 577; Lawson v. King, 56 Wash. 15, 104 Pac. 1118.

[3] 2. The petition does not aver facts sufficient to constitute a ratification so as to take the case out of the statute of frauds. It is averred that defendants accepted the earnest money; that they orally agreed to the unauthorized sale made by the agents; that they procured an abstract of the title to be brought down to date, etc. The courts will enforce a parol agreement for the sale of lands, where the vendee has paid the purchase price, and taken possession, in good faith, of the premises, with the knowledge and consent of the owner, and has made permanent improvements thereon. Harris et ux. v. Arthur, 36 Okl. 33, 127 Pac. 695; Sutherland v. Taintor, 17 Okl. 427, 87 Pac. 900. But the mere acceptance of the purchase price is not of itself sufficient. Halsell v. Renfrow, 14 Okl. 674, 78 Pac. 118, 2 Ann. Cas. 286; Rowe v. Henderson, 4 Ind. T. 597, 76 S. W. 250; Givens v. Culder, 2 Desaus. (S. C.) 172, 2 Am. Dec. 686; Cooper v. Thomason, 30 Or. 161, 45 Pac. 296; Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708; 20 Cyc. 297, and note 23.

Our statute of frauds, as indeed is the statute of most of the states, is substantially the same as that of England, and, while the English chancery courts, at an early period, created many exceptions to the statute, some of which have been followed by the American courts, yet these exceptional cases, taken out of the operation of the statute, are usually based on facts which show that the party invoking the statute, designed to prevent frauds, is in fact using the same to perpetrate one.

The Alabama Supreme Court speaking through Justice Taylor (Allen v. Booker, 2 Stew. 21, 19 Am. Dec. 34), discusses this subject, and quotes from the great Chief Justice Marshall as follows: "In the United States, the cases uniformly show that the courts are rather inclined to restrict than to enlarge the cases of exception to the strict execution of the statute. In the case of Grant v. Naylor, 4 Cranch, 235, that distinguished judge, Chief Justice Marshall, observes: 'Already have so many cases been taken out of the statute of frauds which seem to be within its letter that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been car-

ried, and the court entirely concurs in that opinion.'"

Nor are the facts that the owners ordered the abstract brought down to date, and made oral statements that they would make the sale, sufficient to ratify an unenforceable contract in regard to the sale of lands. *Harris et ux. v. Arthur*, 36 Okl. 33, 127 Pac. 695; *Givens v. Calder*, 2 Desaus. (S. C.) 172, 2 Am. Dec. 686; *Parrish v. Koons*, 1 Pars. Eq. Cas. (Pa.) 78; *Hutchins v. Wertheimer*, 51 Wash. 539, 99 Pac. 577; *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296; *Halsell v. Renfrow*, supra; *Kasner v. Miesch*, 204 Ill. 320, 68 N. E. 405; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416; *Roth v. Goerger et al.*, 118 Mo. 556, 24 S. W. 176.

The case should be affirmed.

PER CURIAM. Adopted in whole.

MCCARTY v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 20, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 594*)—REFUSAL OF CONTINUANCE—ABSENT WITNESSES.

In reviewing the refusal of a continuance asked on account of an absent witness, the evidence adduced at the trial will be considered by this court for the purpose of determining whether the alleged testimony was probably true and when it is not probable that the absent witness would swear to the facts stated in the defendant's affidavit, and where the record shows that the defendant was not put upon his trial until more than a year after the indictment was returned, there is no error in refusing a further continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.*]

2. RAPE (§ 52*)—SUFFICIENCY OF EVIDENCE.

In a prosecution for statutory rape, the evidence is held to sustain the verdict and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.*]

Appeal from District Court, Bryan County; A. H. Ferguson, Judge.

Frank McCarty was convicted of statutory rape, and appeals. Affirmed.

Utterback, Hayes & MacDonald, of Durant, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (Jos. L. Hull, of Oklahoma City, of counsel), for the State.

DOYLE, J. Plaintiff in error was tried and convicted in the district court of Bryan county, upon an indictment returned by the grand jury on the 20th day of April, 1911, wherein he was charged with the crime of statutory rape, alleged to have been committed March 15, 1910, upon the person of one Anna Wilkerson, an unmarried female, under the age of 18 years, and of previous chaste and virtuous character. On the 30th day of May, 1912, in accordance with the

verdict of the jury, the court sentenced the defendant to imprisonment in the penitentiary for the term of five years. To reverse the judgment an appeal was taken by filing in this court on November, 7, 1912, petition in error with case-made.

[2] The prosecutrix testified: That she was 17 years old in March, 1910; had resided in Durant with her parents for eight years, and had been employed in the office of the Pioneer Telephone & Telegraph Company for about five years. That she first met the defendant at his home in 1904, and began keeping company with him in 1908. That in 1909 she went with him as often as once a week. That they became engaged in January, 1910, and were to be married the following fall. That he then went with her almost every night. That she would go off duty at 8 o'clock p. m., and he would come to the office for her and take her home. Sometimes they would go to a show, and they went driving several times. That they went driving on the night of the 15th day of March, 1910, and he succeeded in having sexual intercourse with her, which he afterwards repeated about a dozen times during the following three months, and as a result she became pregnant. That she informed him of her condition several times and asked him to make his promise good and marry her. That in August, 1910, she asked him, "What are you going to do?" and he told her: "I don't aim to do anything. You will never see me any more. I aim to leave on the Limited." That he left and stayed away a month, and after his return he avoided her. Later he left Durant again. That she continued to work for the telephone company until the 6th day of March, which was the day prior to the birth of her child. That the defendant was the only man who ever had sexual intercourse with her, and they were not married.

Several witnesses, including the parents of the prosecutrix, testified that she was born at Whitewright, Tex., October 11, 1892.

The defense was that the prosecutrix was not of chaste and virtuous character previous to the commission of the offense charged. The defendant did not take the stand himself, and offered no testimony to disprove any of the testimony of the prosecutrix concerning his conduct with her. The only testimony offered in support of his defense was an alleged deposition of one Pink Mullins, taken at Parsons, Kan. In rebuttal, the state called this witness, Pink Mullins, to the stand, and he testified that the deposition in so far as it reflected upon the chaste character of the prosecutrix was forged and false. He also testified that he never had sexual intercourse with the prosecutrix, and knew nothing which even tended to show she was not of previous chaste and virtuous character. He further testified that he came to Durant when the case was set for trial in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

January, and the defendant met him at the train and told him not to get off; that he would get the trial put off with him out of town; that he went on to Denison, Tex., and when he returned to Durant the defendant met him and gave him \$20 and told him not to get off the train; that he went on to Parsons, Kan., where he resided at the time of the taking of his deposition.

Arthur Cranston, the notary before whom the deposition was taken, testified that the witness Pink Mullins gave the deposition as it was written.

[1] The refusal of a continuance is assigned as error, and relied upon for a reversal of the judgment. The record shows that the defendant was arraigned on April 27, 1911. It appears to be incomplete as to the various times at which the case was set for trial, and the causes for continuance at such times. However, it appears that on January 2, 1912, the cause was reset for January 10th. On January 8th, the defendant applied for leave to take the deposition of one Pink Mullins. On January 10th, the case was continued on motion of the defendant. When the case was called for trial on May 22, 1912, the defendant filed his affidavit in support of another motion for continuance. His affidavit contained all the formal allegations required by law, and, among others, the following statement: "That B. W. Williams of Hugo, Okl., is a witness properly and legally subpoenaed to appear in his behalf at the trial of this case; that the said B. W. Williams on the 21st day of May, A. D. 1912, which was yesterday, did not show up in Durant; and that one of the defendant's attorneys, to wit, W. E. Utterback, talked to the said B. W. Williams over the telephone, and he attached hereto the statement of the said W. E. Utterback as to the said conversation. He further states: That the said B. W. Williams did not reach Durant this morning, but that his said attorney received from the said B. W. Williams a certificate from Dr. Rutherford which is hereto attached as a part hereof and designated as 'Exhibit A.' That the said B. W. Williams is not absent by the procurement or connivance of this defendant, and is not absent with his consent. That the said B. W. Williams is a material witness in behalf of this defendant, and if present at the trial of this cause this defendant is informed and believes and alleges that the said B. W. Williams would testify as follows, to wit: He knows Anna Wilkerson, the prosecuting witness in this case, and has known her for nearly three years. That prior to the 15th day of March, 1910, the time this defendant is alleged to have had intercourse with Anna Wilkerson, he knows of his own personal knowledge that the said Anna Wilkerson was not a virtuous woman. That prior to said date he had gone buggy riding with her at night and had intercourse with her. That all of said testimony is material in behalf of this de-

fendant. That this defendant knows of no other witness by whom he can prove these facts; and that he cannot safely go to trial without the attendance of the said B. W. Williams."

An affidavit by W. E. Utterback, Esq., one of the defendant's attorneys, stated that he had talked to B. W. Williams, the day before, over the telephone, and Williams had told him that he could not afford to make a trip to Durant in his present condition.

The affidavit of Dr. B. O. Rutherford was also filed, wherein it is stated: "This is to certify that Mr. B. W. Williams is suffering from traumatism of a large gland. Also inflammation of another large gland, and should he make a trip to Durant at present and miss his treatment, which would also aggravate the inflammation, I feel sure he would have to undergo a painful and dangerous operation."

The order of the court overruling a motion for continuance is as follows: "Now on this the 22d day of May, 1912, comes the defendant herein and files his motion for a continuance, said continuance being asked for the reason that a witness B. W. Williams, who resides at Hugo, Okl., and who, it is alleged, is a material witness, is sick and unable to be in attendance on the court; the motion being supported by an affidavit of Dr. Rutherford to the effect that the witness is affected with the swelling of some gland. After the presentation of the motion, the court personally made an investigation of the matter and found that the said witness, B. W. Williams, on the day the motion was filed and presented left the town of Hugo, Okl., his home, on the train and came West toward Durant to the town of Soper, a distance of eleven miles, where he remained until noon, returning to Hugo at that time. That he was on the streets of Hugo continually that day after his return, and that apparently there was nothing to prevent him from being in attendance on this court. That the defendant or his attorneys knew nothing of such investigation and were not advised of the same at the time said motion was presented or overruled. Because of the facts as found to exist by the court as above stated, and because of the indefinite and unsatisfactory nature of the affidavit of the doctor, supporting the motion for a continuance, and because of the fact that this case has heretofore been continued twice upon the application of the defendant because of absent witnesses, the motion is by the court overruled, to which order of the court the defendant duly excepted; whereupon the hearing of the case is postponed until May 23, 1912. And on this May 23, 1912, the motion filed on the 22d day of May, 1912, is renewed by the defendant on the same grounds and supported by the same affidavit. The motion is again overruled, and the cause directed to proceed to trial. To which ruling of the court the defendant duly excepts." The record further

shows that, when the motion for continuance was overruled on May 22d, "the defendant asks that an attachment be issued for B. W. Williams; request granted."

The trial began the following day and continued until May 24th. The record shows nothing further, however, with reference to the attachment issued for the witness Williams.

It is the right of every defendant in a criminal case to have compulsory process to compel the attendance of his witnesses, and that involves, as a matter of course, the time reasonably necessary to enable a defendant to procure and produce all legal and competent evidence necessary in his defense. In reviewing the refusal of a continuance, on account of the absence of witnesses, the record will be examined, and the evidence adduced at the trial will be considered by this court for the purpose of determining whether the alleged testimony was probably true. *Tucker v. State*, 9 Okl. Cr. —, 132 Pac. 825.

The record here shows that the indictment was returned on the 20th day of April, 1911, and the defendant was put upon trial May 23, 1912, more than 13 months later. The testimony of the witness Mullins is that he came to Durant in January, and that the defendant induced him to leave, saying "that he would get the trial put off with him out of town," and it is undisputed that the lower court was imposed upon by the defendant in securing a continuance at that time.

Judging from the record, we do not believe that the witness Williams would have testified as it is alleged that he would. No affidavit of Williams was presented with the motion for continuance, nor in support of the motion for new trial. If said witness had been present and testified to the facts stated, we think the jury would not have given credence to such a story in the face of the evidence adduced. It is our opinion that the court did not err in overruling the application for a continuance.

The contention of the defendant's counsel that the verdict is not sustained by the evidence is without merit. A case seldom appears in criminal annals showing more depravity in the defendant, or a greater outrage to common decency and public morals. There appears in the record no error prejudicial to any substantial right of the defendant.

The judgment of conviction is affirmed.

ARMSTRONG, P. J., and FURMAN, J.,
concur.

STEENSLAND v. HESS.

(Supreme Court of Idaho. Nov. 19, 1913.)

1. APPEAL AND ERROR (§ 656*)—CERTIFICATE TO TRANSCRIPT—AMENDMENT.

Where a clerk's certificate to a transcript is insufficient and does not properly certify the

record, as required by the statute and the rules of the court, the same may be amended on motion of the appellant prior to the final submission of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2826-2828; Dec. Dig. § 656.*]

2. COSTS (§ 3*)—ALLOWANCE—STATUTORY AUTHORITY.

The allowance of costs is not a matter left to the discretion of the court, but is governed by the statute, and where there is no statute authorizing costs, no costs are allowable in an action at law.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1, 4, 5; Dec. Dig. § 3.*]

3. COSTS (§ 203*)—ALLOWANCE—COST BILL.

Under the provisions of section 4912, Rev. Codes, a party in whose favor a judgment is rendered, who claims his costs, must, within five days after the verdict or notice of the decision of the court, file with the clerk and serve upon the adverse party or his attorney a copy of his itemized memorandum of costs and disbursements, and a failure to both serve and file the same within the time prescribed by the statute is fatal, and costs cannot be allowed where the statute is not complied with.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 768-771, 779; Dec. Dig. § 203.*]

4. COSTS (§ 203*)—ALLOWANCE—COST BILL.

Filing and service of cost bill is jurisdictional, and it is the evident purpose of the statute to require the party claiming costs to furnish the adverse party with an itemized statement of the same, so as to enable him to file his objections to any item therein contained, or to the whole cost bill, for any cause which may appear to be good grounds for disallowing the same.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 768-771, 779; Dec. Dig. § 203.*]

Appeal from District Court, Gooding County; Edward A. Walters, Judge.

Action by A. J. Steensland against C. B. Hess. From an order refusing to strike a cost bill from files and disallow costs, plaintiff appeals. Reversed.

T. E. Bennett and E. K. Walsh, both of Gooding, for appellant. W. T. Stafford, of Gooding, for respondent.

AILSHIE, C. J. [1] In this case a motion has been made to dismiss the appeal on the grounds that no proper certificate of identification was attached to the transcript, as required by the rules of this court. The certificate which was attached to the transcript by the clerk is insufficient, and falls within the rule announced in the following cases: *Supreme Court Rule No. 21* (96 Pac. 1x); *Village of Sandpoint v. Doyle*, 9 Idaho, 236, 74 Pac. 861; *Simmons Hardware Co. v. Alturas Commercial Co.*, 4 Idaho, 386, 39 Pac. 553; *Kootenai County v. Hope Lumber Co.*, 13 Idaho, 262, 89 Pac. 1054; *Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363; *Hall v. Jensen*, 14 Idaho, 165, 93 Pac. 962; *Doust v. Rocky Mountain Bell Tel. Co.*, 14 Idaho, 679, 95 Pac. 209; *Johnston v. Bronson*, 19 Idaho, 449, 114 Pac. 5. The appellant, however, has filed a motion for leave to supply the record, and has tendered and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

filed a certificate which satisfies the requirements of the rules of the court. The practice of allowing an amended certificate to a transcript has been established by several cases in this court. *Barrow v. B. R. Lewis Lumber Co.*, 14 Idaho, 698, 95 Pac. 682; *Steve v. Bonners Ferry Lumber Co.* (on rehearing) 13 Idaho, 393, 92 Pac. 363. The motion to dismiss the appeal must therefore be denied.

[3, 4] The only question raised on this appeal is the action of the trial court in refusing to strike the cost bill from the files. The cost bill was filed within the five days prescribed by the statute (section 4912, Rev. Codes), but was not served within that time. It appears that the attorney for defendant filed his cost bill, and thereupon stated to one of the attorneys for the plaintiff that "the cost bill has been filed," and the amount thereof, and requested him to pay the same, but did not make a service, as prescribed by the statute, or furnish the attorney with a copy of the cost bill, containing the items, as provided by statute. If the statute is mandatory, and filing and serving the cost bill is jurisdictional, then the judgment of the trial court must be reversed. If it is directory only, and not jurisdictional, the action of the trial court may be upheld.

The section of the statute involved is 4912, Rev. Codes, and reads as follows:

"The party in whose favor the judgment is rendered and who claims his costs, must, within five days after the verdict or notice of the decision of the court or referee, file with the clerk, and serve upon the adverse party or his attorney, a copy of a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief, the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

"A party dissatisfied with the costs claimed, may, within five days after the service upon him of the copy of the memorandum, file and serve upon the adverse party or his attorney, a notice of a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers."

This statute came under the consideration of this court in *Stickney v. Berry*, 7 Idaho, 303, 62 Pac. 924, a case where a cost bill had been stricken from the files, on the ground that it had not been filed within the time prescribed by the statute. The court said: "This statute is mandatory in its terms. The memorandum was not filed in time. * * * The order striking out the cost bill was proper."

California seems to have a similar statute,

and has held to the same doctrine in *Riddell v. Harrell*, 71 Cal. 254, 12 Pac. 67; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409; *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123; *Mullally v. Irish-American Benev. Society*, 69 Cal. 559, 11 Pac. 215; *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783. The same doctrine has been maintained in Montana. See *Orr v. Haskell*, 2 Mont. 350; *Reins v. King*, 27 Mont. 511, 71 Pac. 763; *Riddell v. District Court*, 33 Mont. 529, 85 Pac. 367. A similar doctrine has been followed by the Oregon court in *Miller v. Shute*, 55 Or. 603, 107 Pac. 467.

[2] Costs are statutory, and without a statute authorizing the taxing of costs in actions at law against a losing party no costs could be awarded. *Schmelzel v. Board of Commissioners*, 16 Idaho, 32, 100 Pac. 106, 21 L. R. A. (N. S.) 199, 133 Am. St. Rep. 89, 17 Ann. Cas. 1226; 11 Cyc. 24 and 493. The awarding of costs not being a matter within the discretion of the court, but being governed and regulated by statute, the taxing thereof is jurisdictional, and the statute must be substantially complied with in settling and taxing the same. The fact that the adverse party has notice that a cost bill has been filed does not constitute service any more than notice that a complaint has been filed would constitute service in an action. This statute contemplates that the party who is called upon to pay costs shall be furnished with a copy of the memorandum of costs containing the items, so that he may object to any or all items claimed, and serve and file his objections within the time limited by the statute.

The judgment of the trial court must be reversed; and it is so ordered, and the cause is remanded, with direction to take further proceedings in harmony herewith. Costs of this appeal are awarded in favor of appellant.

SULLIVAN and STEWART, JJ., concur.

SMITH et al. v. INTER-MOUNTAIN AUTO CO., Limited.

(Supreme Court of Idaho. Nov. 22, 1913.)

1. APPEAL AND ERROR (§ 641*)—CERTIFICATE TO TRANSCRIPT—DISMISSAL OF APPEAL.

Where the transcript on appeal does not contain the proper certificate showing what papers the trial court or judge used on the hearing of the matter presented to him, and a motion is made to dismiss the appeal on that ground, and counsel for appellant asks for permission to procure the proper certificate, and he is given permission to do so, and thereafter furnished the proper certificate, the appeal will not be dismissed on that ground.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2789, 2790; Dec. Dig. § 641.*]

2. CORPORATIONS (§ 503*)—FOREIGN—POWERS—RESIDENCE—VENUE.

Foreign corporations that have complied with the Constitution and laws of this state in

regard to doing business in this state have all the rights and privileges of domestic corporations, under the provisions of section 2792, Rev. Codes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.*]

3. CORPORATIONS (§ 503*)—FOREIGN—POWERS—RESIDENCE—VENUE.

Boyer v. Northern Pac. Ry. Co., 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691, cited and approved.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.*]

4. CORPORATIONS (§ 503*)—PLACE OF TRIAL—RESIDENCE OF CORPORATION.

A domestic corporation, under our statutes, has not the absolute right to have all actions brought against it tried in the county where its principal place of business is located.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.*]

5. CORPORATIONS (§ 503*)—CHANGE OF VENUE.

Where an action is brought against a domestic corporation in the county where the contract on which the action is based was made, the corporation has no absolute right, under our statutes, in this state, to have the venue of such action changed to the county wherein is located the principal place of business of such corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.*]

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Action by W. E. Smith and others, co-partners, etc., against the Inter-Mountain Auto Company, Limited, a corporation, to recover commissions for the sale of certain automobiles. From denial of a motion for change of venue, defendant appeals. Affirmed.

Pence & Koelsch, of Boise, for appellant. W. G. Bissell, of Gooding, for respondents.

SULLIVAN, J. This action was brought in Lincoln county to recover commissions for the sale of three automobiles, under a written contract made in said county. The defendant, the Inter-Mountain Auto Company, is a domestic corporation, with its principal place of business in Boise City, Ada county. After the service of summons, the defendant appeared and filed a demurrer to the complaint, and also a motion for a change of venue, basing said motion on the fact that the residence of said auto company was in Ada county. Said motion was supported by an affidavit showing the facts in regard to the residence of defendant. The motion was denied, and this appeal is from the order denying the motion.

[1] 1. A motion has been filed in this court to dismiss this appeal on the ground that there is no certificate to the record showing what papers were considered by the trial court in deciding said motion for a

change of venue. On the hearing counsel for appellant suggested a diminution of the record, and time was given him to furnish the proper certificate from the judge who decided said motion. Thereafter the proper certificate was filed. On the authority of *Steensland v. Hess*, 136 Pac. 1124, decided at the present term of this court, the motion to dismiss must be denied.

[4, 5] 2. The next question presented for decision is, Did the court err in denying said motion for a change of venue, made upon the ground that appellant's principal place of business is in Ada county? It is contended by counsel for appellant that this cause of action is not a local one, and not one of those the place of trial of which is specifically fixed by the statute, and that "the action must be tried in the county in which the defendant * * * resided at the commencement of the action." Section 4123, Rev. Codes. Counsel

for appellant most earnestly contend that a corporation, for the purpose of being sued, is to be regarded as a resident of the county where its principal office or place of business is located, and that a suit against it must be brought in that county, and cites many cases that hold with them upon that point. Those decisions, however, are under a Constitution and statute different from the Constitution and statutes of this state.

[2, 3] In *Boyer v. Northern Pac. Ry. Co.*, 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691, this court held that a foreign corporation doing business in this state does not acquire a fixed residence in a particular county by designating an agent residing in that county upon whom process may be served, and expressly overruled the case of *Easley v. New Zealand Ins. Co.*, 4 Idaho, 205, 38 Pac. 405, announcing a different rule. The statutes of many states provide that the residence of a domestic or foreign corporation is in the county where the place of business of such corporation is located. We have no such statute. Since under the statute (section 2792) foreign corporations that have complied with the Constitution and laws of this state have all the rights and privileges of domestic corporations, the rule laid down in *Boyer v. Northern Pac. Ry. Co.*, supra, is the rule applicable alike to domestic and foreign corporations.

If this court holds under the statutes of this state that all suits must be brought against a corporation doing business in this state in the county designated by it as its principal place of business, then if an animal is killed on the railroad in the western part of the state, and the principal office or place of business of the railroad company is in the eastern part of the state, the venue would be so far distant from the owner of the animal that it might cost him more to try his case at such distant point than the animal is worth, and such holding would be prohibitive of the recovery of the value

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of such animal. The fact that the law provides that service may be made upon a ticket agent or other agent of a railway company would make no difference if this court holds that actions against a corporation must be tried in the county designated as its principal place of business.

As stated in *Boyer v. Northern Pac. Ry. Co.*, supra: "We have no statute or constitutional provision in this state giving a corporation, whether foreign or domestic, the right to have actions against it tried in the county in which its principal place of business is located, or in which the agent who may have been designated under the provisions of section 2653 of the Revised Statutes resides."

In Thompson's Commentaries on the Law of Corporations, vol. 6, § 7426, the author says: "The rule as to venue deducible from the foregoing section is that a corporation, whether foreign or domestic, having a general residence in the state for the purposes of jurisdiction, is deemed to reside throughout the entire limits of the state, and especially in those counties where it carries on its business and exercises its franchises, and is hence suable in any county where it has an agent upon whom process against it may lawfully be served."

The appellant corporation, being a domestic corporation, has no more rights under the statute in this state in regard to venue than has a foreign corporation that has complied with the Constitution and laws of this state.

For the foregoing reasons, the action of the trial court in denying the motion for a change of venue must be affirmed; and it is so ordered. Costs of this appeal are awarded to the respondents.

AILSHIE, C. J., and STEWART, J., concur.

BURGESS v. CORKER et al.

(Supreme Court of Idaho. Nov. 25, 1913.)

1. VENDOR AND PURCHASER (§ 341*)—SUFFICIENCY OF EVIDENCE—DECREE.

Held, that the plaintiff should be charged with the sum of \$40.70 for the possession of the land and the benefit of the same during the period she has been in such possession since the time she paid \$500 on the 24th day of May, 1911, as an offset against the interest which the court finds in finding of law No. 5; that plaintiff cannot recover as an offset for the taxes she has paid, inasmuch as she was in possession of the land during the time she paid the taxes, and paid the same voluntarily.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

2. VENDOR AND PURCHASER (§ 341*)—SUFFICIENCY OF EVIDENCE—DECREE.

Held, that conclusion of law No. 9 be modified as follows: That the plaintiff should have judgment for the sum of \$500 and the costs of this appeal; that the decree should be modified

according to the findings as modified in this opinion.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.*]

Sullivan, J., dissenting.

Appeal from District Court, Elmore County; Edward A. Walters, Judge.

Action by Nellie Burgess against W. G. Corker and another, to cancel and annul a contract for selling and purchasing real property. From a judgment for plaintiff, defendants appeal. Modified.

W. C. Howie, of Mountain Home, for appellants. W. T. Stafford, of Gooding, for respondent.

STEWART, J. When this case came on for hearing counsel for plaintiff presented a motion to dismiss the appeal on the following grounds: (1) That rule 21 of this court has not been complied with; (2) that the record on appeal has not been authenticated or identified by bill of exceptions, or in any manner, or at all; (3) that the record does not show that the papers contained in the transcript are the papers or copies of the papers used by the court below in considering and deciding the action denying a new trial. At that time counsel for appellant made a showing to this court, and upon that showing requested that he be allowed to supply a proper identification of the papers that were used by the trial court at the hearing of the motion for a new trial, and the same was signed by Judge Edward A. Walters, the judge who tried the case, and counsel for appellant, W. C. Howie, makes an affidavit and certificate which show clearly the particular papers and records that were used by the trial judge; that they included the instructions to the jury, the interrogatories submitted by the court to the jury, together with the jury's answers thereto, findings of fact, conclusions of law, decree, defendant's notice of intention to move for a new trial, defendant's amendment to notice of intention to move for a new trial, defendant's motion for a new trial, and the reporter's transcript of the proceedings, all of which are of the records and files in the case, and were submitted to the judge and by him used on the hearing of the motion for a new trial, and constitute all the records and papers used or considered by the judge at such hearing. In the certificate of the district judge he certifies that all of the records and files in said case were submitted to him and used on the hearing of the motion for a new trial, and constitute all the records, papers, and files used or considered, and in this certificate the judge specifies the pleadings and the order of the court overruling the motion for judgment and the overruling of the demurrer, the plaintiff's answer to the cross-complaint, the objection by defendants to trial by jury,

the court's instructions to the jury, the interrogatories submitted by the court to the jury, together with the jury's answers thereto, findings of fact, conclusions of law, decree, defendant's notice of intention to move for a new trial, defendant's amendment to notice of intention to move for a new trial, defendant's motion for a new trial, and the reporter's transcript of the proceedings. Upon the showing made the motion to dismiss the appeal is overruled. *Stensland v. Hess*, 136 Pac. 1124. This action was brought in the district court by the respondent against the appellants for the purpose of canceling and annulling a certain contract entered into between appellants and the respondent, dated the 24th day of May, 1911, whereby the appellants agreed to sell to the respondent certain real estate for the sum of \$3,000, the respondent agreeing to pay \$500 cash down and the balance as follows: \$500 in 6 months, \$1,000 in 18 months and the other \$1,000 in 30 months, or November 24, 1913, and upon completion of the payments appellants were to convey to respondent a good title to the land.

The contract also provides: "In the event of a failure to comply with the terms hereof, by the said party of the second part, the said parties of the first part shall be released from all obligations in law or equity to convey said property, and the said party of the second part shall forfeit all rights thereto and all moneys theretofore paid shall be forfeited as liquidated damages, and the said parties of the first part, on receiving such payments at the time and in the manner above mentioned agree to execute and deliver to the said party of the second part, or to her assigns, a good and sufficient deed for the conveying and assuring to said party of the second part the title to the above-described premises free and clear of incumbrances." The contract also provides: "It is hereby understood and agreed, however, that whereas the said parties of the first part have not now a deed to said lands, but a contract for a deed, the said property being now in process of administration to straighten the title, it is hereby agreed that in the event the said parties of the first part should from any cause fail to perfect their said title to said lands that the said parties of the first part will refund to said party of the second part all moneys heretofore paid or hereafter paid by her on this contract, including all taxes and other necessary payments made by said party of the second part. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties, and that the said party of the second part is to have immediate possession of said premises, but when it is fully determined, if it should be, that the title shall fall, upon repayment of the moneys, as heretofore stipulated, the said party of the second part will redeliver possession of the

premises to said parties of the first part." This contract was recorded in the recorder's office of Lincoln county on the 6th day of June, 1911.

[1] The trial court made findings of law, which were based upon the contract made between the parties to the action, and the court finds as follows:

"(5) That the defendants are indebted to the plaintiff in the sum of \$500, with interest thereon from the 24th day of May, 1911, at the rate of 7 per cent. per annum, together with her necessary costs and disbursements here fixed at \$40.70."

"(9) That the plaintiff should have judgment for the sum of \$500, with interest at the rate of 7 per cent. per annum, interest from the 24th day of May, 1911, together with her costs and disbursements in the sum of \$40.70, and that the said contract should be rescinded, set aside, and held for naught, and canceled of record."

The decree in this case was mainly founded upon findings of law 5 and 9 above stated.

Shortly after the contract was made, the respondent secured an engineer and had a survey made of the land described in the contract, and found that a small portion, three or four acres of cultivated land and a part of the orchard, the house and well, were not on the lands included in the description, and notified appellants of that fact. Appellants also had a survey made, and found that this statement of the respondent was true, and that it was government land, and they immediately took steps to secure scrip to place on the lands containing the improvements and notified the respondent of the above facts, and that they would secure her title to the land she thought she was getting as quickly as they would the balance of the land, but before they had completed the arrangements for the scrip the respondent notified the appellants by letter, dated November 5, 1911, as follows: "Replying to your letter of October 25th, will say I would not be interested in purchasing any new land from you without a stipulated number of inches of water to cover said land, therefore will repeat that the only settlement I will consider is a return of my funds and a release from the agreement entered into under false information." This contract provides for reversion to the appellants if the respondent fails to make her payments and forfeiture of the money heretofore paid, it being cheaper to file a desert entry, although appellants offered to acquire title for the land containing the improvements immediately, and to convey it to her, along with the other lands, without extra charge. This she refused. The respondent never returned possession of the property or offered to do so, notwithstanding the fact that she has been in possession for two years, and never has accounted for or offered to account for the rents and profits of the property, but rather repudiated the contract and refused to comply with

it, and brought this action to have the contract declared null and void, and for the return of her \$500, with interest.

It will be seen that mutual provisions are to be found in the contract involved in this case, among which are that in the event of a failure to comply with the terms of the same by the party of the second part the parties of the first part shall be released from all obligations in law or equity to convey the property, and that the second party shall forfeit all rights thereto and all moneys that had been paid as liquidated damages, and that it was agreed that the parties of the first part had not a deed to said land, but a contract for a deed, the property being in process of administration to straighten the title, and it was agreed in the event the parties of the first part should, from any cause, fail to perfect their title to the lands, that they would refund to the second party all moneys paid.

The record clearly shows that neither one of the parties to the contract complied with the provisions of the contract, in that they did not attempt to carry out the obligations upon either one of the parties, but the record does show that the appellants have retained the \$500, and have never tendered to the plaintiff the \$500 paid at the time the contract was executed, and the plaintiff has refused to surrender the possession of the land she was in possession of by reason of the contract, or to account for the rents and profits of the property during the period from the time the contract was made up to the time of trial. The trial court in his findings and decree has attempted to place the parties in statu quo at the time the contract was executed.

It is apparent in this case that the contract was void on the part of the appellants because of promises made by the appellants, inasmuch as it is admitted by the evidence that the appellant was not the owner of part of the property conveyed by the contract, and that such land was government land, unsurveyed, and that no definite land was agreed upon as definitely settled by the contract, and that in fact the land to be conveyed was not described by the contract as the land intended by either party to the contract, and therefore the contract was void, and could not be enforced by either party. 39 Cyc. pp. 1420-1433; *Lamb v. Davenport*, 85 U. S. (18 Wall.) 307, 21 L. Ed. 759; *Adams v. Church*, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769; *Thredgill v. Pintard*, 12 How. 24, 13 L. Ed. 877; *United States v. Barber Lumber Co.* (C. C.) 172 Fed. 948; *Phillips v. Carter*, 135 Cal. 604, 67 Pac. 1031, 87 Am. St. Rep. 152; *Montague v. McCarroll*, 15 Utah, 318, 49 Pac. 418; *Reynolds v. Sumner*, 126 Ill. 58, 18 N. E. 334, 1 L. R. A. 327, 9 Am. St. Rep. 523; *Maxwell v. Moore*, 22 How. 185, 16 L. Ed. 251; *French's Lessee v. Spencer*, 21 How. 228, 16 L. Ed. 97.

We have examined the verdict of the jury and the findings of the trial judge; and,

while the evidence is conflicting, we are satisfied that there is sufficient evidence to support the trial judge's findings, except the court erred in his conclusions of law Nos. 5 and 9.

Conclusion of law No. 5 should be modified to read as follows: "That the plaintiff should be charged with the sum of \$40.70 for the possession of the land and the benefit of the same during the period she has been in such possession, since the time the plaintiff paid \$500 on the 24th day of May, 1911, as an offset against the interest which the court finds in finding of law No. 5, and that plaintiff cannot recover as an offset for the taxes she has paid, inasmuch as she was in possession of the land during the time she paid the taxes and paid the same voluntarily."

[2] Conclusion of law No. 9 should be modified to read as follows: "That the plaintiff should have judgment for the sum of \$500 and the costs of this appeal; that the decree should be modified according to the findings as modified in this opinion."

It is therefore ordered that the judgment appealed from be modified as follows: That the plaintiff is indebted to the defendant in the sum of \$40.70 for the possession of the land and the benefit of the same during the period she had been in possession since the time she paid the \$500 on the 24th day of May, 1911, as an offset against the interest which the court found in finding of law No. 5; that the plaintiff have judgment for the sum of \$500 and the costs of this appeal.

AILSHIE, C. J., concurs.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. Under the contract the plaintiff purchased a certain tract of land, and it was understood between the seller and the purchaser that certain improvements were on the land purchased, but after a survey it was found that three or four acres of the land in question containing some of the improvements were not on the land described in the contract of purchase. As soon as that was ascertained, the seller offered to script the land and convey to the purchaser a good title to the land on which that part of said improvements was situated, so that the purchaser would get the land she purchased with all improvements that she had contracted to purchase. But for some reason, as soon as she ascertained that all of the improvements were not on the land described in the contract, she refused absolutely to purchase said land and take a good title thereto. The record shows that the seller, the defendant, acted in perfect good faith in this transaction, and that there was no deception or misrepresentation on his part. He informed the purchaser at the time she examined the land that he did not know whether the lines were located. The clear intent of the con-

tract of purchase was to get the land on which all of the improvements were situated, and it was not an essential part of the contract, sufficient to defeat it, if a good title to all of the land did not come through the grantor or grantors that were at first contemplated by the contract. The seller offered to convey to her a good title to all of the land she purchased, containing all of the improvements, and to convey to her a good title within the time required by the contract. She was offered just what she purchased with a perfect title, and it is clear to me that the contract ought to be enforced against her.

Then again: She has had possession of the land for about two years, and the evidence clearly shows that the rental value of that land was \$150 per year, or \$300 for the two years. She having had the use of the land, the rental value ought to be applied on the \$500 payment made by her to the seller in case she is permitted to repudiate the contract. There is no equity in favor of the respondent, the purchaser. She ought to be required to take said land, since a good title has been offered to her. The judgment ought to be reversed.

MANTLE v. JACK WAITE MINING CO.
(Supreme Court of Idaho. Dec. 16, 1913.)

On rehearing of respondent's petition to affirm original judgment without modification. Opinion filed upon appellant's petition for rehearing affirmed.

For former opinion, see 135 Pac. 854.

A. G. Kerns, of Wallace, for appellant.
Jas. A. Wayne, of Wallace, and John P. Gray, of Coeur d'Alene, for respondent.

STEWART, J. A petition for rehearing by counsel for appellant was filed in this case, and this court held that the only shares of stock involved in the controversy, and against the assessment of which an injunction should have been issued in the case, were the 66,000 shares of stock secured by Mantle from the promoters, and that the trial court erred in including in the judgment other shares, amounting to 9,750, owned by Mantle, and the judgment was modified by striking out "9,750" shares of stock.

Thereafter attorneys for respondents filed a petition for rehearing, which was granted, and this branch of the case was thereafter reargued. We have examined this question again, and see no merit in the showing made and argument advanced. The opinion filed upon appellant's petition for rehearing is affirmed.

AILSHIE, C. J., concurs.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court, to the effect that there

was no merit in the petition for a rehearing. This court held in its original opinion in this case as follows: "Under this limitation, the corporation has no power to make an assessment until the promotion stock, as provided in the contract, is paid up to 25 cents per share, which was not paid in this case, and had not been paid at the time the plaintiff's stock was assessed and sold; therefore the assessment was void." In the original complaint, the ownership by the respondent, Mantle, of 75,750 shares of stock was alleged, and also that the corporation was wrongfully attempting to assess the same, thus putting directly in issue the authority of the corporation to assess, not only said 66,000 shares of the treasury stock, but 9,750 shares of the common stock, of said corporation. The trial court enjoined the sale of the entire 75,750 shares of stock. The amended and supplementary complaint set forth the ownership of said 75,750 shares, and alleged that the same and all thereof had been sold in violation of the injunction of the court, and in violation of the rights of the owner, and the complaint alleged that none of said stock was liable for assessment until the promoters had paid up to 25 cents per share on the \$1,000,000 worth of stock issued to them.

The trial court found that the promotion contract was a valid contract and binding on the corporation, and that the defendant corporation had never made any effort to collect from the promoters the unpaid balance due under the promotion contract, and that they had paid nothing except 9½ cents per share, making a total of \$95,000 out of \$250,000 that they were required to pay under said contract. The court also found that a large number of the promoters were solvent and the balance due on their subscription could be collected by the corporation. By finding No. 23 the trial court found that some of the directors of the corporation threatened to levy an assessment upon all of the stock of the corporation, and thereupon the respondent, Mantle, served upon the directors a notice requiring them as directors to proceed and collect from the promoters of the corporation and the subscribers of the 1,000,000 shares of stock the balance due on said promoters' contract, and protested against the levying of any assessment on the general stock of the corporation until the promoters had complied with that agreement. The trial court further found that said corporation had disregarded its duties in that regard, and pretended to levy an assessment upon all of the stock of the corporation, including said 75,750 shares owned by Mantle. The trial court issued an injunction, which covered said 9,750 shares, as well as the 66,000 shares, enjoining the corporation from levying an assessment on the ground that said company had not proceeded in accordance with law in making said assessment, and held in effect that no assessments could be levied upon the general stock of the corpora-

tion until the promoters' contract had been complied with.

This court in the original opinion found that said promoters' agreement was a valid and binding agreement, and that the corporation had no power to make an assessment until the promoters had paid up to 25 cents per share on the stock issued to them, as provided by said contract, which had not been paid at the time the plaintiff's stock was assessed and sold, and therefore said assessment was void. As I understand the pleadings, the validity of said assessment was fairly put in issue, and the trial court found on such issue, and it was not the intention of this court in its original opinion, nor in either of the subsequent opinions, to hold that said assessment and sale were valid as to any of the stock issued by said corporation.

The decision of the majority leaves some of the vital issues undecided. The judgment of the trial court ought to be affirmed, without any modification whatever.

NORTHERN PAC. RY. CO. v. GIFFORD, Secretary of State.

(Supreme Court of Idaho. Nov. 22, 1913.)

1. LICENSES (§ 5*)—CORPORATIONS—LICENSE TAX.

Under the Constitution of this state (section 2, art. 7), the Legislature is authorized to impose a license tax both upon natural persons and corporations, other than municipal, "doing business in this state."

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 4, 19; Dec. Dig. § 5.*]

2. LICENSES (§ 5*)—LICENSE TAX—"DOING BUSINESS IN THIS STATE."

The words "doing business in this state" employed in the Constitution do not apply to a foreign corporation doing only an interstate business, but only applies to local and intrastate business as the same may be distinguished from interstate business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 4, 19; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 2, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

3. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION OF STATUTES—VALIDITY.

Where a statute would be unconstitutional as applied to a certain class of business and cases arising thereunder, and is constitutional as applied to another class, and it is reasonably probable that the Legislature had in mind applying it to the latter class, it should be held to have been intended by the Legislature to apply only to the class to which it could constitutionally apply.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

4. LICENSES (§ 5*)—CORPORATIONS—LICENSE TAX—APPLICATION OF STATUTE—COMMERCE.

Under the provisions of section 2, art. 7, of the state Constitution, authorizing the Legislature to provide for such revenue as may be needful by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, *held*, that section 3, c. 6, of the Session Laws of the Extraordinary Session of the Legis-

lature of 1912, laying a license tax upon domestic and foreign corporations doing business in this state, is an excise tax within the purview and meaning of the state Constitution, and was so intended by the state Legislature, and that it is not a property tax which is laid or intended to be laid upon corporations engaged exclusively in interstate commerce, and cannot apply thereto, but that it does apply to the local and intrastate business in which a corporation may be engaged, whether it is also engaged in interstate commerce or not so engaged.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 4, 19; Dec. Dig. § 5.*]

5. LICENSES (§ 29*)—CORPORATIONS—LICENSE TAX—BASIS.

Under the act of the Legislature, the authorized capital stock of a corporation is only used as a basis of measuring the license or excise tax which is imposed upon the corporation, and is not used for the purpose of a basis for taxing the property of the corporation; the purpose being to graduate the license tax proportionately to the size, magnitude, and probable activities of the corporation seeking to engage in domestic business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 63; Dec. Dig. § 29.*]

6. COMMERCE (§ 69*)—CORPORATION TAX—VALIDITY.

A license or corporation tax imposed on a foreign corporation engaged in both interstate and intrastate business must be so imposed upon the domestic or intrastate business, and have such direct reference to that, as not to impose burdens upon or impair the right of the corporation to continue to carry on its interstate business, and do all things necessary to be done in conducting such business.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113-119; Dec. Dig. § 69.*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by the Northern Pacific Railway Company against Wilfred L. Gifford, Secretary of State. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. H. Peterson, Atty. Gen., J. J. Guheen, and T. C. Coffin, Asst. Attys. Gen., and Miles S. Johnson, Pros. Atty., of Lewiston, for appellant. James E. Babb, of Lewiston (C. W. Bunn, of St. Paul, Minn., of counsel), for respondent.

AILSHIE, C. J. This action was instituted by the Northern Pacific Railway Company to recover from Wilfred L. Gifford a license fee paid by it for the year 1912 to Wilfred L. Gifford as Secretary of State. The Clearwater Short Line Railway Company and the Northern Express Company each paid a license fee for the year 1912 under the same circumstances as that paid by the respondent corporation, and their claims have been assigned to the respondent. The Northern Pacific Railway Company commenced its action, setting up the three causes of action, for the recovery of these license fees which had been paid under protest. These fees were demanded under the provisions of section 3, c. 6, of the Session Laws of the Extraordinary Session of the Legis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lature of 1912. Laws Extraordinary Session 1912, p. 13. The statute reads as follows:

"It shall be the duty of every corporation incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, except such as are exempt by the provisions of section 2 of this act to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows:

"When the authorized capital stock does not exceed \$5,000.00, an annual license fee of \$10.00; when the authorized capital stock exceeds \$5,000.00 and does not exceed \$10,000.00, \$12.50; when the authorized capital stock exceeds \$10,000.00 and does not exceed \$25,000.00, \$15.00; when the authorized capital stock exceeds \$25,000.00 and does not exceed \$50,000.00, \$22.50; when the authorized capital stock exceeds \$50,000.00 and does not exceed \$100,000.00, \$37.50; when the authorized capital stock exceeds \$100,000.00 and does not exceed \$250,000.00, \$52.50; when the authorized capital stock exceeds \$250,000.00 and does not exceed \$500,000.00, \$75.00; when the authorized capital stock exceeds \$500,000.00 and does not exceed \$1,000,000.00, \$90.00; when the authorized capital stock exceeds \$1,000,000.00 and does not exceed \$2,000,000.00, \$130.00; when the authorized capital stock exceeds \$2,000,000.00, \$150.00.

"Said license tax or fee shall be due and payable on the first day of July of each and every year, to the Secretary of State, who shall pay the same into the state treasury. If not paid on or before the hour of four o'clock p. m. of the first day of September, next thereafter, the same shall become delinquent, and there shall be added thereto, as a penalty for such delinquency, the sum of ten dollars (\$10.00).

"The license tax or fee hereby provided authorizes the corporation to transact its business during the year, or for any fractional part of such year, in which such license tax or fee is paid. 'Year,' within the meaning of this act, means from and including the first day of July, to and including the thirtieth day of June next thereafter."

The Northern Pacific Railway Company is a corporation organized under the laws of Wisconsin, with an authorized capital stock in excess of \$2,000,000. The Clearwater Short Line Railway Company is a corporation organized under the laws of Montana, with an authorized capital stock in excess of \$2,000,000, and the Northern Express Company is a corporation organized under the laws of New Jersey, with an authorized capital stock in excess of \$2,000,000. The lines of all three of these companies extend through Idaho and into other states, and all are engaged in interstate commerce. The property of each of these companies was duly and regularly assessed for taxation for

the year 1912 under the general revenue laws of the state providing for the raising of an ad valorem tax.

[1, 4] The fee required to be collected under the provisions of the statute involved in this case is referred to indiscriminately as a "license tax" or an "annual license fee" by the statute, which makes it clear that it is not intended as a property tax. That fact appears from the statute in unmistakable terms. The fee here exacted is clearly an excise tax as usually distinguished from a property tax. It is authorized by that portion of section 2, art. 7, of the state Constitution which says: "The Legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state)." See *State v. Doherty*, 3 Idaho (Hasb.) 384, 29 Pac. 855; *State v. Union Central Life Ins. Co.*, 8 Idaho, 240, 67 Pac. 647; and *In re Gale*, 14 Idaho, 761, 95 Pac. 679. Section 2, art. 7, of the Constitution also provides for a property tax as follows: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article herein otherwise provided." The statute here under consideration would be void, if held to be a property tax, as violating the foregoing provision of the Constitution, in that it does not lay the tax according to the valuation of the property. It would also conflict with section 5 of article 7 of the Constitution, which provides that all taxes shall be uniform. *Humbird Lumber Co. v. Thompson*, 11 Idaho, 624, 83 Pac. 941.

[2] The fact that the statute provides that this license fee shall be paid by "every corporation incorporated under the laws of this state and of every foreign corporation now doing business or which shall hereafter engage in business in this state" does not invalidate the statute as imposing a fee or tax upon interstate commerce, for the reason that it was clearly the purpose of the Legislature that the act should apply only to those corporations "doing business in this state," as that phrase is usually understood, and as it had been previously construed by the Supreme Court of the state. In *re Gale*, 14 Idaho, 761, 95 Pac. 679; *Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038; *Bonham Nat. Bank v. Grimes Pass Placer Mining Co.*, 18 Idaho, 634, 111 Pac. 1078; *Diamond Bank v. Van Meter*, 19 Idaho, 225, 113 Pac. 97. It was evidently not the intention of the lawmakers that this statute should apply to corporations doing only an interstate business within the state, and not "doing business within the state" within the meaning of those terms as applied to local or intrastate business.

[3] In addition to the foregoing, there is another principle of law which would be applicable here, and that is that, where a stat-

ute would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, it should be held to have been intended by the Legislature to apply only to the latter class, and not to the former (In re Gale, 14 Idaho, 761, 95 Pac. 679; Attorney General v. Electric Storage Battery Co., 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631; Commonwealth v. Gagne, 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 442), and so we have no hesitancy in holding that the statute here in question has no application or reference to a corporation engaged solely and exclusively in interstate commerce, or in any way to interstate business, and so for that reason the statute does not run counter to the commerce clause of the federal Constitution.

[5, 6] Counsel for respondent have argued that the judgment of the trial court in sustaining a demurrer to the complaint and entering judgment of dismissal should be sustained upon three grounds: First, that the statute under which this license fee was collected violates the commerce clause of the Constitution of the United States (section 8, art. 1) by imposing a burden on the interstate commerce carried on by the respondent; second, that it violates the due process clause of the Constitution of the United States (section 1 of the fourteenth amendment) by providing a tax upon property situated outside the jurisdiction of the state of Idaho, and thereby depriving respondent of its property without due process of law; and, third, that it violates section 1 of the fourteenth amendment to the federal Constitution in denying to the respondent the equal protection of the law. Our discussion of the one question will necessarily dispose of the first two questions raised. As we have already seen, the fee exacted under the statute in question was not a property tax within the purview of our Constitution and statutes, and was not so intended by the Legislature, as an entirely different method of taxation upon property is provided for by both the Constitution and the statute. It remains to ascertain, first, whether the statute has the effect of taxing the property of the corporation, and, second, whether it imposes a burden on interstate commerce. Respondent relies for affirmance of the judgment in this case upon the following authorities: *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; *A. T. & S. F. R. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; *H. K. Mulford Co. v. Curry*, 163 Cal. 236, 125 Pac. 236; *C. M. & St. P. Ry. Co. v. Swindlehurst (Mont.)* 130 Pac. 966; *Hirschfeld v. McCullagh (Or.)* 130 Pac. 1131; *S. S. White Dental Mfg. Co. v. Commonwealth of Massachusetts*, 212 Mass. 35, 98 N. E. 1056,

Ann. Cas. 1913C, 805; *King County, Wash., v. Northern Pac. Ry. Co.*, 196 Fed. 323, 116 C. C. A. 143.

The case of *S. S. White Dental Mfg. Co. v. Commonwealth of Massachusetts*, last above cited, was taken on writ of error to the Supreme Court of the United States, and since hearing the oral arguments in this case an opinion has been filed in that case by the Supreme Court, under date of November 3d. 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. —. In the opinion in the latter case, the court announces the questions that were presented as follows: "First, the tax is a regulation of interstate commerce, in that it imposes a direct burden on that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, that the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the commonwealth of Massachusetts; and, third, the tax denies to the plaintiffs in error the equal protection of the law." It will therefore be seen that the same questions that were raised in the late *Massachusetts* case are raised in the case at bar.

The Massachusetts statute (St. 1909, c. 490, pt. 3, § 56) which was brought under consideration provided as follows: "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax, to be assessed by the tax commissioner, of one-fiftieth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

The court, after a consideration of the matter and review and citation of a number of authorities, said: "The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

In course of an analysis and discussion of the statute, the court said: "It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed, in part at least, in interstate commerce, when such receipts or capital are not taxed

as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained. *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217 [12 Sup. Ct. 121, 163, 35 L. Ed. 994]; *Provident Institution v. Massachusetts*, 6 Wall. 611 [18 L. Ed. 907]; *Hamilton Co. v. Massachusetts*, 6 Wall. 632 [18 L. Ed. 904]; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 162-165 [31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312]; *United States Express Co. v. Minnesota*, supra [223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459]."

It seems to us that the Idaho statute is freer from objection than the Massachusetts statute upon the point that it attempts to tax the property of the corporation outside of and beyond the jurisdiction of the state. The Massachusetts statute, as will be observed, measures the license or excise tax to be collected by a straight percentage of "one-fiftieth of one per cent. of the par value of its authorized capital stock"; while under the Idaho statute the fee charged is a trifle, based upon a slightly ascending scale, starting with the sum of \$10 on a \$5,000 corporation, and ascending at stated amounts until the largest possible corporation is required to pay an annual fee of \$150, while in the Massachusetts case the maximum fee might reach the sum of \$2,000. Our statute is not based on any established percentage of the company's property or capital stock. *The fee exacted under the Idaho statute is an excise tax on the right of a foreign corporation to carry on business within the state, that is, intrastate business, or purely local and domestic business as distinguished from any interstate business it may be doing.* This statute provides by sections 4, 5, 6, 7, and 8 for the termination of the right of a foreign corporation "doing business within the state" after failing to pay its license tax. No such consequence can be visited upon a corporation for engaging in any interstate business within the state, and a forfeiture under the statute of the right of a foreign corporation to do local or domestic business would in no way affect the right of a corporation to continue to carry on its interstate business, and to do all things necessary to be done in conducting such business.

The principal cases upon which respondent relies for an affirmance of the judgment herein are *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; and *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423. We shall not undertake to analyze those cases, but rather content ourselves with quoting the latest view of them as expressed by the Supreme Court of the United States as the same is set out in the late Massachusetts case hereinbefore cited. The court says: In *Western Union Tel. Co. v. Kansas*, and

Pullman Co. v. Kansas, the statute under which the state of Kansas undertook to levy a charter fee of one-tenth of 1 per cent. of their authorized capital upon the first \$100,000 of the capital stock of foreign corporations and one-twentieth of 1 per cent. upon the next \$400,000, and for each million, or major part thereof, \$200, making a tax of \$20,100 against the *Western Union Tel. Co.* and \$14,800 against the *Pullman Co.*, was declared to be unconstitutional, as having the effect, not simply to exert the lawful power of taxing a foreign corporation for the privilege of doing local business, but to burden interstate commerce, and to reach property represented by the capital stock of the companies, which was duly paid in and invested in property in many states and therefore beyond the taxing jurisdiction of Kansas."

Counsel for appellant place great reliance on *Maine v. Grand Trunk R. R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994; while counsel for respondent have suggested that the rule announced in that case has been characterized by the Supreme Court in *Galveston, H. & S. A. R. Co. v. Texas* [170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017] as an "extreme case," and subsequently criticized in *Meyer v. Wells Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445. We find, however, that the Massachusetts case heretofore quoted from, so recently decided by the Supreme Court, cites *Maine v. Grand Trunk Ry. Co.*, and *Flint v. Stone Tracy Co.*, and U. S. Express Co. v. Minnesota with approval. We find, too, that in most of the cases since *Maine v. Grand Trunk Ry. Co.* the court has been divided, frequently five to four. We see Mr. Justice Holmes concurring with the majority of the court in the cases of *Baltic Mining Co.* and *S. S. White Dental Co. v. Commonwealth of Massachusetts* in enunciating a rule and pointing out distinctions which seem in the plainest accord with the clear, terse, and logical statements of the same justice in his dissenting opinion in *Western Union Tel. Co. v. Kansas*, all of which impresses us with the controlling force of the statement by Mr. Justice Day, in *Dental Mfg. Co. v. Massachusetts*, in commenting upon the Kansas cases, that: "Every case involving the validity of a tax must be decided upon its own facts, and, having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases." And, again, quoting his language from the same case, where he says: "An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to

burden interstate commerce, or to tax property beyond the jurisdiction of the state."

The foregoing excerpt reminds one of the impression he has after reading the Kansas cases, namely, that the really controlling consideration with the great jurist who wrote the majority opinion of the court in those cases was the fact that the amount of the excise or license fee laid upon the corporations by the statute of Kansas was so exorbitant and unreasonable that the companies would not likely have been able to pay the same, and would have, as an alternative, been obliged to abandon their local or intrastate business, if the statute had been upheld, and that the Kansas Legislature was in fact trying to tax the whole property of the corporation, and so the court concluded that it amounted to really laying a tax upon all the property of the companies, whether within or beyond the state, and had the effect of both interfering with *interstate commerce* and *taking the property* of the company *without due process of law*. No such charge can be justly laid against the Idaho statute. It is clear from every viewpoint that it is a mere excise or what is commonly and locally designated as an "occupation" fee intended to be charged against both domestic and foreign corporations for maintaining offices and engaging in local and domestic business, as distinguished from purely interstate commerce. The fee charged is a trifle; the maximum that can be charged upon the largest corporation which may enter the state being only \$150.

So far as the allegation is concerned to the effect that the local business is done at a loss instead of a profit, we think it immaterial and of no avail in a case like this. No objection is made to the corporation abandoning its local business, if it is willing to take the consequences which necessarily follow that action. The license fee or excise claimed is not based upon or measured by the amount of business done. Many corporations and individuals may be doing business either at a loss or profit; but that fact is not considered in laying an excise on the business as such.

We have examined and considered the array of authorities presented on this question with considerable care and much interest; but it would be entirely useless for us to pursue an analysis of these decisions any further. This case presents a purely federal question, and we have endeavored to follow the rule that has been announced by the Supreme Court of the United States, and we believe that, in the light of all the decisions, which is made clearer by the latest expression from that court, the tax here involved is legal and lawful, and does not infringe upon any constitutional right of the respondent, or in any way *burden or interfere with interstate commerce*.

The principle upheld in the following cases seems to support the view we are taking of

this case: *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; *Allen v. Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Horn Silver Mining Co. v. New York*, 143 U. S. 805, 12 Sup. Ct. 403, 36 L. Ed. 164; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586.

We are not unmindful of the holding of the California court in *H. K. Mulford Co. v. Curry*, supra, and of the construction there placed upon a statute substantially the same as ours. An examination of that case discloses that the California court were of the opinion that the Kansas and Arkansas cases (*Western Union Tel. Co. v. Kansas*, supra; *Pullman Co. v. Kansas*; and *Ludwig v. Western Union Tel. Co.*, supra) were controlling, and that they had direct application to the statute there under consideration. It is very apparent from a perusal of the opinion of the court in that case that the writer was of the belief that the Supreme Court had departed from the doctrine of the case of *Maine v. Grand Trunk Ry. Co.* and similar cases. Since the California decision, however, the Massachusetts case has been decided both by the Supreme Court of Massachusetts and the Supreme Court of the United States, and the latter court has cited the Maine case with approval, and the comment of the writer of the latest opinion to the effect that it is the settled purpose of that court to decide each case upon its own facts, irrespective of any theoretical rule, convinces us that the Supreme Court intend to determine the *effect* of the statute as it will apply in *actual practice*, rather than decide it upon the *theory* of any apprehended dangers which might flow from other similar legislation which might prove more exacting. Indeed, the court says: "*A tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the state.*" Possibly, if the statute here under consideration placed the maximum fee to be charged at \$50,000 instead of \$150, the Supreme Court, deciding upon the theory above suggested, might hold that it unreasonably burdens interstate commerce, although the company has the alternative of abandoning its purely intrastate business. In such case the court might conclude that this exaction was not merely an occupation tax for the right to carry on the intrastate business of the company as distinguished from its interstate business. But that is only an imaginary case. The case in hand, on the contrary, imposes a mere nominal fee which can in no case exceed \$150, and is claimed only from corporations "doing business in this state," and we have heretofore seen that this expression has reference only to the carrying on of intra-

state or domestic business as distinguished from interstate business. Certainly, if the corporation's domestic business is not worth paying a fee of \$150 annually for the privilege of transacting such business, it will not suffer by abandoning that business, and confining itself only to its interstate business and such business as necessarily attaches and pertains to its interstate traffic. The proclamation of the Governor declaring a non-complying foreign corporation outlawed and no longer entitled to do business in this state has no reference or application to interstate business, and would in no way impair or diminish the right of such corporation to carry on its interstate business (*Foore v. Simon Piano Co.*, 18 Idaho, 167, 108 Pac. 1038); but it would deprive it of the right to maintain or defend actions in the courts of this state or to any standing whatever in this state in reference to domestic business. In this connection it has been suggested by counsel for respondent that under the provisions of section 5 of article 2 of the state Constitution the respondent corporation as a common carrier could not decline or refuse to carry on domestic or intrastate business. This provision of the Constitution is dealing with domestic business and with corporations doing business in this state as distinguished from interstate business. *Foore v. Simon Piano Co.*, supra. But, if it were otherwise, this provision of the Constitution says they are subject to legislative control, and in the case at bar the Legislature has spoken and designated the terms on which respondent can do business in the state, and that, upon failure to comply with the legislative requirement, it shall have no existence or standing in the state so far as local and intrastate business is concerned, and shall have no standing in the courts for the purpose of prosecuting actions or defending any rights of property. We conclude, therefore, that to refuse to comply with this provision of the statute, and to become outlawed so far as it involves its right to do business in this state, would not subject it to another process compelling it to do the very business that it is prohibited doing under this legislative direction.

We are of the opinion that the statute in question can and ought to be upheld, and that it falls clearly within the purview of the case of *Malne v. Grand Trunk Ry. Co.* and many other cases following the holding there announced, and clearly within the case of *Baltic Mining Co. v. Commonwealth of Massachusetts*, so recently decided (231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. —). We therefore conclude that the judgment of the trial court must be reversed, and the cause remanded, with direction to the trial court to sustain the demurrer.

It is so ordered, with costs in favor of appellant.

SULLIVAN and STEWART, JJ., concur.

JOHNSON v. SOWDEN et al.

(Supreme Court of Idaho. Nov. 28, 1913.)

1. ADVERSE POSSESSION (§ 13*)—QUIETING TITLE (§ 49*)—TAXATION (§ 824*)—LIEN—PRESCRIPTIVE TITLE—JUDGMENT.

Where the evidence shows that J. was in open, notorious, and adverse possession of the land for more than five years continuously before the date of the trial, and that he paid the taxes assessed against his possession, and made improvements upon the land by building a house and barn and fencing a portion of said land, and it appears that S. claims a title upon three tax receipts for the years 1907, 1908, and 1909, and the holder of the tax receipts was at no time in possession of said land or made any improvements upon the same, and never demanded or received a deed based upon the tax receipts or from any person who had any title or claim to said property, and J. has shown his title by adverse possession, and S. has shown that he has a lien upon the land for the taxes he paid, with interest, for the years 1907, 1908, and 1909, it is error on the part of the trial court to enter a judgment quieting the title to each of the parties to a part of the tract of land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. § 13;* Quieting Title, Cent. Dig. §§ 98, 99; Dec. Dig. § 49;* Taxation, Cent. Dig. § 1632; Dec. Dig. § 824.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-235; vol. 8, p. 7668.]

2. TAXATION (§ 824*)—ADVERSE POSSESSION—DEFENSE—TAX LIENS.

In an action to quiet title, where it is shown that J. and S. both claim title, one by adverse possession and the other by reason of being a holder of three tax receipts for the years 1907, 1908, and 1909, and J. showed by the evidence that he has complied with the law as provided in sections 4041, 4042, and 4043, Rev. Codes, and the holder of the tax certificates never returned the same or demanded a deed of said lands upon the certificates, and never went into possession of the land, the adverse possession should not be defeated by the lien of the tax certificates, but the adverse owner should pay to the holder of the tax certificates the amount due for taxes under the law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1632; Dec. Dig. § 824.*]

3. TAXATION (§ 697*)—TAX SALES—REDEMPTION—"PARTY IN INTEREST."

A "party in interest," within the meaning of Rev. Codes, § 1770, providing that redemption of the property sold at tax sale may be made by the owner or any party in interest within three years from the date of purchase, includes a party who was in possession of the property under claim of right at the time it was sold for taxes and who continued in the exclusive possession from that time until redemption was made, especially where the purchaser at the tax sale had no interest in the property except such as he acquired by tax certificate, and where the purchaser of such certificate has never been in possession of the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1394-1400; Dec. Dig. § 697.*]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by George W. Johnson against William Sowden and others to quiet title. From the judgment, the parties named appeal. Modified.

J. G. Hedrick, of Hailey, for appellant Johnson. Sullivan, Sullivan & Baker, of Hailey, for appellant Sowden.

STEWART, J. This is an action to quiet title to the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, section 2, township 1 N., range 18 E. B. M. The complaint is in proper form in an action to quiet title. The defendant filed an answer, denying all the allegations of the complaint, and also a cross-complaint, alleging a cause of action to quiet the title to the same property described in the complaint, which is in proper form in an action to quiet title. This cross-complaint was met by a denial of the allegations contained therein. Upon these issues the case went to trial. The parties stipulated that the findings of fact and conclusions of law in the above-entitled action be waived. Upon the evidence and the pleadings the court entered a decree wherein the title of plaintiff is quieted to the following lands, which were included in the lands described in the complaint and also the cross-complaint: The N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 2, township 1 N., range 18 E. B. M., together with the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining. It was also decreed that the defendants were perpetually estopped and enjoined from setting up any claim thereto or to any part of the property decreed to plaintiff. The court also decreed that the defendant's title was quieted to the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2 in township 1 N., range 18 E. B. M., together with the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining, and that the plaintiff was perpetually estopped and enjoined from setting up any claim thereto, or to any part of the property decreed to defendant. The plaintiff appeals from that portion of the decree which decrees to the defendant the land above described, and the defendant likewise appeals from that portion of the decree quieting title in plaintiff to the lands described. A stipulation was filed by counsel for the respective parties that the two appeals be consolidated, and that the same transcript be used by both parties.

The appellant Sowden assigns errors as to the insufficiency of the evidence; that it was not sufficient to sustain that portion of the judgment or decree quieting title in Johnson to the lands described in the decree. First. In that it fails to show that Johnson had any right, claim, or interest in said property. Second. In that it fails to establish that the plaintiff had any right, claim, interest, or title in the same or any portion thereof sufficient to entitle him to redeem the same from the tax sale. Then follows a number of errors of law which will be taken up after a consideration of the errors assigned as to the sufficiency of the evidence.

The appellant Johnson specifies errors in the insufficiency of the evidence to sustain the decree of the district court as follows: (1) That the defendant Sowden is the owner of the land decreed to him; (2) that the adverse claim of the plaintiff Johnson to the land is invalid and groundless. Then follow errors of law which we will consider in order in the opinion.

[1, 2] We will consider the evidence in support of the title to the land in question by virtue of the possession of Johnson. The facts as to Johnson's title are: That the government issued a patent to the land in controversy to one William C. Morse; that Morse and wife deeded the land to M. T. Harlan, and Harlan and wife deeded the land to Duncan W. Teeter; that subsequently Teeter deeded it by quitclaim deed to the plaintiff Johnson. Johnson testified in this case, and his evidence was corroborated by his son and other witnesses, that he has lived on the land described since December 23, 1905; that he has built a house and stable on the land, costing about \$125, has fenced about 40 acres with a substantial fence and cultivated about 15 acres; that in 1906 he had the land assessed to an unknown owner with the intention of buying the tax certificate, but that Sowden "beat him to it." He afterwards redeemed the tax certificate and paid to the county treasurer the sum of \$23.98, and the treasurer issued to him a printed certificate, dated June 7, 1909, for the sum paid and a description of the land, and that the same was assessed to unknown owner and sold to William Sowden, and there was indorsed on the same "tax redemption fund \$23.98." On June 8, 1910, the plaintiff, by his attorneys, served on the tax collector notice: "July 8, 1907, there was sold at tax sale, by your predecessor in office, the following property, assessed to unknown owner, viz.: [Describing the property involved in this case]. Property was bought in by William Sowden for \$17.97. On June 7, 1909, George W. Johnson redeemed said property from said tax sale, paying the money to the county treasurer through the county recorder, and the tax records were marked showing such redemption. Mr. Sowden, however, has not surrendered his certificate of tax sale, and this is notice to you to caution you not to issue a tax deed to said Sowden or any one else, upon said certificate, as the same has been redeemed as aforesaid. You can readily verify these facts from the records in the office of the auditor and recorder. Very respectfully, George W. Johnson, by McFadden & Brodhead." This was served upon the tax collector. Objection was made to the introduction of this in the following form: "But object to it." No reasons are assigned why the objection is made, or any reason given why the same is not admissible and the trial court overruled the objection. There was no error in the ruling. This is a brief statement of the facts shown

by the proof offered by the plaintiff. The defendant Sowden in support of his claim that he is the owner of the property, and to prove his title, testifies that he purchased the land at a tax sale on the 6th day of July, 1907, and the certificate was received in evidence showing the sale by the tax collector, and that it was struck off to William Sowden, who was the bidder who offered to pay the taxes, penalties, costs, and charges due thereon, amounting to \$17.97. The defendant also introduced tax receipts for the taxes assessed against the property in controversy for the year 1907, amounting to \$15.20 and for the year 1908, \$99.40, and for the year 1909, \$86.14. He also testifies that he has paid the taxes for the years 1910 and 1911, and that he holds receipts for the taxes. They were not, however, introduced in evidence for the years 1910 and 1911. The defendant also introduced evidence showing that the improvements made by Johnson were not so large as fixed by the witnesses for Johnson, but such evidence is so indefinite that the amount cannot be ascertained, and we are satisfied upon this point that the preponderance is with the plaintiff.

As shown by the record, a patent was issued from the United States government to Morse; Morse and wife deeded the land to Harlan; Harlan and wife deeded the land to Duncan W. Teeter. After the above transfers were made Johnson learned that Teeter owned the land upon which he had settled, and upon which he constructed his improvements, and that it was not government land, as he supposed when he located there. After he discovered this fact he began to investigate the condition of the title and to locate Teeter, and he finally succeeded and secured from Teeter the quitclaim deed for the land on the 19th day of —, 1912, which quitclaim deed was filed with the recorder of Blaine county the 23d day of February, 1912. This deed conveyed the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 1 N., range 18 E. B. M., 160 acres.

At the time Johnson made his location on said land his family consisted of himself, his wife, and five children. At that time he thought the land was government land, and that upon establishing their residence and occupancy his son would file a homestead upon the said land; but, soon after he settled upon the land, he ascertained that it was not, and in 1906, about a year after the settlement, he had the same assessed by the assessor to an unknown owner, with the intention to buy the tax certificate, but Sowden beat him to it, but he did in fact redeem the land and paid the county treasurer, and received a receipt therefor for the sum due at the time, June 7, 1907, of the tax sale, at which Sowden received his certificate of sale. The certificate of sale was dated July 8, 1907. Section 1770, Rev. Codes.

The evidence in this case is decisive as to the payment of taxes upon the land in con-

troversy. Johnson testifies that he paid the taxes every year after he went into possession of the land, and that he had the land put on the tax roll in the name of an unknown owner, because he was not sure whether Teeter was the owner, and that thereafter he paid the taxes and took receipts. The receipts, however, were not introduced, and there was very little examination of the witnesses as to what became of the receipts, but the evidence shows that the land was placed on the tax roll at his request. It is shown that the property was not assessed in the name of Johnson or Sowden at any time; and, where it is shown that Johnson was in possession of the property, and paid or tendered the taxes assessed against the land, regardless of the time or priority of payment of taxes by another party, where the other party is not the owner, and is the holder of a tax certificate after payment, this is a lien upon the land for the taxes each year until the deed is issued. This certificate should not defeat the rights of the adverse party.

At the date of the trial Johnson had been in open, notorious, and adverse possession of the land for more than five years continuously, except a part of the winter at two periods, when he spent a short time with his daughter away from home at school, and his title to said land was finally completed by quitclaim deed from Teeter, who was the patentee, which was dated the 19th day of January, 1912. By this quitclaim deed D. W. Teeter does "remise, release and forever quitclaim" the lands involved in this case "together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," and at the time this action was tried George W. Johnson, the plaintiff in this action, secured a title to said land by a written conveyance from the owner, D. W. Teeter.

[3] It has been urged that under the provisions of section 1770, Rev. Codes, Johnson had no right to redeem from the previous tax sale. The statute says: "Redemption of the property sold may be made by the owner or any party in interest within three years from the date of the purchase." It would seem that a party who was in possession of the property under claim of right at the time it was sold for taxes and who continued in the exclusive possession from that time on until redemption was made might be a "party in interest" within the meaning of the foregoing statute, especially in a case where the purchaser at tax sale had no interest in the property whatever except such as he acquired by tax certificate, and where the purchaser of such certificate has never at any time been in possession of the property. It would seem that this would constitute at least color of title, in so far as it concerned a stranger purchasing land at tax sale, where the land has been assessed to "an unknown owner."

Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784. The following authorities would seem to support this view: Foster v. Bowman, 55 Iowa, 237, 7 N. W. 513; Jaggard on Taxation, p. 622.

In this case it should also be remembered that the controversy arose and was originally waged between strangers to the record title; Johnson entering upon the land, thinking in the first place that it was public domain, and subsequently discovering that it was deeded land. It was thereafter assessed to an "unknown owner," and Sowden purchased it at tax sale. Neither one connected himself with the record title until this action was instituted, whereupon Johnson procured a deed from the owner of the legal and record title. He is therefore in a position at this time to aid his adverse possession, which was at all times good as against all the world, except the owner of the legal and record title, by the legal title acquired from the original owner. Sowden has never been in possession of said land or any part thereof. He has never made any improvements upon said land; he has never claimed title to said land except his claim under his tax receipts for 1907, 1908, and 1909, and has never received a deed based upon the tax certificates, or any one of them, for any of the years named in the same. By reason of the above tax receipts he has a lien upon said lands for the taxes he has paid, and Johnson should be required to pay such taxes that are due, with interest from the time that Sowden paid the taxes for the years 1907, 1908, and 1909.

It is clear from the facts stated as to Johnson's adverse possession that the record shows that such possession was open, notorious, and adverse possession of the land for more than five years continuously before the date of the trial, and that he paid the taxes thereon.

Section 4041, Rev. Codes, provides:

"For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

"1. Where it has been usually cultivated or improved;

"2. Where it has been protected by a substantial inclosure;

"3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purpose of husbandry, or for pasturage, or for the ordinary use of the occupant;

"4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

The evidence supporting Johnson's title upon the ground of adverse possession shows that Johnson complied with the usual course and custom of the adjoining country where this land was cultivated, and the evidence shows that he cultivated 15 acres and constructed a house and barn and inclosed 40 acres of the land, and intended such improvements to become a part of the entire 160 acres, which brings it within the provisions of subdivision 4 of section 4041. Hall v. Blackman, 8 Idaho, 272, 68 Pac. 19; Craven v. Lesh, 22 Idaho, 463, 128 Pac. 774; Cramer v. Walker, 23 Idaho, 495, 130 Pac. 1002.

We therefore hold in this case that Sowden is not the owner, and is not entitled to have his title quieted to the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 1 N., range 18 E. B. M.; that the part of the decree of the lower court from which the plaintiff appeals should be modified and a decree entered quieting the title to plaintiff to the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 1 N., range 18 E. B. M. The trial court is also directed to require Johnson to pay to the clerk of the district court the amount of taxes paid by Sowden upon the land in controversy for the years 1907, 1908, and 1909, with interest as provided by law. The costs in this case, both in the district court and on this appeal, are awarded to the plaintiff. The taxes for the year 1906 were paid by Johnson in redeeming the land and the money was paid to the county treasurer.

The judgment is modified. Costs awarded to plaintiff.

AILSHIE, C. J., and STEVENS, District Judge, concur.

STATE v. AURAND.

(Supreme Court of Washington. Dec. 5, 1913.)

1. BURGLARY (§ 45*)—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for second degree burglary held to make it a jury question whether accused was the person who committed the offense.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 110; Dec. Dig. § 45.*]

2. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—REASONABLE DOUBT.

The court instructed that the burden was on the state to prove that accused was the party who committed the burglary, and that he was presumed to be innocent and entitled to the benefit of that presumption unless the state satisfied the jury by the evidence beyond a reasonable doubt that he committed the offense, and that it was not enough that it be shown that it was probable that accused was the person, and, on the other hand, the state did not have to satisfy the jury to such an absolute certainty that there was no possibility of being mistaken, but the jury must be satisfied to a moral certainty, and if accused was "the man who is to blame you must say so, if he is not to blame you must say so," and that if the jury

felt that they had an abiding and settled conviction that accused was the man then they were satisfied beyond a reasonable doubt. *Held*, that the quoted words, construed with the whole instruction, were not erroneous as tending to destroy the legal presumption of innocence; the word "blame" being used as synonymous with "guilty."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

William J. Aurand was convicted of second degree burglary, and appeals. Affirmed.

Ivan Blair, of Seattle, for appellant. John F. Murphy and H. B. Butler, both of Seattle, for the State.

CHADWICK, J. Defendant is charged with the crime of burglary in the second degree. The only question in the case is one of identity. The burglary is not denied, but the defendant insists that he is not the one who is guilty of the offense. At about 11:30 o'clock p. m., on the 20th day of December, 1912, a man was discovered in an attempt to burglarize a tailoring establishment in the city of Seattle. A policeman was called. The man was seen by the one who first discovered his presence, but upon the witness stand this person was not willing to swear that the defendant was the same man. When discovered the burglar fled. The policeman gave chase. The burglar was 150 to 200 feet ahead of the officer. The tailoring establishment was located on or near the corner of First avenue and Seneca street in the city of Seattle. The burglar ran up Seneca street, thence through an alley to Spring street, thence east on Spring street to Second avenue, thence south on Second avenue to Madison street, thence east for a block or two, where defendant was arrested. When the chase began, the officer fired two shots. Defendant accounts for his presence and his running, saying that he was a stranger in the city; that he had been down on the water front looking for a job longshoring; that he was walking up the hill; that he heard the shots, and ran in order to keep out of trouble.

The testimony of the officer on the question of identity is substantially as follows: "Q. I will ask you whether or not you saw this defendant on that night? A. Did I see him? Yes, chased him four blocks. * * * Q. Under what circumstances did you see this defendant that night? A. Well, I was coming up First avenue on my beat, and got right there at Mr. Curran's store, and he came out, and he said: 'I think there is somebody back out in the alley. I have got a bell that goes through the back end, and that don't ring unless somebody touches it.' So we went around to take a look, went into the alley, and I threw up my light and I couldn't see anybody. * * * Q. Was anybody with

you? A. Mr. Curran was with me. Q. Where was he? A. Back of me. * * * I threw the light around and didn't see anybody, and I turned to come out, and as I turned I threw the light up like that, and Mr. Curran seen this fellow, and he says, 'There he is.' With that I beat it out. I got to Seneca street, and he was just going down the alley, and I took after him. * * *

Q. Where did he go then? A. He dove around the corner and went up Spring to Second; and I got to the corner of the alley just in time to see him go down Second, and I kept after him. * * * The Court: He ran down the alley to Madison? A. No, he ran down Second to Madison. He ran down the alley from Seneca to Spring; then ran up Spring to Second; then ran down Second to Madison; and I had him in sight every turn. I could just see him; so I kept after him. When I got to Second and Madison, I looked up, and he was halfway up the hill again up to— The Court: He was halfway where? A. Halfway to Third on Madison. * * *

Q. Then what happened? A. He stopped, and I went up and took hold of him and led him down to the box and sent him in. * * * Q. And so you stood there and looked up that grade and saw a fellow just disappear into the alley? A. Yes, sir. Q. And you followed him? A. You bet I did. Q. How far do you think it is, from this little blind alley that you came out of there, up to this platted alley? A. Oh, it is probably 50 feet; 40 or 50 feet. Q. You could not—that party that you saw around the tailor shop, at any time that you saw him there, you don't pretend that you could identify him, do you? A. Well, I didn't see him. All I saw was somebody disappear down the alley. Q. Then you got no view of him except it was just somebody? A. Yes, sir; but I had somebody in sight all the time. * * *

Q. Could you see any one at the time you fired? A. I seen this man running. Q. Could you see any one else? A. No. * * * Q. How far were you behind the man you were following? A. I was about 200 feet, after I first got sight of him, after I got to the alley. Q. After you got into the alley, he was about 200 feet in advance of you? A. Yes. Q. At the time the man turned out of the alley into Spring street, how far in advance of you was he? A. Possibly 100 feet or 150 feet. Q. And you lost sight of him then? A. At that time for a minute. Q. And you also lost sight of him when he went into the alley? A. Sure I did. Q. When you were running from this blind alley up to the main alley, he was out of your sight? A. He was out of my sight until I got to the corner. * * * Q. This man that you chased down the alley in that chase, did you become familiar enough with his appearance, so that, when you lost sight of him and picked him up again, you knew it was the same person? A. Yes, I took a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

view of him. Q. How many men were running that night, that you saw? A. I didn't see anybody. Q. Whenever you picked this fellow up again he was still running? A. Still running. He appeared to be getting slower, of course. I kept sight of him. Q. So that the fellow you caught, you know is the same fellow you were chasing? A. Positively."

[1] This testimony, coupled with the fact that defendant was a witness in his own behalf, and that his testimony as we read it in the record seems unsatisfactory, and must have been so considered by the jury, leads us to believe that the testimony was sufficient to carry the question of identity to the jury.

Error is also complained of in the following instruction: "Now the burden is on the state to prove that he is the party. He is presumed to be innocent and entitled to the benefit of this presumption, unless the state has overcome that and satisfied you by the evidence, beyond a reasonable doubt, that this defendant is the party who committed the burglary. It is not enough that the state may have shown you that it is probable this is the man. That is all that you have to be satisfied of in a civil action—probability on one side or the other. In a criminal case, you may believe that he probably is the man, yet have a reasonable doubt. On the other hand, the state don't have to satisfy you so conclusively and to such an absolute certainty that there is no possibility of being mistaken whatever. Very few things in the domain of human knowledge are susceptible of such absolute proof as that. You may be satisfied of a thing beyond a reasonable doubt, and yet you may possibly be mistaken. So you don't have to be satisfied to an absolute certainty; but you must be satisfied to a moral certainty. Now, if you are satisfied beyond every reasonable doubt that this young man is the man who committed burglary, then you will find him guilty, notwithstanding the fact that you may possibly be mistaken about it. You men and women are fair and impartial and don't care whether he is the man or not. If he is the man who is to blame, you must say so. If he is not to blame, you must say so. So, examine carefully all the evidence in this case, and if you can say and feel that you have an abiding and a settled conviction that this is the man, then you are satisfied beyond a reasonable doubt. If you have not such a conviction in your mind, you are not satisfied."

[2] The words: "If he is the man who is to blame, you must say so; if he is not to blame, you must say so"—are complained of. It is said that the instruction tends to minimize, if not destroy, the legal presumption of innocence, and that the use of the words last quoted places a heavier burden

on the defendant than the law warrants. The court had fairly instructed the jury, and we think that it cannot be said that the instruction tended to produce in the minds of the jury a belief that, unless the defendant's conduct in question was blameless, he should be convicted. The word "blame" must be construed as a part of the entire instruction and, when so considered, it is evident that the court used the word "blame" as synonymous with the word "guilty." The whole context of the instruction seems to make this conclusion certain. When so considered, the words will not be held to be misleading.

The judgment is affirmed.

CROW, C. J., and MAIN, ELLIS, and GOSE, JJ., concur.

HAUMESSER v. CHEHALIS COUNTY.

(Supreme Court of Washington. Dec. 5, 1913.)

1. PUBLIC LANDS (§ 106*)—FINAL CERTIFICATE—SUBSEQUENT ATTACK ON TITLE.

The United States land department may contest the regularity of the proofs as to residence, etc., or the sufficiency thereof, after final certificate issues to a homestead applicant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

2. TAXATION (§ 5*)—LIABILITY OF PERSONS AND PROPERTY—HOMESTEAD INTEREST—SUSPENSION OF LIABILITY.

Under Rem. & Bal. Code, § 9140, providing for the assessment of all improvements on public lands as personal property until the settler has made final proof, and that after final proof and the issuance of a certificate therefor the assessment of the land itself, notwithstanding no patent therefor is issued, the filing by the land department of adverse proceedings after the issuance of the final certificate did not suspend the right of the state to levy and collect taxes upon the land, especially where the hearing was dismissed and the land remained in the possession of the locator, to whom patent was finally issued.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 17, 31-44; Dec. Dig. § 5.*]

Department 2. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action for injunction by Joseph Haumesser against Chehalis County. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to dismiss the proceeding.

J. E. Stewart and A. Emerson Cross, both of Aberdeen, and O. M. Nelson, of Montesano, for appellant. W. H. Abel, of Montesano, for respondent.

MOUNT, J. This action was brought by the plaintiff to restrain Chehalis county from collecting taxes for the years 1911 and 1912 upon certain lands owned by him, upon the ground that the taxes levied for those years were void. The cause was tried upon an agreed statement of facts. The court concluded as a matter of law that the taxes for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1911 and 1912 levied upon the plaintiff's lands were void. A judgment was accordingly entered. The defendant, Chehalis county, has appealed.

The stipulated facts are as follows: On June 24, 1905, Joseph Haumesser made homestead application for the lands in question. Thereafter, on October 27, 1909, Mr. Haumesser made final proof and received a final certificate. The lands were assessed for the year 1910, and the taxes for that year were paid by Mr. Haumesser to Chehalis county. On October 1, 1910, the United States government, by its duly authorized officers, filed an adverse proceeding against the entry and final proof of Mr. Haumesser, alleging that he had never established and maintained a residence on the lands and that he had never cultivated them. In March, 1913, after investigation and additional proofs, the adverse proceeding was dismissed and the lands were clear-listed for patent. Thereafter on April 15, 1913, a United States patent was issued to Mr. Haumesser conveying the lands to him.

The controlling question in the case is: Did the filing of the adverse proceeding against the entry and final proof exempt the land from taxation pending the hearing? It is argued by the respondent that the issuance of final certificate was only prima facie evidence of compliance with the homestead law; that this certificate was subject to attack and additional proofs by the land department of the United States.

[1] There can be no question that the land department of the government had a clear right to contest the regularity of the proofs or the sufficiency thereof after final certificate had been issued.

In *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591, the Supreme Court of the United States upon this question said: "It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title had passed. *Cornelius v. Kessel*, 128 U. S. 456 [9 Sup. Ct. 122, 32 L. Ed. 482]; *Orchard v. Alexander*, 157 U. S. 372, 383 [15 Sup. Ct. 635, 39 L. Ed. 737]; *Parsons v. Venzke*, 164 U. S. 89 [17 Sup. Ct. 27, 41 L. Ed. 360]. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. 'A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.' *Miller v. Kerr*, 7 Wheat. 1, 6 [5 L. Ed. 881]. After the issue of the patent the matter becomes subject to inquiry

only in the courts and by judicial proceedings. * * * This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase money has been paid and a receiver's final certificate issued."

And in *Orchard v. Alexander*, 157 U. S. 372, at page 383, 15 Sup. Ct. 635, at page 639 (39 L. Ed. 737), that court said: "Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius v. Kessel*, 128 U. S. 456 [9 Sup. Ct. 122, 32 L. Ed. 482], not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson v. Towsley*, 13 Wall. 72 [20 L. Ed. 485]. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. *Carroll v. Safford*, 8 How. 441 [11 L. Ed. 671]; *Witherspoon v. Duncan*, 4 Wall. 210 [18 L. Ed. 339]. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department."

There can be no doubt, therefore, that the land department was authorized to investigate the proofs upon which the final certificate was issued and to call for additional proofs. This, we think, did not change the status of the final certificate. It simply delayed the issuance of the patent, and in case of an adverse ruling by the land department the certificate might have been canceled. But in this case the final certificate was not canceled, and Mr. Haumesser remained in possession of his land.

[2] No case has been cited to us which holds that an adverse proceeding such as this relieves the land from taxation. The statutes of this state (Rem. & Bal. Code, § 9140) provide: "The assessor must assess all improvements on public lands as personal property until the settler thereon has made final proof. After final proof has been made, and a certificate issued therefor, the land itself must be assessed, notwithstanding the patent has not been issued."

It is clear, therefore, that under the statute this land was subject to taxation unless the filing of the adverse proceeding after the issuance of the final certificate suspended the right of the state to levy taxes upon the land. This question was before the Supreme Court of Minnesota in the case of *County of Polk v. Hunter*, 42 Minn. 312, 44 N. W. 201. That was a case substantially like this. The court there said: "Lands sold by the United States may be taxed before it has parted with the legal title by issuing a patent, and this doctrine is applicable to cases where the right to the patent is complete, and the

equitable title is fully vested in the party, without anything more to be paid, or any act to be done going to the foundation of his right. * * * The respondent concedes the law to be as stated above, but argues that, because the entry is suspended and further proof required, the land is still public and nontaxable; but this position cannot be sustained. The defendant has complied with the law in all respects, except in the matter of proof. That submitted was held sufficient, but irregularly made. He has paid his money, and to him has been issued a receiver's final receipt, which, under the laws of this state, is prima facie evidence of title, * * * and may be recorded with the same force and effect in law, with respect to notice and title, as the patent. * * * The respondent is the equitable owner of the land, the legal title only remaining in the United States. He is required to perform another act, that is, to submit his proof in the regular way; but this in no manner affects the foundation of his right to the land. That is assured, because he has complied with the pre-emption law; and if he fails to obtain formal evidence of title, it will be through an omission for which he is responsible. Should this be the result, and the land revert to the federal government, the question of its taxation would be one to be hereafter settled, and in which respondent would have no interest. * * * It would be opposed to sound reason to say that the state can be deprived of its revenue, if the suspension be arbitrary and unauthorized, until such time in the future as it pleases the department to so declare, by rescinding its order or otherwise; and it would be unjust to permit the respondent to escape the common burden of taxation by delaying to comply with the requirements of the commissioner as to formal proof. The land is taxable."

In Iowa, in *Herrick & Stevens v. Sargent & Lahr*, reported in 140 Iowa, 590, 117 N. W. 751, 132 Am. St. Rep. 281, the court, in considering the same question presented here, said: "The rights of the locator in the premises do not date from the time when he succeeded in removing the cloud, but from the date when the location was actually made. It is the well-established doctrine that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxes. *Railroad Co. v. Price*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687. And the fact that patent is suspended during some investigation or controversy concerning the rights of the person claiming such patent does not necessarily prevent the application of this rule. *Railroad Co. v. Patterson*, 154 U. S. 130, 14 Sup. Ct. 977, 38 L. Ed. 934; *Maish v. Arizona*, 164 U. S. 609, 17 Sup. Ct. 193, 41 L. Ed. 567; *Loan & Trust Co. v. Railroad Co. (C. C.)* 76 Fed. 15."

In *Farpham v. Sherry*, 71 Wis. 568, 37 N. W. 577, in considering the same question we now have presented, in a case very similar to the one under consideration, that court said: "The case of *Wis. Cent. R. Co. v. Price Co.*, 64 Wis. 579 [26 N. W. 93], in principle is identical with the present case. The railroad company was entitled to patents from the United States for certain specific lands. The government land officers refused to issue such patents, claiming that the railroad company was not entitled thereto, yet the equitable title was held to be in the railroad company, and the lands were held taxable although the patents were refused. See, also, the recent cases of *Wis. Cent. R. Co. v. Wis. River Land Co.*, 71 Wis. 94 [36 N. W. 837]; *Spiess v. Neuberg*, 71 Wis. 279 [37 N. W. 417, 5 Am. St. Rep. 211]. The question under consideration was fully discussed in those cases by Mr. Justice Cassoday, and numerous authorities cited bearing upon it. The opinions and judgments therein are conclusive of the question, and relieve us from the necessity of further discussion thereof. * * * We hold that, from the location of the land by Watkins in 1857 down to the sale thereof in 1863 for nonpayment of taxes, the entire equitable title to, and beneficial interest in, the land in controversy was in Watkins, by virtue of his entry, location, and purchase thereof, and hence that the same was taxable in 1862 unless exempted from taxation by the act of 1861."

These cases, it seems to us, are in point upon the question here, and are decisive of it. We are of the opinion, therefore, that the filing of the adverse proceeding did not suspend the right of the state to collect the taxes which were levied against the land pending this hearing, especially where the hearing was dismissed, and where the land had remained in the possession of the locator and patent was finally issued to him.

The respondent relies upon *Kansas Pac. Ry. Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373. But that was a case where the court held that the equitable title had not fully vested in the railway company, because the railway company had not paid the cost of the survey as required by the act granting the land to it. That was an act going to the foundation of the right to the land. In this case the final certificate was issued upon proofs, and the equitable title thereby fully vested in the settler. The adverse proceeding which was filed did not purport to set aside the certificate of final proof, but merely had the effect to suspend issuance of the patent until the proceedings were determined. The equitable title and possession of the land rested in Mr. Haumesser during that time.

The judgment of the superior court is therefore reversed, and the cause remanded, with instructions to dismiss the proceeding.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

PACIFIC DRUG CO. v. HAMILTON et al.
(Supreme Court of Washington. Dec. 5, 1913.)

APPEAL AND ERROR (§ 1199*)—REMAND—POWER AFTER REMAND—MODIFICATION OF JUDGMENT.

After the Supreme Court had rendered a judgment affirming a judgment in favor of plaintiff against the original defendant, and a remittitur was filed, the trial court had no power to enter an order, on plaintiff's ex parte application amending the judgment so as to include as a defendant a casualty company, who was not originally a party below or on appeal, except that the Supreme Court's judgment ran against it as surety for costs; Rem. & Bal. Code, § 1741, providing that the Supreme Court's order on affirmance and remand, upon being certified to the trial court, shall have the same force as if made by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674-4676; Dec. Dig. § 1199.*]

Department 1. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by the Pacific Drug Company against J. J. Hamilton. From an order modifying a judgment for plaintiff against such defendant, by including the Pacific Coast Casualty Company as a party defendant, and from an order denying a motion to quash such order, the Pacific Coast Casualty Company appeals. Reversed, with directions to vacate the amended judgment.

Harrison B. Martin, of Seattle, for appellant.

GOSE, J. This is an appeal from an order denying a motion to quash an order, entered ex parte, modifying a judgment which had been affirmed by this court, and from the order modifying the judgment.

The facts are these: On the 3d day of February, 1912, a judgment was entered in favor of the Pacific Drug Company, a corporation, against the defendant J. J. Hamilton, in a suit then pending in the superior court of King county. On the 10th day of February, 1913, this court affirmed the judgment. On the 4th day of March, 1913, after the filing of the remittitur in the court below, on the ex parte application of the plaintiff, the court entered an order amending the judgment so as "to include as party defendant the said Pacific Coast Casualty Company, a corporation." The appellant, the Pacific Coast Casualty Company, thereafter and on the 25th day of March appeared specially and moved the court to quash its amended judgment, on the ground (1) that it was entered ex parte; and (2) that the court had no jurisdiction either over the subject-matter or of the person of the appellant. This motion was denied. This appeal followed.

The respondent has not favored us with a brief. The case on appeal is reported in 71 Wash. 469, 128 Pac. 1069. This appellant was not a party to the original proceeding in

the court below or in this court, except that the judgment of this court ran against it as surety for the costs upon appeal. The final disposition of the case in this court was that the judgment "is affirmed."

The respondent made no application in this court to have its judgment extended to include the appellant. It was the duty of the court below to carry out the judgment of this court. It had no power to do otherwise. The amended judgment against the appellant was a nullity. Rem. & Bal. Code, § 1741; State ex rel. v. Superior Court, 8 Wash. 591, 36 Pac. 443; State ex rel. v. Hatch, 36 Wash. 164, 78 Pac. 796; German-American State Bank v. Sullivan, 50 Wash. 42, 96 Pac. 522.

The judgment of the lower court, amending the former judgment, and the order of the court refusing to vacate it, are reversed, with directions to vacate the amended judgment.

CROW, C. J., and CHADWICK, ELLIS, and MAIN, JJ., concur.

FROSTMAN v. STIRRAT & GOETZ INV. CO.

(Supreme Court of Washington. Dec. 12, 1913.)

1. APPEAL AND ERROR (§ 1097*)—REVIEW—DECISION ON PRIOR APPEAL—LAW OF CASE.

The decision of the Supreme Court on a prior appeal is the law of the case on all points then passed on.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.*]

2. APPEAL AND ERROR (§ 1099*)—SUBSEQUENT APPEAL—LAW OF THE CASE.

Where it had been held, on a prior appeal of an action for injuries to a third person by the omission of an adjacent property owner to cover a sidewalk area during the reconstruction of an adjoining building, that plaintiff was not a trespasser, but was lawfully at the place where he was injured, the court's failure to include a clause in the instruction embodying a finding that such adjoining owner had forbidden plaintiff to enter the sidewalk area was not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

3. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE VERDICT.

Plaintiff, a workman engaged in installing cluster street lights for the city within the sidewalk area in front of a building under reconstruction, was injured by a piece of scantling thrown from one of the upper windows. At the trial four years after the injury plaintiff's evidence showed that he was practically a physical wreck, and always would be, that he was constantly in pain, and unable to sleep except an hour or two each day, and had entirely lost an earning capacity of from \$3 to \$3.50 a day. It also appeared that he had incurred an indebtedness of \$2,000 for medical attendance and services. There was a difference of opinion between the medical witnesses; those testifying for plaintiff being of the opinion that his injuries were severe and permanent, while those testifying for defendant were of the opinion that he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was a malingerer. *Held*, that a verdict allowing plaintiff \$10,000 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 182.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Edward Frostman against the Stirrat & Goetz Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles A. Riddle and Hughes, McMicken, Dovell & Ramsey, all of Seattle, for appellant. Dillon & Dunaway and Reynold, Ballinger & Hutson, all of Seattle, for respondent.

MORRIS, J. This is the second appeal in an action for damages for personal injuries. On the first appeal the judgment of the lower court in dismissing the action at the close of plaintiff's evidence was reversed, and a new trial ordered. This has been had, and, plaintiff having obtained verdict and judgment, defendant now appeals.

[1] The facts will be found stated in the opinion on the first appeal. 65 Wash. 608, 118 Pac. 742. Many of the points now relied upon as error were urged in support of the first judgment, where it was contended that the judgment appealed from was proper, because plaintiff was a trespasser, and that the absence of the staging was not the proximate cause of the injury. These contentions were overruled, and it was held that plaintiff was not a trespasser, that he was lawfully within the sidewalk area, and that the proximate cause of the injury was the absence of the staging required by the city ordinance. The first opinion is conclusive of all points there passed upon, and disposes of all the errors now urged save a few. It is now urged that respondent was guilty of contributory negligence in law. The only facts now before the court that were not before the court on the first appeal are such as were brought out in appellant's evidence, and we do not find that they are sufficient to change the result then reached, that the cause should have been submitted to the jury.

It is said that the first record refers to the obstruction between the street proper and the sidewalk area as an accumulation of debris sufficient to impede public travel across it; while the evidence in this record discloses that what was then referred to as an accumulation of debris was stone and brick taken from the dismantled wall, and neatly and compactly piled, making a loose wall six or eight feet high along the front of the building. This is probably true; but it is also shown that respondent could easily have passed this pile through openings left for the workmen engaged on the building, so that it does not materially alter the situation so far as the questions of trespass, assump-

tion of risk, and contributory negligence are concerned. Nor does it change the situation from which it was found on the first appeal that the lack of staging was the proximate cause of the injury.

[2] Error is also predicated upon the giving of an instruction and the refusal to give three others. Two of those it is said were refused we find actually given in the language requested. The third was given as requested, save that the court omitted one clause embodying a finding that the appellant had forbidden respondent to enter the sidewalk area. It having been held, as the law of the case on the first appeal, that respondent was not a trespasser, and that he was lawfully at the place where he was injured, the failure to include this clause was not error.

The instruction objected to is this: "The mere facts, if you find them to be facts, that the city granted a permit to the defendant to deposit material, tools, etc., upon the sidewalk area in front of the Seattle Theater Building, and that there was no staging over it, would not make plaintiff's work there unlawful. If his work called him to the area, and if you find that the evidence does not show that he was unlawfully where he was, he had a right to be there."

We see no objection to it, and appellant calls our attention to none. The first part, viz., that the permit to deposit material and tools upon the sidewalk area and the absence of staging would not make plaintiff's work unlawful, must now be held to be the law, since on the first appeal, with all these facts before the court, it was said that respondent was lawfully within the sidewalk area. As to the second part, it requires no reasoning to say that respondent had a right to be where he was at work, if the evidence did not show he was there unlawfully.

[3] It is next urged that the verdict of \$10,000 was excessive. Unfortunately there was much dispute and contradiction between the medical men as to respondent's present condition. Those testifying for respondent said his injuries were severe and permanent; while appellant's witnesses were of the opinion that respondent was a malingerer. Whatever our opinion may be of the fact, we cannot usurp the function of the jury, and say that they have erroneously decided a question of fact. If there was no dispute as to respondent's physical condition, we could say whether or not, in our judgment, the damages allowed were more than compensatory, and under such circumstances appellate courts frequently do say that verdicts are excessive. But, where there is a sharp conflict as to the damages sustained, the verdict becomes a finding of fact, which we are not at liberty to disturb, unless we could say, assuming the theory of respondent as to the extent and nature of his injuries to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

correct the amount awarded is excessive. This we cannot do in this case. Four years have passed since the injury. There was evidence that respondent had lost an earning power of from \$3 to \$3.50 per day; that he was practically a physical wreck, and always would be; that he was constantly in pain, unable to sleep except an hour or two each day; that he has incurred an indebtedness of \$2,000 for medical attendance and services. If this is true, and the jury by the verdict say it is, we refuse to say the verdict is excessive.

We find no reason for disturbing the judgment, and it is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

STATE v. CHIN SAM.

(Supreme Court of Washington. Dec. 12, 1913.)
CRIMINAL LAW (§ 564*)—SUFFICIENCY OF EVIDENCE—VENUE OF OFFENSE.

On a criminal trial, where the testimony taken as a whole clearly showed that the witnesses referred to the city of Bellingham, and no doubt could have remained in the minds of the jury as to situs of the crime, and one witness testified that the restaurant "where the crime was supposed to have been" was located in Bellingham, Whatcom county, the venue of the offense in Whatcom county was sufficiently proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 726, 1277-1284; Dec. Dig. § 564.*]

Department 1. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Chin Sam was convicted of crime, and he appeals. Affirmed.

Crowder & Crowder and Hans Briggs, all of Seattle, for appellant. Frank W. Bixby, of Bellingham, for the State.

CHADWICK, J. Appellant is charged with having committed a crime in the county of Whatcom, state of Washington. He was convicted, and has brought his case to us on appeal.

Two questions are submitted for our determination: First, was the venue of the crime proven; and, second, is the verdict sustained by the evidence?

No witness was asked the direct question whether the crime was committed in Whatcom county, but the testimony taken as a whole clearly shows that the witnesses had reference to the city of Bellingham, and that no doubt could have remained in the minds of the jury as to the situs of the crime. 12 Cyc. 494.

One witness testified as follows: "Q. You know where the restaurant is where this defendant held out and was the cook; you know where it is in Bellingham? A. Where the crime was supposed to have been? Q.

Yes. A. Yes. Q. And that restaurant is located in Bellingham, Whatcom county, Wash.? A. Yes, sir." This is sufficient proof of the venue under the authority of State v. Fetterly, 33 Wash. 602, 74 Pac. 810; State v. Kincaid, 69 Wash. 274, 124 Pac. 684.

The evidence in this case is too revolting to discuss. We have read it, and have no hesitation in saying that if the testimony of the state is to be believed, no verdict other than the one rendered could have been returned.

Affirmed.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

McCULLOUGH v. PUGET SOUND REALTY ASSOCIATES.

(Supreme Court of Washington. Dec. 5, 1913.)

APPEAL AND ERROR (§ 1008*)—JUDGMENT—CONCLUSIVENESS.

The court, on an appeal which involves questions of fact only will not disturb the judgment, where it cannot say that the trial court erred in finding that the successful party established his case by a preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Fred D. McCullough against the Puget Sound Realty Associates. From a judgment for plaintiff, defendant appeals. Affirmed.

Corwin S. Shank and Horatio O. Belt, both of Seattle, for appellant. Louis E. Shela, of Seattle, for respondent.

PER CURIAM. This is a suit upon an express parol contract for the recovery of a money judgment. There was a judgment for the plaintiff. The defendant has appealed.

The appeal involves questions of fact only. We cannot say upon the record that the court was in error in concluding that the plaintiff had established his case by a preponderance of the evidence.

Affirmed.

ROE et al. v. WALSH et al.

(Supreme Court of Washington. Dec. 13, 1913.)

En Banc. On rehearing. Petition denied. For former opinion, see 135 Pac. 1031.

PER CURIAM. Both the appellants and the respondents have filed petitions for a rehearing of this case, upon the ground that the opinion is not clear whether the defendants under the answer, if proved, are entitled to the fee or an easement in the strip of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

land 21.6 inches wide, or whether the strip of land extends the length of the lot or merely the length of the building.

In order to make these questions clear we now state: That if the allegations in the answer are proved to the effect that the vendors represented to the vendees that the building and walk were wholly upon lot 10, the vendors and their successors are bound by that representation to the extent thereof, and title vested according to the representation. If the representations were implied, the title of the strip vests in the vendees only in so far as it is covered by the improvements. If the appellants fail to prove that the representations were made as to the location of the building or the lot line, then the respondents are to recover to the true line.

There is no merit in the other questions presented in the petition for rehearing and hearing en banc.

The petitions are therefore denied.

BECKER v. SUNNYSIDE LAND & INVESTMENT CO. et al

(Supreme Court of Washington. Dec. 15, 1913.)

1. FRAUD (§ 23*)—ACTIONS FOR MISREPRESENTATION—LIABILITY.

Where plaintiff, a purchaser of land, knew nothing about alkali land, and that fact was communicated to defendant, who consummated a sale, defendant was liable for misrepresentations as to the freedom of the land sold from alkali, even though the parties made an inspection of the land, it appearing that no one, unless familiar with alkali land, could distinguish it by bare inspection, for the parties did not deal at arms' length; defendant having knowledge which was unavailable to plaintiff.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 59; Dec. Dig. § 23.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

A verdict of the jury on conflicting evidence will be affirmed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by Charles Becker against the Sunnyside Land & Investment Company, a corporation, and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Stephen E. Chaffee, of Sunnyside, and Wendé & Taylor, of North Yakima, for appellant. J. M. Dunn, of Sunnyside, for respondent.

MAIN, J. This action was brought for the purpose of recovering damages on account of false and fraudulent representations in the sale of land. On February 4, 1910, and for some years prior thereto, A. N. Swigart and wife were the owners of a 40-acre tract of land in Yakima county, Wash. The defend-

ant Sunnyside Land & Investment Company, a corporation, was the agent of Swigart and wife for the purpose of negotiating the sale of this land. The plaintiff for many years had been a resident of Western Washington and was a stranger in Yakima county. He knew nothing about alkali lands or how to distinguish them. On February 3, 1910, while en route to Mabton for the purpose of investigating with a view to purchasing land there, he met one A. Wilmot, with whom he had been acquainted for a number of years. Wilmot persuaded him not to go to Mabton, but to stop at Sunnyside. This the plaintiff finally consented to. The train upon which they were arrived at the latter place during the morning of February 4th. Immediately upon leaving the train, Wilmot took the plaintiff to the office of the defendant, and there introduced him to H. L. Miller. Wilmot testifies that he told Miller that the plaintiff was a friend of his from Seattle; that he had been farming on the West side, and had come over to Eastern Washington to look at land; that he did not know anything about irrigated land or alkali land, and requested that Miller do the best he could for him and give him a good piece of land. Becker testified that he told Miller at this time that he wanted a good piece of land which would produce alfalfa, potatoes, and other farm produce; that he knew nothing of the country there, and would leave it to Miller to select for him such land as he wanted. Soon thereafter, Miller secured a conveyance, and he and the plaintiff drove into the country and after looking at one or two pieces of land casually, came to the 40 owned by the Swigarts. Here they got out of the conveyance and walked across the land. When approaching the southwest corner thereof, Miller told the plaintiff that there was five or six acres of alkali land at that point. Becker testifies that he then inquired of Miller as to the remaining portion of the land, and that Miller told him it was all good land, and would produce hay, potatoes, and other farm products, and that there was no alkali on it. It appears from the evidence on the part of the plaintiff that at this time practically the entire south 20 acres of the land was impregnated with alkali; that, at the time of the year they were there, one not familiar with alkali land would not be able to ascertain its condition by an inspection, while one who was familiar with land of this character would readily recognize it. Upon returning to Sunnyside this day the plaintiff contracted for the purchase of the Swigart 40, and moved upon the same in about a month thereafter. He did not discover that about one-half of the 40 was alkali until after he had moved upon the land. He lived upon the place and farmed it for two seasons. On or about April 26, 1912, the present action was begun to recover dam-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ages, the plaintiff claiming that he had been defrauded in that Miller had misrepresented to him the character of the south 20 acres of the 40 other than the 5 or 6 acres in the southwest corner. The cause was tried to the court and a jury. A judgment of nonsuit was entered as to Swigart and wife. As to the Sunnyside Land & Investment Company, the question whether or not there had been fraudulent and false representations was submitted to the jury. A verdict was returned for the plaintiff in the sum of \$1,250. Motion for new trial being made and overruled, judgment was entered upon the verdict. The Sunnyside Land & Investment Company appeals.

[1] The appellant argues that since there was no fiduciary relation existing between the parties and the respondent had an opportunity of inspecting the land, there was not sufficient evidence to justify the court in submitting the question to the jury. But this contention overlooks the fact that the means of knowledge as to the condition of the land was not equally open to the parties, and that the respondent, knowing nothing about alkali land, would not be able to ascertain its condition from an inspection. In the recent case of *Stewart v. Larkin*, 134 Pac. 186, it is said: "It has always been the law that, where the parties deal as strangers, and the means of knowledge are equally available, and the lands subject to the inspection of the purchaser, and he avails himself of the opportunity of inspection afforded him, he cannot be heard to say that he has been deceived, even though the truth has been withheld from him, or the facts misrepresented, as the true facts are as available to him and as much within his knowledge as that of the one with whom he deals" (citing previous decisions of this court). Applying this rule to the facts in the present case, it was the duty of the trial court to submit to the jury the matter as to whether or not there had been fraudulent representations. If the plaintiff's evidence is to be believed, then the means of knowledge were not equally available to the seller and the purchaser. Neither would an inspection of the land by the purchaser who was not familiar with alkali land apprise him of its condition.

Many other assignments of error are set out and argued in the briefs. In the limited space allotted to an opinion a discussion of all these claims of error would not be possible. It is sufficient to say that the record has been read with care, and all the assignments of error considered. We do not find substantial merit in any of them.

[2] The primary question in the case was one of fact. If the evidence on the part of the respondent is believed, it was sufficient to establish fraudulent misrepresentations. On the other hand, if the evidence on the part of the appellant correctly presents the

facts, then the respondent was not overreached. Upon this conflicting evidence the jury found for the plaintiff.

The judgment will be affirmed.

CROW, C. J. and ELLIS, MORRIS, and FULLERTON, JJ., concur.

KELLY v. HAMILTON et al.

(Supreme Court of Washington. Dec. 6, 1913.)

1. COUNTIES (§ 113*)—POWERS OF COMMISSIONERS—CONSTRUCTION OF COURTHOUSE.

Rem. & Bal. Code, § 3890, provides that the county commissioners shall provide for the construction of necessary public buildings, but does not require them, in submitting to the electors a proposed construction bond issue, to submit plans for such building. County commissioners who were guilty of no fraud in the matter submitted to the electors of a town a resolution authorizing the issuance of bonds not to exceed \$950,000 for the construction of a courthouse, and at a regular election the resolution was carried. *Held*, that the legality of such issue was not destroyed by the fact that prior to such election advocates of the resolution circulated letters and photographs to show the building which could be erected for that amount, and that it was within the power of the commissioners after election to determine the plans and specifications for the building to be constructed, and to erect a smaller building than that shown by the pre-election letters and pictures.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.*]

2. COUNTIES (§ 113*)—POWERS OF COUNTY COMMISSIONERS—COUNTY BUILDINGS.

In the absence of fraud, the decision of county commissioners, charged by statute with the construction of courthouses, as to the character of courthouse needed, is final.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.*]

3. COUNTIES (§ 113*)—POWERS OF COMMISSIONERS—RESOLUTION SUBMITTED TO VOTERS—POLITICAL MATTERS.

Where county commissioners charged by statute with the construction of public buildings regularly submitted a resolution to voters for the issuance of courthouse bonds to the amount of \$950,000, without including the specifications for the building in the resolution voted on, the fact that a large number of voters voted in favor of the issue on the ground that the city and county were to construct the building jointly, or the reasons influencing the votes for or against the issue, could not be considered, since they were political and could not affect or control the commissioners' final action.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174-180; Dec. Dig. § 113.*]

En Banc. Appeal from Superior Court, King County; Everett Smith, Judge.

Injunction by Fred W. Kelly against A. L. Hamilton and others, composing the Board of County Commissioners of King County, and others. Judgment for plaintiff, and defendants appeal. Reversed, and action dismissed.

John F. Murphy and Robt. H. Evans, both of Seattle, for appellants. Carkeek, McDonald & Kapp, Irving M. Clark, Jackson Silsbaugh, France & Helsell, and Robert C. Saunders, all of Seattle, for respondent. J. A. Stratton and Peters & Powell, all of Seattle, amici curiae.

MOUNT, J. This action was brought by a taxpayer of King county to restrain the board of county commissioners from proceeding to the sale and delivery of \$950,000 worth of King county courthouse bonds, and to restrain the commissioners from erecting a proposed county building in said county with the proceeds of the bonds.

The complaint alleges, in substance: That the county commissioners of King county prior to the general election in November, 1912, entered into a conspiracy for unlawfully expending county funds. That they fraudulently misrepresented to the voters that an adequate public building for county purposes could be erected on a site then owned by the county for the maximum cost of \$950,000. That in furtherance of the conspiracy they contracted with an architect to prepare plans and specifications for such building. That the plans submitted by the architect provided for a present building of seven stories covering the entire block of ground on a foundation capable of supporting a structure of 20 stories high. That it was then known to the commissioners that such a building could not be constructed for any sum less than \$1,600,000. That they submitted to the voters of King county under an official resolution the proposition of issuing county bonds not in excess of \$950,000 for the construction of the building, and also an alternative proposition of issuing bonds not in excess of \$1,400,000 for the purchase of a site and the erection of a county building thereon in the north end of the city of Seattle. That the commissioners had no information as to the cost of the county building and the site therefor, but that the sums named in both propositions were arbitrarily and fraudulently fixed so as to favor the site already owned by the county, and with the further intent of building a structure on said site which would cost far in excess of \$950,000. That the commissioners, prior to the election, represented to the voters by letters, circulars, photographs, and otherwise, that an adequate seven-story building could and would be built over the whole of the present property for the maximum cost of \$950,000. That three-fifths of the electors voted on the proposition so submitted in favor of a bond issue of \$950,000 for the proposed building at a maximum cost of \$950,000. That after the election the commissioners ratified the plans as previously outlined by the architect, which were the plans and drawings on exhibition prior to the election, and directed the detailed completion thereof. That they are about to issue bonds in the

sum of \$950,000 for starting the construction of the proposed building, well knowing that \$950,000 will not complete the same according to the plans prepared by the architect, but intending to construct a building which will cost far in excess of that sum. The prayer of the complaint is for an injunction prohibiting the issuance of the bonds so voted, and forbidding in any event the letting of a contract for a building to cost completed in excess of \$950,000, and restraining the expending of a sum in excess thereof in the erection of such a building.

After a demurrer to the complaint had been interposed by the defendants, which was waived before hearing thereon, the defendants filed an answer denying any false and fraudulent representations on the part of any of them. The answer admits the submission to a vote of two bond propositions, but denies that either proposition specified any plans for the building under contemplation. The answer further alleges that the commissioners were about to proceed with the construction of a county building to cost not in excess of \$950,000 from the proceeds of the authorized bond issue.

At the trial of the case it appeared without any dispute that prior to September 30, 1912, the city council of the city of Seattle and the county commissioners of the county of King, in which county Seattle is situated, considered the feasibility of constructing a building for the joint use of the city of Seattle and the officers of the county of King. After a joint meeting of the city council of the city of Seattle and the board of county commissioners of King county, a resolution was passed, in effect, that such a building should be constructed. An architect was thereafter employed to prepare tentative floor plans for such a building and submit the same to the county commissioners of King county. On September 30th the county commissioners of King county passed a resolution as follows: "This matter coming on for hearing before the board on the 30th day of September, 1912, at the regular meeting hour of said board, and the board, after due consideration given to said subject, find it to be for the best interests of King county and the people thereof, that said board should submit to the qualified electors of King county, at the general election to be held in King county, on the 5th day of November, 1912, the question of issuing certain county bonds for strictly county purposes, to procure money for the construction of a courthouse upon the property now owned by King county at the corner of Third avenue and James street in the city of Seattle, legally described as block 33, C. D. Boren's addition to the city of Seattle, King county, Washington. Said proposition shall be stated as follows: Shall the board of county commissioners of King county, Washington, be authorized to issue the negotiable, coupon, county bonds of King county in and to the aggregate amount of

not to exceed \$950,000 or so much thereof as may be necessary, * * * and by and through the board of county commissioners of King county, contract indebtedness by selling said bonds or portions thereof from time to time at not less than par; and expend or cause to be expended under the direction and subject to the approval of said board, all the proceeds of said sale to construct and in aid of the construction of said courthouse upon said site?" Upon the same date, the board passed another resolution submitting to the electors of the county the proposition of issuing \$1,400,000 worth of county bonds for the purpose of acquiring a site and constructing a building in the north end of the city upon a site to be purchased by the county. This resolution was substantially the same as the one above quoted, except as to the amount of bonds to be issued.

Pursuant to these resolutions, notices were published calling an election on November 5th for the purpose of voting upon these two proposed bond issues by the qualified electors of the county. After the passage of these resolutions, and while the notices were being published, a political campaign was conducted throughout the county by the friends of each measure for the purpose of securing the requisite number of votes to carry the propositions submitted in the resolutions. While this campaign was being conducted, a perspective of a building was drawn by the architect. This perspective showed a building covering an entire block of ground and some 20 stories high. Pictures were made of this drawing and were scattered broadcast over the county. It was not claimed by the advocates of the proposed bond issue that this completed building could be constructed for the amount thereof, but it was urged that six or seven stories of the building might be completed for the \$950,000. When the election came on, the bond issue for \$1,400,000 was defeated, but the bond issue for \$950,000 for the construction of a building upon the block then owned by the county carried by a large majority. After the election the bonds were advertised for sale, and purchasers were secured therefor. The county commissioners thereupon concluded that a building the size of the block could not be constructed to the height of seven stories for the amount of the bond issue and were proceeding to call for bids for a building of smaller dimensions, when this action was brought to restrain both the sale of the bonds and the construction of the building which they proposed to erect. The trial court, after hearing all the evidence in the case, found, in substance, that the county commissioners were not guilty of fraud in submitting the bond issue to a vote of the people, but concluded that inasmuch as the architect employed by them had prepared plans and a prospectus which showed a very large building and had scattered the same, or had been instrumental in scattering the

same, throughout the county prior to the election, and because of this advertisement votes were probably cast in favor of the bonds which might not have been cast in favor thereof, concluded that the bond issue was illegal and unwarranted, and therefore issued an injunction restraining the sale of the bonds. The commissioners, and the auditor, and the treasurer of King county have appealed from that judgment.

[1] It was apparently conceded throughout the trial of the case, and is not disputed here, that the question of issuing \$950,000 in bonds of King county for strictly county purposes and procuring money for the erection of a courthouse upon the property owned by King county described as block 33, C. D. Boren's addition to the city of Seattle, was regularly submitted to the electors of King county, and that the question carried by the required majority. But it is contended that the legality of this bond issue is destroyed by the fact that, prior to the election, electors were informed by advocates of the measure that a certain building would be constructed for the amount of the bond issue. It will be noticed that, in the resolution submitting the question of issuing county bonds for strictly county purposes to procure money for the construction of a courthouse, the character or details of the courthouse so to be constructed was not stated. The commissioners simply submitted the proposition to the voters of the county whether or not the bond issue should be made for the purpose of constructing a courthouse. The definite character of the building was not specified, except that it was to be for a courthouse to cost not to exceed \$950,000.

The statute (Rem. & Bal. Code, § 3890) provides: "The several boards of county commissioners are authorized and required,—(1) To provide for the erection and repairing of courthouses, jails, and other necessary public buildings for the use of the county; * * * (5) to allow all accounts legally chargeable against such county not otherwise provided for, and to audit the accounts of all officers having the care, management, collection, or disbursement of any money belonging to the county or appropriated to its benefit; (6) to have the care of the county property and the management of the county funds and business. * * *"

We find nothing in the statute, and no provision is called to our attention, which requires the board of county commissioners, in submitting a proposed bond issue for the construction of a county courthouse, to submit at the same time plans and specifications for such building; and in the absence of such a provision, and especially in the absence of a resolution by the board definitely defining the structure which they intend to build, it is clearly within the power of the county commissioners, after the bonds are voted, to determine the plans and specifica-

tions for the building which they shall construct. Where authority is vested by law in the board of county commissioners to provide for the erection of courthouses, it is at least doubtful if the board of county commissioners could legally shift the responsibility of determining the specific character of building which they intended to construct to any other person, board, or commission. In speaking to this question in *Yesler v. Seattle*, 1 Wash. 308, 25 Pac. 1014, in reference to the power of a city council, this court said: "Now, the power is thus delegated to the municipal Legislature, with the assent given, to proceed and 'borrow money' or 'contract indebtedness,' it being the sole judge of the proper method, whether by bonds, or warrants, or open account, confidence being reposed in the wisdom and honor of the members that they will act for the best interest of the community. No citizen or taxpayer can question, in the courts, the uncorrupted action of his city council in these particulars. * * * Nor does the law permit the council of a city to delegate to the popular vote the determination of any matter before it, unless the right to so delegate it has been expressly conferred or enjoined by statute. * * * Therefore, we conclude that the council could lawfully submit to vote only those matters directed to be submitted by its superior authority, the Legislature." And in this case the board of county commissioners did not submit to the voters of the county the question as to the specific building to be constructed. They therefore reserved that right to themselves to act according to their best judgment.

It is true the county commissioners employed an architect, who prepared a perspective for a building, a picture of which was scattered broadcast throughout the county, and the fact that the picture was being used was probably known to the commissioners. It is argued by the respondent that the county commissioners were bound by the acts of this architect, and that therefore they were required to build the building pictured for the sum specified in the bond issue. But the board of county commissioners can act authoritatively only by resolution properly spread upon the minutes and joined in by a majority of the board. This it is conceded was never done. The commissioners were no more bound by the unauthorized acts of the architect than they were by speeches or statements of enthusiasts who were advocating or resisting the issuance of the bonds. Whether or not the building which the enthusiasts supposed could be built for \$950,000 could be built for that sum, or whether its cost would be two or three times that sum, were political questions which were to be decided by the voters individually, and the courts cannot review such questions. When it was determined from the evidence—and we think the evidence cannot well be construed otherwise—that the board of county

commissioners were guilty of no fraud or conspiracy, but acted in good faith, this was the end of the matter so far as the commissioners were concerned. In short, the legality of the bond issue depended entirely upon the question which was submitted by the record to the voters, and upon which a majority of the vote was cast. To go further than the question which was presented legally upon the ballot, and inquire into the causes of the vote, would be to open the door to all sorts of speculation, which cannot be indulged in.

[2] In *Montgomery v. Orr* (C. C.) 27 Fed. 675, the court said: "Except when attacked for fraud, their decision (the county commissioners) as to the character of a courthouse that is needed is final." And in *Rotenberry v. Board of Supervisors*, 67 Miss. 470, 7 South. 211, the court said: "The power of the board of supervisors over courthouses, and sites for courthouses, is complete and exclusive in this state, and no interference with the exercise of this power by the chancery courts can be upheld, so long as the power is alleged to be only exercised unwisely, and without discretion."

The respondent relies upon the case of *Tukey v. City of Omaha*, 54 Neb. 370, 74 N. W. 613, 69 Am. St. Rep. 711. In that case the proposition was submitted to the people whether bonds in the sum of \$200,000 should be issued for the purpose of paying the cost of securing a site for a market place and erecting a market house thereon. The public officials were about to erect a market house upon property already owned by the city without securing a market site. The court said: "That, when the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for any particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued, is so well settled that it would be idle to cite authorities on the proposition." The bonds in that case were enjoined because the proceeds were about to be used for the construction of a market house on property belonging to the municipality, whereas the bonds had been voted for the purpose of purchasing a site and constructing a market house. The proceeds of the bonds in that case were not being used for the purposes for which they were authorized, and the court, of course, enjoined the issuance of the bonds. But in this case the bonds are to be used precisely for what they were authorized, namely, the construction of a courthouse.

The respondent also relies upon the case of *Wullenwaber v. Dunigan*, 33 Neb. 477, 50 N. W. 428. That was a case where a railroad company had promised, in consideration of a vote of bonds to aid in the construction of its road, to locate a depot at a certain point. The court held that the promise of the railroad company constituted a part of the con-

sideration for the bonds, and the failure to furnish the depot relieved the city from issuing the bonds. And this was clearly correct. But in this case the county commissioners authorized a vote merely upon the question whether the bonds should be issued for strictly county purposes for the construction of a courthouse.

[3] Argument is also made to the effect that it was the idea of the voters, when the proposition was submitted, that the city and county should join in the construction of the building which was to be erected. After the election the county commissioners were advised by the county attorney that the county was not authorized by law to construct a building jointly with the city of Seattle, nor for the use of the city; that the construction of the building must be for strictly county purposes. It is contended, and evidence was introduced to the effect, that a large number of the voters voted in favor of the bonds because it was the intention of the city and county to build the building jointly. As we have heretofore said, the reasons influencing voters to vote for or against the bonds cannot now be considered. Those reasons are political. The question submitted upon the record was whether or not the county commissioners should be authorized to issue bonds in the sum of \$950,000 for strictly county purposes, namely, for the building of a courthouse. The specifications for such courthouse were not stated by any official action of the board prior to the election, and the reasons of the voters in voting for or against the issue cannot now be inquired into by the courts. The question of bonds was legally submitted in the form required by law; it was carried by the requisite vote; and, if the county commissioners see fit to construct a courthouse and to use the proceeds of the bonds for that purpose, their action is final and, except for fraud, cannot be inquired into. No fraud is shown.

The judgment of the lower court is therefore reversed, and the action dismissed.

CROW, C. J., and GOSE, MORRIS, MAIN, ELLIS, and PARKER, JJ., concur.

BROOKS v. TRUSTEE CO.

(Supreme Court of Washington. Dec. 12, 1913.)

1. SALES (§ 91*)—CONSTRUCTION—OPTION TO RESCIND.

An agreement by a seller of bonds to allow plaintiff to withdraw from her purchase at any time upon return of the bonds after consultation with third persons necessitates plaintiff's making an election whether to take the bonds or not within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 254-256; Dec. Dig. § 91.*]

2. SALES (§ 91*)—OPTION TO RESCIND—EXERCISE OF RIGHT—REASONABLE TIME.

Where defendant agreed that plaintiff might withdraw from her purchase of bonds

within a reasonable time, plaintiff's delay to exercise that right for more than six years was an unreasonable one and barred her right.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 254-256; Dec. Dig. § 91.*]

3. LIMITATION OF ACTIONS (§ 46*)—ACCRUAL OF ACTION—BAR OF LIMITATIONS.

Where defendant, in May, 1906, agreed to permit plaintiff to withdraw from a contract for the purchase of bonds at any time upon returning the bonds, plaintiff's rights under the agreement accrued immediately, and her failure to act under the agreement for more than six years barred her right by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by E. A. Brooks against the Trustee Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss.

J. A. Stratton and S. J. Wettrick, both of Seattle, for appellant. P. Tworoger, of Seattle, for respondent.

MOUNT, J. On May 24, 1906, the appellant sold to the respondent two half-units, numbered 256 and 257, representing proportional undivided interests in its property No. 4, for the sum of \$1,050, and gave the plaintiff the following memorandum: "Seattle, May 24, 1906. Mrs. E. A. Brooks, City: In consideration of the purchase by you on this date of Inv. Bonds in our property No. 4, to the extent of one thousand fifty dollars (1,050), we hereby agree that after you have consulted your sister or any one else in regard to this investment you desire to withdraw your investment you may at any time return these bonds to our office and withdraw your entire investment with a 6 per cent. earning per annum. The Trustee Co., per Wm. F. Howe, Trust Officer." The ownership of these units entitled respondent to a proportional share of the earnings of the property which they represented, and on or about June 1, 1906, and continuously thereafter until March 1, 1912, the respondent accepted quarterly her share of the earnings upon these units, aggregating \$298.50. This action was begun on September 16, 1912. The complaint alleged the purchase of the units under the above agreement, and that the respondent has since repeatedly tendered the units and demanded the return of the money paid therefor. Judgment was demanded for the amount paid with interest. The appellant interposed a demurrer to the complaint, which was overruled and an exception taken. An answer was then filed admitting the sale of the units under the agreement, but denying that the respondent ever tendered the units or demanded the return of the money paid therefor, except about the time this action was begun. As a first affirmative defense, the appellant alleged that the respondent had elected to retain the units

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by receiving and accepting the earnings thereon. As a second affirmative defense, the appellant alleges that the respondent's alleged cause of action did not accrue within six years before the commencement of the suit. The allegations of both defenses were denied by the reply. Upon the trial of the cause, the court entered a judgment for the amount of money paid for the units, together with interest thereon at 6 per cent. per annum, less the earnings which the respondent had received as dividends upon the units. This appeal is prosecuted from that judgment.

[1] It is plain, we think, that the contract above set out was a contract to purchase, with the option at any time to return the bonds and withdraw the investment with 6 per cent. interest per annum. It is also plain that the words "at any time" merely gave a reasonable time to the respondent within which to act. The contract, upon its face, was not intended to remain in force forever or to run in perpetuity. In *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161, where the agreement was, "I will give you my guaranty to take the meter stock from you at cost, without interest, at any time after January 1, 1886, if at that time you desire to have me do so," the court said: "The words 'at that time' mean the same as 'at that date.' But if that is not the true construction, at least the offer must be accepted within a reasonable time after that date. Plainly the offer was not to continue forever. The words 'at any time' do not import perpetuity; and, if not, then the plaintiff was entitled only to a reasonable time; and, there being no facts in dispute, this was to be determined by the court." See, also, to the same effect, *Ellis' Adm'r v. Durkee*, 79 Vt. 341, 65 Atl. 94; *Larmon v. Jordan*, 58 Ill. 204; *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95.

[2, 3] This agreement was made on May 24, 1906. The action was not begun until September 16, 1912, or more than six years after the contract was entered into. It is plain upon the face of it that the offer to withdraw the investment was not made within a reasonable time, nor even within the statute of limitations upon written instruments which, in this state, is six years. The respondent's cause of action, if any she had, begun to run at the date of the contract, viz., May 24, 1906. If she had accepted none of the earnings of the bonds during the time between the date of the contract and the date of bringing the action, it is clear that the statute of limitations has more than run upon the contract, even if the phrase "at any time" may be held to mean at any time within the period of the statute of limitations. In *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113, this court said: "Again, it has been many times held—and this is another important reason why the ac-

tion should be held to be barred—that it is not the policy of the law to put it within the power of a party to toll the statute of limitations. And this court has at least twice held that the failure of a party to take the necessary steps to perfect his right of action, although such steps were conditions precedent to the right, would not prolong the statute. *Spokane County v. Prescott*, supra, 19 Wash. 418 [53 Pac. 661, 67 Am. St. Rep. 733]; *Spinning v. Pierce County*, 20 Wash. 126 [54 Pac. 1006]." It is unimportant when a demand was made for the return of the money. The right of action accrued at once upon the contract, and if, as above stated, the time within which the action might be maintained extended to the period of the statute of limitations, that time had fully run when this action was brought. The court was therefore in error in entering a judgment in favor of the respondent.

The judgment must therefore be reversed and the cause remanded with directions to dismiss the action.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

CASUALTY CO. OF AMERICA v. BEATTIE et al.

(Supreme Court of Washington. Dec. 18, 1913.)

INTEREST (§ 19*)—RIGHT—INSURANCE PREMIUM.

Upon rendering a judgment for an insurance company for a balance due on premiums, interest should be allowed on the amount of the judgment from the time the policy was canceled.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

On petition for modification of former opinion. Petition granted, and opinion modified as stated.

For former opinion, see 134 Pac. 817.

The action was brought by plaintiff insurance company for a balance due on premiums on a liability policy taken out by defendant, and the judgment of the Supreme Court formerly rendered did not award interest on the amount of the recovery.

PER CURIAM. The appellant in this case has filed a petition for a modification of the opinion heretofore filed so that a judgment may be entered for interest on the amount due the appellants from March 18, 1907.

We think this modification should be made under the authority of *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381, and it is accordingly made, so that the closing paragraph of the opinion shall read: "The judgment is therefore reversed, and the cause remanded, with instructions to enter judgment in favor of the appellant for this sum, together with interest thereon from the 18th day of March, 1907, and for its costs."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—78

**NORTHWESTERN GRAIN CO. v. KERR
GIFFORD WAREHOUSE CO.**

(Supreme Court of Washington. Dec. 15,
1913.)

**1. AGRICULTURE (§ 12*)—PROCEEDINGS TO
PERFECT—DESCRIPTION OF PROPERTY.**

Liens filed against wheat, which had been delivered to a warehouse company describing the subject-matter of the lien in one case as the east half of a section of land and in another case as a certain crop situated upon such land, were void for indefiniteness of description.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 40, 41; Dec. Dig. § 12.*]

**2. WAREHOUSEMEN (§ 25*)—LIABILITY FOR
NONDELIVERY.**

Where a warehouse company refused to deliver wheat to the holder of the warehouse receipts, who had sent them to the warehouseman, because labor liens had been filed against the wheat, and thereafter the only valid lien was satisfied and the company notified of such satisfaction, it was its duty, upon request, to either ship the wheat or return the warehouse receipts, and, having failed to do either, it was liable for the value of the wheat.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 38-47; Dec. Dig. § 25.*]

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkee, Judge.

Action by the Northwestern Grain Company against the Kerr Gifford Warehouse Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John Pattison, of Spokane, for appellant. Belden & Losey and Henry R. Newton, all of Spokane, for appellee.

MAIN, J. [1] This action was brought for the purpose of recovering the value of certain wheat, with the conversion of which the defendant was charged. On August 16, 1909, the defendant was a corporation engaged in the warehouse business and operating a warehouse at Eltopia, Wash. On that date and on the 17th, 18th, and 24th of August, one A. E. Gallagher delivered to the defendant for storage wheat in sacks aggregating 501½ bushels. As the wheat was delivered, and on the dates mentioned, the defendant issued to Gallagher warehouse receipts therefor wherein the defendant agreed to deliver to A. E. Gallagher, or order, the number of sacks of the weight and quality therein specified, upon the surrender of the receipts properly indorsed and payment of the charges and advances as therein provided for. Some time thereafter the warehouse receipts were sold and delivered to the plaintiff corporation. The receipts bear the written indorsement of A. E. Gallagher. After the assignment and on September 11, 1909, the plaintiff at Spokane, Wash., wrote to the defendant at Eltopia, inclosing with the letter the warehouse receipts and a check for the storage charges, and directed that the wheat be shipped to its order, Seattle, Wash. This direction was not complied with for the reason, as the defendant informed the plain-

tiff, that certain labor liens had been filed against the wheat. These alleged liens were three in number and are known as the Dixon, Bruner, and Visby liens. The Dixon lien was claimed on account of hay furnished to A. E. Gallagher and used while the wheat crop was being harvested. The only description of the subject-matter contained in the claim of lien is "the east half of section 21, township 12, range 30 E. W. M., in Franklin county, Wash." The Bruner lien was claimed on account of labor performed upon a certain crop situated upon the same land as described in the Dixon lien. The Visby lien was on account of harvesting the wheat. The description in this claim of lien not only described the land upon which the wheat grew, but describes the wheat upon which the lien is claimed by giving the number of sacks, the kind and quality of the wheat, the warehouse in which it is located, and the lettering upon the sacks. On or about October 28th the defendant had notice that the Visby lien was satisfied. On November 9th, by letter from the plaintiff, the defendant was again notified to ship the wheat. On November 24th, by letter, request was made that the warehouse receipts be returned to the plaintiff. The wheat at no time was shipped; neither were the warehouse receipts returned, but were retained by the defendant until the time of trial and by it offered in evidence. The action was brought for the purpose of recovering the value of the wheat. The cause was tried by the court without a jury. Judgment was entered for the plaintiff in the sum of \$475.70. The defendant appeals.

If the plaintiff is entitled to recover upon the facts stated, there appears to be no dispute as to the amount. Under the holding of this court in *Dexter v. Olsen*, 40 Wash. 199, 82 Pac. 286, both the Dixon and the Bruner liens were void for indefiniteness of description, and consequently cannot be considered. In that case it was said: "The statute requires the lien notice to 'contain a description of the property to be charged with the lien sufficient for identification with reasonable certainty.' Bal. Code, § 5936. The lien notice involved in this case tells the approximate number of sacks of wheat (about 850), and states where it was grown. But there is no other description. Nothing is said as to the quality or kind of wheat, nothing as to the character, size, or markings of the sacks. The whereabouts of the wheat is in no manner indicated. It may have been in the field, in the barn, or in somebody's warehouse. It may have been in Walla Walla county, or elsewhere. It may have been in the state of Washington, or in some other state. We do not see how any person could locate or identify the wheat in question by the description given. Unless he should resort to sources of information outside of the lien notice, an officer seeking to execute a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment or decree against this wheat would be powerless. The facts set forth in the notice are not sufficient, in themselves, to show jurisdiction of the court over the subject-matter."

For the purposes of this case it will be assumed, but not decided, that the defendant was justified in not delivering the wheat upon demand until all valid liens claimed against the same had been satisfied.

[2] As to the Visby lien, as already stated, subsequent to its satisfaction the defendant was notified once to ship the wheat. And later a demand was made that the warehouse receipts be returned. Neither request was complied with. That it was the right of the plaintiff after the only valid lien had been satisfied to have the wheat shipped, as per its request, or the warehouse receipts returned, is too plain to require discussion. Under the facts in this case the plaintiff was clearly entitled to recover.

Since this is the conclusion upon the facts, consideration of the questions of law discussed in the briefs would be merely academic, and will not be indulged in.

The judgment will be affirmed.

CROW, C. J., and ELLIS and MORRIS, JJ., concur.

KOM v. CODY DETECTIVE AGENCY, Inc.
(Supreme Court of Washington. Dec. 5, 1913.)

1. CONTRACTS (§ 108*)—CORPORATIONS (§ 82*)
— CAPITAL STOCK — DIMINUTION — REPURCHASE BY CORPORATION.

A contract by a corporation with a stockholder, upon his purchase of stock, to repurchase the stock whenever the purchaser discontinued his connection with the corporation was invalid as against public policy and Rem. & Bal. Code, § 3697, making it unlawful for the trustees to withdraw or pay to the stockholder any part of the capital stock or to reduce the capital stock except as provided.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503, 505, 507-511; Dec. Dig. § 108; * Corporations, Cent. Dig. §§ 285-295; Dec. Dig. § 82.*]

2. CORPORATIONS (§ 67*)—REDUCTION OF CAPITAL STOCK—PERSONS ENTITLED TO OBJECT.

Rem. & Bal. Code, § 3697, making it unlawful for the trustees of a corporation to withdraw or pay to the stockholders any of the capital stock or reduce it except as provided, protects future creditors and stockholders, who are not parties to an illegal agreement to withdraw capital stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.*]

3. CORPORATIONS (§ 67*)—CAPITAL STOCK.

The trust fund doctrine, as applied to the capital stock of a corporation, is recognized by the Washington courts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Fred S. Kom against the Cody Detective Agency, Incorporated. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss.

Aust & Terhune, of Seattle, for appellant.
Miller & Lysons, of Seattle, for respondent.

CHADWICK, J. Plaintiff purchased a part of the capital stock of the defendant under a contract to repurchase. The material parts of the contract follow: "This agreement made and entered into on this 10th day of December, A. D. 1912, by and between the Cody Detective Agency, Inc., party of the first part and Fred S. Kom, party of the second part, witnesseth: That the said party of the first part is an organized detective agency duly incorporated under the laws of the state of Washington, and doing a general criminal and civil detective business and being duly incorporated for the sum of ten thousand (\$10,000) dollars, each share of stock being the amount of twenty-five (\$25.00) dollars, and the said Fred S. Kom being desirous of purchasing a block of stock from the said Cody Detective Agency, Inc., now hereby it is agreed as follows: That if at any time in the future the said Fred S. Kom wishes to cancel his engagement as an operative with the said Cody Detective Agency, Inc., and wishes to dispose of his share of stocks, which is forty (40) shares at the said price of twenty-five (\$25.00) dollars per share, being one thousand (\$1,000.00) dollars, he does hereby agree to sell the stock back to the Cody Detective Agency, Inc., at the price he paid for same. The said Cody Detective Agency Inc., agrees to purchase the said stocks at the price received for the same from the said Fred S. Kom, which will terminate this agreement." Thereafter plaintiff became dissatisfied with his bargain and demanded repayment of the purchase price. The sum of \$250 was paid. Defendant then declined to pay the balance due under the contract, and plaintiff brought this action. Defendant answered, setting up the illegality of the contract, to which a demurrer was sustained, and upon plaintiff's motion a judgment was entered for the full amount sued for, with interest.

[1] There is but one question for us to determine; that is, whether the contract is in contravention of the statute (section 3697, Rem. & Bal. Code). "It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company unless in the manner prescribed in this chapter, or the articles of incorporation or by-laws." It is admitted that the stock issued to plaintiff is a part of

the original capital stock, and that the company is solvent.

It has been repeatedly held by this court that: "The obvious purpose of the statute is to make the public records show the amount of the capital stock of a corporation; in other words, to speak the truth. It follows, therefore, that, where the capital stock has not been diminished in compliance with the statute, the original articles of incorporation operate as a continuing representation on behalf of the corporation that its capital stock is unimpaired, and that the impairment of its capital stock in any other manner is a fraud upon its creditors, both as to the corporation and all others who participate in or profit by such an act." *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539. Other cases sustaining this holding are *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Id.*, 38 Wash. 59, 80 Pac. 172; *Jorguson v. Apex Gold Mines Co.*, 133 Pac. 465; *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389. The soundness of these decisions is not questioned by plaintiff, but it is said that, inasmuch as it is admitted that the company is solvent and has no creditors, the statute and the authorities cited can have no bearing on the case. The following cases, holding where the rights of creditors are not involved such contracts are not ultra vires, are relied on: *Browne v. St. Paul Plow Works*, 62 Minn. 90, 64 N. W. 66; *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307, 67 N. W. 70; *Fleltmann v. John M. Stone Cotton Mill*, 186 Fed. 466, 108 C. C. A. 444; *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Iowa Lumber Co. v. Foster et al.*, 49 Iowa, 25, 31 Am. Rep. 140; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569; *Ophir Consol. Mines Co. v. Brynteson*, 143 Fed. 829, 74 C. C. A. 625; *Wisconsin Lumber Co. v. Green & Western Telephone Co.*, 127 Iowa, 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387.

In the *Brown Case* the court held that the contract fixed an agreed damage. The principle now under discussion was not considered.

In the *Vent Case*, the *Wisconsin Lumber Co. Case*, the *Fleltmann Case*, and the *Fremont Carriage Mfg. Co. Case*, it either appeared that there was no prohibitory statute or limitation in the charter or that there was an express authorization.

The *Porter Case* and the *Consolidated Mines Co. Case* are seemingly in point. The *Porter Case*, in our opinion, is not a well-reasoned authority. It is written on the assumption that, if the stock is repurchased, it is available for the benefit of creditors or stockholders and may be reissued by the corporation. It must be admitted that this reasoning is sustained by some of the cases. *Clark and Marshall on Private Corporations*, § 3475, and cases cited. In a sense this is

true, but it is not actually so. The surrendered certificate, a mere piece of paper, is in the hands of the corporation, but the money it represents, the fund in which other stockholders and creditors have an interest, is withdrawn, and to that extent the capital stock is actually diminished. To hold otherwise would be to declare that the corporation might do by indirection that which it could not do directly; i. e., reduce the capital stock or work a practical dissolution of the company. The purpose of the statute might be entirely defeated, and the vices suggested in the *Amery Case* might go unchallenged. In other words, if we follow the *Porter Case*, we would write the statute out of the books. The reasoning employed in that case is met by the very exhaustive opinion of *McSherry, C. J.*, in the case of *Maryland Trust Co. v. Mechanics' Bank*, 102 Md. 608, 63 Atl. 70. We will not pursue the discussion but will content ourselves by referring to and adopting the argument of that learned jurist and by referring to *Morawetz on Corporations*, § 112, wherein it is said: "A purchase by a corporation of shares of its own stock in effect amounts to a withdrawal of the shareholder, whose shares are purchased, from membership in the company and a repayment of his proportionate share of the company's assets. There is no substitution of membership under these circumstances as in case of a purchase and transfer of shares to a third person, but the members of the company and the amount of its capital are actually diminished. Whatever a transaction of this character may be called in legal phraseology, it is clear that it really involves an alteration of the company's constitution just as the withdrawal of a member of a copartnership, with his proportionate share of the joint funds, involves an alteration of the constitution of copartnership. The amount of the company's assets and the number of its shareholders are diminished; every continuing shareholder is injured by the reduction of the fund contributed for the common venture; and the creditors, who have trusted the company upon the security of the capital originally subscribed, or who are entitled to expect that amount of security, are entitled to complain. It is no answer to say that shares having a market value must be regarded like any other personal property, and that no person is injured if a solvent corporation in good faith purchases shares in itself at their market value, inasmuch as the shares so purchased are property in the hands of the company and may at any time be reissued or sold. No verbiage can disguise the fact that a purchase by a corporation of shares in itself really amounts to a reduction of the company's assets, and that the shares purchased do in fact remain extinguished, at least until a reissue has taken place. The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. It is con-

trary to the fundamental agreement of the shareholders and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a fruitful source of unfairness, mismanagement, and corruption. It is for these reasons that a shareholder cannot be allowed to withdraw from the corporation with his proportionate amount of capital, either by a release and cancellation before the shares have been paid up or by a purchase of the shares with the company's funds." Moreover, it occurs to us that the Porter Case is written in the teeth of a local statute. The court followed what many courts have variously said is the general rule existing in this country. That is, that the company may purchase its shares in the absence of a prohibitory statute, or that it may purchase its shares if it is expressly authorized so to do by statute, or that it may purchase its shares if the rights of creditors are not immediately involved.

The Ophir Mining Co. Case, in the opinion of the writer, does not sustain the right of a company to purchase its shares when its powers are limited by a statute such as we have in this state. It is the rule in England, almost without qualification, that a company cannot contract for or purchase shares of its own capital stock. Cook on Corporations, § 309. There is great confusion in the American authorities, as will be noted by reference to the text cited. Our statute is sustained by a sound public policy and a due regard for creditors present and prospective and associate stockholders.

In the Amery Case the right of subsequent creditors to challenge a contract falling within the statute is admitted. It is assumed arguendo that there were no creditors at the time the contract was entered into. The court said: "If the respondent's contention that creditors, who became such after the stock has been purchased and retired by the corporation, have no redress were to be sustained, the practical result would be that as soon as a corporation was organized, and before it had incurred any indebtedness, it could purchase from each of its stockholders one-half or more of his stock, retire the stock, deplete the treasury, and then proceed to make debts and defraud creditors who had a right to rely upon the public records as to the amount of the capital stock and to extend credit to the corporation upon the faith that it had not impaired its capital by any such unlawful means. We cannot stand sponsor for a view which would lead to such mischievous ends."

In the Jorguson Case the rights of creditors were not involved. The court held in strict line with the statute that a corporation could not impair its capital stock by the payment of dividends. While it does not appear in the reported decision, we deem it not out of place to say that a very able petition for rehearing was filed in that case

urging that inasmuch as the rights of creditors were not involved, and the controversy being between the individual and the corporation, we should recede from our holding and allow a recovery. We denied the petition for rehearing, so that, when the subsequent history of the Jorguson Case is understood, it seems to the writer that it is directly in point. "But, whether a corporation be solvent or insolvent, the fund represented by its capital stock must remain inviolate for the protection of its creditors. In the absence of statutory authority in that behalf, a corporation has no legal power to reduce this fund by any formal or voluntary act or contract on its part, to the prejudice of its creditors either then or thereafter existing, whether by distributing any part of it among the stockholders by way of dividend, or by giving any part of it to one or more stockholders, or by disposing of any part of it in any other manner, except by way of changing its form to meet the exigencies of the corporate business. * * * There are many decisions by the state courts, and some dicta in the opinions of the Supreme Court, which support the proposition that a contract of a corporation, not contra bonos mores or involving malum in se or forbidden by the charter or any other law, and merely beyond the grant of corporate power, can be enforced against the corporation after it has been executed on the part of the plaintiff, notwithstanding the fact that the plaintiff, at the time of entering into the contract, was aware of the lack of corporate authority. But this doctrine has not been accepted by the Supreme Court. In Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 48, 59, 11 Sup. Ct. 484 [35 L. Ed. 55], the court said: 'The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with the corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. * * * A contract of a corporation, which is ultra vires in the proper sense (that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature), is not voidable only but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it but that it could not make it. The contract cannot be ratified by either par-

ty because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it." *Hamor v. Taylor-Rice Engineering Co. (C. C.)* 84 Fed. 392, 397. See, also, *Burke v. Smith*, 16 Wall. 390, 21 L. Ed. 361.

[2] The statute contemplates transactions that may arise in faith of the capital stock and is broad enough to protect future creditors and also stockholders who are not parties to a prohibited contract. This is suggested but not argued in *Olsen v. Northern Steamship Co.*, 70 Wash. 493, 127 Pac. 112, where we held a similar contract to be divisible. It is there suggested that, if the contract was void, it was so because its performance would be a fraud upon other stockholders as well as upon creditors. Our statute makes no exceptions, and the logic of our own cases leads us to the imperative conclusion that the absence of present creditors will not vitalize the contract sued on.

[3] This court is still committed to the trust fund doctrine, as applied to corporations. *Lantz v. Moeller*, 136 Pac. 687. *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364. The indorsement of contracts such as the one we have before us would be destructive of that doctrine.

We have discussed this case upon general lines, not because we have doubted the application of the statute, but because of the fact that many of the American courts have been disposed to write an exception into the statute in favor of contracting parties where the rights of present creditors are not involved. We have endeavored to show that the contract is contrary to public policy as well as violative of the letter and spirit of the statute law.

The judgment of the lower court is reversed, and the case is remanded, with instructions to dismiss.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

HEWSON v. PETERMAN MFG. CO. (Supreme Court of Washington. Dec. 12, 1913.)

1. FRAUDS, STATUTE OF (§ 83*)—"GOODS, WARES, AND MERCHANDISE."

Corporate stock is "goods, wares and merchandise" within the statute of frauds, whether the stock is issued or to be issued (citing *Words and Phrases*, vol. 4, p. 3131; see, also, vol. 4, p. 3138; vol. 8, p. 7635).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 147-153; Dec. Dig. § 83.*]

2. FRAUDS, STATUTE OF (§§ 94, 95*)—"GOODS, WARES, AND MERCHANDISE"—"PART PAYMENT"—REQUISITES.

Rem. & Bal. Code, § 5290, provides that no contract for the sale of goods, wares, or merchandise for the price of \$50 or more shall be valid unless the purchaser shall accept and

receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized. *Held*, that a "part payment," to satisfy the statute, must be something really given and received in part payment, and hence where plaintiff orally contracted to purchase certain of defendant's corporate stock for \$5,000 therefor, and defendant contracted to sell plaintiff the stock and give him employment, the fact that plaintiff, on the day the bargain was made and in part performance thereof, resigned his present position and thereafter tendered his services to defendant, together with the price of the stock, did not constitute the giving of something in earnest to bind the bargain or in part payment so as to take the contract out of the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 182, 183-185; Dec. Dig. §§ 94, 95.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5181, 5182.]

3. CORPORATIONS (§ 294*)—EMPLOYÉS—REMOVAL—"POSITION OF RESPONSIBILITY AND TRUST."

Where defendant corporation contracted to employ plaintiff as its bookkeeper, under the title of "secretary and treasurer," at a salary of \$150 per month, such position was one of "responsibility and trust," from which plaintiff would have been removable at the will of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1263-1266; Dec. Dig. § 294.*]

4. TRIAL (§ 159*)—SUBSTANTIAL DAMAGES—FAILURE TO PROVE.

Where an action is for damages only, not involving property or personal rights having value in themselves, a failure to prove substantial damages is a failure to prove the substance of the issue and warrants a judgment of dismissal.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 359-367; Dec. Dig. § 159.*]

5. APPEAL AND ERROR (§ 1171*)—REVIEW—REVERSAL—NOMINAL DAMAGES.

A judgment will not be reversed on appeal in order that plaintiff may prove and recover nominal damages.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by F. C. Hewson against the Peterman Manufacturing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Garvey, Kelly & MacMahon, of Tacoma, for appellant. John E. Gallagher, of Tacoma, for respondent.

GOSE, J. Plaintiff claims damages for breach of an oral contract to sell corporate stock and give employment. His complaint alleges that he and the defendant entered into an oral contract, whereby the defendant agreed to increase its capital stock and sell him 50 shares of such increase at par, that is, at \$100 a share, and to employ plaintiff as its "bookkeeper under the title of

secretary and treasurer," at a salary of \$150 per month, in consideration of his resigning the position which he then held with another company and paying to defendant \$5,000 for the stock. It is further alleged that, in fulfillment of the contract, the plaintiff, upon the day of the bargain, resigned his position, and thereafter tendered to the defendant his services and the sum of \$5,000, both of which the defendant rejected; that the defendant increased its capital stock; that its capital stock is of the market value of \$150 per share; and that his resignation was "known, acquiesced in, and accepted" by the defendant as a part performance of the contract. The prayer is for \$2,500 damages for failure to deliver the stock, and \$600 for breach of the contract of employment. A demurrer to the complaint was interposed on three grounds: (1) That several causes of action are improperly united; (2) that the complaint does not state facts sufficient to constitute a cause of action; and (3) that the contract under the statute of frauds is required to be in writing. The demurrer was sustained and judgment of dismissal entered. The plaintiff has appealed.

The respondent's contention is twofold: (a) That shares of corporate stock are "goods, wares, and merchandise" within the meaning of the statute of frauds; and (b) that the act of the appellant in resigning his position was not the giving of an earnest or a part payment under the statute. Our statute (Rem. & Bal. Code, § 5290) provides: "No contract for the sale of any goods, wares or merchandise, for the price of \$50 or more, shall be good and valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." Section 3693, Rem. & Bal. Code, provides that the stock of a corporation shall be deemed personal property.

[1] It is established by the great weight of authority that corporate stock is goods, wares, and merchandise within the meaning of the statute of frauds. 20 Cyc. 244; Cook on Corporations, § 339; Helliwell, Stock & Stockholders, p. 15; 4 Words and Phrases, p. 3131; Sprague v. Hosie, 155 Mich. 30, 118 N. W. 497, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558; Franklin v. Matao Gold Min. Co., 158 Fed. 941, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302. This construction of the statute is not seriously disputed by the appellant. He contends, however, that a contract for the sale of stock to be issued does not fall within the ban of the statute; but he offers no sound reason for the distinction. It is well settled, we think, that a contract for the sale of stocks at a future date is within the statute. Franklin v. Matao, etc., supra, and authorities there cited. In Mee-

han v. Sharp, 151 Mass. 564, 24 N. E. 907, cited by appellant, the court suggested that it was "at least doubtful" whether a contract for the sale of corporate stock that had not been regularly issued was within the statute, but the case was affirmed upon the ground that there had been a delivery of the stock.

[2] The second proposition is: Did the resignation of the appellant constitute giving "something in earnest to bind the bargain or in part payment"? The statute obviously contemplates that something of value shall pass to the promisee; that is, that something of value "must be really given and received toward payment." Benjamin on Sales (7th Ed.) p. 180. "There must be an actual payment" of money or something of value "in the eye of the law." Clark on Contracts, § 57. "To constitute a payment as earnest, or a part payment within the meaning of the statute of frauds, there must be an actual transfer or delivery of the thing, or the money, agreed to be given as earnest or part payment." Walrath v. Ingles, 64 Barb. (N. Y.) 265. "Acts which are only preliminary or ancillary to the agreement, such as the delivering of an abstract of title, giving directions for a conveyance, the preparation of the agreement, making valuations, and other like acts, are not sufficient." Reynolds v. Scriber, 41 Or. 407, 69 Pac. 48. The allegation that the appellant's resignation was "known, acquiesced in, and accepted by the defendant" as a part performance of the contract, is merely the conclusion of the pleader. There is but one fact pleaded touching part payment, and that is that the appellant resigned an employment which he held with a third party. In White v. Drew, 56 How. Prac. (N. Y.) 53, cited by appellant, one of the elements of the consideration agreed upon passed from the vendee to the vendor. In the instant case the appellant merely resigned after the agreement had been made. Nothing actually passed to the respondent. Although not cited in the briefs, we have not overlooked the case of Harris v. Johnson, 134 Pac. 1048. The question there was: What constitutes a sufficient consideration for a promise to pay money? The question here is the correct interpretation of the words of a particular statute. The rule applicable to the one question is not necessarily controlling in the other. We conclude that there was nothing given in earnest to bind the bargain or in part payment within the meaning of the statute. It follows that the contract for the sale of the corporate stock was void under the statute of frauds.

[3] The appellant argues, however, that the contract is not an entirety, and that he is entitled to recover at least nominal damages for a breach of the contract to give him employment. Had he been given employment, he would have occupied a position "of responsibility and trust" and would have been removable at the will of the respondent.

Llewellyn v. Aberdeen Brewing Co., 65 Wash. 319, 118 Pac. 30, Ann. Cas. 1913B, 687. It cannot be doubted that the position of bookkeeper "under the title of secretary and treasurer" would be a position of responsibility and trust. If he had the title of secretary and treasurer, we think the legal presumption would be that he would exercise the functions of secretary and treasurer.

[4] This court has held that, where the action is one for damages only, there being involved no property or personal rights having value in themselves, a failure to prove substantial damages is a failure to prove the substance of the issue, and warrants a judgment of dismissal. *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 8 L. R. A. (N. S.) 783, 117 Am. St. Rep. 1079, 11 Ann. Cas. 54; *Casassa v. Seattle*, 134 Pac. 1080. This view is sound for another reason; that is, the law "does not concern itself with trifles." *Matzger v. Page*, 62 Wash. 170, 113 Pac. 254.

[5] The case will not be retained for the purpose of determining the question of nominal damages.

The demurrer was properly sustained, and the judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

STATE v. NORTHERN EXPRESS CO.

(Supreme Court of Washington. Dec. 13, 1913.)

1. CARRIERS (§ 11*)—EXPRESS COMPANIES—RENUNCIATION OF BUSINESS—POWER—"COMMON CARRIER."

Const. art. 12, § 13, declares all railroad and other transportation companies to be common carriers and subject to legislative control. Section 15 prohibits transportation companies from discriminating between places or persons upon the same class of freight within the state, "or coming from or going to any other state." Article 12, § 21, requires railroad companies to allow all express companies transportation over their lines upon equal terms. Const. art. 12, § 7, and Rem. & Bal. Code, § 3720, provide that a foreign corporation may not transact business on more favorable terms than a domestic corporation. Laws 1911, c. 117, § 8, provides that the term "common carrier" includes express companies, and section 9 requires every such carrier to furnish adequate facilities to promptly and safely handle all persons or property offered to or received by it. Section 10 requires every carrier to promptly receive and transport persons or property offered to or received by it, and section 53 authorizes the public service commission to require every carrier to accommodate its business to the requirements of the law. *Held*, that an interstate express company doing business within the state could not at will give up the carrying of goods from one point to another in the state, being controlled by the public service statute while doing an intrastate business through the state, so long at least as its local business is not done at a loss.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 30; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1313-1319; vol. 8, p. 7607.]

2. COMMERCE (§ 69*)—INTERSTATE COMMERCE—REGULATION BY STATE—VALIDITY.

Laws 1907, c. 54, § 7, requiring the State Treasurer to collect from each express company doing business in the state "a sum in the nature of an excise or privilege tax," computed by taking five per centum of the amount fixed by the tax commissioners as the gross receipts of the company for business done within the state for the preceding year, provided that its tangible property shall not be relieved from taxation, violates the commerce clause of the federal Constitution.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113-119; Dec. Dig. § 69.*]

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by the State of Washington against the Northern Express Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. V. Tanner and Stephen V. Carey, both of Olympia, for the State. Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, for respondent.

GOSE, J. This is an action brought by the state to collect an "excise or privilege" tax under Laws 1907, p. 79. The defendant in due form raised the objection that the tax law is repugnant to the commerce clause of the federal Constitution.

The complaint alleges facts which show that the tax was levied in compliance with the statute (Laws 1907, p. 79), and that it is due to the state if the statute is valid. The defendant, in avoidance of the tax, alleges affirmatively that it is a corporation duly organized under the laws of the state of New Jersey with power to conduct an express business in the several states of the Union; that it owns and operates an express business on the line of the Northern Pacific Railway Company from the city of Ashland, in the state of Wisconsin, through the states of Minnesota, North Dakota, Montana, and Washington, to the cities of Tacoma and Seattle in this state, and thence through this state to the city of Portland in the state of Oregon; that it came into the state prior to the passage of the act in controversy, for the purpose of transacting its express business, and fully complied and has continued to fully comply with the laws of the state relating to foreign corporations doing business in this state; and that the tax and the law under which it was levied are a direct burden upon and regulation of interstate commerce in violation of section 8, art. 1, of the federal Constitution. The state's demurrer to the affirmative matter in the answer was overruled. It having elected to stand upon the demurrer and declining to plead further, the case was dismissed. The state has appealed.

The tax was imposed under the provisions of Laws 1907, p. 79. The statute provides, section 2, that every express company shall

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

annually, between certain fixed dates, make and file with the state board of tax commissioners a statement containing "the entire receipts (including all sums earned or charged, whether actually received or not) for business done within this state, including its proportion of gross receipts for business done by such company within this state in connection with other companies." Section 3 prescribes how the board shall ascertain the entire gross receipts of express companies for business done within the state for the particular year, and provides that the amount so ascertained shall be held and deemed to be the gross receipts of such company for business done within the state for the year under consideration. Section 7 provides that: "It shall be the duty of the State Treasurer, annually, to collect from each such express company, doing business in this state, a sum in the nature of an excise or privilege tax, to be computed by taking five per centum of the amount fixed by the state board of tax commissioners as the gross receipts of such express company for business done within the state of Washington for the year next preceding the first day of April, as determined and certified by the state board of tax commissioners: Provided, nothing contained in this act shall exempt or relieve any express company from the assessment and taxation of their tangible property in the manner authorized and provided by law."

The single question presented by the appeal is whether the statute is repugnant to the commerce clause of the federal Constitution. This is confessedly a federal question upon which the decisions of the federal Supreme Court are controlling. Counsel for both parties have presented their argument under two principal heads or topics: (1) Under the Constitution and public service law of the state, is an express company free to take or renounce business within the state as it may choose? The appellant contends that it is free so to do, whilst the respondent contends that it is not. And (2), in either case, is the law in conflict with the commerce clause of the federal Constitution?

[1] These questions will receive consideration in the order stated. Section 13, art. 12, of the Constitution of the state, provides: "All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control." Section 15, art. 12, provides that transportation companies shall not discriminate between places or persons or in the facilities afforded upon the same class of freight or packages within the state "or coming from or going to any other state." Section 21, art. 12, provides: "Railroad companies, now or hereafter organized or doing business in this state, shall allow all express companies organized or doing business in this state transportation over all lines of railroad owned or operated by such railroad companies

upon equal terms with any other express company; and no railroad corporation organized or doing business in this state shall allow any express corporation or company any facilities, privileges, or rates for transportation of men or materials or property carried by them, or for doing the business of such express companies, not allowed to all express companies." Section 7, art. 12, of the Constitution, and section 3720, Rem. & Bal. Code, provides that a foreign corporation shall not be permitted to transact business within the state on more favorable conditions than domestic corporations. The public service commission law (Laws 1911, p. 538 et seq.) makes the following provisions: Section 8 provides that the term "common carrier" includes "express companies." Section 9 provides that every common carrier shall furnish adequate and sufficient service and facilities to enable it to "promptly, expeditiously, safely, and properly" handle all persons "or property offered to or received by it for transportation," etc. Section 10 provides: "Every common carrier shall under reasonable rules and regulations promptly and expeditiously receive, transport and deliver all persons or property offered to or received by it for transportation." Section 53 empowers the public service commission to require every common carrier to accommodate its business and facilities to the requirements of the law, to the end that it shall furnish the public a reasonably adequate service at a reasonable price. These sections are supplemented by other provisions of the law imposing obligations and restrictions such as to render the law efficacious. It is significant that these duties, restrictions, and regulations are made to specifically apply to "every common carrier." To sustain the argument of the Attorney General that the provisions of the statute are mandatory as to all public service companies having their own equipment, such as railroad, telegraph, and telephone companies, and that because express companies have no such equipment they are free to renounce local business, would be an unwarranted limitation of both the letter and the spirit of the statute.

Nor is it necessary for us to construe section 21, art. 12, of the Constitution. It has reference to the duties of railroad companies toward express companies. There is no controversy here between such companies. The question here is between the state and an express company. Neither the express company nor the state is complaining because of the failure of the railroad company to grant any right arising out of that section of the Constitution.

Nor are we confronted with the question whether an express company can be required to continue to carry on a local business at a loss. The record presents no such question.

The state relies chiefly upon the rule announced in *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. That was a suit between certain railroad companies and certain express companies, the latter contending that it was the duty of the railroad companies to act as common carriers for the express companies. The court held that, so long as a railroad company gave the public a reasonably adequate express service itself or through its chosen agencies, it could not, in the absence of legislation or a definite contract, be required at the suit of an express company to serve it; that is, it could not be required to become a common carrier "of a common carrier." The case is not apposite in the light of our interpretation of the Constitution and laws of the state. We think that it would be a perversion of the Constitution and the public service statute to hold that an express company (admittedly a common carrier) has the "right to choose between what points it would carry, and therefore could give up the carrying [of goods usually carried by express companies] from one point to another within the state." In other words, it is controlled by the public service statute, at least so long as it does an intrastate business through the state when there is no suggestion that the local business is being conducted at a loss.

[2] This brings us to the principal question, that is: Is the statute under which the tax is levied repugnant to the commerce clause of the federal Constitution? As we read the cases, this question is foreclosed against the state by the decisions of the federal Supreme Court. *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Allen v. Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Galveston, etc., v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459; *Oklahoma v. Wells Fargo, etc., Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445.

In the *Adams Case* it was held that a privilege tax imposed upon an interstate carrier on account of local business is valid under the law of the state if the carrier is "free to renounce local business," but that, if the state law requires the carrier to accept local business, the tax would be invalid as an interference with commerce between the states. The statute there reviewed provided that: "A tax on privileges is levied as follows, to wit: * * * Sleeping car companies: On each sleeping and palace car company carrying passengers from one point to another within the state, \$100, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars." In considering the statute, the court said: "If the clause of the state Constitution re-

ferred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the state Constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher v. Kentucky*, 141 U. S. 47 [11 Sup. Ct. 851, 35 L. Ed. 649]. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida*, 164 U. S. 650 [17 Sup. Ct. 214, 41 L. Ed. 586]. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax. As the validity of the tax is thus bound up with the effect of the section of the state Constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure."

In *Crutcher v. Kentucky*, a statute of the state of Kentucky, making it unlawful for an agent of any express company not incorporated under the laws of the state to engage in the business of transportation therein without first procuring a prescribed license, was held to be a direct invasion of the commerce clause of the federal Constitution. After a reference to the statute, the court said: "It is a prohibition against carrying on of such business without a compliance with the state law. * * * To carry on interstate commerce is not a franchise or a privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporation facilities, as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. * * * We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. * * * We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of

interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such."

In the Allen Case it was held that a law requiring the payment of a tax for the privilege of running cars through the state, as well as upon those operated wholly within the state, was void as an attempt by the state to impose a burden upon interstate commerce. In *Western Union, etc., v. Kansas*, the court, in considering the effect of a statute of the state of Kansas which provided that "each corporation which has received authority from the charter board to organize shall, before filing its charter with the Secretary of State as provided by law, pay to the State Treasurer of Kansas for the benefit of the permanent school fund a charter fee of one-tenth of one per cent. of its authorized capital upon the first \$100,000 of its capital stock," and for a descending graduated tax upon all of its capital stock in excess of that amount, said: "The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating in some instances directly, in others indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a state for purposes of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort, and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the state, and to be respected until Congress covers the subject by legislation. *Cooley v. Port Wardens*, 12 How. 299, 320 [13 L. Ed. 996]; *Sherlock v. Alling*, 93 U. S. 99, 104 [23 L. Ed. 819]; *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 463 [6 Sup. Ct. 1114, 30 L. Ed. 237]; *Smith v. Alabama*, 124 U. S. 465 [8 Sup. Ct. 564, 31 L. Ed. 508]; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 100 [9 Sup. Ct. 28, 32 L. Ed. 352]; *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 631, 632 [17 Sup. Ct. 418, 41 L. Ed. 853]; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 626 [18 Sup. Ct. 488, 42 L. Ed. 878]; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297 [19 Sup. Ct. 465, 43 L. Ed. 702]. We are aware of no decision by this court holding that a state may by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another state, although the state may tax the

corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent in fact on the value of its property situated within the state.' *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 696 [15 Sup. Ct. 268, 360, 39 L. Ed. 311]; *Leloup v. Mobile*, 127 U. S. 640, 649 [8 Sup. Ct. 1383, 32 L. Ed. 311]. On the contrary, it is to be deduced from the adjudged cases that a corporation of one state, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce. It may go into the state without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, on account of such business." And it further said: "If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show." And referring to the *Adams Case*, the court said: "The court did not hold that the state could, in any form, directly burden interstate commerce. It really held to the contrary." And referring to the *Allen Case*, it is said: "In the *Allen Case* the license tax there in question under the Tennessee act of 1887 was imposed generally on account of each sleeping car used on railroads traversing the state, without any discrimination being made between cars transporting interstate passengers and those transporting local passengers. On that ground the tax was held to be void." In dissenting, Mr. Justice Holmes said: "The whole matter is left in the *Western Union's* hands. If the license fee is more than the local business will bear, it can stop that business and avoid the fee. Whether economically wise or not, I am far from thinking that the charge is inherently vicious or bad. If the imposition were absolute, or if the attempt were to oust the corporation from the state if it did not pay, the arguments that prevail would be apposite. But the state seeks only to oust the corporation from that part of its business that the corporation has no right to do unless the state gives leave."

In *Galveston, etc., v. Texas*, the act which was under review was "An act imposing a tax upon railroad corporations * * * and other persons * * * owning * * * or controlling any line of railroad in this state * * * equal to one per cent. of their gross receipts * * * and repealing the existing tax on the gross passenger earnings of railroads." After observing that

the lines of the railroads concerned were wholly within the state, that they connected with other lines, that a part—in some instances a larger part—of their gross receipts was derived from the carriage of packages and freight coming from or destined to points without the state, the court said: "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697 [15 Sup. Ct. 268, 360, 39 L. Ed. 311]. See *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 158 U. S. 431, 438, 439 [15 Sup. Ct. 896, 39 L. Ed. 1043]. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard v. Morgan*, 185 U. S. 27, 37 [22 Sup. Ct. 576, 46 L. Ed. 785]; *Asbell v. Kansas*, 209 U. S. 251, 254, 256 [28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101]. We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states." Mr. Justice Harlan dissented, saying: "But it is said that the tax in question, even if regarded as an occupation tax, is invalid, as constituting a direct burden on interstate commerce, the regulation of which belongs to Congress. It is not, in my opinion, to be taken as a tax on interstate commerce in the sense of the Constitution; for its operation on interstate commerce is only incidental, not direct. A state, in the regulation of its internal affairs, often prescribes rules which in their operation, remotely or incidentally, affect interstate commerce. But such rules have never been held as in themselves imposing direct burdens upon such commerce, and on that ground invalid. The state in the present case ascertains the extent of business done by the corporation in the state, and

requires an annual occupation tax 'equal' to a named per centum of the amount of such business. It does not lay any tax directly upon the gross receipts as such. * * *

We are not able to distinguish the case at bar from *Galveston, etc., v. Texas*. Indeed, the two acts in meaning are identical, except that our statute defines the tax as "an excise or privilege tax," and imposes it in addition to a property tax. The argument of the Attorney General in substance and effect is the same as that made in the dissenting opinion of Mr. Justice Harlan. In the *Minnesota* case a distinction was made between a legitimate tax laid upon property, although engaged in interstate commerce, and an attempt in the guise of taxation to impose real burdens upon interstate commerce as such; the court saying that the former was not, and that the latter was, invalid. In the *Oklahoma* case a statute was condemned which provided that: "Every corporation hereinafter named shall pay the state a gross revenue tax * * * which shall be in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation equal to the per centum of the gross receipts hereinafter provided, if such public service corporation operate wholly within the state, and if such public service corporation operates partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business. * * *

In *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, cited by the state, the basis of assessment provided by the statute was: "The true value in money of the entire property of said companies within the state of Ohio in the proportion which the same bears to the entire property of said companies as determined by the value of the capital stock thereof." The statute was held valid; the court saying: "The principal contention is that the rule contravenes the commerce clause because the assessments, while purporting to be on the property of complainants within the state, are in fact levied on their business, which is largely interstate commerce. Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and

taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government." In referring to this case in the later case of *United States Express Co. v. Minnesota*, supra, the court said that the tax was sustained in the Ohio case as a property tax, "upon the property of an express company, which property was considered a part of one money-earning organization extending through many states." But where a gross revenue tax was laid in addition to an ad valorem tax, the court said in the Oklahoma case, supra, that there was no warrant for calling the tax a property tax.

We think the case at bar is ruled by the conclusion reached in the Adams, Texas, and Oklahoma cases. A further review by this court would be fruitless. Our duty is to follow the rule laid down by the federal Supreme Court. This, as we read its decisions, requires an affirmance of the judgment.

CROW, C. J., and MAIN, ELLIS, and CHADWICK, JJ., concur.

DOUGAN v. CITY OF SEATTLE.

(Supreme Court of Washington. Dec. 18, 1913.)

1. MUNICIPAL CORPORATIONS (§ 817*)—INJURY TO PEDESTRIAN—DEFECTIVE SIDEWALKS—NEGLIGENCE.

That a sidewalk was negligently constructed at an excessive grade will not be presumed, because plaintiff fell thereon and was injured.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1725; Dec. Dig. § 817.*]

2. EVIDENCE (§ 5*)—JUDICIAL NOTICE.

The courts will take judicial notice that sidewalks of a grade equal to 13 per cent. are common in the cities of the state and have not been prohibited by legislation.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. MUNICIPAL CORPORATIONS (§ 821*)—SIDEWALKS—JURY QUESTION.

In an action by one injured by a fall on a sidewalk which was at a grade of about 13 per cent., the court cannot as a matter of law hold that the municipality was negligent in laying it without cleats; the question of negligence being one of fact for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

4. APPEAL AND ERROR (§ 1008*)—REVIEW—FINDINGS OF TRIAL COURT.

Findings of fact by the trial court, when reviewed in accordance with Rem. & Bal. Code, § 1736, providing for the review of such findings, are treated as a verdict of the jury, and will be sustained unless against the preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.*]

Gose, J., dissenting.

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Jas. A. Dougan against the City of Seattle, a municipal corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Jas. A. Dougan, of Seattle, for appellant. Jas. E. Bradford and Melvin S. Good, both of Seattle, for respondent.

CHADWICK, J. Plaintiff slipped and fell upon a sidewalk laid upon a slope of 12.9 per cent., suffering injuries for which he seeks compensation in this action. The accident occurred on the morning of the 5th day of April, 1912. There was a slight frost on the sidewalk. From a judgment in favor of the defendant, plaintiff has appealed.

Plaintiff estimated the grade of the walk at about 17 per cent. The court made no specific finding upon this point, holding, in addition to the fact that the city was not negligent, that plaintiff was guilty of contributory negligence and it made no difference whether the grade was 13 per cent. or 17 per cent. The evidence of a city engineer based on actual measurements fixes the grade at 12.9 per cent., and we shall accept his finding.

Waiving the question of contributory negligence, there is but one question in this case; that is, whether it is negligence per se for a city to maintain a sidewalk without cleats on a 12.9 per cent. grade.

[1] Negligence is not to be presumed from the sole fact that plaintiff fell and was injured. *Grossenbach v. Milwaukee*, 65 Wis. 32, 26 N. W. 182, 56 Am. Rep. 614; *Sorenson v. Menasha, P. & P. Co.*, 56 Wis. 338, 14 N. W. 446; *Lush v. Parkersburg*, 127 Iowa, 701, 104 N. W. 336. The testimony does not show the opinion of those who are competent to pass an opinion upon the physical facts disclosed; nor is it made to appear that other accidents upon sidewalks similarly constructed have happened with sufficient frequency to put the city upon notice of its dangerous character.

[2, 3] No cases are cited, nor have we found any, where courts have assumed to hold a grade of like character dangerous as a matter of law. We may take judicial notice that such grades are frequent—in fact common—in the cities and towns of this state, and that they have been maintained without prohibitive or regulative legislation. The courts have treated the question of negligence in such cases as one of fact and have persistently refused to direct verdicts or render judgments non obstante.

In *Morrison v. City of Madison*, 96 Wis. 452, 71 N. W. 882, the slope was 22 inches in 18½ feet, or 13.6 per cent. The court said: "The facts in regard to its construction and condition are all undisputed; yet, if there was any room for honest differences

of opinion among reasonable men of unbiased minds in respect to the inferences that should be drawn therefrom regarding the fact in issue, then it was for the jury, and not the court, to draw the correct inference. It is only when the facts are undisputed, and the reasonable inferences therefrom in regard to the ultimate fact in issue are all one way, that what is the proper inference is a question of law for the court to answer." This case is instructive in that it refers to many cases where the grade and absence of cleats were the only defects complained of. In *Lush v. Parkersburg*, supra, it is said: "The only evidence as to the approach to the sidewalk being dangerous, and as to the negligence of the defendant in allowing it to remain in a dangerous condition, was to the effect that it should have been provided with cleats or strips nailed across it. The approach was of pine planks laid lengthwise, 5 feet long, and it was 8½ inches higher where it joined the sidewalk than where it joined the street. The slope of the approach was therefore one foot in seven, and there is no evidence whatever that this slope in itself rendered the approach dangerous, or that the town was negligent, in view of all the circumstances, in constructing the approach at such a slope." The annotator of the lawyers' reports, in an exhaustive monographic note following the case of *Elam v. Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512, finds the rule to be: "Whether a given street was in a reasonably safe condition for the convenience of travel is a practical question, to be determined by the jury in each case by the particular circumstances."

Plaintiff cites many cases holding that it is negligence for the city to maintain a sloping sidewalk without cleats. We have examined these cases carefully and find confirmation of our tentative opinion that it has always been so held in aid of the verdict of a jury. In other words, an appellate court will not so hold as a matter of law unless the facts are so patent as to warrant it in saying that the minds of reasonable men would not differ in their conclusions; but a jury, having considered all the facts, and having so found, its verdict will not be disturbed. Reference to the cases will show that the grade complained of in this case is not unusual. The instant case was tried before the court and findings made that the city was not negligent.

[4] It is the settled practice of this court to treat such findings as a verdict of a jury and sustain them, unless upon an examination de novo we find that the evidence preponderates against them. Section 1736, Rem. & Bal. Code.

Plaintiff cites the cases of *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054, *Short v. Spokane*, 41 Wash. 257, 83 Pac. 183, and *Bull v. Spokane*, 46 Wash. 237, 89 Pac. 555, 13 L.

R. A. (N. S.) 1105. We have examined these cases and find that they suggest nothing in opposition to our present conclusion.

The judgment is affirmed.

CROW, C. J., and ELLIS and MAIN, JJ., concur.

GOSE, J. It was not necessary to offer evidence to show that one is more liable to fall when descending a smooth, slippery inclined plane than when walking over a smooth, slippery level. That fact is one of common knowledge. The danger necessarily increases as the grade increases. When a sidewalk is laid at such a grade as to render travel upon it unsafe, its maintenance without cleats or other safeguard is a negligent act. It requires neither evidence nor argument to prove that a smooth surfaced sidewalk laid upon a grade of approximately 13 per cent. is unsafe and dangerous. That fact is so obvious, as I view it, that evidence can neither emphasize nor weaken its force. Nor was it necessary to prove that others had fallen. The inference to be drawn from the majority opinion is that the first traveler who fell, or perhaps the first half dozen who were so unfortunate as to fall and sustain injuries, could have no redress, but that those who later fell, and who could prove the misfortune of their brethren, could recover. The city laid and maintained the walk and knew its condition. To my mind its negligence is apparent. The appellant testified that he did not observe the frost, which was a light one, before he fell. He is therefore not chargeable with contributory negligence. I therefore dissent.

BROWN v. CITY OF WALLA WALLA.

(Supreme Court of Washington. Dec. 13, 1913.)

1. JUDGMENT (§ 199*) — NOTWITHSTANDING VERDICT.

In an action against a city by a person injured when a horse ran away on a street which was being paved, evidence held to make questions for the jury as to whether sufficient barriers were maintained, whether the city had notice of the insufficiency of the barriers, whether the driver was negligent, and whether he and plaintiff were so identified in a common enterprise as to charge her with his negligence; and hence defendant's motion for judgment notwithstanding a verdict for plaintiff was properly denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. JUDGMENT (§ 199*)—MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.

A motion for judgment notwithstanding the verdict invokes no element of discretion, but invokes the pure judicial functions of the trial court and the Supreme Court, and can be granted only when the court can say as a matter of law that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. NEW TRIAL (§ 1*)—DISCRETION OF COURT.

A motion for a new trial invokes both the discretionary and the judicial functions of the trial court.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

4. APPEAL AND ERROR (§ 979*)—REVIEW—MOTIONS FOR NEW TRIAL.

On a motion for a new trial for insufficiency of the evidence, the trial court alone can weigh the evidence and in its discretion grant or deny such motion, and the Supreme Court can interfere only where there has been a clear abuse of discretion or a failure by the trial court to exercise its discretion at all, or where its action is based upon a misconception of the law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

5. APPEAL AND ERROR (§ 979*)—REVIEW—MOTIONS FOR NEW TRIAL.

Where the trial court would not have abused its discretion by granting a new trial for insufficiency of the evidence, and in denying a motion therefor stated that he thought either that motion or a motion for judgment notwithstanding the verdict should be granted, and that if he were in the Supreme Court he would be in favor of granting one of such motions, the judgment would be reversed and a new trial directed because of the trial court's misconception of the functions respectively of the trial court and the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Fullerton, J., dissenting.

Department 2. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by Florence V. Brown against the City of Walla Walla. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

John F. Watson and Rader & Barker, all of Walla Walla, for appellant. Dunphy, Evans & Garrecht, of Walla Walla, for respondent.

ELLIS, J. [1] The plaintiff seeks in this action to recover damages for injuries suffered by being thrown from a buggy by a runaway horse on South Second street in the city of Walla Walla. The material facts are as follows: South Second street runs approximately north and south. Whitman street comes into it from the east almost a block south of where Eagan street comes in from the west. Each of these streets terminates at its intersection with South Second street. At the time of the accident, South Second street was being paved. The concrete base had been laid from south of Whitman street to about the north line of Eagan street. There was a street car track on Whitman street which curved into South Second street and extended therein to the north. There was also a street car track in Eagan street which curved into South Second, and about opposite the north line of Eagan street connected with the other track forming a wye. This curve of the Eagan street track was ele-

vated about four inches. Street cars were in regular operation on these tracks. There was a drop or incline from Whitman street to the concrete base on South Second street estimated by different witnesses at from 8 to 18 inches. Back a short distance from the east line of South Second street, Whitman street was obstructed on the north of the car track by a pile of crushed rock about 60 feet long, 15 feet wide, and something over 4 feet high practically closing the street north of the car track. South of the car track there was a pile of sand 10 or 12 feet wide and 2½ or 3 feet high, and between this and the car track was a concrete mixer practically closing the street south of the track, save a space 8 or 10 feet wide between the mixer and the track. Vehicles had passed through this opening marking a well-defined roadway. The car track was left unobstructed for the operation of street cars. A few feet to the south line of Whitman street, South Second street was barricaded by boards preventing any passage on that street to the south. The accident happened at about 6 o'clock in the evening of Sunday August 7, 1910, when it was perfectly light. Up to this point there was no conflict in the evidence. A conflict arises as to other obstructions in Whitman street. A man employed by the paving company for the purpose of keeping up barriers and placing of lights as danger signals testified that, after the street was torn up, he had endeavored to keep a board with one end resting on the sand or a bag of cement against the mixer, and the other end on a section of drain tile, standing on end just a sufficient distance from the street car track to permit cars to pass, and that at nights he placed on this board a red light and another on the gravel pile north of the track near the street curb; that on the Sunday in question this board had been twice knocked down by street cars passing round the curve, and the last time he replaced it with the north end some three or four feet from the track; that he had placed a red light upon it and another on the rock pile about 25 or 30 minutes before the accident. In this he was corroborated by positive testimony of three other witnesses, two of whom claimed to have been sitting at the time on the front porch of a house located directly across Second street opposite the end of Whitman. The third witness testified that at the time he was sitting in a yard above and overlooking Whitman street and located in the angle formed by the intersection of the south line of Whitman and the east line of South Second streets, and saw the board and lights placed in position. The plaintiff and her niece, who was in the buggy with her at the time it was driven past this point by another occupant, a man who was killed in the accident, testified that there was no board there. In this they were corroborated by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

somewhat negative testimony of several witnesses, who were in the vicinity shortly before or shortly after the accident, who said they saw no board, and some of them that they saw no lights. The niece testified that she saw the light on the rock pile near the north curb of the street and a light near the mixer just as she passed it, but behind a pile of sand, so as not to be visible to one coming down Whitman street till opposite it and too late to turn back, and that she then called it to the attention of Owsley, the driver, who observed that it was all right, as the tracks indicated that other teams had driven in there. The evidence was without conflict that some horse-drawn vehicles had been driven from Whitman into South Second street on this and prior days, but that many, on the drivers observing the conditions, had been turned and driven back up Whitman street.

On the day of the accident, the plaintiff and Owsley had driven to Walla Walla from Dayton, where she resided, leading behind their vehicle a horse belonging to Owsley, which he and the plaintiff were endeavoring to trade to one Wood, a horse dealer of Walla Walla. About 5 o'clock in the afternoon, Owsley went to the livery stable and had the horse hitched to a single buggy. While being driven out of the barn down a slight incline, the horse became frightened and broke the buggy shafts. These were replaced, and, the horse being again hitched to the buggy, Owsley proceeded to the hotel or lodging house where the plaintiff and her niece were and took them into the buggy. The plaintiff, being an expert horsewoman, took the reins and drove to Wood's home to inspect his horse upon which Owsley desired her opinion. From there the party started to drive to the home of the niece by way of Whitman and South Second street. When they reached the obstructions in Whitman street, Owsley drove down the slight incline onto the concrete, intending to go south, but, then noticing the barrier on South Second street, turned to the north, when the horse became frightened and ran away, the buggy wheels striking the raised curve of the street car track at the Egan street wye, throwing the occupants out, killing Owsley, and seriously injuring the plaintiff. There was considerable testimony as to the gentleness of the horse to rebut the inference of his fractiousness raised by the incident at the barn.

The jury returned a verdict of \$4,500 for the plaintiff. The defendant moved for judgment notwithstanding the verdict and for a new trial. The trial court, after stating the obvious fact that both motions could not be granted, expressed the view that one or the other ought to be sustained upon the merits of the case, expressing at considerable length the conviction that the evidence showed no negligence on the defendant's part, but did show the plaintiff guilty of negligence as a matter of law. After further expressing the

view that justice would be done by a reversal in this court, he overruled both motions. From a judgment on the verdict, the defendant prosecutes this appeal, assigning as errors the action of the court: (1) In denying the motion for judgment notwithstanding the verdict; (2) in denying the motion for a new trial.

[2] 1. The motion for judgment notwithstanding the verdict invokes no element of discretion. It invokes the pure judicial functions of the trial court and of this court on review. It can only be granted when the court can say as a matter of law that there is neither evidence nor reasonable inference from evidence sufficient to sustain the verdict. Our summary of the evidence makes it plain that the motion in this instance was properly denied. Whether barriers were maintained sufficient to warn a reasonably prudent man of the danger of entering South Second street was, under the conflict in evidence, a question for the jury. Whether the condition of that street could be seen from Whitman street in time to turn back, and whether the evidences of others having driven through the opening justified the respondent and her companions in essaying that route, and whether the respondent and Owsley were so identified in a common enterprise as to charge her with his contributory negligence in any event, and whether the barriers had been so negligently maintained by the paving company and for a sufficient length of time to put the city on notice of the conditions, were also all questions for the jury on sharp conflicts in the evidence.

[3-5] 2. The motion for a new trial invokes, on the other hand, a compound of the discretionary and judicial functions of the trial court. Both the discretion and the attendant responsibility of its exercise are vested by the statute in the trial court, not in this court. *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 817, 47 Pac. 738. Where the motion is based upon the claim of insufficiency of evidence, the trial court alone possesses the power to weigh the evidence and, in its discretion exercised thereon, either to grant or deny the motion. The powers of this court are confined to a consideration of the evidence only in review of that exercise. This is not a court of first instance. We can only interfere with the exercise of the discretion of the trial court in granting or refusing to grant a new trial in such a case where there has been a clear abuse of discretion: *Thomas & Co. v. Hillis*, 64 Wash. 288, 116 Pac. 854; *Id.*, 70 Wash. 53, 126 Pac. 62; *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175; *McGraw v. Manhattan Co.*, 66 Wash. 388, 119 Pac. 822; *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798; *Farrell Co. v. Ihrig*, 50 Wash. 281, 97 Pac. 52; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246; *Best v. Seattle*, 50 Wash. 533, 97 Pac. 772; *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109; *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907. Or where that discretion has not been exer-

cised by the trial court at all. *Tacoma v. Tacoma Light & Water Co.*, supra; *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760; *Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147; *Cranford v. O'Shea*, 134 Pac. 486. Or where the action of the trial court is based upon a misconception of the law. *Grant v. Huschke*, 70 Wash. 174, 126 Pac. 416; *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88; *Armstrong v. Musser Lumber, etc., Co.*, 43 Wash. 584, 86 Pac. 944; *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011.

The court's remarks in overruling the motion for a new trial clearly bring this case within the rule announced in the decisions last cited. He said: "If I were upon the Supreme Court, as I look at this case, I should be in favor of granting one or the other of these motions. As I say, I cannot grant them both, for they are inconsistent; but I should grant one or the other of them." This, as applied to the motion for a new trial based on a claim of insufficiency of evidence, evinces a palpable misconception of the law. It assumes that the Supreme Court has the power to weigh the evidence and in its discretion either to grant or refuse a new trial when as we have seen it has no such power. Its only power in such a case is to review the action of the trial court, which alone has the discretion and responsibility of weighing the testimony of witnesses whom he has seen and heard testify and whose demeanor he has observed. The refusal to grant a new trial on the assumption that this court can do so upon conflicting evidence was a palpable mistake of law. Had the trial court granted a new trial for insufficiency of the evidence, we could not have set the order aside as an abuse of discretion in the face of the conflict of evidence disclosed by the record.

The judgment is reversed, and the cause is remanded, with direction to the trial court to act upon his expressed convictions as to the weight of the evidence, and grant a new trial.

CROW, C. J., and MAIN and MORRIS, JJ., concur. FULLERTON, J., dissents.

JOHNSON v. DOMER.

(Supreme Court of Washington. Dec. 1, 1913.)

1. NEW TRIAL (§ 68*)—DISCRETION OF COURT.

Where the trial judge believed that the verdict was not sustained by a preponderance of the evidence, as indicated by his remarks in ruling on a motion for a new trial, the denial of such motion on the ground that there was no reason to believe that a different result would be reached on a new trial was an abuse of discretion requiring a reversal.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 135-140; Dec. Dig. § 68.*]

2. NEW TRIAL (§ 70*)—POWER AND DUTY OF TRIAL COURT.

While the jury are the exclusive judges of all questions of fact, yet, when the case comes before the trial judge upon a motion for a new trial, it is his duty to determine whether the evidence is sufficient to justify the verdict, and in doing so he must be controlled by his own judgment.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

3. FRAUD (§ 58*)—STOCK SUBSCRIPTIONS OBTAINED BY FRAUD—ACTIONS—EVIDENCE.

In an action against an officer of a corporation to recover the price of stock, the purchase of which it was claimed was induced by misrepresentations, a verdict for plaintiff held to be against the preponderance of the evidence, which showed that the stock was not sold by defendant.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

4. EVIDENCE (§ 117*)—RELEVANCY.

In an action against an officer of a corporation to recover the price of stock, the purchase of which it was claimed was induced by false representations, in which defendant denied that the stock was sold by him, evidence that plaintiff was advised by a fortune teller to purchase such stock and to see defendant relative thereto was improperly admitted, where there was no competent evidence that any previous acquaintance or understanding existed between defendant and the fortune teller or that defendant had ever seen the fortune teller.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 136; Dec. Dig. § 117.*]

Chadwick, J., dissenting in part.

Department 1. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by Edward Johnson against S. P. Domer and others. From a judgment against him, the defendant named appeals. Reversed and remanded, with instructions.

S. P. Domer, B. C. Mosby, and Harris Baldwin, all of Spokane, for appellant. Geo. M. Nethercutt, of Spokane, for respondent.

CROW, C. J. Action by Edward Johnson against Anchor Oil Company, a corporation, S. P. Domer, and Amelia E. Domer, his wife, to recover \$825 alleged to have been paid to S. P. Domer for stock of the defendant corporation.

The complaint alleged that on or about July 2, 1907, the defendant S. P. Domer represented to the plaintiff that the stock of the defendant company was then worth 15 cents per share; that it would, in less than six months, be worth \$1 per share; that the company was then producing and shipping oil from its wells in Virginia at the rate of 150 barrels a day; that the shipments would increase with further development; and that dividends would be paid within one year. Plaintiff further alleged that he was unable to read or write; that he relied upon defendant's representations; that he paid S. P. Domer \$825 for 5,500 shares of stock; that the money thus paid was used by and inured to the benefit of the community, consisting of S. P. Domer and wife; that

all of the alleged representations were false and fraudulent; and that plaintiff had tendered a return of the stock and demanded a return of the purchase money. Defendants denied that S. P. Domer ever made any representations to plaintiff; that he ever sold plaintiff any stock; or that he had received any purchase money therefor. Two jury trials were had. On the first trial the court dismissed the action as to defendants Anchor Oil Company and Amelia E. Domer but submitted the case to the jury as to defendant S. P. Domer, against whom a verdict was returned. This verdict was set aside for insufficiency of evidence, and a new trial was granted to S. P. Domer, but the order of dismissal as to the defendants Anchor Oil Company and Amelia E. Domer was not disturbed. On the second trial a verdict was returned in plaintiff's favor for \$825, upon which a judgment was entered, and from which the defendant S. P. Domer has appealed. Plaintiff's death, which occurred subsequent to the appeal, has been suggested, and his administrator has been substituted as respondent.

On July 2, 1907, F. E. Snodgrass and A. F. Richardson, two government employes, had offices in the Symons Block, in the city of Spokane, where, as a side issue, they sold Anchor Oil Company stock; Snodgrass being secretary and treasurer of the company, in which Richardson was also interested. On that date, and for more than 15 years prior thereto, S. P. Domer was and had been a practicing attorney, with offices in another building. He at no time officed in the Symons Block and was seldom there, although he was vice president of the defendant company. Plaintiff testified that he went to the offices shown to be those of Snodgrass and Richardson, where he met Domer, who then made the false and fraudulent statements relative to the stock; that in the course of a few days, accompanied by his wife, he returned to the same offices with \$825; that he again talked with appellant, who repeated his representations to plaintiff's wife; that plaintiff paid his money to appellant, who then made out and delivered the certificate and received the money, \$25 in cash and \$800 in check. The canceled check was not produced on the trial. Plaintiff and wife both testified they never saw or knew Domer prior to this transaction, nor did they see him for nearly three years thereafter. Appellant denied that he sold the stock, or that he ever saw or knew plaintiff or his wife prior to this controversy, which arose nearly three years after the alleged purchase of the stock when plaintiff made his charge of fraud. He further testified that he never sold any stock in the Symons Block or anywhere else, but that he had signed certificates in blank which he left with Snodgrass and Richardson to be issued when sold. The stock book, which is in evidence, contains a number of blank certificates signed

by him as vice president. A. F. Richardson testified that he himself, representing the company, sold the stock and received the purchase money, which he immediately paid to Mr. Snodgrass, treasurer of the company; that the stock was issued on a blank certificate previously signed by S. P. Domer as vice president; that Domer was not present; that the certificate was in Richardson's handwriting, except the signatures of S. P. Domer as vice president and F. E. Snodgrass as secretary and treasurer; and that it was made out by Richardson in the presence of plaintiff and his wife. He further testified that appellant had never sold any stock from the office in the Symons Block. Mr. Snodgrass, who corroborated the testimony of Mr. Richardson, stated that, at both visits made by plaintiff at the Symons Block, Mr. Richardson represented the company; no one being present other than Mr. Richardson and himself. Plaintiff's certificate, which is in evidence, although signed by appellant as vice president, is not otherwise in his handwriting.

[1, 2] In ruling on the motion for a new trial, the trial judge said: "I will say frankly, if this case had been tried before me, I would have said that the Johnsons might have honestly been mistaken in their identification of Domer, but that the three witnesses for the defense could not be mistaken, and if their testimony was not true they committed perjury, and that is giving proper credence to all the evidence. This case was formerly tried before a jury in Judge Webster's department of this court. At that trial the jury gave the plaintiff a verdict. Judge Webster granted a new trial. Upon a trial of the case subsequently in my department of the court, a jury again awarded a verdict to the plaintiff. A motion is now made for a new trial for the reason, among other things, the evidence does not sustain the verdict. There is nothing before me that would leave me to believe that, if a new trial was granted, the same result would not follow in the future as in the past. There is nothing to indicate any newly discovered or additional evidence. Therefore it appears to me it would be a waste of time and money to grant a new trial." From this statement it is manifest that the trial judge found the verdict of the jury to be against the weight of the evidence, and appellant contends that he abused his discretion and committed prejudicial error in denying the motion for a new trial. Respondent contends that the jury must determine all questions of fact, and that the verdict herein must be sustained. While it is true that the jury are exclusive judges of all questions of fact, yet, when the case comes before the trial judge upon a motion for a new trial, it is his duty to determine whether the evidence is sufficient or insufficient to justify the verdict. In doing so he must be controlled by his own judgment. *Cranford v. O'Shea*, 134 Pac. 486;

Brown v. Walla Walla, 136 Pac. 1166, just decided by this court.

Respondent cites and relies on *Money v. Seattle*; *Renton & Southern Ry. Co.*, 59 Wash. 120, 109 Pac. 307; *In re Renton*, 61 Wash. 330, 112 Pac. 348; and *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4. In the *Money* Case the trial judge did not say that he believed the verdict was contrary to the evidence, as in the case at bar. In the *Renton* Case the trial judge went no further than to say that he differed with some of the witnesses. In the *Suell* Case the court stated that, if he felt at all certain that the verdict was unjust, he would set it aside, but that he had no such conviction. Here the trial judge distinctly stated that he believed plaintiff had not sustained his case by the evidence, and that the plaintiff and his wife were mistaken as to the identity of the person from whom the stock was purchased.

[3] Although it is not within the province of this court to pass upon the weight and sufficiency of conflicting evidence offered in a jury trial, yet we are constrained to say that after reading the entire record we are convinced the trial judge was right when he found the verdict was not supported by the evidence, and that justice had not been done.

There were two distinct issues: (1) Whether any fraud was perpetrated upon plaintiff; and (2) whether appellant sold the stock. The evidence without dispute shows that plaintiff and his wife were old, illiterate, and ignorant. Plaintiff admitted that he had seen the appellant Domer in the Symons Block but twice; the first time being a few days before he paid for the stock, and the second when he made the payment. He testified that never before had he seen Domer; that he did not see him afterwards for about three years, when he again met him for a few minutes shortly before the commencement of this action; and that he then made his first claim of fraud. Plaintiff's wife testified that she first met Domer in the Symons Block when plaintiff paid for the stock and never saw him again until the first trial of this action. Neither the plaintiff nor his wife claimed any previous acquaintance with Domer. It is undisputed that Domer had no office in the Symons Block; that he was seldom there, perhaps not oftener than once a month, and then for only a few minutes at a time. Richardson and Snodgrass, neither of whom is interested in the event of this action, testified that Richardson sold the stock to plaintiff; that Domer was not present; that he never sold any stock and had nothing to do with the transaction. Appellant testified that he sold no stock to any one, and that he never saw respondent until about one week before the institution of this action. Stubs for more than 80 certificates of stock which had been sold by the defendant company are in evidence, but not one is in appellant's handwriting,

while many of them are in Richardson's handwriting. There is no evidence that appellant ever received any financial benefit from the sale. On the contrary, Richardson and Snodgrass both testified that plaintiff's money was paid into the treasury of the defendant corporation and, with the proceeds of other sales of treasury stock, was used in drilling a well for oil. As a condition precedent to plaintiff's right of recovery, it was necessary for him to show by a preponderance of the evidence that Domer was the identical party who sold him the stock. If he failed in this he could not recover, even though fraudulent representations upon which he relied were made by the party who did sell the stock. The evidence tending to show that Domer made the sale was, to say the least, flimsy, uncertain, contradictory, and entitled to but little, if any, weight. It was contradicted by, and was in conflict with, undisputed facts and circumstances of the case, to say nothing of the positive oral testimony of Richardson, Snodgrass, and appellant.

[4] Over appellant's objection plaintiff was permitted to testify that he had been directed to appellant by one St. Charles, a fortune teller, who had influenced him to purchase the stock, had advised him to do so, and that he went to see Domer for that reason. Plaintiff's counsel endeavored to show all conversations between him and St. Charles but, upon appellant's objection, was to some extent prevented from so doing; yet plaintiff's counsel continually and repeatedly endeavored to introduce this evidence and as a consequence was permitted to show the advice given to plaintiff by St. Charles as above mentioned. There was no competent evidence that any previous conversation had occurred; that any previous acquaintance or understanding had existed between St. Charles and appellant; or that appellant had ever seen St. Charles. In fact, the only evidence on that point shows that Domer never knew him. To show the substance of any conversation between St. Charles and plaintiff, wherein plaintiff was advised to purchase the stock as an investment, and to see Domer relative thereto, was admitting prejudicial hearsay evidence, which had a direct tendency to impress the jury with the idea that some previous understanding relative to promoting sales of the stock must have existed between appellant and St. Charles, a fact not shown. If it was true that plaintiff had been directed to see Domer, these questions naturally arise: Why did plaintiff not call at Domer's office where he had done business for many years, and where he could be found most readily? Is it probable that on each occasion when he happened into the office in the Symons Block he would find appellant in charge, selling stock, collecting money, and transacting business for the corporation? The entire record is convincing to the effect that plaintiff and

his wife were mistaken when they stated that Domer was the vendor. They doubtless conceived the idea that he was the man who made the sale because his name was subscribed to their certificate.

On the record before us we conclude that the trial judge abused his discretion and committed prejudicial error in overruling the motion for a new trial.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

MOUNT and GOSE, JJ., concur.

CHADWICK, J. It is my opinion that this case does not fall within the rule of *Cranford v. O'Shea*, 134 Pac. 486, or any of the cases cited therein. In that case the judge did not exercise the judicial discretion which the law had put upon him. He misconceived the extent of his power. Here the judge did exercise his discretion. He went no further than did the court in the case of *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982. He says the evidence is conflicting and that he would not have found as the jury did. The cases pertaining to this subject are collected and differentiated in *Brown v. Walla Walla* just decided. If the trial judge in this instance had said no more than "the motion for a new trial is denied," the question discussed in the majority opinion would not have occurred. I do not understand that we have ever intended to go so far as to penalize the winner of a verdict because the trial judge disagreed with it, or upon the same state of facts would have rendered a different verdict, or where he talked too much or too little, or apologized for his decision when passing upon the motion for a new trial. If judges were denied the right of salving the wounds of unsuccessful litigants, the work of trial judges would be robbed of much of its charm. I have gone over the evidence and am satisfied that the plaintiff and his wife were mistaken and Mr. Domer was not the man who sold them the mining stock, but that question in my judgment was for the jury.

The testimony with reference to the fortune teller was improperly admitted and calls for a reversal in any event. I disbelieve it in its entirety. It does not ring true. The trial judge disagreed with the jury as to the weight of the evidence. The positive testimony of the defendant and all of the associated facts that were not susceptible of denial or disproof, when measured with the testimony of the respondents, makes it very improbable that a just verdict was rendered. There was ample ground for the exercise of the judge's discretion, and, had he granted a new trial, this court would have undoubtedly sustained him.

I concur in the result.

BORDE v. KINGSLEY.

(Supreme Court of Washington. Dec. 12, 1913.)

1. FRAUD (§ 22*)—MISREPRESENTATION.

Where the subject-matter of a contract is not at hand, and the facts are within the knowledge of one party and cannot be ascertained by the other without trouble and expense, the latter is not bound to make an independent investigation, but may rely on the representations made to him.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 19-23; Dec. Dig. § 22.*]

2. MINES AND MINERALS (§ 103*)—MINING CORPORATION—STOCK—RIGHT TO SELL STOCK.

Rem. & Bal. Code, § 8677, provides that corporations for manufacturing, mining, and other purposes shall not commence business or institute proceedings to condemn land until the whole capital stock has been subscribed, while section 7347, relating to mining corporations, provides that where the capital stock of the corporation consists of the aggregate valuation of the number of feet, shares, or interest in a mining claim, no actual subscriptions to the capital stock shall be necessary. *Held* that, as the two statutes were passed at the same session of the Legislature, they must be construed in pari materia; and hence an ostensible mining corporation cannot conduct business where there has been no subscription to its capital stock, and it owns only an option on the mining property; hence a sale of the stock of such corporation is contrary to public policy and is not sufficient consideration to support a contract.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 227; Dec. Dig. § 103.*]

3. FRAUD (§ 9*)—WHAT CONSTITUTES — MISREPRESENTATIONS.

A false and fraudulent representation of a material fact relating to the property of a corporation, which necessarily affects the value of the corporate stock, constitutes a cause of action against a party who, by means of the misrepresentation, induced plaintiff to make a purchase.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8; Dec. Dig. § 9.*]

4. FRAUD (§ 58*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action to recover damages for fraud in the sale of corporate stock, evidence *held* to establish defendant's fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

5. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS.

A finding of the trial court, even on conflicting evidence, will be allowed to stand only when the Supreme Court is satisfied that it is not against the preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by L. A. Borde against William Kingsley. From a judgment for defendant, plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Herchmer Johnston and Edward N. Sears, both of Seattle, for appellant. Edwin H. Flick and C. E. Hughes, both of Seattle, for respondent.

CHADWICK, J. The court below made findings in favor of the respondent. The facts are somewhat conflicting, and to undertake to state them in detail would put upon us the burden of reciting the respective contention of the parties. We find the facts to be that respondent held an option upon ten mining claims and a mill site located on the Nespelem river in Okanogan county. In February, 1909, he organized a mining company. He made himself president of this company and was at all times the moving spirit and directing genius of its affairs. He prepared a communication, directed to the company, in which he proposed to convey all of his interest in the option in consideration of the issuance to him of the entire stock of the company. No conveyance or formal assignment was ever made. The minutes of the meeting held at or about the time the company was organized show that all but 25,000 shares of the stock was common stock, the 25,000 being reserved as preferred stock. It is also stated by respondent that some 60,000 shares were to be held by him as a treasury for the benefit of the company and that this stock was to be sold for development purposes. If this is true, it would be in law treasury stock. There is no evidence that the corporation ever had any funds or realized any money from any source. Payments were due on the option from month to month. One Frantz was either a sales agent for the company or was interested as a stockholder, it matters not which, and he, being informed of the fact that the company was in need of funds and that appellant, whom he had known for a long time, was possessed of some ready money, solicited him to purchase the stock of the company. Frantz accordingly arranged for a meeting in his office, and, upon appellant's coming, he telephoned respondent to come over and present the matter to appellant. This he did, and a sale of 20,000 shares of the stock of the company at 10 per cent. of its par value was consummated. The representations made at the time were that the money was needed for patenting the claims; that they were subject to patent, a letter being shown to appellant by respondent purporting to come from the Commissioner of the General Land Office; that the company had contracted for building a smelter; that it would have a valuable power site, and had entered into a contract with the San Marino Mining Company for smelting its ores. It was also represented to appellant that \$200,000 had been offered by some one in the East for the property, and that the Tacoma Smelting Company had offered \$75,000 for 51 per cent. of the stock. Plaintiff was led to believe that he was purchasing treasury stock and that his money

would be used for the purposes specified. The company afterwards became defunct, and litigation arose between Frantz and respondent. Upon the trial of that action, appellant discovered for the first time that he had not been given the stock of the company, but had received a block of Kingsley's stock.

It is insisted that, the stock certificate being in the name of Kingsley and being water marked with the word "common," the appellant cannot now be heard to say that he did not know these things. However this might be, it cannot now be urged by respondent, for he himself has sworn that he held in his own name and as trustee a block of stock to be sold and used for the benefit of the corporation.

The record does not disclose the truth of the statement that \$200,000 had been offered for the property or that \$75,000 had been offered for 51 per cent. of the stock. There is nothing in the record to show that the San Marino Mining Company, a company owned or controlled by respondent, was a going or active concern or that its contract was of any value. After much solicitation upon the part of appellant, respondent sometime thereafter delivered to him one of his own certificates calling for common stock, indorsed in blank. The trial judge found that the parties were dealing at arm's length; that the sales were negotiated and closed by Frantz, and that defendant made no false or fraudulent representations; that he did not solicit plaintiff to buy any stock from the company; that plaintiff well knew that the company had only an option to purchase the property, and that it could be kept alive only by payments made from month to month; that all of the moneys received by defendant were applied, as agreed with appellant and as fully understood by him, toward keeping the said option alive and toward perfecting title and not otherwise; that respondent did not appropriate any of the money to his own use. The court further found that plaintiff had the means at hand to investigate the truth of any statement made concerning the status of the title or property, and that appellant put no reliance upon any representation or statement that might have been made by respondent. It further found that respondent practiced no fraud or deception upon appellant.

Appellant's contention is sustained, not only by the number of witnesses, but by clear and convincing evidence. Respondent makes no substantial denial of the representations he is said to have made. From the questions asked of appellant upon the witness stand and from the argument made by counsel, it is apparent that respondent's main reliance, in so far as the facts are concerned, rests upon the contention that appellant might have gone to Nespelem and investigated the property and the title for himself; that he did not ask for an inspection of the stock book, the minute book, or books of ac-

count; and that he did not make any inquiry about the title to the property.

[1] This court has frequently held, where the subject-matter of the contract is not at hand and the facts are within the knowledge of the vendor and could not be ascertained by the vendee without trouble and expense, that he is not bound to make an independent investigation, but may rely on the representation of his vendor. These cases are collected in *Bell v. Jovita Heights, etc.*, 71 Wash. 7, 127 Pac. 289; *Conta v. Corgiat*, 132 Pac. 746.

[2-4] This disposes of appellant's failure to make an independent inquiry as to the title. As for the other objections, it is enough to say that inspection of the stock, minute, and books of account would not have revealed anything to negative the statements of respondent or to have put appellant on his guard. But, as we read the record, the state of the title is not of so much consequence. The title, in so far as it could be represented by an option, was in respondent with a unilateral contract or agreement to assign it to the company. Now, let us assume that the company did own the option. Appellant's money was paid, we find it to be the fact, under an understanding that it would be used in patenting the mining claims. This was not done, nor was there any pretense of doing it. A part of it, either \$100 or \$200, was used to pay an attorney's fee, \$400 was paid out as a commission to the sales agent of the company for finding appellant and his money, and the balance was used to take up monthly payments due under and to keep the option alive. When it is known that, in so far as the record shows, the company never had a dollar in money that it could call its own except the money paid by appellant, it will not be contended that any sane man having knowledge of the facts would have thrown his money into such a rat hole. It is said that, notwithstanding these things, appellant cannot complain, because respondent has not only accounted for the money he obtained from appellant, but has shown that he put enough of his own funds into the option payments to more than make up the diversion of appellant's contribution to the treasury. This may be answered in two ways: First, appellant was not dealing with respondent, but with the company, and respondent's voluntary contribution, all of which might have been and no doubt would have been recovered if other stock buyers had been found, cannot be made of concern to him; and, second, the money was paid for a specific purpose that was not carried out or attempted to be carried out. We feel warranted in saying, our assertion being based on the evidence of the respondent himself, that there was never any intention of patenting the claims at that time.

Assuming that the company is a separate entity and that the stock delivered to appellant was in fact treasury stock, it is our

judgment that appellant is entitled to recover from the respondent upon the theory that the stock was of no value and was issued in defiance of a sound public policy and in contravention of the statute laws of this state. Section 3677, Rem. & Bal. Code, and subsequent sections provide for the organization and management of corporations. The corporations enumerated include those organized to carry on a mining business. This section of the law was originally passed in 1866. At the same time and in the same act, the Legislature provided that, where the amount of the capital stock of a corporation consists of the aggregate valuation of the whole number of feet, shares, or interest in a mining claim, no actual subscriptions to the capital stock of such corporation shall be necessary. The transfer of the title to the mining claim is made a legal equivalent for the stock subscriptions provided for in the first section of the act. Section 3677, *supra*. The law, after various enactments, is to be found in section 7347, Rem. & Bal. Code. In 1886 (Laws 1885-86, p. 84), it was provided that no corporation formed under section 3677 of the Code (section 2421, Code 1881) shall commence business until the whole amount of its capital stock has been subscribed. It will be seen, when we take into consideration the history of our statute providing for the incorporation of companies to do business in this state, that the acts referred to must be construed in *pari materia*. It follows, then, that the stock of a mining company must be subscribed or the mining company must be possessed in its own right of a mining claim for the working and development of which the corporation has been formed. In the case at bar, there was no subscription to the stock, neither was the corporation possessed of any property. Its stock represented nothing, and was insufficient to support a consideration for the money paid by appellant to respondent. We think this case falls within the rule stated in 20 Cyc. 60: "A false and fraudulent representation of material facts, which relate to the property of a corporation, and which necessarily affect the value of the corporate stock, constitutes a cause of action against the party who, by means of such misrepresentations, induces another to purchase stock in the corporation; and the situation is exactly the same as if the purchase were of the corporate property with regard to which the representation is made."

Without further citation of authority, our holding is that the plaintiff was induced to part with his money upon representations that were false and fraudulent under an understanding that he was to receive the treasury stock of the company and that it was to be put to a specific use; that he has not obtained that which he bought and paid for; and, furthermore, that at no time, either before or since the sale of the stock to appellant, has the corporation owned any property

of any kind or nature whatsoever; that its issue of stock was unlawful, and at no time has it been of any value; that its circulation by respondent was an act of deceit for which he is liable to those dealing upon the faith of his representations.

[8] Respondent also contends that this court has held that, where there is evidence to sustain the findings of the court in an action tried before the court without a jury, the judgment will not be disturbed on appeal. He cites a number of cases which upon casual consideration may seem to sustain his contention.

It is to be regretted that many loose and inapt expressions have crept into our opinions. It has never been the intention of this court to sustain findings upon a scintilla of evidence, or because there may be some evidence sustaining the findings, or because a greater number of witnesses testified to the facts found by the trial judge than testified for the other side. The rule is that this court will go into the record for the purpose of finding out whether the findings are sustained by a preponderance of the evidence. If we find that they are not, we will reverse the judgment. If we find that they are, or from an inspection of the whole record we are unable to say that the evidence does not preponderate in favor of the appealing party, the trial judge having had the witnesses before him and marked their demeanor, we will sustain the findings and judgment. It would involve a task clearly beyond the time that any of us have to devote to it to go through the 74 volumes of our reports and select the cases in which we have referred to this subject. Neither would it serve any useful purpose. But it may be understood henceforth that this court will sustain the findings and judgment of the trial court when, and when only, we can say that we are satisfied that the evidence does not preponderate against the findings.

The judgment is reversed, with instructions to enter a judgment in favor of the appellant.

CROW, C. J., and GOSE, MAIN, and EL-
LIS, JJ., concur.

In re CAREY'S ESTATE.

CAREY v. PRICE et al.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. WILLS (§ 302*)—EXECUTION—PROOF—SIGN- ING.

Rev. St. 1908, § 7071, provides that wills shall be reduced to writing, signed by the testa-
tor or by some one in his presence and by his
direction, and attested in the presence of the
testator by two or more credible witnesses.
Section 7088 provides that if it shall appear,
on proof of a will, by the testimony of two
or more of the subscribing witnesses that they
were present and saw the testator sign the
will and attested the same at his request, or

that he acknowledged the same to be his last
will, and that they believed testator of sound
mind and memory at the time of signing and
acknowledging the same, the court shall admit
it to probate. *Held*, that such sections only
require that testator acknowledge the will, as
distinguished from his signature at the time of
execution; and hence, where the subscribing
witnesses, testifying nearly ten years after the
execution of the will, stated that testator came
into the room where the witnesses were with
pen, ink, and the paper in his hand, sat down
for a moment at a table, arose, handed the pen
to the first witness, said it was his will, and
asked them to sign it, it sufficiently appeared
that testator signed the will before it was signed
by the witnesses in the absence of evidence
to the contrary, though they both testified that
they could not remember whether the paper
bore testator's signature at the time they
signed it or not.

[Ed. Note.—For other cases, see Wills, Cent.
Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

2. WILLS (§ 327*)—PROBATE—DIRECTION OF VERDICT.

The court may direct a verdict in a will
contest when the facts require it as in an ordi-
nary civil action.

[Ed. Note.—For other cases, see Wills, Cent.
Dig. § 773; Dec. Dig. § 327.*]

3. WILLS (§ 166*)—CONTEST—UNDUE INFLU- ENCE.

Evidence that testator's principal benefi-
ciary, who was not related to him, had trans-
acted considerable business for him during
many years of their acquaintance, and that
they had lived some distance apart, had visited
each other frequently, and were warm personal
friends, was insufficient, in the absence of any
evidence that the beneficiary influenced the
making of the will, to raise an issue of undue
influence.

[Ed. Note.—For other cases, see Wills, Cent.
Dig. §§ 421-437; Dec. Dig. § 166.*]

4. WILLS (§ 82*)—EXECUTION—VALIDITY— CAPRICE.

Testator executed a will leaving the bulk
of his estate to a friend who was no relative.
Testator left England about 40 years before
his death, during all of which time he had
been separated from contestant, his brother,
and had no communication with him, and dur-
ing the nine or ten years intervening between
the making of the will and his death testator
told several people that his brother had done
him a great wrong and that he was leaving his
property to P. and knew that he would care
for him in his old age when he needed care.
Held that, under such circumstances, the will
was not objectionable as capricious or unnatu-
ral.

[Ed. Note.—For other cases, see Wills, Cent.
Dig. § 203; Dec. Dig. § 82.*]

Appeal from District Court, Adams Coun-
ty; Charles McCall, Judge.

Application for the probate of the will
of George Strachan Carey, deceased, to which
Richard John Carey filed objections. From
a decree of the District Court affirming a
decree of the County Court admitting the
will to probate, contestant appeals. *Affirmed*.

Frank Prestidge and George L. Hodges,
both of Denver, and George A. Garard, of
Brighton, for appellant. Edward Ring and
Harrie M. Humphreys, both of Denver, for
appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MUSSER, C. J. By this appeal it is sought to reverse a judgment of the district court admitting to probate a paper writing purporting to be the last will of George Strachan Carey. The judgment of the district court was a result of an appeal from the county court, where the writing had been admitted to probate as a will. The date of the purported will was February 26, 1900, and the subscribing witnesses fixed the time that they signed the paper at about that date.

[1] The appellant calls attention to sections 4653 and 4670, Mills' Ann. St. (1st Ed.). The first section is as follows: "All wills, by which any lands, tenements, hereditaments, annuities (or) rents are devised, shall be reduced to writing, and signed by the testator or testatrix or by some one in his or her presence, and by his and (or) her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses." This section appears as section 2 of chapter 90, Rev. Stat. 1868; section 2789, Gen. Laws 1877; section 3482, Gen. St. 1883. In 1903, the law with reference to wills was revised, and the substance of that section now appears in Rev. Stat. 1908, § 7071, as follows: "All wills by which any property, real or personal, is devised or bequeathed, shall be reduced to writing and signed by the testator, or by some one in his presence and by his direction, and attested in the presence of the testator, by two or more credible witnesses." Section 4670, Mills' Ann. St. (1st Ed.) is as follows: "If, upon the hearing of such proof, it shall satisfactorily appear by the testimony of two or more of the subscribing witnesses to such will, that they were present and saw the testator sign such will, and attested the same at his request, or that he acknowledged the same to be his last will, and that they believe the testator to be of sound mind and memory at the time of signing and acknowledging the same, the court shall admit the same to probate and record; provided, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of the court, shall be deemed sufficient to invalidate or destroy the same, and every will, testament or codicil, when thus proven, shall be recorded by the clerk of the county court, in a book to be provided by him for that purpose, and shall be good and available in law, for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby given, granted and bequeathed." That section appeared in chapter 90, Rev. Stat. 1868, as section 19, section 2806, Gen. Laws 1877, section 3499, Gen. St. 1883, and with some verbal modifications, not important in this case, it now appears as section 7088, Rev. Stat. 1908.

The appellant first contends that the paper writing in question was not executed or proven as provided by these statutes. He intimates that the evidence of one of the

subscribing witnesses shows affirmatively that the signature of the testator was not on the paper writing at the time they signed it as witnesses. This cannot be said to be a correct statement of the result of the testimony. The only inference that can be drawn from the testimony of each of the subscribing witnesses is that at the time they testified they did not remember whether the signature of the testator was there or not when they affixed their signatures. They did not testify that it was there, neither did they testify that it was not there. Accepting this as the effect of their testimony, we understand the position of the appellant to be that such testimony was not sufficient to admit the will to probate. His position, as stated in the language of the brief, is as follows: "The primary contention upon which our arguments will rest as to this branch of the case is that, in order that the paper writing here under consideration may be held to constitute a legal will, it must be established by legal proofs that the signature of George Strachan Carey was affixed thereto at the time the attesting witnesses affixed their signatures thereto or before the attesting witnesses separated on the occasion of the alleged execution of the paper as a will."

The deceased was a bachelor and lived alone on and operated a large ranch in Adams county. Each of the subscribing witnesses testified that about the date of the paper writing, to wit, February 26, 1900, they were present with Mr. Carey in the kitchen of his ranch house. Mr. Carey went into another room and returned with pen and ink and the paper in question in his hand, and told them that it was his last will, and requested them to sign it as witnesses, which they did in the presence of Mr. Carey and each other. They both testified that they believed Mr. Carey was of sound mind and memory at that time. One of the witnesses, Mr. Patterson, testified that Mr. Carey sat down at the table and got up and requested them to sign it. As said before, each of the witnesses testified that he did not remember whether the signature of Mr. Carey was there or not at the time they signed it. The signature could have been seen by them at the time, if it was there. The testimony showed that the body of the writing, as well as Mr. Carey's signature thereto, was in the handwriting of Mr. Carey. Mr. Carey died in November, 1908. After his death, the writing was found in his ranch house, among his personal effects, inclosed in a sealed envelope, on which was written, in the handwriting of Mr. Carey, a direction that it was to be sent to a named attorney in Denver. The trial, at which the subscribing witnesses testified, occurred in the district court in September, 1909, nearly ten years after they had written their names on the paper. The testimony, as stated above, was not contradicted in any way.

The witnesses did not see Mr. Carey sign

the paper. The evidence shows a sufficient acknowledgment of it as the last will of the testator, if it was a will at the time the witnesses subscribed their names thereto. The question is: Was the evidence, in the absence of anything to the contrary, sufficient to establish that the signature of the testator was on the paper at that time, for there is no evidence that it was placed thereon by the testator after the witnesses had signed it and before they separated? This question has not been heretofore determined by this court.

In *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151, it is pointed out that some local statutes, particularly in New York, require that there must be an acknowledgment of his signature by the testator, while, in Illinois, it was sufficient when the witnesses did not see him sign the paper that the testator acknowledged the will to be his act and deed, and the court was inclined to think that decisions from those states that require an acknowledgment of the signature were not applicable in Illinois. This difference in statutes is pointed out in *Schouler on Wills*, § 321, where the author states that one line of statute expression follows the old English statute of frauds, which made the will the subject of acknowledgment, while the other follows the statute of Victoria, which made the signature the subject of acknowledgment, and it is said that, when the statute makes the signature and not the will the subject of acknowledgment, a stricter rule of construction has been adopted.

The appellant, in his brief, admits that under the old statute of frauds a more liberal construction was adopted than under the Victorian statute. It must be borne in mind that our statute requires the will and not the signature to be the subject of acknowledgment. Our statute does not say that the will shall be acknowledged to be the act and deed of the testator, as in Illinois, but simply that he shall acknowledge it to be his last will. In the face of these differences as to construction in the two lines of statutes, our Legislature adopted a statute expression more in conformity with the old statute of frauds than with the Victorian statute. Our statute is the guide that our courts have as to the legislative intent in his state. It must have been intended thereby that the courts of this state should adopt a construction in harmony with that adopted under similar statute expressions by other courts, rather than a construction adopted under essentially different statutes.

It appears to us that the authorities upon which the appellant relies have reference to statutes wherein the signature and not the will is the subject of attestation and acknowledgment. Such cases can be authority here only by way of analogy, and when the facts are analogous also. His principal cases are from New York, where it seems the statute

has particular reference to the signature of a testator.

In the matter of *Mackay*, 110 N. Y. 611, 18 N. E. 433, 1 L. R. A. 491, 6 Am. St. Rep. 409, the testator told the subscribing witnesses that the paper was his will. He handed it to them so folded that they could see no part of the writing except the attestation clause. They did not see either his signature or his seal. The direct evidence was that the witnesses did not see the signature and could not see it. At the close of the opinion it is said: "The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature." If the paper had been so placed that the witnesses could have seen the signature, and ten years thereafter they testified that they could not remember whether the testator's name was there or not, but that they could remember that he told them that it was his will and wanted them to witness his signature, the facts would be analogous to the facts here, but the case does not inform us what the court would have done under the changed circumstances.

In *Lewis v. Lewis*, 13 Barb. (N. Y.) 17, on page 25, the paper was so folded that the witnesses could not see the signature if it was there. The court bore down on the fact that the attestation and acknowledgment of the signature were required by the statute. If the facts had been that the paper was so placed that the signature could have been seen, but the witnesses did not remember whether it was there or not, the opinion does not disclose what the result would have been. The court, however, says: "The law of evidence, in its application to the proof of the several facts which, united, constitute a valid will, is the same as it is in its application to the proof of any other fact. The evidence may be direct and positive, or it may be circumstantial and presumptive; for the law of evidence in regard to wills, as well as in regard to deeds and documentary proof generally, must have reference to the casualties of human life and the infirmities of human memory."

This is a general declaration of law that is applicable here, in view of the fact that the subscribing witnesses could not remember, after ten years, whether Mr. Carey's signature was on the will when they signed it. In the case of *Sears v. Sears*, 77 Ohio St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353, 11 Ann. Cas. 1008, it appears that the statute required that the will should be signed by the testator at the end thereof. At the end of the will, before the attestation clause, appeared a blank space where the name should have been written. It was not there. The only place where the name did appear was in the attestation clause. Under such a statute

and such a state of facts, the court held that the will was not properly executed. Other cases cited could be analyzed to show such a difference in statutes or in facts as to render them inapplicable to the case at bar. On the other hand, in *Orser v. Orser*, 24 N. Y. 51, in a case where one of the subscribing witnesses was dead and the other could not remember that the decedent declared the instrument to be his will or acknowledged his signature, the court said: "The result of the authorities upon the probate of wills is that the question of the due execution of a will is to be determined, like any other fact, in view of all the legitimate evidence in the case; and that no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must, of course, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial. A will, duly attested upon its face, the signatures to which are all genuine, may be admitted to probate, although none of the subscribing witnesses are able to swear, from recollection, that the formalities required by the statute were complied with; and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were."

In *Schouler on Wills*, § 322, it is said that the result of the cases under the statute of Victoria, as to whether the testator's signature was on the will when it was produced to the witnesses for their attestation, appears to be: "That in the absence of direct evidence on the point one way or the other, the court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from these circumstances, and from the appearance of the document itself, whether the name of the testator was or was not upon it (or rather might not have been seen), at the time of the attestation. But the court should mainly consider whether the witnesses did not see, or at least have an opportunity of seeing, the testator's signature when they attested; for, if they did not, it is immaterial that the signature was actually there, but hidden from them." It would appear from this that in the circumstances of this case the will would be sufficiently proven under the Victorian statute, or a statute essentially like it.

The opinion in *Re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216, shows that circumstances surrounding the execution of a will may be appealed to. In the face of that decision, we do not go astray in saying that in a case like the present where, owing to the failure of the memory of the subscribing witnesses, after the lapse of a long time, it was impossible to obtain direct testimony that Mr. Carey's signature was on the paper when the witnesses signed it, circumstances

may be resorted to to supply whatever deficiency there was in that particular. Mr. Carey came into the room where the witnesses were with pen, ink, and the paper in his hand, sat down for a moment at the table, arose, and, handing the pen to the first witness, said it was his will and asked them to sign it. What did he sit at the table for with a pen in his hand but to sign the paper? If it was his will, it was not his completed will until he had signed it, and his declaration that it was his will at that time and under such circumstances indicated that he had completed his part and that he wanted the witnesses to attest it as completed. The usual order of signatures in such cases is for the testator to sign first and then the witnesses. It is said in *Allen v. Griffin*, 69 Wis. 529, 533, 35 N. W. 21, 22: "We think, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first. This would be the usual order of signature."

While it is not necessary that the testator sign before the witnesses, yet the usual order is that he do so. So that, in the absence of anything to the contrary, it appears from the testimony that when Mr. Carey sat down at the table with a pen in his hand he signed the will and after him the witnesses. In *Hobart v. Hobart*, supra, it appeared that the statute made the will the subject of attestation and acknowledgment. One of the subscribing witnesses was dead. The other testified that the deceased witness was her husband; that the testator and his wife brought the will to her house. It was not stated that the testator had signed it, and she could not remember whether his signature was there or not. He declared it was his will and asked the witness to sign it. The court said: "While it is true that the witness cannot remember seeing the signature, yet she cannot say positively that she did not see it. It is clear, however, that the testator produced before the subscribing witnesses an instrument in writing which he stated to be his will, and asked them to sign it as witnesses. A will must be reduced to writing, and signed by the testator, or by some one in his presence and under his direction. The words, 'said will,' in section 2, refer back to a will reduced to writing and signed. An instrument not in writing and not signed is not a will. When the testator called the paper his will, it will be presumed, in the absence of any evidence to the contrary, that he had signed it, inasmuch as a signature was necessary to justify him in calling it a will. Included in the declaration of the testator to the witnesses that the paper was his will was the further declaration that he had signed it. Where the testator declares to the witnesses that the instrument is his will, or requests them to attest his will, such declaration or request implies that the same has been signed by him. *Nickerson v. Buck*, 12

Cush. [Mass.] 332. In the latter case it was said: "The request to these witnesses to attest his will was quite enough to authorize the inference that he had executed a paper as a will, and was equivalent to his acknowledgment that he had signed some paper as a will." The fact that a testator seeks the attestation of witnesses and gives directions to them as to signing their names furnishes strong presumptive proof that he had signed the will. *Dewey v. Dewey*, 1 Metc. [Mass.] 349 [35 Am. Dec. 367]. Where a testator took a paper from his desk, and asked a witness to sign it, and pointed out the place where he wished him to put his name, and the witness did so, not knowing what the paper was, and not noticing the signature on the paper, it was held that there was a good attestation of the will. *Ela et al. Ex'rs, v. Edwards*, 16 Gray [Mass.] 91."

In *Mead v. Presbyterian Church*, 229 Ill. 526, 82 N. E. 371, 14 L. R. A. (N. S.) 255, 11 Ann. Cas. 426, there was no attestation clause to the will, but the name of the testator and of the two witnesses appeared at the end as is precisely the case here. Boswell, one of the subscribing witnesses, identified his signature as such witness and said that he had no recollection of the transaction. The other witness, Paul, identified his signature and testified that he signed the instrument at the request of the testator, but had no recollection of anything that was said at the time he signed the instrument or whether the other witness was present or not. The court held that the evidence was sufficient to admit the will to probate. The instrument was in the handwriting of the testator. It was found among his private papers after his death, duly signed and witnessed. And the court said there was "nothing lacking in the evidence to show a legal execution of the will, save that the witnesses, by lapse of time, could not recollect the facts surrounding the execution of the instrument by Mead Holmes as his last will and testament. To lay down as a rule of law that the failure of the attesting witnesses to recollect all the facts surrounding the execution of a will would defeat its probate, would be, in many instances, to defeat the probate of wills where there is no reasonable question but that they were executed by the testator or testatrix with all the formalities required by law, which is in conflict with the decisions of this and many other courts of last resort."

What the appellant desires this court to say is that, although the subscribing witnesses testified directly to all the requirements of the statute for the attestation and acknowledgment of the will, except as to the presence of Mr. Carey's signature thereon at the time they signed it, the will was not proven to have been duly executed. Such an announcement as that would result in the overthrow of most of the wills that are made and

would be almost a deprivation of the statutory right to make a will.

It is plain therefore that the proponents, by evidence direct and circumstantial, made prima facie proof of the due attestation and acknowledgment of the will in question, and, as there was no evidence in the case to in any manner overcome the prima facie proof, the evidence was conclusive.

This conclusion also disposes of objections made to instructions given and refused and relating to this branch of the case, for under the evidence the jury could not have found otherwise than that the will was executed and proven as the statute requires.

In the will, the testator, Mr. Carey, gave \$500 to a friend and the remainder of his property to Richard Price, the proponent and appellee, and it was expressly stated in the will that it was made to prevent any property from going to the testator's brother, the contestant and appellant.

[2, 3] The issue of want of mental capacity of the testator was raised. This issue was submitted to the jury and found against the contestant. The issue of undue influence was also raised, and on this issue the court instructed the jury to find for the proponent and against the contestant. Error is assigned on this direction of the court. In a will contest, as in ordinary civil actions, the court may direct a verdict when the facts require it. In *re Shell's Est.*, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181. All that the evidence discloses as to influence exerted by Price is that Price transacted considerable business for the testator during many years of their acquaintance, especially in selling cattle. They lived some distance apart. Price and the testator visited each other's home frequently and were warm personal friends. Aside from this, there is utter want of testimony that Price influenced the making of the will. It is claimed that this established a fiduciary relation between them. This claim cannot be sustained. The direct opposite was held in *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548, where it was said: "It is not true, as contestant says, that the fact that proponent was the cousin and friend, the nurse and business partner, of testatrix, gave rise to a fiduciary relation between them. The contrary has been expressly ruled." There is no evidence whatever, circumstantial or otherwise, that Price unduly influenced the making of the will. The fact that he and the testator were friends and that he showed some acts of neighborly kindness towards and transacted business for the testator, no doubt influenced the latter to make Price his legatee. It cannot be expected that a man will leave his property to another not related to him by ties of blood and family unless that other has shown friendliness toward him and a disposition to help him when in need. Such kindness, friendliness, and disposition cannot be said to be undue influence.

[4] It is said in the brief that the disposition of the testator's property was unnatural and capricious, and that this was a fact to be considered on the question of undue influence. The testator had left his home in England about 40 years before his death, and during all that time had been separated from his brother and had no communication with him. During the nine or ten years that intervened between the making of the will and his death, the testator told several people that he had made a will leaving his property to Price. He told some of them that he did not want his brother to have any of his property because, as he said, his brother had done him a great wrong. He also stated that he knew the Prices would take care of him in his old age when he needed care.

Under such circumstances, it was certainly not capricious or unnatural for him to make the will as he did. There is in this state a statute giving the right to make wills, as well as a statute of descent and distribution. People are given their choice of these statutes. The testator, in this case, chose to avail himself of his right to make a will. Neither courts nor juries ought to deprive a man of that right simply because he may dispose of his property in a manner not satisfactory to them.

On the whole record, it appears plainly that this will was the free and voluntary act of George Strachan Carey, and that he did precisely what he wanted to do without any undue influence whatever, and no other conclusion can be drawn from the testimony. Under such circumstances, the court was right in directing the jury as it did on the question of undue influence. Perceiving no prejudicial error in the record, the judgment is affirmed.

Judgment affirmed.

GABBERT and HILL, JJ., concur.

WEAVER v. NEW JERSEY FIDELITY & PLATE GLASS INS. CO.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. INSURANCE (§ 424*)—POLICY—LIABILITY.

An insurer, issuing a policy covering loss from breakage of glass in a building of insured, thereby agreed to indemnify insured for loss by a breakage occasioned by the wrongful act of a third person.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 424.*]

2. INSURANCE (§ 603*)—LOSS OCCASIONED BY WRONGFUL ACT OF THIRD PERSON—RECOVERY BY INSURED—EFFECT.

Generally a recovery by insured from a third person causing a loss of the property insured releases the insurer from liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1499; Dec. Dig. § 603.*]

3. INSURANCE (§ 606*)—LOSS OCCASIONED BY WRONGFUL ACT OF THIRD PERSON—RECOVERY BY INSURED—EFFECT.

Where an insurer undertakes to indemnify insured, with full knowledge of an antecedent

settlement between him and a third person causing the injury, the insurer is a mere volunteer, and cannot recover of insured under the subrogation clause of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.*]

4. PLEADING (§ 343*)—MOTION FOR JUDGMENT.

Where the answer tendered a good defense to the complaint stating a cause of action, the court could not render judgment for plaintiff on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.*]

Error to District Court, City and County of Denver; James H. Teller, Judge.

Action by the New Jersey Fidelity & Plate Glass Insurance Company against Edward E. Weaver. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Garwood & Garwood and Jacob V. Schaetzel, all of Denver, for plaintiff in error. William J. Miles, of Denver, for defendant in error.

BAILEY, J. Plaintiff below, an insurance company, brought suit against the defendant in the district court, alleging, in substance, that on or about June 4, 1909, it delivered to the defendant, for certain considerations therein mentioned, an insurance policy covering loss from breakage of certain glass in a building owned by him, situate at number 1421 Arapahoe street, Denver; that aside from \$9 paid as premium thereon, there was a further consideration contained therein of subrogation on demand of all rights and equities of the assured against any party or parties causing or liable for any damage or loss covered by the policy; that thereafter, while the policy was in full force and effect, a third party made an excavation on a lot immediately adjoining defendant's lot and building, causing his building to collapse, thereby breaking and destroying, among other things, the glass insured by the policy; that defendant made claim against the wrongdoer, in pursuance of which it paid him \$1,000, which he accepted in full satisfaction of all damage to his property and made and delivered to the wrongdoer a complete release in writing; that plaintiff made good the loss and damage by replacing the glass destroyed, according to the terms of its contract, at a cost to itself of \$143.15; that it made demand of defendant for that much of the money so received from the wrongdoer, which he refused to pay, wherefore it prays judgment for that amount with interest. A demurrer was interposed and overruled. Defendant answering admitted the contract and settlement as alleged, but set up as new matter that the actual damage to his property was in excess of \$5,000, and that the \$1,000 was accepted from the wrongdoer to avoid litigation, and did not include the glass covered by the policy; that plaintiff,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fully advised of the settlement and release between himself and the wrongdoer, voluntarily replaced the glass destroyed; that plaintiff did not make demand for a subrogation until about 18 months after the damage occurred, having knowledge of the antecedent settlement, whereupon a subrogation receipt was assigned and delivered to it. On motion, judgment was entered on the pleadings, against defendant in the sum of \$153.25. The only evidence submitted was proof of corporate capacity, to which no objection was made. A motion for new trial was overruled. Defendant brings the cause here on error.

[1, 2] Did the court below commit error in granting the motion for judgment on the pleadings? The answer avers that the plaintiff company, in replacing the glass, did so with full knowledge of the antecedent settlement between defendant and his tort-feasor. This averment was not denied. The law applicable to these facts is clear. The company's capacity under its contract was simply to indemnify for loss covered by it. As a general rule, recovery by the insured from the third party releases the insurer from liability. 19 Cyc. 883-894. In *Dilling v. Draemel*, 16 Daly, 104, 9 N. Y. Supp. 497, involving a similar state of facts, this was said:

"It is well settled that, if a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety, and the wrongdoer that of a principal debtor; and all the incidents of suretyship attach to the position of the underwriter in such a case, including the right of subrogation. * * * The same principle is applicable to a contract of insurance if the assured destroys the remedy of subrogation, and relieves the assurer to the full extent to which the wrongdoer could have been made liable for the loss."

And *Packham v. German Fire Insurance Co.*, 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. Rep. 461, approving *Dilling v. Draemel*, supra, held that there could be no recovery on an insurance policy where the assured had been indemnified by the person causing the injury, since by settling with the tort-feasor the insurer's right of subrogation was destroyed.

"The liability of the wrongdoer is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability." May, Insurance, § 454.

[3] Under the authorities, and in the light of reason, an insurer who undertakes to indemnify the assured, with full knowledge of an antecedent settlement between him and the party causing the injury, does so at its peril, is a mere volunteer and cannot recover of the insured under the subrogation clause of the contract, because the right to subro-

gation, under such circumstances, has been destroyed.

[4] The complaint stated a cause of action, but a good defense was tendered when the answer alleged knowledge before indemnifying defendant, on the part of plaintiff, of the former's settlement with the wrongdoer, and since there was no issue on this alleged fact, the court erred in rendering judgment for plaintiff on the pleadings. It must be reversed and the cause remanded, with leave to plaintiff to reply to the answer, if he shall be so advised.

Judgment reversed and cause remanded.

MUSSER, C. J., and WHITE, J., concur.

NOONAN et al. v. STEIN et al.

(Supreme Court of Colorado. Dec. 1, 1913.)

1. CONTRACTS (§ 321*)—IRRIGATION WORKS—CONSTRUCTION.

A contract for the construction of an irrigation reservoir provided that, if the contractor failed to perform satisfactorily, the irrigation board might notify him to discontinue all work under his contract; whereupon he should immediately stop work; should cease to have any rights to the possession of the ground, and should forfeit his contract and that the board might thereupon advertise and let a contract for the uncompleted work in the manner followed for the original contract and charge the cost thereof to the original contractor. Held, that the amount the board was authorized to charge to the original contractor was not limited to the cost of readvertising and letting another contract, but included the cost of the uncompleted work.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1508-1527; Dec. Dig. § 321.*]

2. CONTRACTS (§ 321*)—IRRIGATION WORKS—CONSTRUCTION—RETAINED FUNDS—EQUITABLE ASSIGNMENT.

A contract for the construction of an irrigation reservoir, providing for the retention of 15 per cent. of monthly estimates for work and materials, and payment of such sum only after 60 days from completion of the contract, and after all damages and other proper charges against the contractor had been deducted, etc., and requiring the contractor to give bond to protect the irrigation board against liens, etc., did not amount to an equitable assignment of the amount so retained for the benefit of subcontractors and materialmen holding claims against the contractor, as against the district so as to preclude it from claiming the right to offset against such retained percentage damages from the contractor's failure to perform to the prejudice of such subcontractors and materialmen.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1508-1527; Dec. Dig. § 321.*]

3. CREDITORS' SUIT (§ 8*)—SCOPE OF REMEDY.

A creditor's bill which will not lie to reach assets of the debtor which he cannot recover in an action in his own name.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 12-41; Dec. Dig. § 8.*]

Appeal from District Court, Chaffee County; Lee Champion, Judge.

Action by John H. Stein and others against John J. Noonan and another, partners, doing business as Noonan & O'Neill, and the Otero

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Irrigation District. Decree for complainants, and defendants appeal. Reversed and remanded.

Fred A. Sabin, of La Junta, for appellants. G. K. Hartenstein, of Buena Vista (George D. Williams, of Salida, Jos. W. Clarke, of Leadville, and Harry L. McGinnis, of Buena Vista, of counsel), for appellees.

HILL, J. This action involves the interpretation of certain portions of a contract between the Otero Irrigation District and Noonan & O'Neill. The court found that the district has in its possession \$12,908.64 due Noonan & O'Neill, which the decree holds was a fund created by express agreement for the express purpose of satisfying claims for labor and material furnished to, and used by, Noonan & O'Neill in the construction of a reservoir for the district. By reason of these findings, it was held that the appellees (who were subcontractors, materialmen, and laborers under the contractors Noonan & O'Neill) were entitled to have most of this fund applied in payment of their claims against the contractors. Judgments were entered accordingly.

The case was disposed of upon the admissions contained in the pleadings and an agreed statement of facts. They disclose that the district was organized under our irrigation district statutes; that it entered into a written contract with Noonan & O'Neill for the construction of a reservoir for which it agreed to pay a certain sum; that the contractors entered upon the construction of this work, during which period they were paid 85 per cent. of their estimates, 15 per cent. being reserved under the provisions of the contract; that the contractors failed to comply with the terms of the contract on account of which the district gave them notice to discontinue the work, which they did, all as provided by the terms of the contract; that the district then advertised for bids for finishing the uncompleted portion, let a contract therefor under which it was completed. This cost the district \$17,047 more than it would have cost had it been completed under the terms of the original contract with Noonan & O'Neill. The district claims the right to charge the contractors with this difference as an offset, or to recoup as much of this amount as will offset the 15 per cent. unpaid under the estimates. The appellees performed labor and furnished material under Noonan & O'Neill, who still owe them about \$12,000 therefor. After the termination of the contract as aforesaid, the appellees filed mechanics' liens upon the reservoir, and thereafter instituted suits against the contractors and the district to recover judgments against the contractors and to have their liens foreclosed against the property in order to enforce payment. Personal judgments were awarded against the contractors, but the right to maintain their mechanics' liens against the property of the

district was denied and the actions dismissed as against the district. No appeals were taken from these judgments. The appellees thereafter instituted the present action against the contractors and the district, in which they make the claim, that the 15 per cent. of the estimates withheld from the contractors by the district was a fund created by express agreement for the express purpose of satisfying their claims for labor and material; that the terms of the contract created an equitable assignment of this fund for the benefit of this class of creditors of the contractors; that in this respect the district constituted itself a trustee of this fund for the benefit of the appellees and others similarly situate. To sustain this position the appellees rely upon certain portions of the contract which read as follows:

"Sec. 2. The work embraced in the contract shall be commenced within fifteen days after the execution of the contract, * * * and carried on regularly and uninterruptedly thereafter with sufficient force to insure its completion on or before the first day of January, 1908. Failure to shall render the contractor liable to the Otero Irrigation District in the sum of twenty-five dollars (\$25) as liquidated damages for each and every day's delay in commencing the work. For reasons satisfactory to the board, said board may waive any claims upon the contractor for damages here referred to."

"Sec. 12. Should the contractor fail to begin the work within the time stipulated, or fail to prosecute the work in such manner as to insure a full compliance with the contract within the time limit, or fail to perform the said work in compliance with the terms of the contract and the specifications hereto annexed and the directions of the engineer, or neglect or refuse to remove or rebuild such work as shall have been rejected by the engineer as being defective or unsuitable, the board shall notify the contractor to that effect in writing; and if the contractor shall not within ten days thereafter take such measures as will insure the satisfactory performance or construction of the work within the time limit, the board may notify the contractor to discontinue all work under his contract, and the contractor shall immediately respect said notice and stop work, and cease to have any rights to the possession of the ground and shall forfeit his contract. The board may, thereupon, advertise and let a contract for the uncompleted work in the same manner as was followed in the letting of this contract and charge the cost thereof to said original contractor upon this contract. It is distinctly understood that 'time,' whenever mentioned in this contract, is of the essence of this agreement."

"Sec. 16. The contractor shall be subject to the laws of the state of Colorado regarding liens for labor and materials furnished for said work and shall protect and indemnify the board against all legal claims or

liens against the work for labor and materials furnished to the contractor, or to parties who may have furnished labor or materials for said work, out of any moneys due or to become due him, and the board shall charge the same to the contractor as so much paid on this contract and the board may from time to time retain such reasonable sums as it may deem necessary for its protection in this behalf, and the contractor shall pay the deficiency arising therefrom upon demand."

"Sec. 20. Payments shall be made, monthly, to the contractor, on or about the fifteenth day of each month, in installments of eighty-five per cent. of all moneys due for the work done or materials delivered under this contract, up to and including the last day of the preceding month, under and in accordance with the provisions and stipulations of this contract based on estimates of work completed, made and certified to by the engineer and approved by the board."

The appellees claim it is also necessary to take into consideration a part of section 23 of the Irrigation District Act of 1905 (Laws 1905, p. 262), which reads: "The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for not less than ten per cent. of the amount of the contract price, conditioned for the faithful performance of said contract."

The district contends that section 21 of the contract should also be considered in arriving at the intention of the parties. It reads: "Sec. 21. When all the work embraced in this contract is fully complete agreeably to the stipulations and specifications of this agreement, and accepted by the board, the board shall cause a final estimate to be made of the amount and value of said work, according to the terms and prices of this agreement; and in making such final estimate, neither the board nor the contractor shall be estopped by the monthly estimates theretofore made, as aforesaid. From the total amount so found, there shall be deducted, firstly, all previous payments made to the contractor, and secondly, all damages and other proper charges under this agreement not theretofore charged to the contractor, and the balance, if any, shall be paid to the contractor, but not until sixty (60) days after completion of his work and contract, upon the giving by the contractor, to the board of directors, a release from all claims whatsoever growing out of this agreement."

Counsel have stipulated that the district's property is not subject to mechanics' liens. A stipulation of counsel as to what the law is would not be binding upon this court; but, as the record discloses that in a former trial it was thus held, from which no appeal was taken, the question is not before us for determination, and we express no opinion concerning it, but will treat the stipulation and

the judgments in the former case (for the purpose of this action) as conclusive of the fact that the district's reservoir could not be held for the payment of these claims, without approving or disapproving of the agreement pertaining to what the law is upon the subject.

The main contention of the appellees is that under the contract the fund in question was specifically and expressly created and appropriated to satisfy claims for labor and material used in the construction of the reservoir; that by the terms of the contract this fund was in equity assigned by the contractors for this purpose; that the district accepted the assignment and expressly agreed to apply the funds to the satisfaction of the claims specified, and thereby created itself a trustee of this fund for this purpose. We agree with counsel that no particular language is required to make an equitable assignment or to create a trust fund, but we cannot agree (when this contract is considered as a whole) that it was intended that the owner should retain this 15 per cent. of the contract price for the express and only purpose of paying subcontractors, materialmen, and laborers in case of their nonpayment by the contractors.

[1] We cannot agree to the construction claimed for section 12 which, in case of the failure of Noonan & O'Neill to comply with the contract, would limit the district's damages against them to the cost of readvertising and letting another contract. As we read that portion of this section, when given its proper grammatical construction, also when considered in connection with the remainder of the contract, the phrase "charge the cost thereof" refers to the uncompleted work and not to "advertise and let." The context thus indicates uncompleted work is the thing about which the sentence is talking, without it the sentence means nothing. The whole of the section contemplates and is providing for uncompleted work. The advertising and letting of another contract is but an incident thereto. According to our construction, upon a breach of the contract, the district had a right of action against the contractors for all proximately resulting damages.

[2] Counsel place considerable stress upon the language contained in section 16 which provides that the contractors shall be subject to the lien laws of the state, and that they shall protect and indemnify the board against all such claims or liens, etc. It further provides that the board may, from time to time, retain such reasonable sums as it may deem necessary for its protection in this behalf and the contractor shall pay the deficiency arising therefrom upon demand. It is evident from this language that the parties were of the opinion that the property would be subject to mechanics' liens, or at least the district was of the opinion that the question was doubtful, for which reason it would take no chances concerning it, but

would reserve the right to retain such reasonable sums as it deemed necessary for its protection in this behalf in addition to the bond required by statute; but it will be observed that the fund sought to be secured in this action was not reserved under the provisions of this section. The agreed statement of facts, when considered in connection with the contract, shows that this 15 per cent. was retained under the provisions of section 20, which provides for the payment of only 85 per cent. of the estimate certified to by the engineer and approved by the board. In the answer of the district it is alleged, and not denied by the appellees, that the district had no notice of these claims until after the contractors had ceased work under the contract; this likewise precludes any assumption that the money was intended to be retained under the provisions of section 16 of the contract.

It is true, as contended, that section 20 does not of itself show for what purpose the 15 per cent. is retained, but it is clear that it was not retained for the sole purpose of protecting the district against the claims of the creditors of the contractors; there is no statement therein that it would retain any amounts and pay it to this class of creditors; no trust in this manner is declared. Reading this section in connection with section 21 following, it becomes apparent the intention was that the contractors should, up to the end, receive only so much of the fund retained as they should have earned over and above any damages which the district might suffer by breach of the contract. Section 21 says that from the total so found due there shall be deducted, firstly, all previous payments to the contractor, and, secondly, all damages and other proper charges under this agreement not theretofore charged to the contractor, and the balance, if any, shall be paid to the contractor, but not until 60 days after the completion, etc. This language contemplates a completion of the work, but the fact that it was not completed would not alter the conditions. The intent is clear that the contractor shall only recover so much of any amount estimated to be due as shall remain after deducting the damages for which they are held liable. We are of opinion that, when considered as a whole, the contract gave to the district the right to retain the fund in question for the purposes of protecting it generally against all breaches of the contract and claims of every kind and nature growing out of it, and that this was done solely for the benefit of the district; hence it was not such a fund as was specifically set apart for the payment of the unpaid bills of the contractors.

Had the fund been reserved under the provisions of section 16, it would not be subject to disposition as contended for by the appellees, for the reason that the reservation was for the benefit and protection of the district, and not for the benefit of the subcon-

tractors, materialmen, etc. Language quite similar was in the contract involved in *School District v. Thomas*, 51 Neb. 740, 71 N. W. 731, where the contract provided that 85 per cent. of the estimates due the contractor be paid at certain times; that 15 per cent. be retained by the district for a stated period for the express purpose of insuring the district that all claims of subcontractors and laborers or others had been fully paid by the contractor. It was there claimed that this fund was created by express agreement for the purpose of satisfying such claims for labor, and that upon account thereof the district became a trustee for the subcontractor, and thus a right originated by which the subcontractor became vested with the claim against the district for such sum. In disposing of this contention the court said: "Neither can it be said that the retention of the amount of the estimates as they were made, presented, and in part paid, raised the right in the subcontractor to demand any part of such sum as his due, because it had its source in labor performed or materials furnished by him. Nor did the district become a trustee for the subcontractor, and thus a right originate by which the subcontractor became vested with a claim against the district for such sum."

In *Steele v. McBurney*, 96 Iowa, 449, at page 452, 85 N. W. 332, at page 333, the contract contained a provision that the owner should hold a certain percentage of the contract price until the completion of the work. Held that this was for the benefit of the owner and did not afford a ground of personal liability by the owner to a subcontractor. In commenting upon this subject, the court said: "The provision for holding a part of the contract price until the conditions of the contract were fully complied with was for the benefit of the lodge to secure the performance of the contract, and to protect it against such claims as might be enforced against it. The provision did not of itself give to the plaintiff any right against the lodge."

A similar announcement is to be found in *Lawrence v. United States* (C. C.) 71 Fed. 228, at page 230, where the United States let a contract for the construction of a courthouse, where a similar trust was sought to be forced by the assignee of the laborers, wherein the court said: "Nor have they (speaking of the subcontractors) any specific interest in the money so withheld."

In *Roussel v. Mathews*, 62 App. Div. 1, 70 N. Y. Supp. 886, the plaintiff furnished material to the building contractors under an agreement that the owner would retain sufficient of the money due the contractors to protect the plaintiff. Pursuant to this agreement, the contractors gave the plaintiff two notes with a writing which said that "we hereby agree that if these notes are not paid at maturity that this letter is to be an order on the owner, naming it, for the amount of

the notes." The notes were not paid at maturity; the owner had retained the money as agreed. The court held that the materialmen had a right to recover the amounts from the owner, that this fact constituted a sufficient consideration between the materialmen and the owner for the owner's promise to pay.

In *Shorthill v. Bartlett*, 131 Iowa, 259, 108 N. W. 308, the owner agreed with the contractor to pay for the materials and labor to the parties entitled thereto, etc., thus placing himself under obligations to them.

In *Bates v. Birmingham Paint & Glass Co.*, 143 Ala. 198, 38 South. 845, the owner promised to reserve and pay, out of the contract price, for the material furnished. These cases are not applicable to the facts here, where the owner only reserved the right to retain certain sums for its protection.

The fact that the district was by statute required to take a bond from the contractors for the faithful performance of the contract is no reason why it could not otherwise protect itself by retaining a certain amount of the monthly estimate or provide in the contract for such other protection as it might require. In our opinion this requirement in no way militates against the construction which we have placed upon the contract; but, to the contrary, although not disclosed in the record, it evidently was a wise precaution upon behalf of the district to make other provisions for its protection, as it is conceded in the briefs that the bond taken in this case has become practically valueless, the record shows that the contractors are insolvent. The argument of the appellees that this money was reserved under a provision of the contract for the benefit of certain creditors of the contractors is a concession upon their part that the district could make provisions in the contract for its protection other than the bond required by statute.

[3] The court having erred in holding that this fund was by agreement reserved for the express purpose of paying a certain class of creditors, and that the district therein agreed so to do, and that this agreement constituted an assignment of this fund, it follows that it cannot be disposed of in this manner. Neither can it be reached by assuming that this action is in the nature of a creditor's bill for the reason that a creditor's bill will not lie to reach assets of the debtor which the debtor cannot recover in an action in his own name. *Bonte v. Cooper*, 90 Ill. 440; *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804; *Weckerly v. Taylor*, 74 Neb. 84, 103 N. W. 1065; *Browning v. Bettis*, 8 Paige (N. Y.) 568.

In *German Nat. Bank v. First Nat. Bank*, 59 Neb. at page 14, 80 N. W. at page 49, in commenting upon this question it was said: "This action," say counsel, "as it now stands, is an action on the part of a creditor to sub-

ject to its claim assets of a debtor not reachable by execution." This being the character of the case, it is evident the plaintiff's rights are precisely the same as those of the hardware company. The plaintiff cannot succeed unless its debtor had an actionable demand against the appellant when this suit was instituted."

The language of the Nebraska case is applicable here. According to the agreed statement of facts, the contractors have no claim against the district which could be enforced for the reason that by the terms of the contract the district is entitled to a greater amount for damages on account of their failure to complete the reservoir than is due the contractors. . 25 Am. & Eng. Ency. of Law (2d Ed.) 551, 552.

For the reasons stated, the judgment is reversed, and the cause remanded.

Reversed.

MUSSER, C. J., and GABBERT, J., concur.

HARTLEY v. DYE et al.†

(Supreme Court of Oregon. Dec. 16, 1913.)

ESCROWS (§ 15*) — CONSTRUCTION OF AGREEMENT.

Where an escrow agreement provided that if defendant were satisfied with a homestead claim the check deposited should be delivered to plaintiff, and that the only evidence of defendant's satisfaction with the claim should be the exhibit of the United States receiver's certificate, or a statement signed by both parties, and that the taking of the homestead by defendant should be conclusive evidence of his satisfaction, but that if defendant should be dissatisfied, or could not make a homestead filing, the money was to be returned to him, and in any event in 22 days, and after examination, defendant filed on the claim as a desert claim, and no evidence was presented to the depository, the return of the money to the defendant after more than 22 days did not render it liable to the plaintiff for the amount thereof.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. § 21; Dec. Dig. § 15.*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by W. B. Hartley against E. C. Dye and the Lumbermen's National Bank. From a judgment for plaintiff, defendant bank appeals. Reversed, with directions to dismiss the action as to the bank.

The plaintiff and the defendant Dye were engaged in some negotiations about the acquisition of a right to homestead some land in Klickitat county, Wash. They made the following writing: "Escrow. Portland, Oregon. To the Lumbermen's National Bank: This check for three hundred dollars (\$300), being number four hundred and sixteen (No. 416), is left in escrow by E. C. Dye and W. B. Hartley for the following purpose: E. C. Dye is to have ten (10) days to go and examine a homestead situated in Klickitat county, Washington, near Roosevelt, described as fol-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 136 P.—75

†Rehearing denied January 6, 1914.

lows: (N. E. ¼) Sec. 8, Tp. 3 North, Range 20 E. of W. M., embraced in homestead application No. 03978 made at the U. S. land office at Walla Walla, receiver's receipt No. 274262, dated September 20, 1909. Said land was filed on by Hugh Alexander Peoples. And if after examination he finds the same as represented and is satisfied to locate upon the same as a homestead, and said W. B. Hartley furnishes to him a relinquishment of said homestead acceptable and accepted by the United States land office, and assists and enables said E. C. Dye to locate and file on the same in his own right the said money is to become due and payable to said W. B. Hartley. The only evidence of complete satisfaction on the part of E. C. Dye is his showing to the aforesaid bank the U. S. receiver's certificate or a signed statement of both parties to that effect. If, however, said E. C. Dye is dissatisfied with the same after examination, or is unable for any reason to make a homestead filing on said premises, then the money is to be returned to him and at any event in 22 days. If for any reason the ground is covered with snow or the weather is so inclement that examination cannot be made, the time for the examination of the homestead hereinbefore described is to be extended until such examination can be made and homestead filings made, full time not to be later than twenty-two days from date hereof. The taking of the homestead by E. C. Dye shall be conclusive evidence of his satisfaction with the same, and his failure to file on the same for any reason within the time specified hereinbefore will be evidence of his dissatisfaction, and the money will revert to him upon demand. Dated this fourteenth day of February, A. D. 1910. [Signed] E. C. Dye. W. B. Hartley." This instrument and the check for \$300 mentioned therein were deposited by Dye and Hartley with the defendant bank, which by an additional agreement cashed the check and held the money on deposit. After stating the transaction substantially as above, the complaint alleges that the plaintiff duly performed all the conditions on his part; that Dye located, filed upon, and took the land, and thereafter, without the consent of the plaintiff, the bank paid the money to Dye, who received it to the plaintiff's damage in the sum of \$300. Alleging a demand for the money prior to the commencement of the action, and the refusal of the defendants to pay it, the plaintiff demands judgment against both of them for the \$300. A demurrer interposed by the bank against the complaint having been overruled, the allegations of the complaint are traversed by the answer of the bank, except as otherwise stated.

For new matter the bank states, in substance, that the defendant Dye demanded of it the \$300 in question, stating that he was entirely dissatisfied with the land after having examined it, and had not made any homestead entry upon the same; that, not-

withstanding his statements, the bank did not pay Dye the money until after the expiration of the full period of 22 days mentioned in the writing; and that after the termination of that period, relying upon the statements and representations of Dye, made as stated, it had paid the money to Dye. Other defenses were interposed which it is not deemed necessary to consider. The reply denies only that the bank relied upon the statements and representations of the defendant Dye, and, as to the defense mentioned, merely contends that the check was deposited for the benefit of both Dye and the plaintiff, and not for the benefit of the former alone. Before taking any testimony in the case, the bank moved for judgment in its favor on the pleadings, on the grounds, among other reasons, that the agreement provides that the bank shall pay the money to Dye in any event after the expiration of 22 days, and that the payment was not made to him until after the expiration of that time. This motion was overruled. The court before whom the case was heard without a jury made findings of fact reciting the deposit of the check, and the agreement, and the cashing of the check by the bank, all as set out in the complaint; that the defendants have not paid the money, and, in addition thereto, made the following findings of fact: "That the defendant E. C. Dye was allowed 10 days as mentioned in said escrow agreement, and went and examined the said homestead, and the said W. B. Hartley furnished to said E. C. Dye a relinquishment to said homestead acceptable and accepted by the United States Land Office. That said E. C. Dye accepted said relinquishment and filed the same in said United States Land Office, and thereupon filed on said homestead as desert land in his own right, and took the same; and that said E. C. Dye was satisfied with said land, and thereafter, without the consent, and against the will of the plaintiff, the defendant Lumbermen's National Bank paid over said money to the defendant E. C. Dye, and the said E. C. Dye received the same, to plaintiff's damage in the sum of \$300." As a conclusion of law the court found that the plaintiff is entitled to judgment against the defendants and each of them for \$300, and for costs and disbursements. From the judgment entered upon these findings, the defendant bank has appealed.

Hugh Montgomery, of Portland (Platt & Platt and J. O. Bailey, all of Portland, on the brief), for appellant. Wm. A. Williams, of Portland (Moser & McCue, of Portland, on the brief), for respondent. C. H. Dye, of Oregon City (T. M. Dye, of Portland, on the brief), for defendant.

BURNETT, J. (after stating the facts as above). As it affects the defendant bank, the plain terms of the document in question re-

quire that, in any event, after the expiration of 22 days, the money was to be repaid to the defendant Dye. It also provides that, if he is dissatisfied with the land, the money should be returned to him, and stipulates further that the only evidence of his satisfaction will be the exhibition by him to the bank of the United States receiver's certificate, or a signed statement by both parties to that effect; and, still further, it is said that "the taking of the homestead by E. C. Dye shall be conclusive evidence of his satisfaction with the same, and his failure to file on the same for any reason within the time specified hereinbefore will be evidence of his dissatisfaction, and the money will revert to him upon demand."

Although it crops out that he filed on the realty as a desert claim, it is not contended that he took the land as a homestead so as to make conclusive evidence of his satisfaction with it. It appears from the findings that he failed to file on it as a homestead, and the terms of the contract make that evidence of his dissatisfaction, entailing the result that the money should revert to him upon demand. If the plaintiff would recover from the bank, which is a mere depository without interest in the subject-matter, he should have caused to be exhibited to the bank, within the period of 22 days, evidence required by the contract of the satisfaction on the part of Dye to take the land as a homestead. The contract so far as it is binding upon the bank, having expired by the limitation prescribed by its own terms, it was incumbent upon the bank to return the money to Dye. Plaintiff has not disclosed, and the court has not found, a situation rendering the bank responsible to the plaintiff. The findings themselves do not justify the verdict.

The judgment of the circuit court is reversed, with directions to enter an order dismissing the action as to the defendant bank.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

WILSON et al. v. PETERSON et al.†

(Supreme Court of Oregon. Dec. 16, 1913.)

1. HOMESTEAD (§ 167*)—LOSS OR WAIVER—CONVEYANCE.

Under L. O. L. § 221, providing that the homestead, exempt from judicial sale, must be the actual abode of and owned by the family or some member thereof, the conveyance of the homestead to the debtor's son, a minor member of the family, did not abrogate the homestead right.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 331, 332; Dec. Dig. § 167.*]

2. HOMESTEAD (§ 5*)—NATURE OF RIGHT—STATUTORY PROVISIONS.

Statutes exempting homesteads from forced sale on judicial process should receive such

a construction as to carry out the beneficent policy of the Legislature.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 7; Dec. Dig. § 5.*]

3. HOMESTEAD (§ 193*)—ENFORCEMENT OF RIGHT—TIME FOR MAKING CLAIM.

The exemption of the homestead being from judicial sale only, and not from the lien of the judgment or the levy of an execution, the notice of claim thereof required by L. O. L. § 224, may be made at any time prior to the sale.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 364; Dec. Dig. § 193.*]

Department No. 2. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Proceedings by Robert F. Wilson and others against John A. Peterson and another to subject real property to the satisfaction of a judgment. From a judgment denying plaintiffs' application for an order directing the sheriff to proceed with the sale of the property on execution, plaintiffs appeal. Affirmed.

The plaintiffs seek to subject lots 8 and 10, block B, Kerr & Schindler's addition to Milwaukie, Clackamas county, Or., to the satisfaction of a judgment against the defendants. The latter claim the real property as a homestead, under the provisions of section 221 et seq., L. O. L. From a judgment denying plaintiffs' application for an order directing the sheriff to proceed with the sale of the property upon execution, plaintiffs appeal.

The property was attached on the 23d day of March, 1912, and on the 11th day of April, 1912, after service of summons, a judgment of default was entered against defendants for the sum of \$282.90, and costs, and an order made that the attached property be sold to satisfy the judgment. On August 23, 1912, defendant Mary Peterson notified the sheriff that the property was claimed by herself and family as a homestead. An affidavit was filed September 10, 1912, on behalf of plaintiffs, showing that on the 23d day of March, 1912, after the attachment of the property, defendants recorded a deed conveying the attached premises to Reuben Peterson; that the same was advertised to be sold on August 31, 1912. The defendants moved the court for an order for the sheriff to sell the property notwithstanding the claim of homestead. In answer to an order for the defendants to show cause why the order to sell should not be granted, the defendants answered that the property involved was the homestead of the defendants and their family, and that a claim of homestead had theretofore been duly made therefor. The defendants presented the affidavit of Mary Peterson to the effect that the property was acquired by her husband, John Peterson, about three years before that time as a home for himself and family; that they built a house on the lots, in which they have lived continuously since that time; that in 1911 defendant John A. Peterson conveyed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 13, 1914.

the property to his wife, Mary Peterson; that the title thereto remained in her name until after the commencement of this action. when, by her husband's advice, in order to save the home from the claim, they conveyed the property to their son Reuben, a boy of 17 years of age; that he and two other children were then, and ever since have been, living with the family on the premises; that the property does not exceed in value the sum of \$1,000.

P. C. Wood, of Portland, for appellants. B. G. Skulason, of Portland (Corliss & Skulason, of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above). [1] The main contention of the plaintiffs is that the conveyance by the judgment debtor, subsequent to the attachment, abrogated their statutory right to claim the property as a homestead. They rely upon the case of Hansen v. Jones, 57 Or. 416, 109 Pac. 868, in which a judgment debtor, after the filing of a transcript of judgment, and before the levy of execution, conveyed his homestead by warranty deed for a recited consideration, and, after the levy of execution, the grantee by a similar deed reconveyed the lots to the debtor. It was held that the debtor, not being the owner of the homestead at the time of the levy of the execution, could not then or thereafter assert the right of a homestead subsequently acquired, as superior to the lien of the judgment. At page 421 of 57 Or., at page 870 of 109 Pac., of the opinion, Mr. Justice Slater said: "The lien of a judgment attaches to the realty and is clearly preserved, but the sale is stayed, and the remedy suspended until the debtor ceases either to own or occupy the premises, for a homestead is exempt only while possessing the character of a homestead; that is, it must be the actual abode of and owned by such family or some member thereof. When it ceases to be occupied, although it may be owned by some member of the family, it is no longer a homestead, and if it should be the abode of the family, but has been aliened to one not a member of the family, it is not a homestead." In the case at bar it will be noticed that the defendants conveyed the homestead to another member of the family; hence the case does not come within the rule in Hansen v. Jones, where the homestead was conveyed to one not a member of the family. In Bowman v. Sherrill, 59 Or. 608, 117 Pac. 1122, a case involving the right of homestead exemption,

it was held that either of the defendants, who were husband and wife, had the right to claim a homestead in property, and that this right was not defeated by a conveyance from one to the other for the purpose of keeping the property from creditors.

Section 221, L. O. L., enacts that: "The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must be the actual abode of, and owned by such family or some member thereof." In the case at bar, in order to divest the defendants of the right to claim the property attached as a homestead, exempt from sale under the rule in Hansen v. Jones, it would be necessary for a conveyance to be made to some person not a member of the family of defendants. It is not disputed that Reuben Peterson, to whom the conveyance was made, was a minor and a member of the defendants' family; nor is it questioned that the property was the actual abode of such family. These conditions fulfill the requirements of the statute that such homestead must be the actual abode of and owned by such family, or some member thereof. The construction sought by plaintiffs would lead to the conclusion that only the husband or wife could own such a homestead; but such is not the language of the statute. It is broader in its terms and includes any member of the family. The homestead in question was under the statute exempt.

[2, 3] It is contended, however, by plaintiffs, that the defendants failed to claim the property as a homestead in due time. Statutes exempting homesteads from forced sale on judicial process should receive such a construction as to carry out the beneficent policy of the Legislature. Black on Interpretation of Laws, p. 311. The exemption of the homestead is from judicial sale only, and not from a lien of a judgment, nor from the levy of an execution thereon. Hansen v. Jones, supra. It is to stay the sale thereunder that a notice to the officer by the owner, wife, husband, agent, or attorney of such owner is required under the provisions of section 224, L. O. L. The claim having been made by the owners of the homestead prior to any sale thereof upon execution was a sufficient compliance with the requirements of the statute.

The judgment of the lower court will therefore be affirmed.

MCBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

SPANDE v. WESTERN LIFE INDEMNITY CO.

(Supreme Court of Oregon. Dec. 23, 1913.)

1. APPEAL AND ERROR (§ 1195*)—REVIEW—FORMER DECISION ON APPEAL.

A decision against plaintiff on a complaint on a benefit certificate, based on a contract between defendant and the order which had originally issued the certificate, does not bar a recovery on an amended complaint, based on defendant's representations that the certificate had been transferred to the defendant; that defendant would assume all obligations thereunder, and if plaintiff would pay to defendant the same premiums he was obliged to pay to the order, defendant would perform all the terms and conditions of the certificate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. INSURANCE (§ 699*)—MUTUAL BENEFIT INSURANCE—ACTIONS.

In an action on a benefit certificate, where plaintiff claims under the representations of defendant that the order which had originally issued the certificate had transferred the certificate to defendant, that defendant would assume all obligations thereunder, and that if plaintiff would pay defendant the premiums, defendant would perform the terms of the certificate, plaintiff is not bound to prove the terms of the contract between the order and defendant, but makes a case for the jury when he shows that defendant has promised to assume the burden of the order, and that, relying on such promise, plaintiff has paid defendant the premiums which would otherwise have been due the order.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 699.*]

3. INSURANCE (§ 699*)—MUTUAL BENEFIT INSURANCE—ACTIONS—QUESTION FOR JURY.

In an action on a benefit certificate, evidence held sufficient, as against a motion for nonsuit, to show a contract of insurance by defendant by the assumption of the burden of the order which had originally issued the certificate.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 699.*]

4. CONTRACTS (§ 170*)—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

The conduct of the parties with respect to the subject-matter of a contract will be looked to as affording evidence of the meaning the parties gave to the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

5. CONTRACTS (§ 147*)—CONSTRUCTION—UNDERSTANDING OF PROMISOR.

The language of a contract must be interpreted in the sense that the promisor knew, or had reason to know, that the promisee understood it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

6. CONTRACTS (§ 155*)—CONSTRUCTION—ADVERSE TO PARTY USING WORDS.

The words of a contract are to be strongly construed against the party using them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. § 155.*]

7. INSURANCE (§ 699*)—MUTUAL BENEFIT INSURANCE—ACTIONS—BURDEN OF PROOF.

In an action against a defendant which has assumed the obligations of a benefit certificate which provides for the payment to plaintiff of the proceeds of one assessment, not exceeding \$2,000, plaintiff need not allege and

prove what the proceeds of an assessment would be, but the burden is on defendant to show that it would be less than \$2,000.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 699.*]

8. INSURANCE (§ 699*)—POWERS—ESTOPPEL TO DENY LIABILITY.

A company which has assumed the obligations of a fraternal order on a benefit certificate, and has accepted, without objection, plaintiff's dues from month to month, cannot escape liability on the ground that its contract with plaintiff is ultra vires.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 699.*]

Department 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by H. A. Larsen Spande against the Western Life Indemnity Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Entertaining the thought that he had a binding contract of insurance with defendant, and that its every provision had been faithfully observed, plaintiff, on November 4, 1908, brought an action on the policy to recover the sum of \$2,000, the amount of its matured value. Plaintiff prevailed in the litigation which followed, and defendant appealed to this court obtaining a reversal of the judgment (61 Or. 220, 117 Pac. 973, 122 Pac. 38), the court holding in effect that plaintiff had failed to prove the contract upon which he built defendant's liability.

Turning to plaintiff's original complaint, we observe these formal averments: "That on and prior to the 21st day of March, 1908, the said defendant represented to this plaintiff in writing that by the unanimous action of the Supreme Union of the Order of Washington, and with the approval of the insurance department of the state of Washington, said defendant had entered into an agreement with the Supreme Union of the Order of Washington, whereby all insurance theretofore taken by said Supreme Union of the Order of Washington had been lawfully transferred to the defendant, and that, by the payment to defendant by this plaintiff of the monthly assessments due by the terms of said certificate, life and endowment policy mentioned to be done and performed by the Supreme Union of the Order of Washington would be thereby assumed, complied with, and paid by the said defendant; and then and there in writing and for a good and valuable consideration in hand paid by this plaintiff in writing covenanted, contracted, and agreed, if this plaintiff would pay the said defendant all of the assessments required to be paid under the laws of the Supreme Union of the Order of Washington on said benefit certificate, life, and 20-year endowment policy, hereinbefore mentioned, that said defendant would assume all of the conditions and stipulations contained in said insurance policy required to be done and performed by said Supreme Union of the Order of Washington. That plaintiff thereupon accepted

said contract and agreement and pursuant thereto, and in accordance therewith this plaintiff on said date paid and has ever since continued to pay all of the assessments, premiums, and moneys required to be paid by said insurance policy aforesaid, and complied with all the conditions thereof, to wit, August 28, 1908, for that said benefit certificate, life, and 20-year policy hereinbefore mentioned, under the laws of said orders and agreement with defendant, matured 20 years from August 28, 1888, namely, August 28, 1908. That on or about the said 21st day of March, 1908, and at the time said defendant entered into said contract of insurance with plaintiff, and as part consideration thereof, the said Supreme Union of the Order of Washington transferred and assigned and delivered to defendant all of its business, assets, property, property rights, and good will, together with all of the policies, benefit certificates, and endowment certificates that had been theretofore issued by the said Supreme Union of the Order of Washington, and in consideration thereof defendant assumed and took over all of the benefit certificates, life, and endowment policies theretofore issued by said Supreme Union of the Order of Washington and business and good will of such order, and thereupon the said Supreme Union of the Order of Washington ceased business and became absolutely insolvent and ceased to exist. That in consideration of the transfer to said defendant by the said Supreme Union of the Order of Washington of all its assets, policies, benefit certificates and endowment policies, properties, and business and good will, the said defendant undertook, promised, and agreed to assume all of the obligations and liabilities of the Supreme Union of the Order of Washington, and said defendant, under each and all such benefit certificates, life, and endowment policies theretofore issued by such order, entered into a new contract with all of the policy holders, holders of benefit certificates and endowment certificates, and in writing with this plaintiff agreed to pay this plaintiff, should he be alive on August 28, 1908, and should have his assessments paid, the full sum of \$2,000."

After asserting the incorporation of defendant and setting forth in *hac verba* the certificate of membership in the company, plaintiff in his amended complaint averred in part: "That on said 22d day of February, 1908, the defendant herein, in writing, represented and stated to plaintiff herein that the said benefit certificate and life insurance policy issued upon the life of plaintiff by said Order of Washington had been lawfully transferred to the defendant, and that the defendant was the owner thereof, and by reason of such transfer, defendant had and thereby assumed all obligations thereof imposed upon said Order of Washington, and in writing demanded that plaintiff should thereafter pay to defendant all of the monthly payments due by the terms of the said benefit

certificate hereinbefore mentioned, and then and there covenanted and agreed that immediate upon the receipt by defendant of the first payment due thereafter on such policy the plaintiff would cease to be of the Order of Washington, and would become one of the defendants herein, and that, by reason of such transfer, and in consideration of such payment and the further payment to defendant of all monthly dues in accordance with the terms of said benefit certificate, the said defendant would thereby make the said benefit certificate and insurance contract issued plaintiff by the Order of Washington aforesaid the benefit certificate and insurance policy of the defendant, and would immediately, and upon the payment by plaintiff to defendant of said first monthly payment, assume all of the obligations theretofore imposed upon said Order of Washington under such certificate until such time as a policy for an equivalent amount and on the same terms could be issued on the forms of the defendant and at the defendant's rates, in accordance with the provisions of the reinsurance contract entered into between the Order of Washington and the defendant. That the said defendant then and there represented to plaintiff that, in accordance with the terms of the said reinsurance contract, which defendant represented to plaintiff as having been entered into between said Order of Washington and the defendant, by plaintiff paying defendant the amount of the dues and assessments required to be paid under plaintiff's said benefit certificate, the said benefit certificate and life insurance policy would become the policy of said defendant, and it would thereby be obligated to pay the amount of said policy in case of plaintiff's death or its maturity, and such benefit certificate would be an obligation on the part of the defendant to assume all of the obligations thereof and theretofore imposed upon the order of Washington thereby. That this plaintiff, relying upon said written statement of said defendant, and believing the same to be true, and believing that said defendant had acquired said policy and benefit certificate aforesaid, immediately upon receipt of said written statement aforesaid, and on or about March 1, 1908, remitted to defendant the full amount of the dues and assessments that plaintiff was then required to pay under and by virtue of the terms of his said benefit certificate aforesaid, and the same was duly received by the said defendant on or about the 1st day of March, 1908. That on the 25th day of March, 1908, the said defendant acknowledged receipt of said payment, and delivered to plaintiff a guaranty certificate, which was in writing, and requested plaintiff to attach the same to his said benefit certificate and life insurance policy aforesaid. That said guaranty certificate so delivered to plaintiff was and is in words and figures following, to wit: 'Western Life Indemnity Company, Geo. M. Moulton, President, Home

Office, Masonic Temple, Chicago. This certifies, that all the covenants and obligations heretofore imposed and undertaken by the Order of Washington under and by virtue of a certain life benefit certificate No. 245, issued by said the Order of Washington on the life of H. A. L. Spande are hereby assumed by the Western Life Indemnity Company to the extent and in the manner as are set forth in a certain contract of reinsurance made and entered into by and between the Order of Washington, of Portland, Oregon, and the Western Life Indemnity Company, of Chicago, Illinois, on the 15th day of February, A. D. 1908. Executed and delivered at the home office of the Western Life Indemnity Company in Chicago, Illinois, this 21st day of March, 1908. Western Life Indemnity Co., by Geo. M. Moulton, President.' That at the time said defendant delivered to plaintiff said paper designated as 'guaranty certificate,' the said defendant represented and stated to plaintiff that the contract therein referred to as the 'contract of reinsurance made and entered into by and between the Order of Washington, of Portland, Oregon, and the Western Life Indemnity Company, of Chicago, Illinois, on the 15th day of February, A. D. 1908,' bound and obligated the defendant to carry out all of the terms and conditions of the said benefit certificate and life insurance policy of plaintiff herein issued to him as aforesaid, which were thereby originally imposed upon the Order of Washington, and that by such contract the defendant herein made such benefit certificate and life insurance policy the benefit certificate and life insurance policy of the defendant herein, and the defendant herein thereby assumed all of the obligations thereof, and not otherwise. That this plaintiff relied upon and believed the said representations of the defendant herein, and believed that the said contract and said guaranty certificate mentioned fully obligated the defendant herein to all of the terms and provisions of said benefit certificate and life insurance policy originally assumed and imposed upon the Order of Washington, and that it thereby made such benefit certificate and life insurance policy the benefit certificate and life insurance policy of the defendant herein, and thereupon this plaintiff released the said Order of Washington from all obligation thereunder, and accepted the insurance contract from said defendant herein, and paid the defendant herein all sums of money he was, by the terms of such benefit certificate and life insurance policy, required to pay the Order of Washington, and in all respects fully paid all such sums and payments and otherwise fully complied with all the terms and conditions of said benefit certificate and life insurance policy aforesaid on his part required to be done and performed up to and until the 28th day of August, 1908, when said policy matured, and by the terms thereof and the said contract between

plaintiff and defendant, the defendant became and was indebted to plaintiff in the full sum of \$2,000."

Following a denial of the contents of plaintiff's amended pleading, defendant alleged as a separate defense that it did not assume any of the obligations of the Order of Washington, so far as the same related to endowment insurance, and that it had no power to contract such insurance under its charter, or by the law of the state of Illinois under which it was incorporated, as the statutes of that state expressly prohibit it from issuing or assuming endowment policies; that it entered into but one contract with the Order of Washington, and by which contract it did not assume the payment of, or include, the certificate issued by the Order of Washington to plaintiff, and that it never agreed to pay the certificate upon maturity, and never assumed to pay any sum whatever to plaintiff during his lifetime, or otherwise, and concluded by defining the nature of the contract had with the Order of Washington. In his reply plaintiff pleaded an estoppel in pais, which called into account defendant's conduct with respect to its representations to plaintiff. Judgment in the sum of \$2,000, was awarded to plaintiff.

Samuel White, of Portland (Manning & White, of Portland, on the brief), for appellant. G. C. Fulton, of Astoria, for respondent.

McNARY, J. (after stating the facts as above). [1] At the gateway of this controversy, defendant challenges the ability of plaintiff to maintain this action, for the reason that the matters here presented were formerly adjudicated, and that in the guise of a new robe plaintiff marshals the same facts as formed the lower structure of the original action. If this situation be true, it is needless longer to pursue the discussion of this case.

A diagnosis of plaintiff's primary pleading in the former action will disclose the true situation.

Plaintiff in his initial complaint took the position that at the time of the purchase of the policies and business of the Order of Washington by defendant it covenanted to assume all the policies issued by the Order of Washington, including the plaintiff's, and that defendant agreed to pay the policy according to the terms contained therein. In fine, plaintiff founded his right to recover upon the contract had between the Order of Washington and defendant. In his amended complaint, plaintiff declares that defendant represented to him in writing that his benefit certificate had been transferred to defendant, and that it would assume all the obligations imposed thereunder; that if plaintiff would pay defendant the same premium which he was obliged to pay the Order of Washington, defendant "would step into the shoes"

of that order, and perform all the terms and conditions of the policy required to be performed by the Order of Washington; that defendant further represented to plaintiff that by the terms of its contract of purchase with the Order of Washington, defendant was bounden to perform all the obligations of the Order of Washington required to be done under plaintiff's benefit certificate; that, acting upon such advice, he entered into the contract of insurance with the defendant, releasing the Order of Washington from any further obligation, and promptly and fully paid defendant all premiums and dues thereunder, which defendant duly received under the terms of the contract, and that after plaintiff had paid the first assessment or dues, defendant sent plaintiff a writing, with the request that it be attached to his benefit certificate, which in itself plaintiff asserts was a binding contract on the part of defendant. Thus it is plain that the first cause of action was predicated on a contract made between defendant and the Order of Washington. Upon this hypothesis, plaintiff could not recover, unless he established the contract which he asserted was the foundation of his right of action. By the terms of the amended complaint, plaintiff places defendant's liability upon certain written representations, made directly with plaintiff, embodying the essential ingredients of a lawful contract. From these reflections, we are of the view the issues tendered in this action are not the same ones litigated in the former controversy, and that defendant's attack is without merit.

[2] At the conclusion of plaintiff's case defendant interposed a motion for an order of nonsuit, upon several grounds, the significant one assigned being that plaintiff offered no evidence to show what "the contract was, or the terms of the contract between the defendant and the Order of Washington, or any contract between the plaintiff and defendant, or to introduce evidence of or prove any contract between the defendant and the Order of Washington whereby the defendant insured the members of the Order of Washington, or assumed to pay their policies, or the certificate held by plaintiff." The trial court overruled the motion. The issues created by the pleadings did not impose upon plaintiff the duty of proving, in a literal way, the context of the contract made between the Order of Washington and defendant with respect to the latter's obligation to the members of the former company. Plaintiff made a case sufficient to be submitted to the jury when he proved from written documents that defendant had promised to take up the load of the Order of Washington, and, relying upon the promise, paid to defendant company the premiums which were due on the policy, and which would have been paid the Order of Washington had not the latter transferred its obligations and property to defendant.

[3] Defendant in its answer pleaded specially a contract had with the Order of Washington which it claimed was a limitation of its liability and the measure of its responsibility to plaintiff; consequently the duty of proving this contract rested on defendant.

Plaintiff erected his case upon the following correspondence and documents, outside of the benefit certificate which is omitted for the sake of brevity:

"Geo. M. Moulton, President. The Order of Washington Department. Western Life Indemnity Co., Masonic Temple, Chicago. Chicago, February 22, 1908. To the Comrades of the Order of Washington: You have already been officially advised by your Supreme President and Supreme Secretary that by the unanimous action of the Supreme Union of your order, and with the approval of the Insurance Department of Washington, the insurance on your life in the Order of Washington has been lawfully transferred to the Western Life Indemnity Company of Chicago. In behalf of this company I extend to you a fraternal greeting with the glad hand of fellowship, and a cordial welcome into the bosom of our organization. By the payment to our company of the next monthly payment due by the terms of your present Life Benefit Certificate you thereby become one of us and one with us, I trust until death do us part. Immediately upon our receipt of such payment a formal agreement or guaranty will be transmitted to you for attachment to your present life benefit certificate, which will bind our company to fulfill all the obligations heretofore imposed upon the Order of Washington, under such certificate, until such time as a policy for an equivalent amount can be issued on our forms, and at our premium rates in accordance with the provisions of the reinsurance contract entered into between the Order of Washington and this company. Continue the monthly payments on your present certificate as heretofore in the same amount and in the same way. By so doing you may rest assured that your rights thereunder will be fully safeguarded and adequately protected. Come with us—live with us—die with us. You will never regret either. Faithfully yours, Geo. M. Moulton, President."

"Geo. M. Moulton, President. The Order of Washington Department. Western Life Indemnity Co., Masonic Temple, Chicago.—March 5, 1908. Esteemed Comrade: You will hereafter remit your regular assessment and quarterly dues direct to the Western Life Indemnity Company, Masonic Temple, Chicago, Illinois, making all remittances payable to said company. Immediately upon receipt of your first remittance this company will send to you a 'Guaranty Slip' which you will attach to your Order of Washington contract. This 'Guaranty Slip' will be countersigned by General Geo. M. Moulton, President Western Life Indemnity Company, and it agrees to fulfill all the conditions of your present certificate for one year, upon your

paying your regular dues and assessments. This arrangement gives you double protection without additional cost. A little later you will be sent a list of the several kinds of insurance certificates issued by the Western Life Indemnity Company, and then, if you wish, you may exchange your present certificate for any certificate issued by the Western Life Indemnity Company within the year. Upon receipt of your first remittance you will be mailed an official receipt, as well as a 'Guaranty Certificate.' Make your remittance by post office money order, bank draft or express money order. Do not delay sending in your remittance so that the 'Guaranty Certificate' may be sent you for your own benefit. Faithfully yours for safe protection, J. L. Mitchell, Manager Order of Washington Dept. Western Life Indemnity Company." J. L. M. G. O. S.

"Sam. H. Nichols, Insurance Commissioner. J. H. Schively, Deputy Commissioner. The State of Washington, Department of Insurance, Olympia. March 5, 1908. Mr. J. L. Mitchell, % Western Life Indemnity Co., Chicago, Ill.—Dear Sir: Now that arrangements have been completed and all papers signed between the Order of Washington and the Western Life Indemnity Company of Chicago, I wish to express my most hearty appreciation and approval of the transfer. I know of no movement in insurance circles which will prove of greater benefit to the interested parties than this reinsurance. The Order of Washington, through the stress of financial times and the absorption of certain other fraternal companies, had reached the point where it could no longer fully discharge its increasing liabilities, the only wise solution of the problem being its reinsurance in some substantial and reliable company. That you have made so satisfactory an arrangement with the Western Life Indemnity Company is a matter concerning which the members of the Order of Washington should congratulate themselves: first, because every policy of the Order of Washington immediately becomes worth one hundred cents on the dollar, and secondly, because I have personally looked into the affairs of the Western Life Indemnity Company through the Insurance Department of Illinois and other sources, and I believe it to be a thoroughly reliable and safe company, and in good financial condition. So far as it lies in my power I shall be glad to assist you in convincing the members of the Order of Washington that this change is in the line of good judgment and of their own best personal interests. Very truly yours, J. H. Schively, Deputy Insurance Commissioner."

"Geo. M. Moulton, President. The Order of Washington Department. Western Life Indemnity Company, Masonic Temple, Chicago. March 25, 1908. H. A. L. Spande, Astoria, Ore.—Dear Comrade: Inclosed herewith please find receipts covering the amount of

your remittance, and also you will find inclosed *Guaranty Certificate* to be attached to your Order of Washington certificate as per agreement entered into by and between the Order of Washington and the Western Life Indemnity Company. Kindly send your next assessment direct to this office to keep your protection well secured. The reinsurance contract is going forward successfully in every degree and every comrade's certificate is now worth 100 cents on the dollar. We all have much cause for rejoicing over this change. Fraternally yours, J. L. Mitchell, Mgr. The Order of Washington Dept., Western Life Indemnity Company." J. L. M. A. L. H. Enc.

"Western Life Indemnity Co., Chicago. Kindly attach the inclosed rider agreement to your life benefit certificate as evidence that this company has assumed liability under said certificate pursuant to the terms of the reinsurance contract entered into between this company and the Order of Washington. Faithfully yours, Geo. M. Moulton, President."

"Western Life Indemnity Co., Geo. M. Moulton, President. Home Office, Masonic Temple, Chicago. This certifies, that all the covenants and obligations heretofore imposed and undertaken by the Order of Washington under and by virtue of a certain life benefit certificate No. 245, issued by said the Order of Washington on the life of H. A. L. Spande are hereby assumed by the Western Life Indemnity Company to the extent and in the manner as set forth in a certain contract of reinsurance made and entered into by and between the Order of Washington, of Portland, Oregon, and the Western Life Indemnity Company, of Chicago, Illinois, on the 15th day of February, A. D. 1908. Executed and delivered at the home office of the Western Life Indemnity Company in Chicago, Illinois, this 21st day of March, 1908. Western Life Indemnity Company, by Geo. M. Moulton, President."

"Geo. M. Moulton, President. The Order of Washington Department. Western Life Indemnity Co., Masonic Temple, Chicago. May 14, 1908. H. A. L. Spande, Astoria, Ore.—Esteemed Comrade: Please find receipt for assessment No. 5. It affords the writer pleasure and much satisfaction to report the successful and eminently satisfactory examination of this company by the Insurance Department of the State of Washington. This company has likewise been examined during the year by the Insurance Departments of Illinois and Indiana and each examination has shown the company to be in excellent condition, with a very promising outlook for the future, all of which we know will be gratifying to our membership. Fraternally yours, J. L. Mitchell, Mgr. the Order of Washington Dept. Western Life Indemnity Company. J. L. M. C. D. K., Enc."

Plaintiff also offered certain receipts for

moneys paid by plaintiff, all of which are identical with the one here given, to wit:

"Secretary's Official Receipt for Membership at Large.

"The Order of Washington. Chicago, Ill., 5/12, 1906.

| | |
|--|--------|
| Received of Comrade H. A. L. Spande— life benefit fund, assessment No. 5, for 1908 | \$1 60 |
| Sick and accident fund, assessment No. _____, for 1908..... | |
| Annual dues, general fund, to _____, 1908 | |

Total \$1 60

"Western Life Indemnity Company,
"by J. L. B."

Stamped on receipt:

"This premium is paid and received under the terms of the reinsurance contract dated February 15, 1908, between the Western Life Indemnity Company and the Order of Washington. Any unearned portion of this premium on February 15, 1909, will be credited upon the first premium of the policy to be substituted under said contract."

On the margin of receipt:

"To the President of Any Subordinate Union, O. W.: If the holder of this receipt visits your union, and be without the password for the current term, you will appoint an investigating committee, and if they can satisfy themselves that the holder hereof is a member in good standing, and his receipt is for the last assessment due, then you may communicate the term password and admit the member to a seat in your union. Patriotism. Purity. Prudence."

In the first letter from the president of the defendant company, plaintiff was told that the insurance on his life in the Order of Washington had been "lawfully transferred to defendant," and that by the payment of his next month's dues in accordance with the provisions of his benefit certificate, he would become "one of us, and one with us, until death do us part," and that immediately upon receipt of the payment, a formal agreement or guaranty would be submitted for attachment to the benefit certificate, which would bind defendant to fulfill all the obligations theretofore imposed upon the Order of Washington until such a time as a policy would be issued on defendant's forms, and at premium rates in accordance with the provisions of the reinsurance contract entered into between the Order of Washington and defendant, and that by so doing plaintiff was assured that his rights would be fully "safeguarded and adequately protected." In this letter plaintiff was apprised of the warmth of the reception that awaited him as indicated from the following excerpt: "In behalf of this company I extend to you a fraternal greeting with the glad hand of fellowship and a cordial welcome into the bosom of our organization." Having extended the "glad hand of fellowship," defendant should not be

permitted to withdraw that hand upon any subterfuge or refined legal construction so as to defeat plaintiff's right to recover, unless there is a palpable failure to prove a contract of insurance. While there is a legal duty upon the parties to a contract to perform it both in spirit and in essence, yet, in contracts of this nature, there is almost a sacred duty of performance, as they frequently act as a bridge that spans the chasm between penury and well-being for those to whom the insured in his life felt most concerned.

[4] The intent of the parties being the factor which the court will try to locate, for this purpose the court will place itself in the shoes of the parties, and view the subject-matter from their perspective, keeping in mind the rule that the conduct of the parties with respect to the subject-matter of the contract will be looked to as affording evidence of the meaning the parties gave to the agreement. Chicago Wharf & Storage Co. v. Street, 54 Ill. App. 569.

[5, 6] Two other rules are applicable: (1) That the language must be interpreted in the sense that the promisor knew, or had reasons to know, the promisee understood it; (2) that the words are to be strongly construed against the party using them. American Lithographic Company v. Commercial Casualty Company, 81 N. J. Law, 25, 80 Atl. 25; 9 Cyc. 578, 590.

Illuminating the documents by these canons of construction, and it is manifest that plaintiff had a contract of insurance with defendant encompassing all the components required in a definition of that term. No error was committed by the court in overruling defendant's motion for an order of nonsuit with respect to the point just discussed.

[7] Counsel for defendant further argues that an order of nonsuit should have been granted for the reason that "it is not alleged in said complaint what one assessment upon the life benefit certificate of the members of the Order of Washington would have amounted to at the time of the supposed maturity of plaintiff's certificate of insurance, and that it is not alleged in said complaint that any assessment upon the members in good standing was made or demanded at or after maturity of plaintiff's certificate, and that there was no evidence introduced by plaintiff showing what one assessment against a member in good standing would have amounted to if lived out, or after the maturity of plaintiff's certificate of membership." Adverting to plaintiff's complaint, we observe the statement that immediately upon the maturity of the policy, plaintiff and his wife, the beneficiary named in the benefit certificate, notified defendant in writing that plaintiff had lived out his life expectancy, and that on account thereof the policy had fully matured; and demanded payment of \$2,000, which sum or any portion thereof defendant refused to pay, and denied liability whatever to plaintiff. On this phase of the controversy

the policy contains this stipulation: "Agrees that after the maturity of this certificate of membership, occasioned by the death of the member, or otherwise, one assessment on the life benefit collected for said fund not exceeding in amount the sum of \$2,000, will be paid as a benefit to Emily Weokoline Larsen Spande." The undertaking is not an unconditional one to pay \$2,000, for the amount payable to the beneficiary is contingent upon the sum that may be realized from "one assessment on the life benefit collected for said fund." The amount to be paid was \$2,000, or a less sum if the yield of one assessment was the result thereof. The policy being in evidence, plaintiff could recover the maximum amount stated therein, without showing the sum yieldable by an assessment, or that an assessment had been levied. The result of one assessment lying peculiarly within the knowledge of defendant, excused plaintiff from alleging and proving such matter. The duty rested upon defendant to allege and prove what amount of money one assessment would produce. Failing so to do, a presumption existed in favor of plaintiff that an assessment would pay the full amount named in the certificate. *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *Neskern v. Northwestern, etc.*, Ass'n, 30 Minn. 406, 15 N. W. 683; *Hollings v. Bankers' Union, etc.*, 63 S. C. 192, 41 S. E. 90; *International Order, etc., v. Boswell* (Tex. Civ. App.) 48 S. W. 1108; *Kroge v. Modern Brotherhood, etc.*, 128 Mo. App. 693, 105 S. W. 685.

[8] The last material objection urged in favor of a reversal of the judgment rests upon the defense that the policy, having been issued in violation of defendant's charter and the laws of the state of its creation, is ultra vires and void. It must be conceded that plaintiff met promptly every condition expressed in his policy of insurance, made payment seasonably of each assessment, and that the sums so paid were accepted and now retained by defendant. With this situation in mind can defendant sustain its plea of ultra vires? We think not. While there is a diversity of thought concerning the law applicable to a plea of this nature, we think the weight of the authorities and the sounder reason leans against such a defense when the contract is executed and the company has received the benefit of it. The Supreme Court of Iowa in *Field v. Eastern Building & Loan Ass'n*, 117 Iowa, 185, 90 N. W. 717, well said: "Sound public policy cannot be promoted by offering a premium for wrongdoing, and such would be the effect of an authoritative announcement that a corporation may send its agents out among the people, inducing them to invest their small savings in its stock, and then, having received the agreed consideration, escape liability because it has promised to do more than it was legally au-

thorized to do. With that doctrine established, it would be to the interest of every corporation to exceed its lawful powers in every contract, as the readiest means of paying its debts without depleting its assets." *Continental Fire Ins. Company v. Masonic Temple, etc., Co.*, 26 Tex. Civ. App. 139, 62 S. W. 930; *Insurance Co. v. Shaw*, 94 U. S. 578; *Security, etc., Co. v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Thompson on Corporations* (2d Ed.) §§ 504, 1060, 1064; *Presbyterian, etc., Co. v. Gilbee*, 212 Pa. 310, 61 Atl. 925.

After a careful consideration of this case, we conclude that the plaintiff made a case sufficient to entitle him to the benefit of the judgment, and that no prejudicial errors appear in the record, and therefore an affirmance is ordered.

YEAGER v. STATE.

(Supreme Court of Wyoming. Dec. 20, 1913.)
APPEAL AND ERROR (§ 773*)—APPEAL—DISMISSAL—FAILURE TO FILE BRIEF.

Under the substantially direct provisions of Supreme Court Rule 21 (104 Pac. xiv), defendant in error may have the cause dismissed on motion, where plaintiff in error fails to file and serve a brief, in a criminal case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error to District Court, Albany County; Roderick N. Matson, Judge.

C. C. Yeager was convicted of second degree murder, and brings error. Proceeding in error dismissed.

Charles L. Rigdon, of Cheyenne, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

BEARD, J. The plaintiff in error, C. C. Yeager, was on April 29, 1911, convicted of the crime of murder in the second degree and sentenced to a term in the penitentiary by the district court of Albany county. A petition in error in said case was filed in this court April 24, 1912, and on June 9, 1912, the original papers, bill of exceptions, and transcript of the journal entries were filed. Since said last-mentioned date nothing further has been done by plaintiff in error or his counsel in the case. No brief has been filed in his behalf, and no application for time to do so, beyond the time allowed by the rules of this court, has been applied for or granted. On September 29, 1913, the Attorney General filed a motion to dismiss the proceedings in error for the reason that no brief had been filed by or in behalf of plaintiff in error. Service of notice of the filing of said motion and of the time the same would be presented to the court was acknowledged, in writing thereon, on the day of September, 1913. On November 17, 1913, said motion was submitted to the court

by the Attorney General; there being no appearance by counsel for plaintiff in error in resistance to said motion, or any objections thereto filed.

Such being the state of the case, the cause might, under the rules, be dismissed without further consideration. Supreme Court Rule 21 (104 Pac. xiv) provides: "When the plaintiff in error or party holding the affirmative has failed to file and serve his brief as required by these rules, the defendant in error or party holding the negative may have the cause dismissed, or may submit it, with or without oral argument." But, on account of the nature of the case, we have read the evidence and have examined the instructions and record presented. There is some conflict in the testimony, but we think it sufficient to fully sustain the verdict and judgment; and we discover no prejudicial error in the instructions, or anything in the record disclosing that the plaintiff in error did not have a fair and impartial trial.

The motion to dismiss the proceedings in error will be granted, and the cause dismissed; and it is so ordered.

Dismissed.

SCOTT, C. J., concurs. POTTER, J., not sitting.

MEMORANDUM DECISIONS

O'BRIEN v. STATE. (Supreme Court of Arizona. Nov. 28, 1913.) Appeal from Superior Court, Pima County; W. F. Cooper, Judge. Thomas O'Brien was convicted of grand larceny, and appeals. Affirmed. Leslie C. Hardy, Asst. Atty. Gen., for the State.

PER CURIAM. The appellant was convicted of the crime of grand larceny. He has appealed from the judgment of conviction and the order overruling his motion for a new trial. His counsel in the trial court has done nothing more than to have the record brought to this court. No brief or assignment of errors has been lodged here. The errors assigned on motion for new trial are all on questions arising during the trial. The reporter's transcript, to which reference must be had to pass upon those assignments, is not authenticated by any certificate of the trial judge, but is merely "approved" by the trial judge. The statute, subdivision 5, § 15, c. 74, Laws Ariz. 1907, provides that the trial judge shall certify that the reporter's transcript is correct. We have our doubts whether a judge's approval simply of the transcript meets the requirements of the statute. However, in this case we have carefully considered the evidence and the instructions of the court, and also the alleged misconduct of the county attorney, being all of the errors assigned in the motion for new trial, and are unable to see wherein the appellant's rights have been prejudiced. The judgment is affirmed.

POPEJOY v. DIEDERICH. (Supreme Court of Colorado. Dec. 1, 1913.) Department 1. Error to Costilla County Court; J. W. McLellan, Judge. Action by John P. Diederich

against Eli O. Popejoy. Judgment for plaintiff. Defendant brings error. Affirmed, because of insufficiency of record. Charles M. Corlett and George M. Corlett, both of Monte Vista, for plaintiff in error. James P. Veerkamp, of Monte Vista, for defendant in error.

PER CURIAM. There were no written pleadings in this case. The defendant in error, as plaintiff, brought suit in a justice court against the plaintiff in error and recovered a judgment. On appeal to the county court, the same judgment was rendered. It is impossible to tell from the abstract just what the suit was about. The contention seems to be with regard to the sufficiency of the evidence. It appears from the abstract that the plaintiff testified that the defendant justly owed him and the defendant testified that he did not. In this state of the record this court cannot presume to know more about the case than the two courts that heard it. The judgment is therefore affirmed. Judgment affirmed.

POYZER v. BEARDSLEY. (Court of Appeals of Colorado. Nov. 10, 1913.) Appeal from District Court, Washington County; H. P. Burke, Judge. Action between James H. Poyzer and William Penn Beardsley. Judgment for Beardsley, and Poyzer appeals. Affirmed. R. H. Gilmore, of Denver, and Ferris & Idding, of Sioux City, Iowa, for appellant. Isaac Pelton, of Akron, for appellee.

KING, J. This was an action commenced by appellee to quiet his title. All matters involved herein have been so frequently decided by the Supreme Court and by this court adversely to the contention of the appellant that a written opinion giving reasons for the conclusion reached would serve no useful purpose, and is therefore dispensed with. The judgment is affirmed. Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. FARLEY et al. (Supreme Court of Oklahoma. June 10, 1913.) Appeal from District Court, Rogers County; T. L. Brown, Judge. Action by W. P. Farley and Heber Skinner, partners as Farley & Skinner, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Dismissed. Vincent M. Miles, of Ft. Smith, Ark., for plaintiff in error. Seymour Riddle, of Vinita, for defendants in error.

KANE, J. This cause comes on to be heard on motion to dismiss the appeal of the plaintiff in error, upon the following grounds: (1) That the case-made of the plaintiff in error herein was not served upon the defendants in error, or upon either of the defendants in error, or upon their attorney, within three days after the rendition of the judgment herein appealed from, nor did the court, or the judge thereof, extend the time for making and serving said case-made. (2) That no order of the court in which said judgment was rendered was made by the court, or by the judge thereof, and filed or entered of record herein, extending the time within which the plaintiff in error should make and serve case-made herein, and that said case-made was not served upon the defendants in error, or either of them, or upon their attorney, within three days from and after the rendition of the judgment herein appealed from. A great many cases by this court sustain the contention of counsel for defendants in error. The motion to dismiss must be sustained. All the Justices concur.

WYLIE MFG. CO. v. CITY OF WANN. (Supreme Court of Oklahoma. Nov. 4, 1913.) Error from District Court, Nowata County;

† Rehearing denied October 28, 1913.

T. L. Brown, Judge. Action between the Wylie Manufacturing Company and the City of Wann. From the judgment the Wylie Manufacturing Company brings error. Reversed and remanded. Bernstein & Spiers, of Oklahoma City, for plaintiff in error. W. D. Humphrey, of Nowata, for defendant in error.

PER CURIAM. The plaintiff in error insists that the judgment of the lower court should be reversed and modified. The defendant in error confesses error, and asks that it be reversed and remanded for a new trial. The case will be reversed and remanded for a new trial.

Ex parte BLYTHE. (Criminal Court of Appeals of Oklahoma. Dec. 13, 1913.) Habeas Corpus Proceedings from Ottawa County. Habeas corpus by Henry Blythe. Writ dismissed. A. N. Whiteside, of Afton, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. This is a companion case to A-1712, *Ex parte Chandler*, infra, and for the reasons given in that case the application for the writ of habeas corpus is dismissed.

BROWN v. STATE. (Criminal Court of Appeals of Oklahoma. Nov. 15, 1913.) Appeal from County Court, Jefferson County; B. T. Price, Judge. Link Brown was convicted of having intoxicating liquors in his possession with intent to sell, and appeals. Reversed. Chas. A. McBrien, of Ripon, Cal., for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (C. J. Davenport, Asst. Atty. Gen., of counsel), for the State.

PER CURIAM. This appeal is prosecuted from a conviction had on an information which charged that the defendant did have in his possession intoxicating liquor with the unlawful intent to sell, barter, give away, or otherwise furnish, contrary to, etc. On the 14th day of October, 1912, judgment was entered, and the defendant was sentenced to be confined in the county jail for a term of 30 days and that he pay a fine of \$150. The evidence shows that the defendant lived on a farm; that the sheriff and deputy sheriff went to his place, and found no liquor in the house or barn, but found a jug and a dozen quarts of whisky concealed in some corn shocks and in a bunch of bear grass. There were three or four other men at the defendant's place; they were cotton pickers. The defendant did not claim the whisky as his, but said to the sheriff that he guessed that the cotton pickers had slipped it in the corn shocks. The land that the liquor was found on did not belong to the defendant. There was no evidence tending to show the payment by the defendant of the special tax required of liquor dealers by the United States, or connecting the defendant with the intention to sell, barter, give away, or otherwise furnish the same. At the close of the state's testimony the defendant moved to direct a verdict of acquittal. It is our opinion that the evidence offered on behalf of the state wholly fails to prove the offense charged, for the reason that no actual or constructive possession by the defendant of intoxicating liquors as charged has been shown by the evidence, nor is there any evidence tending to show an unlawful intention to violate provisions of the prohibition law. However, upon a charge of this kind, in order to prove an intent to violate the prohibition law, possession of intoxicating liquors must first be shown. That was not done in this case. For this reason, the evidence is insufficient to support the verdict. The judgment of conviction is therefore reversed.

CASE v. STATE. (Criminal Court of Appeals of Oklahoma. Nov. 29, 1913.) Appeal from County Court, Jefferson County; B. T. Price, Judge. Aaron Case was convicted of vagrancy, and brings error. Affirmed. Hamilton & Saye, of Waurika, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. This appeal is prosecuted from a conviction had upon an information charging vagrancy. The jury returned a verdict of guilty, and fixed the punishment at a fine of \$10. In our opinion, there is no merit in the appeal. The judgment is therefore affirmed. Mandate forthwith.

Ex parte CHANDLER. (Criminal Court of Appeals of Oklahoma. Dec. 13, 1913.) Application of Charlie Chandler for writ of habeas corpus. Petition dismissed. A. N. Whiteside, of Afton, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. This is an original application for the writ of habeas corpus, filed in this court on the 27th day of April, 1912. The petition alleges that Charlie Chandler was unlawfully restrained of his liberty at the time in the county jail of Ottawa county. It appears that he had been tried before a justice of the peace on a misdemeanor charge, and had been committed, and was at the time in the custody of the sheriff; the commitment requiring him to pay a fine of \$25 and the service of 30 days in the county jail. The petition was never presented to any member of this court for the purpose of securing bail pending the determination of the same, and the attention of the court was not called to the matter. More than 12 months having elapsed since the filing of the petition, and a much longer period than that which the prisoner could have been confined, no good purpose can now be served by discussing the propositions the petition intends to raise. No briefs were ever filed on behalf of petitioner, and no appearance made for argument or otherwise. It is evident that the cause has been abandoned. It is the duty of counsel applying for the writ of habeas corpus to present their petition to the court or some member thereof when the same is filed. If this is not done, the application is placed on the docket and reached in the due course of business. These petitions should have been determined a year ago, and would have been if counsel had followed these suggestions. The petition is dismissed for failure to prosecute.

DAVIS v. STATE. (Criminal Court of Appeals of Oklahoma. Dec. 13, 1913.) Appeal from County Court, Woodward County; Clyde H. Wyand, Judge. Gordon Davis was convicted of conspiracy to defraud, and appeals. Affirmed. Appelget & Herod, of Woodward, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Gordon Davis, was convicted at the July, 1912, term of the county court of Woodward county on a charge of conspiring with another to defraud one Gustave Dahlke of certain real estate situated in said county, and his punishment fixed at imprisonment in the county jail for a period of 6 months and a fine of \$300. A thorough reading of this record, and careful consideration of the facts disclosed thereby, lead unerringly to the conclusion that no miscarriage of justice has resulted by the conviction in this case. It is one of the few cases which, in our judgment, should be affirmed without delay or hesitation. The judgment is affirmed, with instructions to the trial court to cause the same to be carried into execution.

ELLIOT v. STATE. (Criminal Court of Appeals of Oklahoma. Nov. 15, 1913.) Appeal from County Court, Stephens County; W. H. Admire, Judge. Carsie Elliot was convicted of an unlawful conveyance of intoxicating liquors, and appeals. Affirmed. Wilkinson & Morris, of Duncan, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. This appeal is prosecuted from a conviction had in the county court of Stephens county on the 13th day of August, 1912, in which appellant was found guilty of the unlawful conveyance of intoxicating liquors, and his punishment assessed at a fine of \$100 and imprisonment in the county jail for a period of 120 days. The evidence shows that appellant was arrested, driving through Stephens county in a buggy in which he had a suit case with 24 pints of whisky in it. The defendant offered no testimony. After a careful examination of the various questions raised, we are satisfied that under well-settled rules, sustained and upheld by the decisions of this court, no error was committed. The judgment is therefore affirmed. Mandate forthwith.

ELLIOTT v. STATE. (Criminal Court of Appeals of Oklahoma. Dec. 13, 1913.) Appeal from County Court, Stephens County; W. H. Admire, Judge. Carsie Elliott was convicted of having unlawful possession of intoxicating liquors, and appeals. Dismissed. Wilkinson & Morris, of Duncan, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Carsie Elliott, was convicted at the October, 1912, term of the county court of Stephens county on a charge of having unlawful possession of intoxicating liquors with intent to sell the same, and his punishment fixed at a fine of \$200 and imprisonment in the county jail for a period of 90 days. The appeal was filed in this court on the 1st day of December, 1912. On the 4th day of December, 1913, counsel for plaintiff in error filed a motion to dismiss the appeal and asked that mandate be issued forthwith. The motion is sustained and the appeal accordingly dismissed. The clerk is directed to issue mandate forthwith.

MURPHY v. STATE. (Criminal Court of Appeals of Oklahoma. Dec. 16, 1913.) Appeal from County Court, Jackson County; B. N. Woodson, Judge. Pink Murphy was convicted of gaming, and appeals. Affirmed. Lawson & Dabney, of Altus, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., and Herbert M. Peck, of Oklahoma City, for the State.

PER CURIAM. The plaintiff in error, Pink Murphy, was convicted at the January, 1912, term of the county court of Jackson county on a charge of gaming, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 60 days. Upon a careful examination of the record, we are of the opinion that the judgment should be affirmed; and it is so ordered.

STICH v. CITY OF STILLWATER. (Criminal Court of Appeals of Oklahoma. Nov. 17, 1913.) Appeal from County Court, Payne County; W. H. Wilcox, Judge. M. A. Stich was convicted of violating a prohibitory ordinance, and appeals. Affirmed. J. M. Springer, of Stillwater, for plaintiff in error. Chester H. Lowry, of Stillwater, for defendant in error.

PER CURIAM. The plaintiff in error, M. A. Stich, was tried and convicted in the county court of Payne county at the April, 1912, term

on a charge of selling intoxicating liquor in violation of the city ordinance, the trial being de novo upon an appeal by this plaintiff in error from the judgment of the city court of Stillwater. The punishment was fixed at a fine of \$100 and imprisonment in the city jail for a period of 30 days. A careful examination of the record discloses no error prejudicial to the substantial rights of the plaintiff in error. The judgment of the trial court is therefore affirmed.

WHEELER v. STATE. (Criminal Court of Appeals of Oklahoma. Dec. 13, 1913.) Appeal from County Court, Love County; R. A. Keller, Judge. M. O. Wheeler was convicted of violating the prohibition law, and appeals. Affirmed. B. C. Logsdon, of Marietta, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

PER CURIAM. The plaintiff in error was tried and convicted upon an information which charged the unlawful sale of intoxicating liquor to E. P. Gilliam. On the 17th day of July, 1912, he was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. On this appeal it is contended that the verdict of the jury is contrary to the evidence. The complaining witness swore positively to the purchase. Defendant denied the sale and offered proof of an alibi. The cases are very rare in which this court has reversed judgments upon the ground that the verdict is contrary to the evidence, and it is only in a case where the evidence is plainly insufficient to warrant the finding of the jury that the verdict will be disturbed. It is our opinion that the verdict in this case is sufficiently sustained by the evidence. The judgment of conviction is therefore affirmed.

WILSON v. STATE. (Criminal Court of Appeals of Oklahoma. Dec. 16, 1913.) Appeal from County Court, Jackson County; B. N. Woodson, Judge. Pink Wilson was convicted of gaming, and appeals. Affirmed. Lawson & Dabney, of Altus, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., and Herbert M. Peck, of Oklahoma City, for the State.

PER CURIAM. The plaintiff in error, Pink Wilson, was convicted at the January, 1912, term of the county court of Jackson county for gaming, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days. Upon a careful examination of the record, we are of opinion that the judgment should be affirmed; and it is so ordered.

WRIGHT et al. v. State. (Criminal Court of Appeals of Oklahoma. Dec. 20, 1913.) Appeal from County Court, Murray County; Harry W. Fielding, Judge. Frank Wright and another were convicted of playing poker, and appeal. Affirmed. C. N. Allen and Walter E. Latimer, both of Sulphur, for plaintiffs in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (Jos. L. Hull, of Oklahoma City, of counsel), for the State.

PER CURIAM. Plaintiffs in error were indicted in the district court of Murray county December 16, 1911, for the offense of playing poker, which indictment was duly transferred to the county court of said county. On October 8, 1912, the case came on for trial. The jury returned a verdict of guilty as charged. On October 14, 1912, the court rendered judgment, and sentenced each of the defendants to pay a fine of \$50. To reverse the judgment the defendants appealed. We have examined the record, and we do not find that it contains any error prejudicial to the substantial rights of the

defendants. The judgment of the county court of Murray county is therefore in all things affirmed.

YATES v. STATE. (Criminal Court of Appeals of Oklahoma. Dec. 13, 1913.) Appeal from County Court, Payne County; W. H. Wilcox, Judge. J. E. Yates was convicted of libel, and appeals. Reversed. P. D. Mitchell and Robt. A. Lowry, both of Stillwater, for plaintiff in error. Smith C. Matson and R. E. Gish, Asst. Attys. Gen., for the State.

PER CURIAM. Plaintiff in error, J. E. Yates, was convicted in the county court of Payne county in June, 1912, on a charge of libel, and his punishment fixed at a fine of \$350 and imprisonment in the county jail for a period of 3 months. Among other grounds for reversal by counsel in this case is the following instruction given by the court: "If you find from the evidence beyond a reasonable doubt each and every material allegation of the information to be true, except the charge in such information that defendant by such publication intended to charge and did charge that R. E. Grant is an adulterer, then you should acquit the defendant, unless you find from the evidence beyond a reasonable doubt that the article so published contained charges other than adultery concerning the said R. E. Grant which were not true, and which were libelous within the definition heretofore given you." This instruction was calculated to confuse the jury and is meaningless. It should not have been given in the form presented. It is the duty of the court to give clear-cut, concise instructions. After a careful reading of this record, we are of opinion that the time of the court and jury and the money of the taxpayers of Payne county could be used to better advantage than the prosecution of such cases as this appears to be. Apparently there is little merit to either side of this controversy. The judgment is reversed, and cause remanded for a new trial.

HOLCOMB v. HOLCOMB et al. (Supreme Court of Washington. Dec. 5, 1913.) Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge. Action for divorce by Augustus H. Holcomb against Florence E. Holcomb, with cross-complaint by defendant, also making one Charles K. McCoy a party. Judgment for defendant, and plaintiff and McCoy appeal. Affirmed. Herbert E. Snook, of Seattle, for appellant Holcomb. F. E. Knowles, of Seattle, for appellant McCoy.

MAIN, J. The title of this action indicates its purpose. The plaintiff in his complaint as a ground for divorce alleges facts tending to show incompatibility of temperament and prays for a decree of divorce. The defendant appeared and

filed a cross-complaint, in which she charged the plaintiff with cruel treatment, and alleged that certain real property was held by herself and the plaintiff under a contract of purchase from one Charles K. McCoy. She prayed for a decree dissolving the bonds of matrimony and that the community property should be awarded to her. By the cross-complaint, Charles K. McCoy was made a party to the action and appeared by answer, in which he alleged that the rights of the plaintiff and defendant under the contract of purchase had been forfeited and terminated. The cause was tried to the court without a jury. At the conclusion of the trial the court entered a judgment in favor of the defendant upon her cross-complaint, and decreed that she be awarded certain community property, which consisted of the contract of purchase from McCoy and certain household furnishings. It was also adjudged that the contract had not been forfeited or terminated. The only questions here for determination, as in the superior court, are those of fact. The trial court found the facts to be substantially as alleged by the defendant in her cross-complaint. A detailed review of the evidence could serve no possible useful purpose. It is sufficient to say that a reading of the transcript of the testimony as contained in the statement of facts demonstrates that the conclusion of the trial court was right. The judgment will be affirmed.

CROW, C. J., and ELLIS, CHADWICK, and GOSE, JJ., concur.

NEW ENGLAND NAT. BANK v. DREWERY et al. (Supreme Court of Washington. Nov. 15, 1913.) Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge. Action by the New England National Bank against H. O. Drewery and others. Judgment for defendants, and plaintiff appeals. Affirmed. Geo. H. Funk, of Olympia, for appellant. Thomas M. Vance and H. L. Parr, both of Olympia, for respondents.

PER CURIAM. An examination of the record in this case discloses that it is identical with National Bank of Commerce v. Drewery, 70 Wash. 577, 127 Pac. 102; the note here sued upon being a second note given in the same transaction there referred to. Both cases raise the same issues upon like law and facts, resulting in like judgments. The only difference between the cases is in the party plaintiff and in the witnesses relied upon by plaintiff to sustain its cause of action. The witnesses are different, but the essential facts are the same. For this reason, we do not deem it necessary or helpful to discuss the appeal farther, as all the points now suggested were urged and disposed of in the action upon the first note. The judgment is affirmed.

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digest, the Key-Number Series and
Prior Reporter Volume Index-Digests

ABANDONMENT.

See Dedication, § 63; Husband and Wife, §§ 303-313; Vendor and Purchaser, § 97; Waters and Water Courses, §§ 151, 152.

ABATEMENT AND REVIVAL.

See Parties, § 84; Statutes, § 276.

II. ANOTHER ACTION PENDING.

§ 17 (Colo.App.) The fact that a former suit is pending is a matter of defense, which must be pleaded to be available, or, if there are no formal pleadings as in probate proceedings, must be raised by proper objection at the trial in the probate court, and cannot be first raised on appeal to the court of appeals.—*Brown's Estate v. Stair*, 136 P. 1003.

ABORTION.

See Homicide, §§ 18, 65.

§ 1 (Kan.) As used in Gen. St. 1909, § 2532, relative to the crime of abortion, the words "abortion" and "miscarriage" are practically synonymous in their use.—*State v. Harris*, 136 P. 264.

ABSTRACTS OF TITLE.

See Vendor and Purchaser, § 137.

ACCEPTANCE.

See Dedication, § 31; Sales, §§ 151-181.

ACCORD AND SATISFACTION.

See Payment; Release; Warehousemen, § 25.

ACCOUNT.

See Dismissal and Nonsuit, § 19; Limitation of Actions, § 29; Principal and Agent, § 78.

I. RIGHT OF ACTION AND DEFENSES.

§ 1 (Or.) The makers of a note, sued thereon by the payee, cannot file a complaint in equity in the nature of a cross-bill, under L. O. L. § 390, for an accounting for the proceeds of sales of lumber which they intrusted to him to sell, with an agreement that he should credit the proceeds on the note, which he failed to do; fraud not being alleged, nor a discovery sought, and it not appearing the account is so complicated that it cannot be settled in an action at law.—*Haaland v. Miller*, 136 P. 9.

ACCOUNT STATED.

See Limitation of Actions, §§ 29, 151; Sales, § 340.

ACKNOWLEDGMENT.

See Chattel Mortgages, § 61; Homestead, § 45; Limitation of Actions, § 148.

II. TAKING AND CERTIFICATE.

§ 22 (Okl.) Where a notary falsely certifies that he knows a person, or certifies that he knows a person on mere introduction, or takes an acknowledgment without the person actually appearing before him, he is guilty of negligence.—*State Nat. Bank v. Mee*, 136 P. 758.

§ 39 (Colo.App.) Under Rev. St. 1908, § 684, subds. 1, 2, enumerating officers authorized to take acknowledgments and requiring a certificate of authentication thereto, *held* that, where the clerk's certificate did not affirmatively show the authority of a justice, the acknowledgment was defective, and insufficient.—*In re Paul*, 136 P. 476.

§ 48 (Okl.) That the act of a notary in taking an acknowledgment is purely ministerial does not justify him in failing to give due consideration to the discharge of his duty in respect thereto.—*State Nat. Bank v. Mee*, 136 P. 758.

Where a notary made a false certificate to a deed, and a person presented such deed with a forged check at a bank, and secured payment of the check partially on the strength of the certificate, *held* that the notary was not liable to the bank for the loss.—*Id.*

III. OPERATION AND EFFECT.

§ 57 (Or.) Under L. O. L. §§ 7109-7111, a deed executed in New Jersey, before a commissioner of deeds, not certified to have been executed according to its laws, was not a sufficient deed such as a vendee was entitled to.—*Knolhoff v. Mark*, 136 P. 893.

ACTION.

See Abatement and Revival; Dismissal and Nonsuit.

II. NATURE AND FORM.

§ 28 (Colo.App.) One entitled to enforce a constructive trust raised by law may either enforce the trust or waive the tort upon which it is founded, and sue in assumpsit for the value of the property wrongfully taken or withheld.—*Brown's Estate v. Stair*, 136 P. 1003.

§ 32 (Mont.) While the common-law forms of action are abolished, the principles underlying them have not been changed.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 38 (Colo.) Complaint, in an action for failure to comply with the terms of a loan contract, with prayer for specific performance, or in the alternative for a rescission of the agreement, *held* to state a single cause of action against the individual defendant.—*McKeown v. Lawrence*, 136 P. 1014.

ADJOINING LANDOWNERS.

See Boundaries.

ADMINISTRATION.

See Executors and Administrators.

ADMISSIONS.

See Pleading, §§ 214, 376.

ADULTERY.

See Criminal Law, §§ 564, 1186; Judgment, § 751.

§ 11 (Okl.Cr.App.) In an adultery case, evidence of a trip to Kansas made by defendant and the prosecuting witness' wife *held* properly admitted, where such trip was a part of their general plan to have sexual intercourse and tended to explain the purpose of their being together in Oklahoma.—Woody v. State, 136 P. 430.

§ 14 (Okl.Cr.App.) Evidence in an adultery case *held* sufficient to establish the corpus delicti and sustain a conviction.—Woody v. State, 136 P. 430.

ADVERSE POSSESSION.

See Highways, § 1; Taxation, § 824.

I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

§ 7 (Or.) Adverse possession of land in a wagon road allotment for ten years after the allottee's selection under the grant was approved by the Department of the Interior *held* to vest a fee-simple title in the adverse holder as against the allottee.—Sharpe v. Catron, 136 P. 20.

One claiming title to land by adverse possession for ten years against all persons, but recognizing the superior title of the United States, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be an owner under a prior grant.—Id.

§ 13 (Idaho) A party who had been in notorious, adverse possession for more than five years continuously, and had paid the taxes assessed and made improvements, *held* to have acquired title by adverse possession.—Johnson v. Sowden, 136 P. 1136.

(C) Visible and Notorious Possession.

§ 31 (Kan.) Where a landowner holds up to a fence claiming it as his boundary, and does nothing inconsistent with such claim, his occupancy is adverse, though the adjoining owner supposes he intends to claim only what he actually owns.—Peterson v. Hollis, 136 P. 258.

(F) Hostile Character of Possession.

§ 63 (Or.) Possession under a pretended contract of purchase is not adverse.—Haberly v. Treadgold, 136 P. 334.

§ 79 (Colo.App.) A "color of title" on which title by adverse possession may be based is a mere pretense of title, but not a valid title, one which purports to be a good title, but is not so in fact; and that a tax deed is void on its face and notice of application therefor was not given does not prevent its constituting color of title.—Jackson v. Larson, 136 P. 81.

The failure of the grantee in a tax deed to give notice of the application therefor, if sufficient to prevent the original grantee from claiming title by adverse possession thereunder because of bad faith, does not affect such a claim by a purchaser from the grantee.—Id.

§ 79 (Colo.App.) A treasurer's tax deed, void on its face, offered as color of title, and payment of taxes for seven years under claim and color of title made in good faith, is admissible without showing that notice of intention of the grantee to apply for such a deed had been given as required by law, or that the assessed value of

the property was such as to make the giving of such notice unnecessary.—Sedgwick v. Culp, 136 P. 88.

§ 84 (Colo.App.) The failure of the grantee in a tax deed to give notice of his application therefor, rendering the deed ineffectual to establish paramount title, is not sufficient to show want of good faith in claiming title thereunder by adverse possession.—Jackson v. Larson, 136 P. 81.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 115 (Colo.App.) The question of what constitutes color of title is to be decided by the court on inspection of the paper title presented, while the good faith of the party claiming thereunder is a question of fact.—Jackson v. Larson, 136 P. 81.

AFFIDAVITS.

See Criminal Law, § 603; Depositions; Extradition, § 36; Landlord and Tenant, §§ 229, 290; Process, § 96; Trial, § 48.

AFFIRMANCE.

See Sales, § 121.

AGENCY.

See Principal and Agent.

AGRICULTURE.

See Corporations, § 14; Waters and Water Courses, § 226.

§ 12 (Wash.) Liens filed against wheat, describing the subject-matter as half of a section and a certain crop situated thereon, *held* void for indefiniteness.—Northwestern Grain Co. v. Kerr Gifford Warehouse Co., 136 P. 1154.

ALIENS.

See Escheat.

I. DISABILITIES.

§ 9 (Idaho) Under Rev. Codes, §§ 5701, 5702, *held*, that first cousins of the deceased who were resident citizens of the United States were entitled to the estate as against a closer heir, a non-resident alien, who failed to make claim as provided by law.—Connolly v. Probate Court in and for Kootenai County, 136 P. 205.

§ 10 (Idaho) While under Rev. Codes, § 5715, resident aliens may take equally with citizens in all cases by succession, no nonresident alien can take by succession unless he claims such succession within five years after decedent's death.—Connolly v. Probate Court in and for Kootenai County, 136 P. 205.

ALIMONY.

See Divorce, §§ 249, 286.

ALLOTMENT.

See Indians.

AMBIGUITIES.

See Statutes, § 205.

AMENDMENT.

See Appeal and Error, §§ 889, 1201; Constitutional Law, §§ 7, 9; Indictment and Information, §§ 159, 161; Pleading, §§ 236-249; Statutes, §§ 16, 107, 109, 125, 141; Trial, §§ 408, 412.

AMOUNT IN CONTROVERSY.

See Appeal and Error, § 46.

ANIMALS.

See Carriers, § 218; Constitutional Law, § 293; Public Lands, § 108; Railroads, §§ 305, 434; Sales, § 480; Trespass, § 19; Witnesses, § 255.

§ 10 (Mont.) A brand upon an animal, although a circumstance to be considered with others as tending to show ownership, is not *prima facie* evidence of ownership, either at common law or under Rev. Codes, §§ 1791, 1793.—*Cuerth v. Arbogast*, 136 P. 383.

§ 91 (Idaho) Rev. Codes, §§ 1279-1282, authorizing the occupant or proprietor of land to take up trespassing hogs and hold same until payment of the expenses and damages and 50 cents per head additional, and prescribing procedure therefor, *held valid*.—*Fall Creek Sheep Co. v. Walton*, 136 P. 438.

§ 95 (Idaho) Evidence, in an action of claim and delivery of certain hogs taken up by defendant and held pursuant to Rev. Codes, §§ 1278-1283, authorizing the occupant of land to take up and hold trespassing stock for payment of expenses, damages, and penalties, *held* to sustain a verdict for defendant.—*Fall Creek Sheep Co. v. Walton*, 136 P. 438.

ANNULMENT.

See Wills, §§ 227-327.

ANSWER.

See Pleading.

APPEAL AND ERROR.

See Certiorari; Courts, §§ 202, 207-251; Criminal Law, §§ 1024-1186; Divorce, § 184; Eminent Domain, § 263; Exceptions, Bill of; Executors and Administrators, § 256; Homicide, §§ 332-341; Judgment, § 663; Justices of the Peace, §§ 147-174.

I. NATURE AND FORM OF REMEDY.

§ 14 (Colo.) Under Laws 1911, p. 267, §§ 3, 4, and Mills' Ann. Code, § 388a (Code Civ. Proc. § 423), *held*, that the Court of Appeals could, upon dismissing an appeal as not involving an appealable question, in an action transferred to it from the Supreme Court, direct entry of the action as pending on writ of error, though Laws 1911, p. 18, § 25, enacted at the same session, repealed section 423.—*People v. Court of Appeals of State of Colorado*, 136 P. 458.

Mills' Ann. Code, § 388a (Code Civ. Proc. § 423), requiring a cause dismissed by the Supreme Court or Court of Appeals as not appealable to be entered as pending on error, does not require the issuance of a writ of error or *scire facias*, where appellees joined in the error, and appeared in the Supreme Court, and the case was afterwards transferred to the Court of Appeals.—*Id.*

III. DECISIONS REVIEWABLE.**(C) Amount or Value in Controversy.**

§ 46 (Kan.) That the amount in controversy directly affected by the error relied upon is less than \$100 will not deprive the Supreme Court of jurisdiction, where there is a fair basis for the contention that the error affects the whole verdict or that the complainant has not had a fair trial upon a claim involving more than \$100.—*Cardwell v. Union Pac. R. Co.*, 136 P. 244.

(E) Nature, Scope, and Effect of Decision.

§ 110 (Or.) No appeal lies from the refusal to grant a new trial.—*Abercrombie v. Heckard*, 136 P. 875.

§ 117 (Cal.App.) An order extending the time to prepare and serve a bill of exceptions, and

relieving defendant from an alleged default in that respect, is not appealable.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 117 (Cal.App.) An order relieving defendant of its alleged default in failing to prepare and serve a proposed bill of exceptions within the time prescribed by law is not appealable.—*Kramm v. Stockton Electric R. Co.*, 136 P. 534.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS FOR REVIEW.**(A) Issues and Questions in Lower Court.**

§ 169 (Colo.App.) Where plaintiff does not raise a question at trial or upon appeal until after oral argument, the appellate court is not inclined to consider it, unless it is necessary to do so to prevent injustice.—*Modern Woodmen of America v. International Trust Co.*, 136 P. 806.

§ 171 (Okla.) A party will not be permitted on appeal to present his case on an entirely different theory from that upon which he tried the case below.—*Shuler v. Collins*, 136 P. 752.

§ 171 (Okla.) Plaintiff in error, who proceeds upon one theory, and loses, cannot on appeal recover upon some other theory.—*Rhyme Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart*, 136 P. 1095.

§ 171 (Or.) Where the case was tried on the theory that it was for false representations, the Supreme Court will not consider any other theory.—*Cobb v. Peters*, 136 P. 656.

(B) Objections and Motions, and Rulings Thereon.

§ 193 (Colo.App.) Where the evidence was amply sufficient to sustain a verdict for plaintiff as for money had and received, any insufficiency of complaint attempting to state a cause of action for money had and received *held* not to require a reversal where it was not attacked below by demurrer or objections to the evidence.—*R. W. English Lumber Co. v. Hireen*, 136 P. 475.

§ 204 (Cal.) Admission of evidence not objected to below will not be reviewed.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

§ 236 (Ariz.) Plaintiff cannot claim that an answer did not allege with sufficient particularity the items of payment set up with the amounts and dates, where he did not move to correct such defect by making the answer more definite.—*George Fishbaugh v. Beeler*, 136 P. 1057.

§ 237 (Or.) That witnesses testifying as to the usual method of piling boxes stated their opinions cannot be considered where no motion was made to strike out such opinions.—*Anderson v. Meier & Frank Co.*, 136 P. 660.

(C) Exceptions.

§ 260 (Okla.) A ruling on an objection to evidence could not be reviewed where no exception was taken.—*Rhyme Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart*, 136 P. 1095.

§ 263 (Mont.) Plaintiff cannot complain of a ruling that a certain contract was valid, where it did not object to an instruction submitting the existence of such contract, and reserve an exception to an adverse ruling, as required by Rev. Codes, § 7118.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 263 (Okla.) The Supreme Court will not review an instruction where it was not excepted to.—*Shuler v. Collins*, 136 P. 752.

(D) Motions for New Trial.

§ 284 (Okla.) A motion for new trial is not essential to a review of a judgment rendered upon an agreed statement of facts.—*St. Louis & S. F. R. Co. v. Nelson*, 136 P. 590.

§ 284 (Okl.) A motion for a new trial is not essential to a right to review a judgment rendered on an agreed statement which eliminates questions of facts.—Chicago, R. I. & P. Ry. Co. v. City of Shawnee, 136 P. 591.

§ 286 (Okl.) Where defendant on the overruling of his motion for continuance merely objected to the order of the court and proceeded with the trial, the action of the court will not be reviewed in the absence of a motion for a new trial involving such ruling and an appeal from the denial thereof.—Walton v. Kennamer, 136 P. 584.

§ 289 (Okl.) A motion for new trial is unnecessary to enable the Supreme Court to review an objection to the introduction of any evidence by plaintiff for failure of his petition to state a cause of action.—Coward v. Parker-Washington Co., 136 P. 153.

§ 292 (Okl.) The Supreme Court will not review an instruction where objection was not pointed out by motion for new trial.—Shuler v. Collins, 136 P. 752.

§ 301 (Wyo.) Under Supreme Court Rule 13 (104 Pac. xiii), rulings on instructions held not reviewable where they were not made grounds of the motion for a new trial.—Iowa State Savings Bank v. Henry, 136 P. 803.

VII. PARTIES.

§ 334 (Okl.) Proceedings in error will be dismissed where, at the statutory period for their institution, it appears that between the final judgment and the filing of the proceedings the party to the judgment died and no order of revivor is shown in the record.—Holmes v. Dillard, 136 P. 408.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

§ 338 (Or.) In L. O. L. § 550, subd. 5, as amended by Laws 1913, p. 618, extending the time for appeal when the right existed at the taking effect of the act, "right" means privilege or prerogative of taking an appeal.—McCann v. Burns, 136 P. 659.

§ 345 (Okl.) An unnecessary motion for new trial and decision thereon are ineffectual to extend the time within which to perfect an appeal.—Coward v. Parker-Washington Co., 136 P. 153.

§ 345 (Okl.) Where a judgment is rendered on an agreed statement of facts, the time for briefing an appeal runs from the judgment, and not from the overruling of a motion for new trial.—St. Louis & S. F. R. Co. v. Nelson, 136 P. 590.

§ 345 (Okl.) Where a petition in error was not filed, as required by Comp. Laws 1909, § 6082, within one year after a ruling sustaining a demurrer, such ruling could not be reviewed, though the petition was filed within one year overruling motion for new trial.—Rhome Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart, 136 P. 1095.

§ 349 (Or.) Under L. O. L. § 38, providing for substitution of personal representatives for a deceased party, and section 550, subd. 5, as amended by Laws 1913, p. 618, limiting the time for appeal to 60 days, a defendant has 60 days from the substitution of an executor as plaintiff within which to appeal.—McCann v. Burns, 136 P. 659.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 391 (Cal.) Where an undertaking to stay execution of a judgment pending appeal is void, the appellant may stay the execution by filing a second sufficient bond.—Bradley Co. v. Mulcrevy, 136 P. 60.

§ 391 (Or.) Under L. O. L. § 550, subds. 2-4, the trial court may permit appellant to substitute a new undertaking when the sureties on the original fail to justify.—Chambers v. Everding & Farrell Co., 136 P. 885.

Permitting an appellant to substitute a new bond when the sureties on the original fail to justify does not infringe respondent's right to except to the sufficiency of the new bond.—Id.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

§ 458 (Cal.) Where plaintiff recovered judgment, he was entitled to enforce execution at once, and his right was not impaired by the fact that he instituted proceedings for the justification of sureties on a stay bond pending appeal.—Bradley Co. v. Mulcrevy, 136 P. 60.

§ 459 (Idaho) Where Rev. Codes, § 4807, amended by Laws 1911, c. 111, part. 1, providing that appeals shall be taken within 60 days, and Rev. Codes, § 4818, as amended by Laws 1911, c. 117, relative to the papers on appeal, were not complied with, the judge had no jurisdiction to stay execution.—Behrensmeyer v. Gwinn, 136 P. 623.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 501 (Okl.) The Supreme Court will not review an instruction where the exception there to does not appear in the record.—Shuler v. Collins, 136 P. 752.

§ 502 (Okl.) Where the record fails to disclose that a motion for new trial was filed below, and errors alleged occurred at the trial, the appeal will be dismissed.—Shives v. Froberg, 136 P. 399.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 544 (Okl.) Errors of law occurring at the trial must be presented for review by bill of exceptions or case-made.—Homeland Realty Co. v. Robison, 136 P. 585.

§ 544 (Utah) In the absence of a bill of exceptions embracing the testimony, the only question which can be reviewed is the sufficiency of the pleadings to sustain the findings of fact and judgment.—Metz v. Jackson, 136 P. 784.

§ 545 (Okl.) A motion to reinstate a cause cannot be considered, when not presented in the transcript by bill of exceptions, so as to make it a part of the record.—Wallace v. Gay, 136 P. 737.

§ 548 (Or.) Where the only issue on appeal is the admissibility of a receipt incorporated only in a motion for new trial and not in a bill of exceptions, appellants have no standing; the receipt not being a part of the record.—Abercrombie v. Heckard, 136 P. 875.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 564 (Okl.) The time for serving a case-made runs from the date of the judgment on an agreed statement of facts, and not from the subsequent overruling of a motion for new trial.—Chicago, R. I. & P. Ry. Co. v. City of Shawnee, 136 P. 591.

An order extending the time for serving a case-made and a case-made served in accordance therewith are nullities when made and served after the extension of the time specifically given by statute.—Id.

A petition in error with an attached case-made, which is a nullity because not served in time, gives the Supreme Court no jurisdiction.—Id.

§ 564 (Okl.) A case-made, not served pursuant to Wilson's Rev. & Ann. St. 1903, § 4741, within three days after entry of the judgment or order appealed from, or within an extension of time allowed, will not be considered.—Bottoms v. Neukirchner, 136 P. 774.

§ 564 (Okl.) A case-made not served within three days after judgment, or within the extension of time duly allowed, will not be con-

sidered on appeal.—*Brown-Beane Co. v. Rucker*, 136 P. 1075.

(F) Making, Form, and Requisites of Transcript or Return.

§ 597 (Or.) While the word "transcript" as applied to a transcript of record denotes a composition consisting of the same words as the original, yet as defined by L. O. L. § 554, as amended by Laws 1913, p. 618, it is such an abstract as the law or rules of the appellate court may require of so much of the record as may be necessary to present the question to be decided.—*Smith v. Algona Lumber Co.*, 136 P. 7.

Under L. O. L. § 554, as amended by General Laws 1913, p. 618, and Laws 1913, p. 656, the original pleadings and bill of exceptions may be sent to the clerk of the appellate court as a part of the transcript; but, the word "pleading" in chapter 335 not being broad enough to embrace the judgment, notice of appeal, proof of service, and undertaking on appeal, copies of those documents, rather than the original, must be sent up.—*Id.*

(G) Authentication and Certification.

§ 612 (Okl.) The certificate of a transcript upon which a case is presented must specifically show that the transcript is a true and complete transcript of the record.—*E. G. Rall Grain Co. v. First State Bank of McQueen*, 136 P. 744.

(H) Defects, Objections, Amendment, and Correction.

§ 638 (Okl.) Where the signature of the trial judge to a certificate of the case-made is not attested by the seal of the court, and the case-made is not filed with the papers in the case, as required by Rev. Laws 1910, § 5242, the appeal will be dismissed.—*Graham v. Atwood*, 136 P. 1080.

§ 641 (Idaho) Where appellant, with leave of the Supreme Court, furnishes a proper certificate to the transcript, the appeal will not be dismissed because the transcript did not at first contain a proper certificate.—*Smith v. Inter-Mountain Auto Co.*, 136 P. 1125.

§ 656 (Idaho) Where a clerk's certificate to a transcript is insufficient, it may be amended on motion of the appellant prior to final submission of the case.—*Steensland v. Hess*, 136 P. 1124.

§ 659 (Or.) Failure of the clerk to include in the transcript copies of the judgment, notice of appeal, proof of service, and undertaking on appeal held not a jurisdictional defect, where the originals had been sent up instead, so that the court might order copies sent up on the suggestion of diminution of the record, and refuse to dismiss the bill under Supreme Court rule 40 (117 Pac. xiv).—*Smith v. Algona Lumber Co.*, 136 P. 7.

(K) Questions Presented for Review.

§ 671 (Okl.) Unless an alleged error appears in the record proper, it cannot be considered in an appeal by transcript.—*Homeland Realty Co. v. Robison*, 136 P. 585.

§ 671 (Or.) Where the trial court made no findings as to the defense that the note sued on was for the price of land and a mortgage therefor had been foreclosed, and no motion for additional findings or bill of exceptions appears in the record, the defense will not be considered.—*Litscher v. Alexander*, 136 P. 847.

§ 671 (Or.) Under L. O. L. § 171, providing for a statement of evidence, and Const. art. 7, § 3, providing for attachment of testimony to the bill of exceptions, the reporter's transcript and other papers not authenticated as a bill of exceptions will not be considered to ascertain the relevancy of papers offered in evidence.—*Abercrombie v. Heckard*, 136 P. 875.

§ 692 (Okl.) An assignment of error complaining of the exclusion of evidence will not be reviewed, where the record does not show what it would have been.—*Gault v. Thurmond*, 136 P. 742.

§ 696 (Okl.) Where the case-made does not recite that it contains all the evidence, the Supreme Court will not review questions depending upon the facts.—*Worrell v. Fellows*, 136 P. 750.

§ 696 (Okl.) Assignments of error which require an examination of the evidence will not be considered where the case-made does not state that it contains "all the evidence."—*Graham v. Atwood*, 136 P. 1080.

§ 701 (Okl.) Where the evidence is not in the record, the question whether instructions were authorized by the evidence will not be reviewed.—*Worrell v. Fellows*, 136 P. 750.

§ 706 (Wyo.) Under Comp. St. 1910, § 4598, the denial of a motion for new trial on the ground that the evidence is insufficient to support the verdict and that the verdict is contrary to law cannot be reviewed unless all the evidence is incorporated in the bill of exceptions.—*Iowa State Savings Bank v. Henry*, 136 P. 863.

(L) Matters Not Apparent of Record.

§ 717 (Cal.App.) The opinion of the trial court, though appearing in the transcript, cannot be considered as determining any question of fact.—*Wickersham Co. v. Nichols*, 136 P. 511.

XI. ASSIGNMENT OF ERRORS.

§ 731 (Cal.App.) Appellant was not entitled to review, on appeal, of alleged insufficiency of evidence to support a finding, where the objection was not specifically set out in his specifications of error.—*Dunaway v. Anderson*, 136 P. 309.

XII. BRIEFS.

§ 757 (Okl.) An assignment of error, complaining of the sustaining of plaintiff's demurrer, cannot be considered, where defendant's counsel did not set forth in the brief the material parts of the pleadings demurred to, and other material statements contained in the record, as required by Supreme Court rule 25 (95 Pac. viii).—*Eberle v. Drennan*, 136 P. 162.

§ 757 (Okl.) Where a brief of plaintiff in error fails to contain an abstract of the facts and other matters required by Supreme Court rule 25 (125 Pac. viii), and the judgment below has been superseded, such judgment will be affirmed.—*Moore v. Adams*, 136 P. 410.

§ 757 (Okl.) A party complaining of rulings on evidence must set out in his brief the substance of the evidence, stating specifically his objection thereto, as required by Supreme Court Rule 25 (20 Okl. xii, 95 Pac. viii).—*Avants v. Bruner*, 136 P. 593.

§ 757 (Okl.) Supreme Court rule 25 (20 Okl. xiii, 95 Pac. viii), requiring plaintiff in error's brief to set out pleadings, proceedings, and facts relied on for reversal, is mandatory, and, when not observed and no motion to amend the brief is made, the alleged errors will not be reviewed.—*Worrell v. Fellows*, 136 P. 750.

§ 757 (Okl.) Under Supreme Court rule 25 (20 Okl. xii, 95 Pac. viii), requiring that a party complaining of an instruction given set out same in his brief, a mere general complaint that the court erred in giving an instruction could not be considered.—*Rhame Milling Co. v. Farmers' & Merchants' Nat. Bank of Hobart*, 136 P. 1095.

§ 758 (Nev.) The Supreme Court may determine questions involved in a case before it though not discussed by counsel in their briefs.—*Radovich v. French*, 136 P. 704.

§ 758 (Okl.) Where a party merely sets out an instruction in his brief and alleges prejudicial error, without pointing out the error or supporting his contention, such assignment will not be considered.—*Shuler v. Collins*, 136 P. 752.

§ 764 (Cal.App.) The rule of the Supreme Court requiring printed briefs is applicable to the District Court of Appeals.—*Weill v. Danziger*, 136 P. 308.

§ 770 (Okl.) Where no briefs are filed by defendant in error and the errors presented in plaintiff in error's brief are reasonably sustained by the record, his contention will be sustained.—*Goodman v. Broughman*, 136 P. 420.

§ 773 (Okl.) Where plaintiff in error files no brief as required by rule 7 (20 Okl. viii, 95 Pac. vi), the appeal will be dismissed for want of prosecution.—*Turner Hardware Co. v. John Deere Plow Co.*, 136 P. 417; *Joiner v. Cobb*, Id. 421; *Boyd v. Webb Queensware Co.*, Id. 422; *Thompson v. Yount*, Id. 592; *Hill v. City of Kingsfisher*, Id. 775.

§ 773 (Okl.) Where plaintiff in error files a brief and no brief is filed or excuse given by defendant in error, the Supreme Court need not search the record for reasons to sustain the judgment; but, where the brief filed appears reasonably to sustain the assignments of error, the judgment will be reversed.—*Security Ins. Co. v. Droke*, 136 P. 430.

§ 773 (Okl.) Where plaintiff in error fails to serve a brief and file 15 copies thereof as required by the Supreme Court rules, the appeal will be dismissed.—*Nelson-Bethel Clothing Co. v. Samuels*, 136 P. 592.

§ 773 (Okl.) An appeal will be dismissed where the plaintiff in error does not file a brief in compliance with Supreme Court rule 25 (95 Pac. viii).—*E. G. Rall Grain Co. v. First State Bank of McQueen*, 136 P. 744.

§ 773 (Okl.) Where plaintiff in error has filed a proper brief and defendant in error has not, and plaintiff in error's brief appears reasonably to sustain his contentions, the court may reverse the judgment in accordance therewith.—*J. Rosenbaum Grain Co. v. Higgins*, 136 P. 1073.

§ 773 (Okl.) Where plaintiff in error has filed brief, as required by Supreme Court rule 7 (95 Pac. vi), and defendant in error fails to file brief or offer any excuse, the court may take as confessed the errors assigned, and reverse the judgment.—*Divert v. Rainey*, 136 P. 1086.

§ 773 (Wyo.) Under Supreme Court rule 21 (104 Pac. xiv), defendant in error may have the cause dismissed on motion, where plaintiff in error fails to file and serve a brief.—*Yeager v. State*, 136 P. 1195.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Kan.) Where a temporary injunction is denied in an action to restrain the erection of a viaduct by a city, and pending appeal the viaduct is completed, the appeal will be dismissed.—*Meyn v. Kansas City*, 136 P. 898.

§ 781 (Wash.) Where, pending an appeal in a taxpayer's suit against a city to restrain payment of a warrant, the treasurer, who was not a party, paid the warrant, such payment terminated the controversy and required a dismissal of the appeal.—*Carr v. City of Montesano*, 136 P. 363.

XV. HEARING AND REHEARING.

§ 835 (N.M.) Appellee's contention that appellants waived their objections to the amended complaint in ejectment by filing an answer thereto could not be considered when first raised on rehearing.—*Loretto Literary & Benevolent Society v. Garcia*, 136 P. 858.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 843 (Cal.App.) A finding of a fact contrary to an admission of the complaint upon a question not in issue was unnecessary and cannot be considered.—*Wickersham Co. v. Nichols*, 136 P. 511.

§ 852 (Wash.) In an action, on an open account evidenced by notes, where the court reached the right conclusion and judgment, the fact that it first held the action to be on the account and struck out the allegation of the notes and later reinstated it *held* not to destroy the judgment.—*Leavenworth v. Brandon*, 136 P. 375.

§ 854 (Colo.App.) Where the court in its oral announcement found that plaintiffs acquired title by adverse possession under a quitclaim deed, the fact that it failed to refer to a tax deed of plaintiffs' grantor under which they also claimed is not material, where the decree found all the issues in their favor, since the oral announcement merely gave the court's reasons for the decision.—*Jackson v. Larson*, 136 P. 81.

§ 854 (Okl.) The action of the trial court in directing a verdict, if proper under the evidence, will be sustained, though the court gives a wrong reason for its action.—*Homeland Realty Co. v. Robison*, 136 P. 585.

(C) Parties Entitled to Allege Error.

§ 878 (Okl.) In the absence of a cross-petition in error, the Supreme Court will not consider whether there was error, in a ruling against defendant in error not involved in any error assigned by plaintiff in error.—*St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 396.

§ 878 (Or.) Under L. O. L. §§ 550, 557, appeal being only by defendants, and from the part holding their interests subject to a mortgage, plaintiff cannot have a review of the decision refusing a personal judgment against them.—*Barber v. Toomey*, 136 P. 343.

§ 882 (Colo.App.) Defendant insurance company cannot question a finding that its policy would have been issued even had it known of the existence of another policy held by insured, where it requested a certain charge.—*Mutual Life Ins. Co. of New York v. Good*, 136 P. 821.
Appellant cannot complain of instructions given at its request.—*Id.*

§ 882 (Wash.) An appellant cannot complain of the exclusion of evidence which was excluded on his own objection.—*Lantz v. Moeller*, 136 P. 687.

§ 882 (Wash.) Where a finding was in accordance with the allegations of plaintiffs' pleading and its evidence, plaintiff cannot attack the finding on appeal.—*Wisconsin Lumber Co. v. Pacific Tank & Silo Co.*, 136 P. 691.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

§ 889 (Okl.) Though there is a variance between the allegations and proof, no objection to the evidence having been made at the trial, the judgment will not be reversed, where the defect was one which could have been cured by amendment.—*Homeland Realty Co. v. Robison*, 136 P. 585.

§ 895 (Wash.) On a trial de novo in the Supreme Court, findings of the trial court will be given great weight, and if based on conflicting evidence will not be disturbed unless clearly against the weight of the evidence.—*Johns v. Arizona Fire Ins. Co.*, 136 P. 120.

§ 896 (Colo.) Under Rev. St. 1908, § 1539, providing that proceedings on appeals to the district court shall be de novo, that tribunal may in its discretion permit amendments or the filing of new pleadings in an action begun in the county court.—*First Nat. Bank v. Smith*, 136 P. 460.

(E) Presumptions.

§ 900 (Wyo.) The proceedings in the trial court are presumed regular until the contrary is shown.—*Iowa State Savings Bank v. Henry*, 136 P. 863.

§ 907 (Kan.) Since Gen. St. 1909, §§ 5064, 5065, do not require that all the evidence on adoption be recorded, and the record on appeal, in an action wherein the validity of plaintiff's adoption was a determinative issue, did not purport to contain all the evidence, *held*, that the court will presume that sufficient evidence was introduced to sustain the judgment for plaintiff based on such adoption.—*Dowdell v. Sunflower Grand Lodge, K. P., of Kansas*, 136 P. 920.

§ 907 (Okla.) Where the evidence and the proceedings at the trial are not brought up, and all that is before the appellate court are the pleadings, findings, judgments, and motions made after judgment, it will be presumed that the proceedings on the trial were regular and proper.—*Homeland Realty Co. v. Robison*, 136 P. 585.

§ 917 (Okla.) Where two defendants file separate demurrers to a petition upon the same grounds, viz., misjoinder and failure to state cause of action, and the demurrer is sustained generally and the record does not show the ground, it will be presumed that it was sustained upon the latter ground.—*Coody v. Coody*, 136 P. 754.

§ 931 (Colo.) It must be presumed that the court, in setting aside a referee's report in partnership accounting proceedings, had pointed out to it the specific objections to the several items in dispute.—*Davis v. Wright*, 136 P. 1055.

§ 933 (Kan.) A stronger showing is essential to establish error in granting than in refusing a new trial.—*Busalt v. Doidge*, 136 P. 904.

§ 938 (Wyo.) Where neither the bill of exceptions nor the trial judge's certificate recited that all the evidence was incorporated therein, *held*, that it could not be presumed that it was.—*Iowa State Savings Bank v. Henry*, 136 P. 863.

(F) Discretion of Lower Court.

§ 966 (Okla.) The action of a court on a motion for a continuance will not be disturbed unless discretion is clearly abused.—*Walton v. Kennamer*, 136 P. 584.

§ 971 (Nev.) While ordinarily the allowance of leading questions is no ground for reversal even if the trial court abuses its discretion, the abuse may be so flagrant as to require a reversal.—*Anderson v. Berrum*, 136 P. 973.

§ 977 (Okla.) The court's discretion in granting a new trial will not be disturbed in the absence of clear error as respects some pure un-mixed question of law, except for which the ruling would not have been made.—*Slipes v. Dickinson*, 136 P. 761.

§ 979 (Wash.) The trial court alone can weigh the evidence on a motion for a new trial, and the Supreme Court can interfere only where there has been an abuse of discretion or misconception of the law.—*Brown v. City of Walla Walla*, 136 P. 1166.

Where trial court denied motion for new trial for insufficiency of the evidence, though believing it should be granted, and though he intimated that justice would be done by a reversal, new trial *held* to be directed because of his misconception of the functions of that court and the Supreme Court.—*Id.*

(G) Questions of Fact, Verdicts, and Findings.

§ 989 (Colo.) The Supreme Court, in reviewing a referee's report and judgment because of insufficiency of the evidence, will not review in detail numerous items of account.—*Davis v. Wright*, 136 P. 1055.

§ 999 (Okla.) Under Const. art. 23, § 6 (Williams' Const. § 355), making contributory negligence a question of fact for the jury, the verdict is conclusive upon such question.—*St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 896.

§ 1001 (Cal.App.) While the Supreme Court has power to set aside a finding that is supported by substantial testimony, or when it appears that it is erroneous, it is not in a position to know that the verdict or finding is wrong when it is supported by substantial testimony that is not inherently improbable.—*Dunaway v. Anderson*, 136 P. 309.

§ 1001 (Mont.) If there is any substantial evidence to support a verdict, the Supreme Court will not disturb it.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

§ 1001 (Okla.) Where a verdict for plaintiff is reasonably supported by the evidence, it will not be disturbed for insufficiency of the evidence.—*St. Louis & S. F. R. Co. v. Kerns*, 136 P. 169.

§ 1001 (Okla.) A verdict reasonably supported by the evidence will not be disturbed.—*Chicago, R. I. & P. Ry. Co. v. Newburn*, 136 P. 174.

§ 1001 (Okla.) Where the issues of negligence and contributory negligence are fairly and fully submitted to the jury, their findings, if reasonably supported by the evidence, will not be disturbed on appeal.—*Moore v. Johnson*, 136 P. 422.

§ 1001 (Okla.) A verdict reasonably supported by the evidence will not be disturbed, where any error in the instructions is not excepted to as required by Rev. Laws 1910, § 5003.—*School Dist. No. 13 of Latimer County v. Ward*, 136 P. 588.

§ 1001 (Okla.) A verdict reasonably supported by the evidence will not be disturbed where the issues of fact have been properly framed by the pleadings and submitted by proper instructions.—*Avants v. Bruner*, 136 P. 593.

§ 1002. A verdict based on conflicting evidence is conclusive.

—(Cal.) *Mannix v. R. L. Radke Co.*, 136 P. 52;

(Okla.) *Peters v. Holder*, 136 P. 400; *Tulsa St. Ry. Co. v. Jacobson*, *Id.* 410;

(Wash.) *Puget Sound Electric Ry. v. Carstens Packing Co.*, 136 P. 117; *Becker v. Sunnyside Land & Investment Co.*, *Id.* 1147.

§ 1002 (Okla.) In reviewing a verdict, the Supreme Court will treat plaintiff's evidence as true and defendant's evidence conflicting therewith as rejected.—*Chicago, R. I. & P. Ry. Co. v. Newburn*, 136 P. 174.

§ 1002 (Okla.) A verdict based on conflicting evidence and founded on a charge fairly and fully submitting the material issues will not be disturbed on appeal if there is sufficient evidence reasonably tending to support the same.—*Moore v. Johnson*, 136 P. 422.

§ 1004 (Okla.) The verdict of a properly instructed jury will not be set aside as excessive where the amount does not appear unreasonable.—*Moore v. Johnson*, 136 P. 422.

§ 1005 (Mont.) A verdict on conflicting evidence will not be reviewed if sustained by the trial court upon a motion for new trial.—*Lizott v. Big Blackfoot Milling Co.* 136 P. 46.

§ 1005 (Mont.) Where evidence in action for malicious prosecution was conflicting, and district court denied a new trial, *held* that the Supreme Court would not pass upon the credibility of the evidence and the inferences which the jury might be justified in drawing therefrom.—*Grorud v. Lossel*, 136 P. 1069.

§ 1005 (Okla.) A verdict on conflicting evidence, approved by the trial court, will not be disturbed on appeal.—*Tulsa St. Ry. Co. v. Jacobson*, 136 P. 410.

§ 1005 (Wash.) Where the evidence was conflicting, the court's denial of a motion for a new

trial because of insufficiency of the evidence to sustain a verdict will not be reviewed.—*McKay v. Seattle Electric Co.*, 136 P. 134.

§ 1005 (Wash.) Where a verdict is returned on conflicting evidence, and a motion for a new trial is denied, the verdict cannot be disturbed.—*Adams v. Simpson*, 136 P. 704.

§ 1008 (Cal.App.) The appellate court cannot say one's testimony, not appearing to be unreasonable, and believed by the trial court, as shown by its findings, is not true.—*Eaton v. Locey*, 136 P. 534.

§ 1008 (Colo.App.) In an action to subject land conveyed by wife to husband to a judgment against the wife, trial court's finding that any presumption or suspicion of fraud raised by the conveyance with knowledge of plaintiff's claim was overcome by defendants' evidence held not to be disturbed.—*Edwards v. McLaughlin*, 136 P. 552.

§ 1008 (Wash.) Where the trial court did not hear the evidence, its findings are not entitled to the same weight which would be given to the findings of a judge who heard the evidence, especially where, on trial de novo, the Supreme Court passes upon the same record upon which the trial court bases its decree.—*Stoffman v. Okanogan County*, 136 P. 484.

§ 1008 (Wash.) The court, on an appeal which involves questions of fact only, will not disturb the judgment, where it cannot say that the trial court erred in its finding.—*McCullough v. Puget Sound Realty Associates*, 136 P. 1148.

§ 1008 (Wash.) Findings of fact by the trial court, when reviewed in accordance with Rem. & Bal. Code, § 1736, are treated as a verdict of the jury.—*Dougan v. City of Seattle*, 136 P. 1165.

§ 1009 (Colo.App.) The findings of the court on conflicting evidence in an equitable action are conclusive upon appeal.—*Jackson v. Larson*, 136 P. 81.

§ 1009 (Idaho) A decree supported by substantial evidence will not be disturbed, though it is conflicting.—*Dearing v. Hockersmith*, 136 P. 994.

§ 1009 (Or.) Though equity cases are tried anew on appeal, the trial court's findings on conflicting evidence are entitled to much weight, and where the testimony was seemingly balanced, it would be taken to preponderate in favor of the party for whom the trial court found.—*Scott v. Hubbard*, 136 P. 653.

§ 1010 (Cal.App.) If there was any substantial evidence in support of the court's findings, they will be affirmed.—*Weill v. Danziger*, 136 P. 308.

§ 1010 (Okl.) The findings of the trial court, based on evidence reasonably tending to support them, will not be disturbed on appeal.—*Thigpen v. Risby*, 136 P. 418.

§ 1011 (Cal.App.) A court's finding of the material facts upon conflicting evidence is conclusive.—*Johnson v. All Night & Day Bank*, 136 P. 516.

§ 1011 (Colo.App.) A finding of fact, having been on sharply conflicting evidence, cannot on appeal be said to be wrong.—*Rollins v. Fearnley Investment & Real Estate Co.*, 136 P. 95.

§ 1011 (Idaho) Where there is any substantial conflict in the evidence, the judgment will not be disturbed.—*Hufton v. Hufton*, 136 P. 605.

§ 1011 (Kan.) A judgment will not be disturbed where it depends upon conclusions of fact drawn from conflicting evidence, a material part of which consists of oral testimony.—*Work v. Work*, 136 P. 236.

§ 1011 (Okl.) Findings of fact made by the court on conflicting evidence will not be disturbed on appeal when reasonably supported by evidence.—*Gault v. Thurmond*, 136 P. 742.

§ 1011 (Wash.) A finding by the trial court based on conflicting evidence will not be disturbed on appeal, unless the evidence so preponder-

ates against the finding that the appellate court can say that the trial court was not justified.—*Hansen v. Abrams*, 136 P. 678.

§ 1011 (Wash.) A finding by the trial court based on disputed oral testimony will be given weight on appeal but is not controlling.—*Lantz v. Moeller*, 136 P. 687.

§ 1011 (Wash.) A finding on conflicting testimony will not be disturbed where the court would not be justified in determining that it was erroneous as a matter of law.—*Wisconsin Lumber Co. v. Pacific Tank & Silo Co.*, 136 P. 691.

§ 1011 (Wash.) A finding of the trial court, on conflicting evidence, will be allowed to stand only when the Supreme Court is satisfied that it is not against the preponderance of the evidence.—*Borde v. Kingsley*, 136 P. 1172.

§ 1015 (Cal.App.) Where plaintiff's affidavits as to alleged improper remarks of the judge were contradicted by affidavits of jurors and of the judge, trial judge's decision held conclusive on appeal.—*Dougherty v. Union Traction Co.*, 136 P. 722.

§ 1017 (Okl.) Under Comp. Laws 1909, § 2812, a referee's report of the facts has the effect of a special verdict.—*Eberle v. Drennan*, 136 P. 162.

§ 1018 (Colo.) The Supreme Court may review the report and judgment of a referee on an accounting to determine sufficiency of the evidence.—*Davis v. Wright*, 136 P. 1055.

§ 1022 (Okl.) A finding of fact by a referee on conflicting evidence, and approved by the court, will not be disturbed when reasonably supported by evidence.—*Farrow v. Work*, 136 P. 739.

(H) Harmless Error.

§ 1029 (Cal.App.) Where the trial court should have taken the case from the jury because plaintiff was not entitled to recover, errors in the instructions and in the rulings thereon and alleged improper remarks were not prejudicial to plaintiff.—*Dougherty v. Union Traction Co.*, 136 P. 722.

§ 1031 (Or.) Improper argument is presumably prejudicial.—*Zimmerle v. Childers*, 136 P. 349.

§ 1032 (Wyo.) The plaintiff in error must make an affirmative showing of prejudicial error to entitle him to a reversal.—*Iowa State Savings Bank v. Henry*, 136 P. 863.

§ 1033 (Mont.) Appellant cannot complain of a decision in its favor as to the validity of a contract involved.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 1033 (Mont.) In action for malicious prosecution, instructions, though erroneous because requiring plaintiff to prove an arrest and imprisonment, held favorable to defendant.—*Gronud v. Lossel*, 136 P. 1069.

§ 1033 (Or.) Any error in a suit to cancel a deed to plaintiff's son in ingrafting on the deed a trust agreed to by parol is not ground for reversal on plaintiff's appeal.—*Cartwright v. Moffett*, 136 P. 881.

§ 1042 (Utah) Where a demurrer was sustained to defendant's answer, and an amended answer was filed, the original answer went out of the record, and the improper refusal of the motion to strike the answer was not prejudicial.—*Metz v. Jackson*, 136 P. 784.

§ 1042 (Wash.) Reinstatement of stricken paragraph of complaint, setting forth notes evidencing the open account sued on, held not reversible error, where the correct conclusion and judgment was reached by the court.—*Leavenworth v. Brandon*, 136 P. 375.

§ 1048 (Cal.App.) Defendant, in an action for death, held not prejudiced by a question whether witness who represented decedent's employer had discussed the matter of increasing decedent's compensation, where witness answered that he did not remember.—*McGrory v. Pacific Electric Ry. Co.*, 136 P. 803.

§ 1048 (Kan.) Error in restricting the cross-examination of plaintiff to affect his credibility was harmless, where there was other testimony upon all points testified to by plaintiff.—*Cockrill v. Missouri, K. & T. Ry. Co.*, 136 P. 322.

§ 1048 (Nev.) The allowance of leading questions on the redirect examination of plaintiff is not reversible error where the matters elicited might as well have been elicited by a longer series of direct questions.—*Anderson v. Berrum*, 136 P. 973.

§ 1050 (Cal.) In an action for the wrongful death of a husband and father, the erroneous admission of evidence of illness of members of the family after the accident is prejudicial because tending to enhance the amount of the verdict by appealing to the jurors' sympathy.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

§ 1050 (Cal.App.) Allowing one to testify money was not the separate property of his wife was harmless; he also testifying it was the result of their joint earnings after their marriage.—*Eaton v. Locey*, 136 P. 534.

§ 1050 (Colo.App.) Error in the admission of opinion evidence *held* not prejudicial.—*Town of Meeker v. Fairfield*, 136 P. 471.

In an action against a town for personal injuries from a fall upon a sidewalk, erroneous admission of evidence as to its repair after the accident *held* under the circumstances not prejudicial.—*Id.*

§ 1050 (Mont.) In an action against a water company for personal injuries by the caving in of a ditch which plaintiff was digging, the admission of an ordinance granting the franchise, which defendant had acquired by assignment from the original grantee, was not prejudicial to defendant, though irrelevant.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 1050 (Okla.) Under Rev. Laws 1910, § 4791, in an action for slander, the admission of incompetent evidence that plaintiff's brother is a fugitive from justice *held* not ground for reversal.—*Kimberlin v. Ephraim*, 136 P. 1097.

In an action for slander, permitting defendant on cross-examination to show, in mitigation of damages, plaintiff's unfavorable family connection, *held* not ground for reversal.—*Id.*

§ 1050 (Or.) In a shipper's action for misdelivery of shipment consigned to itself, the admission of a check by which party receiving the shipment paid the freight, *held* harmless if error.—*W. H. Stanchfield Warehouse Co. v. Central R. of Oregon*, 136 P. 34.

§ 1050 (Wash.) Defendant was not prejudiced by the admission of hearsay evidence on examination of a witness by the court, which was merely cumulative of competent testimony given by other witnesses.—*McKay v. Seattle Electric Co.*, 136 P. 134.

§ 1051 (Mont.) Admission of an ordinance, granting a franchise which defendant water company acquired by assignment, without proof that it was an ordinance of the city, was harmless where the answer admitted that the franchise was granted by the ordinance.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 1051 (Wash.) Any error in admitting a letter purporting to be a certificate of the record of plaintiff's filing in the land office for the land in controversy would not be prejudicial where the oral testimony sufficiently established plaintiff's right to possession subject only to the paramount rights of the United States.—*Stofferau v. Okanogan County*, 136 P. 484.

§ 1052 (Mont.) The cause not having reached the jury, error in admission of impeaching evidence was harmless.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

§ 1052 (Or.) Any error in permitting a plaintiff to testify as to the cost of personality was

harmless, where he afterwards stated that it was worth at least a given sum.—*Murphy v. Deal*, 136 P. 658.

§ 1054 (Colo.App.) The trial having been by the court without a jury, it cannot be said prejudice resulted from admission of incompetent evidence.—*Rollins v. Fearnley Investment & Real Estate Co.*, 136 P. 95.

§ 1054 (Utah) Any error in an action to recover preferences under the federal Bankruptcy Act, in admitting in evidence schedules filed in bankruptcy proceedings as evidence of the bankrupt's assets and liabilities, was not prejudicial to defendant, where they were not considered by the court on the question of insolvency.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

Any error in admitting such evidence was not injurious to defendant so far as the statements therein were confirmed by the bankrupt's testimony for defendant at the trial.—*Id.*

§ 1056 (Cal.App.) Denial of further inquiry into the extent of the private property of plaintiff's deceased wife, admitted by plaintiff to be large, is harmless, where the issue is whether certain land standing in her name was community property, bought with their joint funds, or her separate property.—*Eaton v. Locey*, 136 P. 534.

§ 1058 (Okla.) Error in striking a witness' evidence is harmless, where the same witness is subsequently permitted to answer practically the same question.—*Gault v. Thurmond*, 136 P. 742.

§ 1058 (Or.) Any error in the exclusion of a photograph of a pile of boxes was harmless where the jury was afterwards shown the pile of boxes itself.—*Anderson v. Meier & Frank Co.*, 136 P. 660.

§ 1061 (Wyo.) Where defendant did not offer sufficient evidence to entitle him to recover had he been permitted to introduce all of the evidence offered, he cannot complain on appeal of an instruction directing a verdict for plaintiff.—*Reynolds v. Morton*, 136 P. 795.

§ 1064 (Mont.) The modification of a requested instruction in a servant's injury action that the shearing of a ditch, by the caving of which plaintiff was injured, was a proper method of protecting workmen, by submitting the propriety of such method to the jury, was not prejudicial to defendant.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 1064 (Okla.) An instruction "to deduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses" *held* harmless, where it could not have misled the jury, though it would have been better to instruct the jury to "adopt any probable or reasonable theory that would harmonize the evidence."—*Chicago, R. I. & P. Ry. Co. v. Newburn*, 136 P. 174.

§ 1068 (Kan.) An erroneous instruction allowing the jury to find a verdict upon grounds of negligence which did not contribute to the injury is harmless, where the jury bases its verdict upon other grounds.—*Smith v. Joplin & P. Ry. Co.*, 136 P. 930.

§ 1069 (Or.) The misconduct of plaintiff and a juror in meeting and conversing will not be held harmless, where the jury rendered a verdict for \$50,000 for breach of promise of marriage.—*Goodeve v. Thompson*, 136 P. 670.

§ 1071 (Wash.) The irregular entry of additional findings could not be prejudicial where the judge who made all of the findings did not hear the evidence, so that his findings are not entitled to the usual weight.—*Stofferau v. Okanogan County*, 136 P. 484.

§ 1073 (Cal.App.) Where there is evidence on an issue, but no finding thereon, a judgment for defendant, to which such finding is essential, will not be affirmed on appeal; it not being

within the province of the appellate court to supply omitted findings.—*Konda v. Fay*, 136 P. 514.

§ 1073 (Okl.) Though the court erred in including in the judgment relief not prayed for in plaintiff's petition, the error was not available to defendant, where the court by a nunc pro tunc order corrected the judgment so as to make it conform to the pleading.—*Walton v. Kennamer*, 136 P. 584.

(I) Error Waived in Appellate Court.

§ 1078 (Mont.) A bare statement in appellant's brief as to alleged error in giving a particular instruction, "and furthermore, as to this instruction, we think that this error is a breach of an elementary proposition of law," is not argument within the rule that an assignment of error not argued will be deemed waived.—*Western Mining Supply Co. v. Melzner*, 136 P. 44.

(K) Subsequent Appeals.

§ 1097 (Okl.) Where the rights of the parties under a contract were determined on a former appeal, such determination becomes the law of the case on a subsequent appeal involving the same questions.—*Mehlin v. Superior Oil & Gas Co.*, 136 P. 581.

§ 1097 (Wash.) The decision of the Supreme Court on a prior appeal is the law of the case on all points then passed on.—*Frostman v. Stirrat & Goetz Inv. Co.*, 136 P. 1144.

§ 1099 (Colo.App.) Holding of Supreme Court on former appeal as to what it was necessary to show to sustain the action *held* to be the law of the case on subsequent appeal.—*R. W. English Lumber Co. v. Hiren*, 136 P. 475.

§ 1099 (Colo.App.) The decision of the Supreme Court on a former appeal as to the admissibility of evidence, so far as applicable, becomes the law of the case on a subsequent appeal.—*German-American Ins. Co. v. Messenger*, 136 P. 478.

§ 1099 (Okl.) Decisions of the appellate courts upon all questions of law involved, though it be a controversy arising upon the state's application under Comp. Laws 1909, §§ 372-381, to determine its outstanding indebtedness, are binding on a subsequent appeal by protestants.—*In re Application of State to Issue Bonds to Fund Indebtedness*, 136 P. 1104.

§ 1099 (Utah) A ruling as to the admissibility of evidence made on a former appeal is the law of the case on a second appeal.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

§ 1099 (Wash.) Where plaintiff, while on an area in front of a building in the process of reconstruction, had been held on appeal not to be a trespasser, it was not error to omit on second trial from an instruction the finding that defendant, the adjoining owner, had forbidden plaintiff to use the sidewalk area which was negligently uncovered.—*Frostman v. Stirrat & Goetz Inv. Co.*, 136 P. 1144.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

§ 1140 (Cal.) Under Code Civ. Proc. § 53, allowing the Supreme Court to direct the entry of a proper judgment, that tribunal may in an action for damages for wrongful death, affirm a judgment on condition that a remittitur be entered for part of the recovery.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

Where the jury on the first trial in an action for wrongful death awarded \$7,000 damages, and on the second, which was not attacked as excessive, where the evidence was practically identical, except that incompetent evidence on the amount of damages was admitted, awarded \$10,000 damages, the judgment may be affirmed on condition that a remittitur of \$3,000 be entered.—*Id.*

(D) Reversal.

§ 1170 (Okl.) Under Rev. Laws 1910, § 4791, a judgment will not be reversed for errors not affecting substantial rights.—*Chicago, R. I. & P. Ry. Co. v. Newburn*, 136 P. 174.

§ 1171 (Kan.) Failure to allow nominal damages to the defeated party is not ground for reversal.—*Benfield v. Croson*, 136 P. 262.

§ 1171 (Wash.) A judgment will not be reversed in order that plaintiff may prove and recover nominal damages.—*Hewson v. Peterman Mfg. Co.*, 136 P. 1158.

§ 1178 (Okl.) Where, on foreclosure of liens of subcontractors and materialmen, the original contractor is not made a party, the judgment will not be reversed and rendered by reason thereof, but the case will be remanded to allow such original contractor to be made a party, and for new trial.—*Eberle v. Drennan*, 136 P. 162.

(F) Mandate and Proceedings in Lower Court.

§ 1195 (Or.) A decision against plaintiff on a complaint on a benefit certificate on a contract between defendant and the original order does not bar recovery on an amended complaint, based on defendant's promise to plaintiff to assume such order's obligations.—*Spande v. Western Life Indemnity Co.*, 136 P. 1189.

§ 1199 (Wash.) Under Rem. & Bal. Code, § 1741, the trial court had no power, after affirmation of judgment for plaintiff by the Supreme Court and remand, to amend the judgment to include as a defendant a corporation which was not a party to the original proceeding, except that the judgment of the Supreme Court ran against it as surety for costs.—*Pacific Drug Co. v. Hamilton*, 136 P. 1144.

§ 1201 (Colo.) Where decree enjoining trespasses was reversed for insufficiency of the complaint to show a right to equitable relief, trial court *held* to have power to permit an amendment.—*Smith v. Schlink*, 136 P. 1008.

APPEARANCE.

§ 24 (Okl.) Where defendant appears and alleges and submits to the court for decision non-jurisdictional questions, it operates as a waiver of irregularities in the process.—*Walton v. Kennamer*, 136 P. 584.

APPLIANCES.

See Master and Servant, § 103.

APPOINTMENT.

See Executors and Administrators, §§ 12, 20; States, § 46.

APPROPRIATION.

See States, §§ 130-137; Statutes, §§ 107, 119; Waters and Water Courses, §§ 7-30, 151, 152.

ARGUMENT OF COUNSEL.

See Criminal Law, §§ 706-728, 1037, 1088, 1171; Trial, §§ 120, 127.

ARREST.

See Assault and Battery, § 26; Escape; Homicide, §§ 55, 111.

ASSAULT AND BATTERY.

See Criminal Law, §§ 371, 384, 1159, 1169, 1172; Husband and Wife, §§ 221, 260; Indictment and Information, § 132; Trial, § 191.

I. CIVIL LIABILITY.

(B) Actions.

§ 26 (Kan.) That plaintiff in a civil action against an officer for assault anticipated a defense by asserting in his petition that he did

not resist the officer making an arrest *held* not to place upon him the burden of proof as to such defense.—*Busalt v. Doidge*, 136 P. 904.

II. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 91 (Colo.) On proof that while a fight was in progress defendant encouraged its continuance by saying, "Kill him; stomp him to death," and made some demonstration with a gun, there was a presumption that he intended at least to encourage an assault or assault and battery upon the person referred to.—*Rice v. People*, 136 P. 74.

ASSESSMENT.

See Corporations, § 175.

ASSIGNMENT OF ERRORS.

See Appeal and Error, § 731; Criminal Law, §§ 1129, 1130.

ASSIGNMENTS.

See Landlord and Tenant, § 79.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

ASSUMPSIT, ACTION OF.

See Money Received; Principal and Agent, § 76; Work and Labor.

ASSUMPTION.

Of risk, see Master and Servant, §§ 206-217, 265, 288.

ASYLUMS.

See Insane Persons, § 63; Limitation of Actions, § 11.

ATTACHMENT.

See Execution, § 457; Garnishment; Landlord and Tenant, §§ 229, 280, 328.

ATTENDANCE.

See Witnesses, § 2.

ATTESTATION.

See Wills, §§ 282, 289, 302.

ATTORNEY AND CLIENT.

See Criminal Law, § 593; Indemnity, § 13; Limitation of Actions, § 46; New Trial, § 86; Officers; Trial, §§ 120, 127, 305; Vendor and Purchaser, § 137.

II. RETAINER AND AUTHORITY.

§ 93 (Or.) The entry of a decree granting relief satisfactory to plaintiff was not an infringement of the authority of her attorney.—*Cartwright v. Moffett*, 136 P. 881.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§ 134 (Cal.App.) Under Civ. Code, § 3358, *held* that there could be no recovery for breach of a contract for the employment of an attorney at a stated compensation for services and expense of employing a physician and detective, where there was no evidence as to what would be a reasonable or necessary expenditure for help which he had agreed to employ.—*Newmire v. Ford*, 136 P. 504.

§ 140 (Cal.App.) Trial court *held* to have abused discretion in allowing \$1,000 to an at-

torney for client's breach of agreement to employ him, even if it had a discretionary power, where the services performed were of slight consequence.—*Newmire v. Ford*, 136 P. 504.

§ 143 (Cal.App.) Agreement by person in jail charged with murder to pay a young and inexperienced attorney \$1,500 for defending her, *held* unconscionable, and contrary to substantial justice, and hence under Civ. Code, § 3359, only reasonable damages could be recovered for a breach thereof.—*Newmire v. Ford*, 136 P. 504.

§ 148 (Kan.) Where a bank delivered notes to an attorney for collection, promising to pay him a fee on collection, and the attorney secured judgment and consulted the bank and prompted the issuance of an execution to keep the judgment alive, he was entitled to compensation for his services upon the judgment being collected on a compromise 11 years after its rendition.—*Joyce v. Miami County Nat. Bank*, 136 P. 232. An allowance of an attorney fee of 50 per cent. of the amount collected on apparently worthless notes, which the attorney put in judgment for a bank, *held* not excessive, where the bank agreed to pay a "lively fee."—*Id.*

ATTORNEY GENERAL.

See Criminal Law, § 1024; Officers, § 100.

§ 3 (Kan.) Under Laws 1903, c. 338, § 1 (Gen. St. 1909, § 4388), an Attorney General is entitled to retain fees adjudged and paid to him as costs in proceedings to punish for contempt the violation of an injunction under the prohibition law.—*State v. Dawson*, 136 P. 320.

AUDITORS.

See Mandamus, § 164.

AUTHORITY.

See Attorney and Client, § 93.

AUTOMATIC MACHINES.

See Trial, § 365.

BAIL

See Evidence, § 158.

II. IN CRIMINAL PROSECUTIONS.

§ 77 (Okl.) As Rev. Laws 1910, § 6110, prescribes the method of declaring a forfeiture on a bail bond, it is not necessary that the amount of the bond be recited in the order declaring a forfeiture, and hence a recital of an improper amount is surplusage and immaterial.—*Edwards v. State*, 136 P. 577.

§ 77 (Okl.) A final order declaring a forfeiture of a bail bond cannot be collaterally attacked in a subsequent action on the bond; the remedy, if any, being by proceeding according to Comp. Laws 1909, § 7112.—*Hines v. State*, 136 P. 592.

§ 79 (Okl.) In an action on a forfeited bail bond, the illness of the principal on the day of the forfeiture was no defense.—*Hines v. State*, 136 P. 592.

§ 80 (Okl.) The surety on a bail bond is technically considered as the custodian of the principal, and he may discharge himself by surrendering the principal in the manner prescribed by statute.—*Edwards v. State*, 136 P. 577.

§ 80 (Wash.) Rem. & Bal. Code, § 2233, *held* to confer on sureties the right to vacation of a judgment on the bail bond on their surrender of accused within the 60-day period but not to limit the court's common-law power to grant similar relief where accused was surrendered and performed the judgment subsequent to such 60-day period.—*State v. Jakshitz*, 136 P. 132.

§ 84 (Okl.) Where the principal and surety on a bail bond made no appearance in the county court when it was forfeited and did not thereafter apply to that court to vacate or set aside the forfeiture, they could not complain, when sued on the forfeited bond, that the surety thereon was discharged by a surrender of the principal.—*Edwards v. State*, 136 P. 577.

§ 93 (Okl.) A decision in an action on a forfeited bail bond need not allege that the sum written in the bond has not been paid.—*Edwards v. State*, 136 P. 577.

BAILMENT.

See Livery Stable Keepers; Warehousemen.

§ 14 (Or.) A bailee for hire cannot so limit his responsibility as not to be liable for negligence.—*Pilson v. Tip-Top Auto Co.*, 136 P. 642.

§ 31 (Wash.) In action for rent of personality, evidence held to sustain judgment for \$500.—*Folliott v. Lord*, 136 P. 126.

§ 33 (Or.) A charge defining negligence of a bailee held correct.—*Pilson v. Tip-Top Auto Co.*, 136 P. 642.

BANKRUPTCY.

See Appeal and Error, § 1054; Witnesses, § 392.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

§ 4 (Utah) The object of the bankruptcy law is to enforce equality among the bankrupt's creditors.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 160 (Utah) A person is deemed "insolvent" whenever the aggregate of his property, exclusive of that conveyed, concealed, or removed with intent to defraud creditors, and all property exempt under state law, shall not at a fair valuation be sufficient to pay his debts.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

§ 166 (Utah) Where the officer of a corporation received a stock of goods from a bankrupt, held, that he had or could have had full information concerning the bankrupt's insolvent condition; being charged with the duty of investigation.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

§ 168 (Utah) Upon recovering a preference made contrary to the federal Bankruptcy Law, interest should be allowed from the time of demand upon defendant for the return of the preference, and, if no formal demand is made, from the time suit is instituted.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

(D) Administration of Estate.

§ 215 (Okl.) Where the original contractor is adjudged a bankrupt during the construction of the building, his trustees should be made a party defendant in actions by subcontractors or materialmen, and the judgment taken against him should be made the basis of the liens claimed against the property.—*Eberle v. Drennan*, 136 P. 162.

The bankruptcy of the original contractor will not prevent the enforcement of liens against the property by subcontractors and materialmen, where the owner has consented to an order of the bankruptcy court directing the contractor's receiver or trustee to complete the contract.—*Id.*

(E) Actions by or Against Trustee.

§ 303 (Utah) Where the inevitable result of a transaction between a debtor and creditor is to create a preference, it is presumed that the creditor as well as the debtor intended to bring about that result.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

In a suit to recover an alleged preference, consisting of a return of purchased merchandise to the seller while insolvent, evidence that on previous occasions the bankrupt had returned merchandise to defendant and received credit therefor was not admissible.—*Id.*

BANKS AND BANKING.

See Criminal Law, § 147; Prohibition, § 6; Usury, § 114.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 105 (Kan.) The president of a bank may contract to pay a customer's checks in preference to the customer's existing debt to the bank if the customer will, before they are presented, deposit the amount necessary to meet them.—*Ballard v. Home Nat. Bank of Arkansas City*, 136 P. 935.

(C) Deposits.

§ 140 (Kan.) Where a bank agreed through its president to pay checks given by a customer for live stock, if the customer would resell and deposit the proceeds with the bank, which he did and the bank applied such deposit to a pre-existing debt, the holder of the checks could sue the bank thereon, though he did not know of the agreement.—*Ballard v. Home Nat. Bank of Arkansas City*, 136 P. 935.

§ 142 (Idaho) Where a bank paid a check, payable individually to the payee, it discharged the drawer's deposit to that extent, though the payee violated his agreement with the drawer to use the money in satisfaction of a mortgage, where the bank had no instructions in the matter.—*Dearing v. Hockersmith*, 136 P. 994.

§ 154 (Idaho) Evidence, in an action against a bank and others for damages from a conspiracy to defraud plaintiff of money which he had on deposit in the bank, which money was paid on a check of plaintiff and misappropriated by the payee, held to show the bank not liable.—*Dearing v. Hockersmith*, 136 P. 994.

BASTARDS.

See Trial, § 311.

I. ILLEGITIMACY IN GENERAL.

§ 13 (Okl.) For a writing to constitute an acknowledgment of paternity of an illegitimate child, within Rev. Laws 1910, § 8420, paternity must be directly and unquestionably acknowledged.—*Holloway v. McCormick*, 136 P. 1111.

A letter by the alleged father of an illegitimate child to its mother held not an acknowledgment of paternity under Rev. Laws 1910, § 8420, though it referred to the child as "my boy" and was signed by the alleged father and written by another at his request.—*Id.*

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

See Criminal Law, § 404; Evidence, §§ 158-174.

BETTING.

See Gaming.

BIAS.

See Jury, § 131.

BILL OF LADING.

See Carriers, § 83.

BILL OF PARTICULARS.

See Pleading, § 327.

BILLS AND NOTES.

See Account; Appeal and Error, § 671; Cancellation of Instruments; Corporations, § 466; Courts, § 163; Evidence, § 117; Gifts, § 64; Sales, § 340; Statutes, § 276; Stipulations, § 14; Usury, §§ 50, 53.

II. CONSTRUCTION AND OPERATION.

§ 129 (Idaho) Under Rev. Codes, § 3528, a note payable on demand becomes due within a reasonable time after its execution.—*Miller v. Del Rio Min. & Mill. Co.*, 136 P. 448.

IV. NEGOTIABILITY AND TRANSFER.

(C) Transfer Without Indorsement.

§ 209 (Or.) Upon a sale, where a negotiable instrument is actually delivered, title passes without indorsement.—*Baker v. Moran*, 136 P. 30.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(C) Assignment or Sale.

§ 310 (Idaho) The purchase of a note is a contract of sale and distinct from a payment of same.—*Miller v. Del Rio Min. & Mill. Co.*, 136 P. 448.

(D) Bona Fide Purchasers.

§ 348 (Idaho) Where plaintiff produced a note payable on demand nearly four years after it was executed, he took it subject to all defenses available to the original maker.—*Miller v. Del Rio Min. & Mill. Co.*, 136 P. 448.

VII. PAYMENT AND DISCHARGE.

§ 425 (Idaho) The payment of a note discharges the debt.—*Miller v. Del Rio Min. & Mill. Co.*, 136 P. 448.

§ 426 (Idaho) Where a note is paid by and delivered to one indorser and treated by the person receiving payment as paid, such indorser cannot reissue the same without the consent of the other parties thereto.—*Miller v. Del Rio Min. & Mill. Co.*, 136 P. 448.

Payment of a note by one indorser held to constitute a "payment" and not a "sale" as between the parties to the transaction.—*Id.*

VIII. ACTIONS.

§ 452 (Wyo.) That notes were given for price of property upon false representations and guaranty which had failed held a defense as against one who took the notes with knowledge of the transaction.—*Iowa State Savings Bank v. Henry*, 136 P. 863.

§ 503 (Colo.) In an action by an indorsee of a note given for the purchase price of goods, with defenses of want of consideration and notice, evidence was admissible of the fraudulent misrepresentations of the seller's agent as to the character of the goods.—*First Nat. Bank v. Smith*, 136 P. 460.

§ 509 (Colo.) In an action on a note given for the purchase price of goods by an indorsee, with defenses of want of consideration and notice, evidence that plaintiff had had ample experience in prior litigation growing out of similar transactions of the seller was admissible on the issue of good faith.—*First Nat. Bank v. Smith*, 136 P. 460.

§ 518 (Idaho) Evidence, in an action on a note, against the maker and subsequent indorsers, held insufficient to sustain a finding that

the note was given at the request and for the benefit of the indorsers.—*Miller v. Del Rio Min. & Mill. Co.*, 136 P. 448.

§ 527 (Idaho) Evidence, in an action on a note which had been reissued after payment by an indorser, held to show that the person to whom the note was reissued took the same without recourse on the indorsers.—*Miller v. Del Rio Min. & Mill. Co.*, 136 P. 448.

BOARDS.

See Counties, §§ 46-101.

BONA FIDE PURCHASERS.

See Bills and Notes, § 348; Vendor and Purchaser, §§ 224-243.

BONDS.

See Appeal and Error, §§ 391, 458, 459; Bail; Justices of the Peace, § 159; Municipal Corporations, §§ 846, 847, 921; Pleading, § 214; Principal and Surety; Sales, § 91; Sheriffs and Constables, §§ 90, 92; States, § 101.

BOUNDARIES.

See Schools and School Districts, § 86.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 54 (Kan.) Where a landowner has acquired title by 15 years' adverse possession up to a fence, he cannot be divested thereof by a survey made to establish the original line.—*Peterson v. Hollis*, 136 P. 258.

BRANDS.

See Animals, § 10.

BREACH.

See Sales, §§ 151-181, 255, 279, 418, 439; Vendor and Purchaser, §§ 180-151.

BREACH OF MARRIAGE PROMISE.

§ 34 (Or.) Circumstances held sufficient to go to the jury on the question whether a remark of defendant that he had landed a girl after 10 years referred to plaintiff.—*Goodeve v. Thompson*, 136 P. 670.

BRIDGES.**I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

§ 28 (Colo.) Attempt to cross bridge with traction engine without complying with Laws 1903, p. 410, believing that the bridge would support the engine, held not to make the person so attempting criminally liable for maliciously breaking the bridge under Rev. St. 1908, § 1874.—*Mayn v. People*, 136 P. 1016.

BRIEFS.

See Appeal and Error, §§ 757-773; Criminal Law, § 1130.

BROKERS.**IV. COMPENSATION AND LIEN.**

§ 50 (Or.) A broker who has fully performed his part of the contract is entitled to his commissions though the owner afterwards changes his mind as to making the sale or imposes additional terms, so as to postpone a transfer until after the time limited to the broker for making the sale.—*Slotboom v. Simpson Lumber Co.*, 136 P. 641.

That a broker was prevented by the intoxication of the owner's agent from informing the corporate owner, before the expiration of the

time limited for procuring a purchaser, of the fact that a purchaser was procured would not entitle to broker to recover commissions on the theory that the owner was charged with its agent's neglect.—*Id.*

§ 55 (Or.) Where property is sold, after the expiration of the time limited for the procuring of a purchaser, by a third person and upon different terms, the original broker is not entitled to commissions.—*Slotboom v. Simpson Lumber Co.*, 136 P. 641.

§ 56 (Or.) A broker is not entitled to commissions upon a sale of the property by the owner after the time allowed the broker for procuring a purchaser, though the sale resulted from efforts to procure a purchaser, begun before the expiration of such time.—*Slotboom v. Simpson Lumber Co.*, 136 P. 641.

§ 57 (Or.) A broker earns his commissions upon introducing a proposed purchaser to the owner, though a sale is made to such purchaser for a less sum or upon different terms than those originally contemplated.—*Slotboom v. Simpson Lumber Co.*, 136 P. 641.

V. ACTIONS FOR COMPENSATION.

§ 84 (Cal.App.) Where, in a real estate broker's action for commission, plaintiff relies, under authority of Civ. Code, § 1559, upon a contract made for his benefit and not upon an employment, and where defendant pleads employment as a basis of a defense resting on a confidential relation, the burden is on defendant to prove such employment.—*Konda v. Fay*, 136 P. 514.

§ 86 (Cal.App.) Where, in a real estate broker's action against the purchaser for a commission, defendant claimed that he relied upon false statements as to the market value of the property and as to the amount of a loan which a certain bank would make upon it, and the evidence showed that defendant made four trips to examine the land and tested the soil, and that the land was located in the same vicinity as the bank, a verdict for plaintiff was proper.—*Konda v. Fay*, 136 P. 514.

§ 88 (Utah) In an action for commissions, an instruction that if the original contract "was changed by mutual agreement for the mutual advantage of both parties," was misleading, as permitting a belief that the modified contract might not have been binding because not as favorable to plaintiff as the original contract.—*Bailey v. Spalding-Livingston Investments Co.*, 136 P. 982.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

§ 94 (Ok.) The mere listing of real estate with a broker does not authorize him to bind the owner by an executory contract of sale.—*Levy v. Yarbrough*, 136 P. 1120.

Before a real estate broker can bind the owner by an executory contract of sale, he must have specific authority therefor from the owner.—*Id.*

BUILDING CONTRACTS.

See *Mechanics' Liens*.

BURDEN OF PROOF.

See *Evidence*, § 91.

BURGLARY.

See *Criminal Law*, § 622.

II. PROSECUTION AND PUNISHMENT.

§ 41 (Utah) Evidence held not sufficient to connect accused with the offense so as to sustain a conviction for burglary.—*State v. Karas*, 136 P. 788.

§ 45 (Wash.) Evidence held to make it a jury question whether accused was the person who committed the offense.—*State v. Aurand*, 136 P. 1139.

BY-LAWS.

See *Corporations*, § 55.

CANCELLATION OF INSTRUMENTS.

See *Appeal and Error*, § 1033; *Sales*, §§ 91-126; *Vendor and Purchaser*, § 341.

I. RIGHT OF ACTION AND DEFENSES.

§ 24 (Kan.) Prompt disaffirmance and offer to return consideration are conditions precedent to a right to sue in equity to cancel deed and note given for a stock of goods for fraudulent misrepresentation.—*Sell v. Compton*, 136 P. 927.

II. PROCEEDINGS AND RELIEF.

§ 37 (Ok.) The petition in an action to rescind a contract for fraud must charge that a material misrepresentation known by defendant to be false was made by him with intent to induce plaintiff to contract, and that plaintiff relied upon and was deceived and damaged by such misrepresentations.—*Sipes v. Dickinson*, 136 P. 761.

A petition in an action to cancel a conveyance for fraud in its procurement held sufficient.—*Id.*

CARETAKERS.

See *Carriers*, § 242.

CARNAL KNOWLEDGE.

See *Rape*.

CARRIERS.

See *Appeal and Error*, § 1050; *Evidence*, §§ 244, 359, 506; *Trial*, §§ 192, 296.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

§ 11 (Wash.) Under Const. art. 12, §§ 13, 15, 21, and article 12, § 7, Rem. & Bal. Code, § 3720, and the Public Service Commission Law (Laws 1911, c. 117) §§ 8, 9, 10, and 53, requiring every common carrier to furnish adequate facilities for the purpose and to promptly transport property received or offered, etc., held, that an interstate express company could not at will give up the carrying of goods from one point to another within the state.—*State v. Northern Express Co.*, 136 P. 1160.

§ 12 (Or.) A provision in a carrier's schedule of rates that the rates apply to directly intermediate points does not mean that they apply to localities between stations.—*Schanen-Blair Co. v. Southern Pac. Co.*, 136 P. 886.

§ 20 (Or.) A carrier, having no siding where a patron desired to have stone hauled, could demand extra compensation before undertaking the service, and is not subject to a penalty for a rate in excess of its schedule for the station beyond.—*Schanen-Blair Co. v. Southern Pac. Co.*, 136 P. 886.

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 62 (Or.) A carrier cannot by contract avoid the performance of its duties as such, if the service in question is one required of it as a common carrier.—*Schanen-Blair Co. v. Southern Pac. Co.*, 136 P. 886.

(D) Transportation and Delivery by Carrier.

§ 82 (Or.) A carrier of goods is always justified in delivering them to their true owner, though not the consignee or lawful holder of the

bill of lading.—*W. H. Stanchfield Warehouse Co. v. Central R. of Oregon*, 136 P. 34.

§ 83 (Idaho) A provision of a bill of lading that the shipper should be entitled to the property only upon surrender of the bill of lading properly indorsed *held* to prohibit the carrier from delivering the property until the bill of lading was indorsed.—*First Nat. Bank of Clarkston, Wash., v. Oregon-Washington R. & Nav. Co.*, 136 P. 798.

Where a bill of lading is outstanding, and the carrier, without requiring same, delivers the goods to some one other than the bona fide holder for value of the bill of lading, it is liable for conversion.—*Id.*

§ 93 (Or.) A shipper of goods consigned to itself, which consented to or authorized a delivery by the carrier to another, or ratified such delivery with knowledge that it had been made, could not sue the carrier for the misdelivery.—*W. H. Stanchfield Warehouse Co. v. Central R. of Oregon*, 136 P. 34.

§ 94 (Or.) In action for misdelivery of a shipment consigned by the shipper to itself, evidence that it charged the shipment on its books against the party to whom it was delivered, and endeavored to collect payment therefor, *held* admissible as tending to prove a sale and a ratification of the delivery.—*W. H. Stanchfield Warehouse Co. v. Central R. of Oregon*, 136 P. 34.

Where the carrier claimed that the shipper had ratified the misdelivery, the check by which party to whom shipment was delivered paid the freight *held* admissible.—*Id.*

Instructions as to carrier's liability, and as to the shipper's ratification of the misdelivery, *held* proper as applied to the facts of the case.—*Id.*

The consignee of goods is *prima facie* entitled to have them delivered to him, and there is a disputable presumption that they belong to him, and the burden is therefore on the carrier delivering them to a person other than the consignee or lawful holder of the bill of lading to show that such person is the true owner.—*Id.*

A carrier which delivered a shipment, consigned by the shipper to itself, to another party, who did not produce the bill of lading, had the burden of showing that, with knowledge of such delivery, the shipper ratified it.—*Id.*

Ratification of misdelivery may be shown by express words, or it may be implied from words, acts, or silence.—*Id.*

(F) Loss of or Injury to Goods.

§ 136 (Kan.) Evidence in an action for grain lost in shipment *held* insufficient to conclusively show such loss or require a verdict for plaintiff.—*Cardwell v. Union Pac. R. Co.*, 136 P. 244.

III. CARRIAGE OF LIVE STOCK.

§ 218 (Kan.) It was not essential that notice be given, where a representative of the railroad company was present at the unloading, and saw the dead and injured cattle.—*Cockrill v. Missouri, K. & T. Ry. Co.*, 136 P. 322.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 239 (Okl.) The payment of fare or the possession of a ticket or pass are not absolutely essential to the creation of the relation of passenger and carrier, so far as relates to the carrier's liability for injuries to a passenger.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

§ 240 (Or.) The relation of an office clerk, as affecting the care required in the operation of an elevator on which the clerk was being carried to her work, was that of passenger.—*Putnam v. Pacific Monthly Co.*, 136 P. 835.

§ 242 (Okl.) A caretaker of a horse shipped under a contract containing an unsigned pass provision, permitted to ride in the caboose without objection or paying any fare, though the train did not carry passengers except those with passes, and the conductor had no authority to permit persons to ride, which facts were unknown to plaintiff, was a passenger and entitled to damages for injuries from a wreck.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

§ 242 (Okl.) Where a shipment contract provided that the shipper should have free transportation in consideration of caring for the stock, the shipper was a passenger.—*St. Louis & S. F. R. Co. v. Kerns*, 136 P. 169.

§ 244 (Okl.) An intruder or trespasser, riding on a train through illegal connivance with the train crew, does not thereby become a passenger and entitled to the care due passengers.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

(D) Personal Injuries.

§ 280 (Okl.) Under Rev. Laws 1910, § 800, Comp. Laws 1909, § 429, a carrier of persons for reward must use the utmost care for their safe carriage and provide everything necessary therefor and exercise a reasonable degree of skill.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

§ 280 (Okl.) A passenger is entitled to the highest reasonable and practicable skill, care, and diligence from the carrier.—*St. Louis & S. F. R. Co. v. Kerns*, 136 P. 169.

Where a shipment contract provided that the shipper should have free transportation in consideration of his sole care of the stock, and where it became necessary for him to enter the stock car at a station to care for the stock, and, while there, he was injured from the negligent running of an engine against the car, *held*, that the carrier was liable.—*Id.*

§ 280 (Or.) The owner of a building, operating an elevator therein, owes to an employé, being carried to her work as a passenger, the highest skill and foresight consistent with the efficient operation of the elevator.—*Putnam v. Pacific Monthly Co.*, 136 P. 835.

§ 286 (Okl.) Where a carrier failed to provide heat for a negro waiting room, as required by Const. art. 9, § 26 (Williams' Const. § 244), and Sess. Laws 1907-1908, p. 202 (Rev. Laws 1910, §§ 861, 864, 865), it was liable for consequential pain and suffering from cold endured by a negro passenger waiting therein for a train.—*St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 896.

§ 295 (Cal.App.) Street car conductor *held* not negligent in going to the forward part of the car to collect a fare, though he was prevented from observing that a passenger was preparing to alight.—*Dougherty v. Union Traction Co.*, 136 P. 722.

§ 316 (Okl.) In a passenger's action for injuries from a wreck, proof of the wreck and the resulting injury places upon defendant the burden of showing that it was not negligent.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

§ 320 (Cal.App.) Whether street car made a sudden lurch *held* to be for the jury, and, the evidence being conflicting, their verdict for defendant amounted to a finding that there was no such sudden movement.—*Dougherty v. Union Traction Co.*, 136 P. 722.

(E) Contributory Negligence of Person Injured.

§ 333 (Cal.App.) Street car passenger, who while car was in motion, without signaling conductor who did not know that she desired to alight, went upon the car step and was thrown therefrom by a sudden lurch, *held* to

blame for the accident.—*Dougherty v. Union Traction Co.*, 136 P. 722.

Street car passenger, who had not notified conductor of desire to alight, *held* not entitled to assume the car would stop merely because its speed had been slackened.—*Id.*

A street car passenger arising from his seat preparatory to alighting while the car is in motion must exercise reasonable care to protect himself from falling.—*Id.*

Street car passenger *held* bound to exercise ordinary care for his safety which he does not do by attempting or preparing to alight without notifying the conductor of his desire to leave the car.—*Id.*

§ 337 (Kan.) Where a passenger leaves the train at an intermediate station for a temporary purpose, and through want of ordinary care stumbles over a mail sack on the platform in starting to reboard the train, and is injured, he is guilty of contributory negligence barring recovery.—*Wetheria v. Missouri Pac. Ry. Co.*, 136 P. 221.

§ 347 (Cal.App.) It is not negligence per se for a street car passenger to arise from his seat preparatory to alighting while the car is in motion.—*Dougherty v. Union Traction Co.*, 136 P. 722.

§ 347 (Okl.) That a negro passenger waiting for a train in a cold, negro waiting room declined to accept the invitation of defendant's station agent to pass through the waiting room for white persons and sit by the fire in his office, *held* not to render her, as a matter of law, guilty of contributory negligence, which was the proximate cause of her suffering from cold.—*St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 396.

CAUSA MORTIS.

See Gifts.

CERTIFICATE.

See Acknowledgment, § 39; Appeal and Error, §§ 612, 641, 656; Depositions, § 76; Public Lands, § 108.

CERTIORARI.

I. NATURE AND GROUNDS.

§ 4 (Cal.App.) Domestic corporation, mistakenly made a party defendant in place of a foreign corporation of the same name, and suffering a money judgment, *held* to have a plain and adequate remedy under Code Civ. Proc. § 473, relating to amendments relieving from judgments on ground of mistake, etc., and on denial of a motion therefor appeal will lie under Code Civ. Proc. § 963, subd. 2, relating to appeals from special orders after final judgment, so that certiorari would be denied.—*Postal Telegraph-Cable Co. v. Superior Court in and for Yolo County*, 136 P. 538.

Regardless of Code Civ. Proc. § 473, a party suffering a judgment rendered without jurisdiction of the person might move to set aside the judgment.—*Id.*

§ 5 (Cal.App.) Under Code Civ. Proc. § 1068, giving a writ of review when an inferior tribunal has exceeded its jurisdiction and there is no appeal, and the term "and there is no appeal" implied that if the aggrieved party had a legal right of appeal, certiorari should not issue.—*Postal Telegraph-Cable Co. v. Superior Court in and for Yolo County*, 136 P. 538.

Party not served, but substituted as a party defendant and suffering judgment, *held* to have a right of appeal, both under Code Civ. Proc. § 938, and independently thereof, so that certiorari would be denied.—*Id.*

Under Code Civ. Proc. § 1068, giving the right of review when an inferior tribunal has exceeded its jurisdiction and there is no appeal, a party cannot allow the time for appeal to

lapse and then urge that circumstance as ground for certiorari.—*Id.*

Under such provision *held* that a party complaining of a wrongful substitution as defendant might have had that question determined on appeal, and was not entitled to certiorari.—*Id.*

§ 5 (Idaho) Since under Rev. Codes, § 4962, the writ of review cannot be granted where there is an appeal or other adequate remedy at law, writs of review will not lie from the action of county commissioners creating a new school district.—*Bobbitt v. Blake*, 136 P. 211.

§ 5 (Wash.) Relator *held* entitled to certiorari to review an order refusing his application for appointment as administrator of the partnership assets of a firm alleged to have been composed of himself and decedent, where an appeal could not be prosecuted in time to afford relator the fruits of his victory in case he was successful.—*State v. Superior Court of Pierce County*, 136 P. 147.

§ 16 (Wash.) Order in condemnation proceeding denying an application for leave to file an answer alleging the unadjudicated rights of interveners *held* an intermediate and interlocutory order, reviewable, if at all, only after the final judgment, so that a writ of review would not lie.—*State v. Superior Court of Grant County*, 136 P. 144.

CHALLENGE.

See Grand Jury, § 19; Jury, §§ 92-131.

CHAMPERTY AND MAINTENANCE.

See Indians, § 36.

§ 7 (Okl.) Under Mansf. Dig. § 644, put in force in the Indian Territory by Act Cong. Feb. 19, 1903, any person claiming title to real estate could, notwithstanding any adverse possession thereof, sell and convey his interest therein with like effect as if the land was in his actual possession.—*Farrow v. Work*, 136 P. 739.

CHANCERY.

See Equity.

CHANGE OF VENUE.

See Venue, § 77.

CHARACTER.

See Witnesses, §§ 337-355.

CHARGE.

Rate of charge, see Carriers, §§ 12, 20; Railroads, § 58.
To jury, see Trial, §§ 191-296.

CHATTEL MORTGAGES.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 6 (Or.) The question whether a bill of sale is really a chattel mortgage or a sale being principally one of intent, the court will take into consideration the intention of the parties in view of all the circumstances.—*Zimmerle v. Childers*, 136 P. 349.

§ 34 (Or.) A bill of sale *held* a chattel mortgage.—*Zimmerle v. Childers*, 136 P. 349.

In an action at law upon a document purporting to be a bill of sale absolute on its face, it may be shown to be a chattel mortgage.—*Id.*

(C) Execution and Delivery.

§ 61 (Wyo.) A chattel mortgage was valid as between the parties without being acknowledged.—*Reynolds v. Morton*, 136 P. 795.

II. FILING, RECORDING, AND REGISTRATION.**(A) Original.**

§ 84 (Wyo.) A chattel mortgage was valid as between the parties without being filed.—*Reynolds v. Morton*, 136 P. 795.

§ 85 (Or.) A bill of sale, if to secure a debt, may be recorded as a chattel mortgage, provided it is duly attested, acknowledged, and certified.—*Zimmerle v. Childers*, 136 P. 349.

III. CONSTRUCTION AND OPERATION.**(D) Lien and Priority.**

§ 138 (Okl.) The lien for rent given by Rev. Laws 1910, § 3806, on crops grown on agricultural land, is superior to a mortgage given by a tenant to a third person on such crops and may be enforced by attachment.—*Crump v. Sadler*, 136 P. 1102.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 173 (Wyo.) The burden was upon plaintiff to establish a lien on the property as claimed.—*Reynolds v. Morton*, 136 P. 795.

A mortgage which was valid as between the parties, when taken in connection with the note secured and evidence of its nonpayment, made out a prima facie case for plaintiff.—*Id.*

One claiming a lien under a chattel mortgage must produce the secured notes or account for their nonproduction.—*Id.*

CHILDREN.

See Divorce, §§ 295, 324; Parent and Child.

CITIES.

See Municipal Corporations.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Counties, § 197; Executors and Administrators, §§ 225-256; Municipal Corporations, § 741; States, § 169.

CLASS LEGISLATION.

See Constitutional Law, § 208.

CLERKS.

See Carriers, § 240.

COLLATERAL ATTACK.

See Judgment, § 490; Schools and School Districts, § 24.

COLOR OF TITLE.

See Adverse Possession, § 79.

COMMERCE.

See Navigable Waters, § 36; Trial, § 296; Witnesses, § 255.

II. SUBJECTS OF REGULATIONS.

§ 40 (Wyo.) A nonresident who solicits orders among residents of the state for vehicles manufactured in another state, which are to be delivered after the orders are procured, subject to the approval of the foreign seller, is engaged in interstate commerce.—*State v. Byles*, 136 P. 114.

III. MEANS AND METHODS OF REGULATION.

§ 66 (Wyo.) Itinerant Vendor's Act is in violation of Const. U. S. art. 1, § 8, because imposing a burden on interstate commerce by requiring agents who take orders for sales by a foreign principal to take out a license.—*State v. Byles*, 136 P. 114.

§ 69 (Idaho) A license tax imposed on a foreign corporation engaged in both interstate and intrastate business must be so imposed upon the intrastate business as not to impair the corporation's right to continue to carry on its interstate business.—*Northern Pac. Ry. Co. v. Gifford*, 136 P. 1131.

Laws Ex. Sess. 1912, c. 6, § 3, imposing a corporation tax, held not invalid as imposing a burden on interstate commerce, in violation of the commerce clause of Const. U. S. art. 1, § 8.—*Id.*

§ 69 (Wash.) Laws 1907, c. 54, § 7, requiring the state treasurer to collect from each express company doing business in the state "a sum in the nature of an excise or privilege tax," computed by taking 5 per cent. of the amount fixed by the tax commissioners as the gross receipts of the company for business within the state for the preceding year provided that its tangible property shall not be relieved from taxation, violates the commerce clause of the federal Constitution.—*State v. Northern Express Co.*, 136 P. 1160.

§ 77 (Wyo.) Itinerant Vendor's Act requiring itinerant agents to procure a license, is invalid under Const. U. S. art. 1, § 10, prohibiting a state from laying imposts or duties on exports or imports, except for inspection purposes, in so far as it requires sellers of goods manufactured in a foreign state to take out a license; there being no provision for inspection.—*State v. Byles*, 136 P. 114.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION AND COMMISSIONERS.

See Gas, § 14; States, § 61.

COMMISSIONERS.

See Acknowledgment, § 57; Schools and School Districts, §§ 24, 36.

COMMISSIONS.

See Brokers.

COMMON CARRIERS.

See Carriers.

COMMON LANDS.

See Parties, § 84.

COMMON LAW.

See Action, § 32; Bail, § 80; Criminal Law, §§ 9, 15, 1206; Statutes, § 161; Wills, § 116.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, §§ 260-270.

COMPENSATION.

See Attorney and Client, §§ 134-148; Brokers; Eminent Domain, §§ 90-148; Officers, §§ 95-100; States, §§ 59-62, 130, 131.

COMPETENCY.

See Evidence, § 535; Witnesses, §§ 37, 53.

COMPLAINT.

See Pleading.

CONCLUSION.

See Pleading, § 8; Trial, §§ 396-405.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 313, 428, 480, 481.

CONFLICT OF LAWS.

See Specific Performance, § 96; Statutes, § 226.

CONSIDERATION.

See Bills and Notes, §§ 503, 518; Contracts, §§ 50, 103-117; Guaranty, § 16.

CONSPIRACY.

See Banks and Banking, § 154; Criminal Law, § 424.

II. CRIMINAL RESPONSIBILITY.**(A) Offenses.**

§ 23 (Okl.Cr.App.) A "conspiracy" is a combination between two or more persons to do a thing criminal or unlawful in itself.—Washmoor v. United States, 136 P. 184.

(B) Prosecution and Punishment.

§ 47 (Okl.Cr.App.) Evidence in a prosecution for conspiracy to murder *held* insufficient to show any conspiracy on the part of accused.—Washmoor v. United States, 136 P. 184.

The mere fact that decedent had been seen in the neighborhood where deceased lived and in company with the deceased prior to the killing *held* insufficient to establish a conspiracy between defendant and the slayer.—Id.

CONSTABLES.

See Sheriffs and Constables.

CONSTITUTIONAL LAW.

See Carriers, § 11; Commerce, §§ 69, 77; Corporations, § 243; Criminal Law, §§ 15, 27, 90; Eminent Domain, § 145; Justices of the Peace, §§ 147, 173; Licenses, § 5; Municipal Corporations, §§ 29, 124, 870; Officers, §§ 61, 70½, 100; Physicians and Surgeons: Railroads, § 434; States, §§ 131, 137, 169; Statutes, §§ 11-64, 77, 107, 125, 141, 178, 255, 276; Taxation, §§ 38, 44; Trial, § 34; Waters and Water Courses, § 182.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ 7 (Wash.) Where a constitutional amendment is proposed in the form of a bill with proper title, it is sufficiently entered in the journals of the Houses of the Legislature to comply with Const. art. 23, § 1, by entry on the journals of the number and full title of the bill.—Cudihoe v. Phelps, 136 P. 367.

§ 9 (Wash.) The requirement of Laws 1911, c. 108, proposing a recall amendment to the Constitution that it should be published for three "weeks" instead of three months required by Const. art. 23, § 1, *held* a clerical mispison, and, the Secretary of State having published the same for three months, it was not objectionable because of such error.—Cudihoe v. Phelps, 136 P. 367.

That the question printed on the ballots submitting the constitutional amendment of the

recall of elective public officers under Laws 1911, c. 108, in accordance with the title of the act, was slightly broader than the provisions of the amendment *held* not to avoid the submission.—Id.

§ 9 (Wash.) The constitutional amendment of 1912, relating to the recall of officers, which was incorporated in the Constitution as article 1, §§ 33, 34, is not invalid because of irregularities in its proposal and submission to the people.—State v. Fairley, 136 P. 374.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 23 (Wyo.) Const. art. 3, § 24, providing that, if any subject is embraced in any act which is not expressed in the title, such act shall be void only as to the part thereof not so expressed, was not retroactive, and hence did not apply to territorial statutes.—State v. Smart, 136 P. 452.

§ 34 (Cal.) Const. art. 12, § 3, imposing a liability for corporate debts upon stockholders is self-executing, and applies to all who are stockholders within the definition of Civ. Code, § 298, and the effect of the provision cannot be limited by the Legislature.—Western Pac. Ry. Co. v. Godfrey, 136 P. 284.

§ 46 (Wyo.) A reserved question as to whether a statute was so changed in its original terms in certain sections of the Revised Statutes as to render the same void, and whether such statute was included in a subsequent revision of the statutory law or was repealed thereby, does not raise any constitutional question, so that the Supreme Court has no power to answer it.—State v. Smart, 136 P. 452.

§ 48 (Idaho) Where a statute is unconstitutional as applied to a certain class of business, and constitutional when applied to another, it presumably applies only to the latter class.—Northern Pac. Ry. Co. v. Gifford, 136 P. 1131.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(B) Judicial Powers and Functions.**

§ 70 (Colo.App.) It is for the Legislature, and not for the courts, to change a well-established rule of law, such as the rule permitting fraternal insurance companies to limit the authority of their agents.—Modern Woodmen of America v. International Trust Co., 136 P. 800.

§ 70 (Nev.) The court has no legislative power, and cannot put into a statute a provision omitted by the Legislature.—State v. Eggers, 136 P. 104.

§ 73 (Okl.Cr.App.) The courts cannot substitute their discretion for that of the Governor or acting Governor, or nullify any of his official acts, where it does not appear that he has usurped power or violated the law.—Ex parte Hawkins, 136 P. 991.

(C) Executive Powers and Functions.

§ 77 (Okl.Cr.App.) No state officer may legally set aside or disregard state laws as a matter of whim or caprice.—Henry v. State, 136 P. 982.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 205 (Nev.) A city ordinance granting the individual named therein a license to conduct a restaurant with the privilege of selling intoxicants would be void as granting a special privilege to an individual.—State v. White, 136 P. 110.

§ 208 (Wyo.) Laws 1888, c. 86, § 1, providing that every person or corporation having a liquor license, who shall keep open his place of business, or shall dispose of intoxicating liquors therein on Sunday, shall be guilty of a misdemeanor, and fined not less than \$25 or

more than \$100, or imprisoned in jail not exceeding three months, was not discriminative so as to invalidate it.—*State v. Smart*, 136 P. 452.

X. EQUAL PROTECTION OF LAWS.

§ 229 (Kan.) A statute requiring that all rebates granted on taxes laid by cities, townships, and school districts shall be charged to the county (Gen. St. 1909, § 9428) does not deny to any person the equal protection of the law.—*Kansas City v. Stewart*, 136 P. 241.

§ 240 (Wyo.) Laws 1888, c. 86, § 1, making every person having a license to sell intoxicants guilty of a misdemeanor who disposes of any such liquor on Sunday, etc., does not violate Const. U. S. Amend. 14, § 1, relating to the equal protection of the laws.—*State v. Smart*, 136 P. 452.

XI. DUE PROCESS OF LAW.

§ 278 (Kan.) A refusal to appoint an administrator of the estate of a nonresident intestate was not a deprivation of property without due process of law where the only property of decedent was capital stock in a Kansas corporation, though the state in which intestate resided refused to grant such administration.—*Miller's Estate v. Executrix of Miller's Estate*, 136 P. 932.

§ 290 (Colo.) To enforce a special assessment for a purpose which does not confer a special benefit upon the property would result in taking private property without due process of law.—*Pomroy v. Board of Public Waterworks*, Dist. No. 2, of City of Pueblo, 136 P. 78.

§ 293 (Idaho) Rev. Codes, §§ 1279-1282, authorizing the occupant or proprietor of land to take up trespassing hogs and hold same until payment of the expenses and damages and 50 cents per head additional, and prescribing procedure therefor, held not to authorize the taking of property without due process of law, in violation of Const. art. 1, § 13.—*Fall Creek Sheep Co. v. Walton*, 136 P. 438.

CONSTRUCTION.

See Bills and Notes, § 129; Contracts, §§ 147-176; Deeds, §§ 93, 109; Insurance, §§ 146, 165; Pleading, § 34; Principal and Surety, § 59; Sales, §§ 61, 82; Vendor and Purchaser, §§ 54, 76.

CONSTRUCTIVE TRUSTS.

See Trusts, § 91.

CONTEMPT.

I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

§ 20 (Ariz.) Under Pen. Code 1901, § 949, where court ordered jurors to be kept together, violation of order, by the bailiff or the jurors, held to make them liable for punishment for contempt.—*Young Chung v. State*, 136 P. 631.

CONTINUANCE.

See Appeal and Error, §§ 286, 966; Criminal Law, §§ 586-611, 1151.

§ 7 (Okl.) The action of a court on a motion for a continuance rests within the sound discretion of the trial court.—*Walton v. Kennamer*, 136 P. 584.

§ 26 (Okl.) It is not an abuse of discretion to deny a continuance for the absence of a witness whose deposition the applicant has not attempted to procure, though the witness was not amenable to or served with a subpoena but promised to appear and testify.—*Wood v. French*, 136 P. 784.

§ 37 (Okl.) An application for a continuance for an absent witness is insufficient to comply with St. 1893, § 4207 (Rev. Laws 1910, § 5045), where it does not show that the applicant believes to be true the material facts which he believes the witness would prove.—*Wood v. French*, 136 P. 784.

CONTRACTS.

See Action, § 38; Appeal and Error, § 263; Attorney and Client, §§ 134-148; Banks and Banking, § 105; Bills and Notes; Breach of Marriage Promise; Brokers; Cancellation of Instruments; Carriers, §§ 62, 242; Chattel Mortgages; Corporations, §§ 80-89, 448; Counties, §§ 113-124; Damages; Deeds; Dismissal and Nonsuit, § 53; Evidence, §§ 397, 441; Exchange of Property; Fraud, § 22; Frauds, Statute of; Gaming, §§ 23-29; Guaranty; Injunction, § 60; Insurance; Interest; Landlord and Tenant; Limitation of Actions, § 46; Master and Servant, §§ 33, 284, 316; Mechanics' Liens; Mines and Minerals, §§ 56-78; Mortgages; Municipal Corporations, §§ 346, 347; Payment; Principal and Agent; Principal and Surety; Reformation of Instruments; Release; Sales; Specific Performance; States, § 101; Statutes, § 226; Stipulations; Tenancy in Common, § 46; Trial, § 199; Usury, §§ 50, 53; Vendor and Purchaser; Warehousemen; Waters and Water Courses, §§ 156, 157; Work and Labor.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials in General.

§ 5 (Colo.App.) A "quasi contract" is a constructive contract which is raised by law to enforce legal duties by contract actions, where an express or implied contract does not actually exist.—*Brown's Estate v. Stair*, 136 P. 1003.

(B) Parties, Proposals, and Acceptance.

§ 28 (Or.) To establish a contract, the evidence must show when, where, and by whom it was made, and the terms thereof.—*Barber v. Toomey*, 136 P. 343.

§ 29 (Okl.) Where a transaction consists entirely of letters and telegrams, the question whether such correspondence constitutes a contract is for the court.—*J. Rosenbaum Grain Co. v. Higgins*, 136 P. 1073.

(C) Formal Requisites.

§ 32 (Wash.) A contractual relation may exist prior to the execution of the subsequent formal contract contemplated by the parties.—*Loewi v. Long*, 136 P. 673.

§ 44 (Cal.) Code Civ. Proc. § 1183, requiring building contracts, when the amount exceeds \$1,000, to be in writing, and a memorandum filed in the county recorder's office, prohibits a recovery on such a contract which is unfilled, even as between the parties.—*Mannix v. R. L. Radke Co.*, 136 P. 52.

(D) Consideration.

§ 50 (Wash.) Where under the law three of the thirteen saloons in a town would be compelled to go out of business, and the saloon keepers agree that three of them, including plaintiff, should be given \$500 each to retire, there was a valuable consideration for the promise to pay.—*Jones v. Maes*, 136 P. 680.

(F) Legality of Object and of Consideration.

§ 103 (Wash.) A contract, lawful in itself and not required or contemplating the doing of an unlawful act, is not necessarily illegal because it is carried out in an illegal way.—*Armour & Co. v. Jesmer*, 136 P. 689.

§ 108 (Wash.) A contract by a corporation with a purchaser of original capital stock to repurchase at the same price on the stockhold-

er's withdrawal from the company *held* against public policy.—*Kom v. Cody Detective Agency*, 136 P. 1156.

§ 116 (Okl.) That a contract, the main purpose of which is to promote the business of those making it, incidentally restrains trade will not render it invalid as in restraint of trade.—*J. W. Ripy & Son v. Art Wall Paper Mills*, 136 P. 1080.

§ 117 (Okl.) A retailer's agreement to buy a particular line of goods exclusively from a manufacturer for a limited period in a particular locality is not invalid as in restraint of trade.—*J. W. Ripy & Son v. Art Wall Paper Mills*, 136 P. 1080.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 147 (Or.) The language must be interpreted in the sense that the promisor knew, or had reason to know, the promisee understood it.—*Spande v. Western Life Indemnity Co.*, 136 P. 1189.

§ 155 (Or.) The words of a contract are to be strongly construed against the party using them.—*Spande v. Western Life Indemnity Co.*, 136 P. 1189.

§ 170 (Ariz.) Where a contract for the services of plaintiff as superintendent for the construction of a courthouse did not fix the manner of compensation, the construction of the parties as to compensation should govern.—*Farrell v. Greenlee County*, 136 P. 637.

§ 170 (Or.) The conduct of the parties as to the subject-matter affords evidence of the meaning they gave to the agreement.—*Spande v. Western Life Indemnity Co.*, 136 P. 1189.

§ 176 (Okl.) Where a contract consists of letters and telegrams containing no technical words or terms of art and not dependent upon extrinsic facts for its meaning, its construction is wholly for the court.—*J. Rosenbaum Grain Co. v. Higgins*, 136 P. 1073.

§ 176 (Utah) The legal effect of a contract is for the court and not the jury.—*Bailey v. Spalding-Livingston Investments Co.*, 136 P. 962.

(B) Parties.

§ 187 (Or.) One who contracted with a city for the construction of a pipe line and undertook to pay for labor and supplies used was primarily liable for such supplies though furnished to a subcontractor, and could be sued for the price.—*Baker City Mercantile Co. v. Idaho Glazed Cement Pipe Co.*, 136 P. 23.

(C) Subject-Matter.

§ 198 (Or.) Supplies furnished by plaintiff for boarding and maintaining men engaged in constructing a pipe line, pursuant to a contract for its construction by defendant for a city, were embraced within the terms of the original contract, which required defendant to furnish all material and do all the work required to construct the line.—*Baker City Mercantile Co. v. Idaho Glazed Cement Pipe Co.*, 136 P. 23.

III. MODIFICATION AND MERGER.

§ 237 (Or.) A parol agreement, extending or enlarging the time for performance of a written contract, must ordinarily be supported by a sufficient consideration, but need not be if mutual acts are to be performed by the parties.—*Scott v. Hubbard*, 136 P. 653.

V. PERFORMANCE OR BREACH.

§ 303 (Cal.App.) The contractor cannot recover as for breach of a contract to build, he having put in a foundation not complying with the contract, and substantially defective, and being merely stopped from proceeding till he remedied the foundation, and failing to put in another, because the owner and architect would not in advance assure him that the sec-

ond one would be accepted.—*Norman v. Hall*, 136 P. 720.

§ 303 (Or.) A party to a contract who prevents another party from strictly performing its terms may not avail himself of the default thereby occasioned.—*Scott v. Hubbard*, 136 P. 653.

§ 314 (Mont.) Where the performance of a contract is prevented by the wrongful interference of the other party, plaintiff may treat such wrongful act as a breach, and immediately sue for damages.—*McFarland v. Welch*, 136 P. 394.

Where plaintiff did not allege that the term of his contract had expired, and his testimony showed that, according to his own theory, it had not expired, he could not stand by in readiness to perform until the term of the contract had expired, and then sue upon the contract.—*Id.*

§ 321 (Colo.) A contract for the construction of an irrigation reservoir construed, and *held*, that the amount the board was authorized to charge to the contractor in case of breach and reletting was not limited to the cost of re-advertising and letting another contract, but included the uncompleted work.—*Noonan v. Stein*, 136 P. 1181.

A contract for the construction of an irrigation reservoir construed, and *held* not an equitable assignment of a percentage, retained by the irrigation board from monthly estimates due the contractor, for the benefit of subcontractors and materialmen, so as to preclude the district from deducting damages sustained by the contractor's breach of contract to the prejudice of such subcontractors and materialmen.—*Id.*

§ 322 (Mont.) Where a contract is severable, a party seeking relief for the prevention of its complete performance must disclose the proportion of the work performed.—*McFarland v. Welch*, 136 P. 394.

Under Rev. Codes, § 4926, providing that partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit is voluntarily retained, plaintiff, seeking relief after wrongful prevention of performance, must show the extent of performance and defendant's voluntary retention of the benefits.—*Id.*

VI. ACTIONS FOR BREACH.

§ 329 (Cal.App.) Action for breach of agreement by client to mortgage or sell house and furniture in order to pay attorney, or, if the house and furniture could not be mortgaged or sold within two months, to deliver her note to the attorney secured by mortgages, *held* premature when brought within 60 days from its execution.—*Newmire v. Ford*, 136 P. 504.

§ 332 (Okl.) In an action for a prize pursuant to an award made by a jury selected under stated conditions, the petition must either allege that the prize was thus awarded, or state facts showing that the award was prevented by defendant's fault.—*Southwestern Land Co. v. McCallam*, 136 P. 1093.

§ 337 (Mont.) Allegations to recover on contract *held* defective in not showing prevention of completion by any wrongful act of defendant.—*McFarland v. Welch*, 136 P. 394.

§ 346 (Cal.) Where a complaint counted on a building contract which was void for failure to record a written memorandum thereof, as required by Code Civ. Proc. § 1183, it did not prevent plaintiff from recovering the reasonable value of the labor and materials furnished on proof that such reasonable value was the contract price.—*Mannix v. R. L. Radke Co.*, 136 P. 52.

§ 349 (Wash.) In an action for repairing certain cars belonging to defendant, damaged in a wreck on plaintiff's railroad, an offer of proof that the plans of the cars were approved by plaintiff when they were constructed *held* properly excluded.—*Puget Sound Electric Ry. v. Carstens Packing Co.*, 136 P. 117.

§ 352 (Okl.) Where, in an action to recover a publicly offered prize, plaintiff's right to recover depends upon whether the prize has been awarded under stated conditions and the testimony is conflicting, the issue is for the jury.—*Southwestern Land Co. v. McCallam*, 136 P. 1093.

§ 353 (Mont.) Where it was impossible to determine from the amended complaint the theory of plaintiff's case or the amount to which he was entitled, if entitled to recover at all upon partial performance of a contract, the trial court's failure to instruct as to the measure of plaintiff's recovery was justified.—*McFarland v. Welch*, 136 P. 394.

CONTRADICTION.

See Witnesses, §§ 388-405.

CONTRIBUTION.

§ 5 (Or.) Joint tort-feasors standing in pari delicto cannot compel contribution, but the fact that the parties stand in delicto each to the other will not foreclose contribution.—*City of Astoria v. Astoria & C. R. R. Co.*, 136 P. 645.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 83, 117, 136.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Fraudulent Conveyances; Homestead, § 167; Indians, § 36; Vendor and Purchaser; Waters and Water Courses, §§ 156, 157.

CONVICTS.

See Extradition, § 39; Pardon.

CORPORATIONS.

See Bankruptcy, § 166; Banks and Banking; Carriers; Constitutional Law, § 34; Contracts, § 108; Evidence, § 117; Executors and Administrators, § 12; Fraud, §§ 9, 11, 58; Frauds, Statute of, § 83; Gas; Insurance, §§ 35, 696, 699; Licenses, § 29; Mines and Minerals, § 103; Municipal Corporations; Quo Warranto, § 17; Railroads; Street Railroads; Telegraphs and Telephones; Trusts, § 70; Waters and Water Courses, §§ 182-247.

I. INCORPORATION AND ORGANIZATION.

§ 14 (Idaho) A corporation formed for the purpose of making agricultural exhibits and of conducting a live stock show comes within the purview of a statute authorizing corporations for "agricultural purposes."—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

§ 28 (Idaho) Where a corporation has proceeded on the theory that it was duly and regularly incorporated, and has exercised its corporate powers, and acquired property, it will be considered as a de facto corporation as affecting the validity of its business transactions.—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

§ 55 (Colo.) Under Rev. St. 1908, § 853, permitting stockholders or directors to make such by-laws as they deemed proper, not inconsistent with the law, and section 865, permitting generally each stockholder to vote in person or by proxy, a by-law could not be adopted which provided that only stock paid in full should vote.—*Lilylands Canal & Reservoir Co. v. Wood*, 136 P. 1026.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(A) Nature and Amount of Capital and Shares.

§ 67 (Wash.) Rem. & Bal. Code, § 3697, making it unlawful for the trustees of a corporation to reduce capital stock except as provided, protects future creditors and stockholders who are not parties to an illegal agreement to withdraw capital stock.—*Kom v. Cody Detective Agency*, 136 P. 1155.

The trust fund doctrine as applied to the capital stock of a corporation, is recognized by the Washington courts.—*Id.*

(B) Subscription to Stock.

§ 80 (Cal.App.) A representation that corporate stock was nonassessable made to induce purchase thereof imported that the corporation waived its right to levy assessments, which representation was one of fact, and, if untrue, entitled the purchaser to sue for damages or rescind.—*Browne v. San Gabriel River Rock Co.*, 136 P. 542.

§ 82 (Colo.App.) Where a corporation, in order to sell certain of its stock to plaintiff, contracted that, if it did not complete a certain machine by a specified date, plaintiff might return the stock and receive his money, a complaint on the contract which did not allege that plaintiff had elected to avail himself of his option, and that the corporation refused to comply, did not state a cause of action.—*Bovee v. Boyle*, 136 P. 467.

§ 82 (Wash.) A contract by a corporation with a purchaser of original capital stock to repurchase at the same price on the stockholder's withdrawal from the company held against Rem. & Bal. Code, § 3697, making it unlawful for the trustees to reduce the capital stock except as provided by law.—*Kom v. Cody Detective Agency*, 136 P. 1155.

§ 88 (Colo.) In absence of statute or charter requirement, corporate stock need not be paid for in cash at the time of its issuance in order to pass title to the purchaser; a subscriber being the owner when he binds himself to pay therefor.—*Lilylands Canal & Reservoir Co. v. Wood*, 136 P. 1026.

§ 88 (Kan.) One who subscribes for stock must pay for same either in money or money's worth.—*Burrell Collins Brokerage Co. v. Dunn*, 136 P. 939.

§ 89 (Cal.App.) Under Civ. Code, § 332, corporate stock, whether fully paid or unpaid, is subject to assessment to pay debts; the only difference being in the amount of the assessment.—*Browne v. San Gabriel River Rock Co.*, 136 P. 542.

(E) Interest, Dividends, and New Stock.

§ 157 (Wash.) Where the stock of a corporation was increased, the assets of the corporation, after deducting the amount of its capital stock and debts, can be applied by the stockholders to the payment of their subscription to the increased capital stock, the transaction being in the nature of a stock dividend.—*Lantz v. Moeller*, 136 P. 687.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

§ 175 (Cal.App.) Under Civ. Code, § 332, corporate stock, whether fully paid or unpaid, is subject to assessment to pay debts; the only difference being in the amount of the assessment.—*Browne v. San Gabriel River Rock Co.*, 136 P. 542.

(C) Suing or Defending on Behalf of Corporation.

§ 206 (Ariz.) A demand upon the corporation to sue to avoid transfers of its property, made in

fraud of the rights of plaintiff stockholders, was not a condition precedent to their own suit, where the officers of the corporation had control thereof, and were hostile to plaintiffs, and had themselves caused the transfer to be made.—*Fleming v. Black Warrior Copper Co. Amalgamated*, 136 P. 273.

§ 211 (Ariz.) A complaint, in an action by minority stockholders to set aside an alleged fraudulent transfer of corporate property, *held* to sufficiently show fraud.—*Fleming v. Black Warrior Copper Co. Amalgamated*, 136 P. 273.

(D) Liability for Corporate Debts and Acts.

§ 232 (Wash.) Where the rights of creditors intervene, property transferred to a corporation in payment of shares must be equal in value to the amount of the subscription, regardless of the subscribers' good faith.—*Lantz v. Moeller*, 136 P. 687.

§ 243 (Cal.) That part of Civ. Code, § 322, which provides that stock held as collateral, or in a representative capacity, does not make the holder liable for the corporate debts, does not limit the effect of Const. art. 12, § 3, creating the stockholder's liability, but is simply a limitation on the broad language in the preceding portion of the code section.—*Western Pac. Ry. Co. v. Godfrey*, 136 P. 284.

§ 245 (Cal.) A legatee who does not renounce a legacy of corporate stock, but upon distribution of the estate accepts the same, is the owner from the death of testator, and is liable as such for corporate debts contracted after the death of testator and before distribution.—*Western Pac. Ry. Co. v. Godfrey*, 136 P. 284.

§ 248 (Cal.) Where, after a creditor had instituted suit against the stockholders of an insolvent corporation, a dividend was paid to him, by which the amount of the debt was reduced, such payment operates as a discharge of the stockholder's debt to that extent, notwithstanding the insolvency of the corporation.—*Western Pac. Ry. Co. v. Godfrey*, 136 P. 284.

§ 262 (Cal.) The pendency of receivership proceedings against an insolvent corporation does not affect the right of a creditor to enforce the stockholders' liability.—*Western Pac. Ry. Co. v. Godfrey*, 136 P. 284.

VI. OFFICERS AND AGENTS.

(A) Election or Appointment, Qualification, and Tenure.

§ 294 (Wash.) Where a corporation contracted to employ plaintiff as bookkeeper under the title of secretary and treasurer at a specified salary, the position was one of "responsibility and trust" from which plaintiff would have been removable at the will of the corporation.—*Hewson v. Peterman Mfg. Co.*, 136 P. 1158.

(B) Authority and Functions.

§ 298 (Mont.) A quorum of all of the members of a duly constituted board of directors may bind the corporation notwithstanding that vacancies at the time existed in the board.—*Great Falls & T. C. Ry. Co. v. Ganong*, 136 P. 390.

The failure to fill two of the offices in a board of directors of a railroad company, which consisted of five members, merely had the effect of such offices remaining vacant; an existing office without an incumbent being "vacant" whether it be a new or old office.—*Id.*

Under Rev. Codes, § 3836, making a majority of the directors a sufficient number to transact corporate business, the failure of railroad stockholders to fill all of the directorates, as required by section 4274, would not prevent three directors appointed from legally representing the corporation, as against an objection by one not connected with it.—*Id.*

§ 306 (Cal.App.) Where an officer of a corporation was held individually liable on a contract for work done in the construction of a certain part of its plant, it was no concern of his that

the court found that the corporation was also liable.—*Dunaway v. Anderson*, 136 P. 309.

(D) Liability for Corporate Debts and Acts.

§ 326 (Colo.App.) Rev. St. 1908, § 911, imposing personal liability on officers and directors of a corporation for failure to file annual reports is penal in character, and must be strictly construed.—*Bovee v. Boyle*, 136 P. 467.

§ 338 (Colo.App.) Where officers and directors of a corporation failed to file an annual report, as required by Rev. St. 1908, § 911, they were not individually liable on a judgment recovered against the corporation after the report was filed and their default removed.—*Bovee v. Boyle*, 136 P. 467.

§ 340 (Colo.App.) Assurances by an officer and stockholder of a corporation in charge of its operations to its employees that it would be in funds and pay them did not create any personal liability against him.—*Anderson v. Dailey*, 136 P. 461.

§ 340 (Colo.App.) The word "debt," as used in Rev. St. 1908, § 911, imposing an individual liability on officers and directors of a corporation for their failure to file proper annual reports, is not synonymous with "obligation," and does not include liability for torts, but means unconditional promise to pay a fixed sum at a specified time.—*Bovee v. Boyle*, 136 P. 467.

§ 360 (Colo.App.) Where the complaint against a corporation and an officer for services was on the common count, and charged a joint liability, there could be no recovery against the officer on proof showing that he was at most a guarantor.—*Anderson v. Dailey*, 136 P. 461.

§ 360 (Colo.App.) In an action against directors of a corporation to enforce their individual liability for debts because of failure to file an annual report, complaint *held* to count on a judgment recovered by plaintiff against the corporation, and not on the original cause of action.—*Bovee v. Boyle*, 136 P. 467.

Since liability of officers and directors of a corporation for failure to file annual reports under Rev. St. 1908, § 911, dates from the sixtieth day after January 1st of the year succeeding that for which the report is to be filed, an allegation that the liability sought to be enforced was incurred during 1909 was insufficient.—*Id.*

§ 361 (Colo.App.) In an action against a corporation and one of its officers and stockholders who was in charge of its operations to recover compensation for services, evidence *held* to show that plaintiff was employed by the corporation, and was working for it, and not for such officer.—*Anderson v. Dailey*, 136 P. 461.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 387 (Idaho) The right of a corporation to exercise powers outside of and in excess of the powers conferred by the statute authorizing its organization cannot be raised in a collateral proceeding by a private litigant.—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

§ 388 (Colo.) Even if the contract under which stock was issued was void under Const. art. 15, § 9, prohibiting issuance of stock except for services or money received, the corporation could not assert such invalidity, in an equitable action by stockholders, if it could not restore the parties to their original status.—*Lilylands Canal & Reservoir Co. v. Wood*, 136 P. 1026.

Where a corporation issued practically all of the original stock to W., under a contract that he should pay for it at par as called for, and the corporation received benefits under the contract, it cannot claim as against W.'s assignees that they are not entitled to vote stock not entirely paid up, on the ground that such contract was void under Const. art. 15, § 9, prohibiting the

issuance of stock except for services or money received.—Id.

A corporation cannot receive and retain benefits under a contract to which it is a party, and afterwards deny its legal effect.—Id.

(B) Representation of Corporation by Officers and Agents.

§ 401 (Cal.) Where the same persons constitute a majority of the directors of two corporations, transactions between them controlled by such directors, in the absence of actual or intended fraud, are voidable only.—Sausalito Bay Land Co. v. Sausalito Improvement Co., 136 P. 57.

§ 411 (Ariz.) Payment to an officer in his individual capacity, or the rendition of services or furnishing of materials to him in such capacity, is not a payment to the corporation.—George Fishbaugh v. Beeler, 136 P. 1057.

§ 423 (Cal.App.) Under Civ. Code § 2323, providing that authority to sell personal property includes authority to warrant the title, quality and quantity, an agent to sell corporate stock was authorized to represent that it was non-assessable.—Browne v. San Gabriel River Rock Co., 136 P. 542.

§ 423 (Mont.) Corporation held liable for acts of agent in course of his duties and within the apparent scope of his authority, though contrary to his instructions, and though prompted by fraudulent or malicious motives.—Grorud v. Loss, 136 P. 1069.

§ 425 (Ariz.) If "F., incorporated," knew that F., as an individual, agreed with the makers of a note and mortgage to the corporation that they should make payments thereon to F. personally by furnishing services and materials, the corporation would be estopped from denying that such services and materials were received in payment of its note.—George Fishbaugh v. Beeler, 136 P. 1057.

§ 426 (Cal.) A contract between two corporations made in 1890 held not subject to rescission by the purchaser in 1903 because executed by the same persons as directors of both companies; the minority stockholders of the purchaser having acquiesced therein, and paid stock assessments levied to raise money to pay on the contract.—Sausalito Bay Land Co. v. Sausalito Improvement Co., 136 P. 57.

§ 426 (Colo.App.) One who loaned money to a corporation which went into its bank account and was checked out in the usual course of business and so appropriated by it held entitled to recover in a suit for money had and received, though the corporation's manager who borrowed the money had no authority to do so.—R. W. English Lumber Co. v. Hiren, 136 P. 475.

§ 432 (Cal.App.) Evidence held to warrant a finding that certain of the defendants contracted with plaintiff individually and not as an officer of a corporation to construct a dam in connection with an irrigation project, and that plaintiff was therefore personally liable for the work.—Dunaway v. Anderson, 136 P. 309.

§ 432 (Mont.) Where president of two corporations, believing that a railway and express agent had not accounted for certain checks of such corporations, had him prosecuted for larceny as bailee of one of such corporation's money, held that there was no presumption that in doing so he was acting for the other corporation.—Grorud v. Loss, 136 P. 1069.

Act of president of corporation in causing arrest and prosecution of person for larceny as bailee of its property held presumed to be in its behalf.—Id.

(D) Contracts and Indebtedness.

§ 448 (Kan.) A contract by the owner of a mill that a corporation which had contracted to take over the mill and had delivered to him one-third of its stock in consideration therefor

would furnish electric power to another company held binding upon the corporation where such owner became a director and general manager of the corporation which for a long time thereafter furnished such power.—Empire Dist. Electric Co. v. Eureka Mining Co., 136 P. 924.

§ 466 (Okla.) A note payable to the order of the "directors" of a corporation is the property of the corporation and may be transferred by indorsement of the secretary and treasurer in obedience to a resolution of the board of directors.—First Nat. Bank v. Walker, 136 P. 408.

(E) Torts.

§ 493 (Mont.) An action for malicious prosecution will lie against a corporation as well as against a natural person.—Grorud v. Loss, 136 P. 1069.

(F) Civil Actions.

§ 503 (Idaho) Under Rev. Codes, § 2792, the rule that a corporation does not acquire a fixed residence for the purpose of suit in a particular county by designating an agent in that county upon whom process may be served applies to both foreign and domestic corporations.—Smith v. Inter-Mountain Auto Co., 136 P. 1125.

A domestic corporation has no absolute power to have all actions brought against it tried in the county where its principal place of business is located.—Id.

Where an action is brought against a domestic corporation in the county where the contract sued on was made, the corporation has no absolute right to have the venue changed to the county in which its principal place of business is located.—Id.

VIII. INSOLVENCY AND RECEIVERS.

§ 547 (Kan.) The capital stock of a corporation is a trust fund pledged for the payment of corporate debts.—Burrell Collins Brokerage Co. v. Dunn, 136 P. 939.

§ 565 (Kan.) Evidence held to support a decision refusing to allow a claim made against an insolvent corporation as against its creditors by a person who had turned over property and credits in payment for shares of stock.—Burrell Collins Brokerage Co. v. Dunn, 136 P. 939.

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 617 (Cal.) The dissolution of a corporation resulting from a statute declaring the forfeiture of the corporate franchise for nonpayment of a license tax has the same effect as if it were declared by judicial decree.—Brandon v. Umpqua Lumber & Timber Co., 136 P. 62.

§ 630 (Cal.) The dissolution of a corporation terminates its existence as a legal entity and renders it incapable of suing or being sued as a corporate body.—Brandon v. Umpqua Lumber & Timber Co., 136 P. 62.

Corporation License Tax Act, § 10a, as amended by St. 1907, p. 746, so as to permit any action begun against a corporation before forfeiture of its franchise for nonpayment of the license tax to be prosecuted as though no forfeiture had occurred, gives the corporation the right to continue the defense in its corporate name notwithstanding the forfeiture and to take an appeal in that name.—Id.

XII. FOREIGN CORPORATIONS.

§ 665 (Ariz.) Where defendant appeared, and the property, title to which was involved, was within the jurisdiction, defendant cannot object to the court's assuming jurisdiction over it on the ground that it is a foreign corporation.—Fleming v. Black Warrior Copper Co. Amalgamated, 136 P. 273.

A foreign corporation engaged in business in this state is estopped to deny its right to do so, in order to defeat the jurisdiction of the courts

of this state when dealing with its property within their jurisdiction.—*Id.*

CORPUS DELICTI.

See Adultery, § 14.

CORRECTION.

See Trial, §§ 408, 412.

CORRESPONDENCE.

See Sales, § 32.

COSTS.

See Attorney General, § 3; Indemnity, § 13.

I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

§ 3 (Idaho) Costs are statutory and cannot be allowed in the absence of statutory authority.—*Steensland v. Hess*, 136 P. 1124.

VI. TAXATION.

§ 203 (Idaho) Failure of the prevailing party to file a bill for costs within the time fixed by Rev. Codes, § 4912, is fatal to his right to an allowance.—*Steensland v. Hess*, 136 P. 1124.

Filing and service of cost bill by the prevailing party, as prescribed by Rev. Codes, § 4912, is jurisdictional.—*Id.*

IX. IN CRIMINAL PROSECUTIONS.

§ 308 (Kan.) Where several defendants are jointly tried and convicted of violating the prohibitory law, the prosecuting attorney is entitled to the allowance of the fee provided by Gen. St. 1909, § 4377, for each count on which each defendant is convicted.—*State v. Bland*, 136 P. 947.

COTENANCY.

See Tenancy in Common.

COUNTIES.

See Highways; Intoxicating Liquors, §§ 46, 101; Mandamus, §§ 121, 151; Officers, §§ 42, 95; Schools and School Districts, §§ 24, 86; Taxation, § 913.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

§ 16 (Wyo.) Under Act Feb. 13, 1911 (Laws 1911, c. 14) § 2, that portion of Campbell county, established by the act, lying within the former limits of Crook county must, in view of Comp. St. 1910, § 1058, be considered a part of Crook county until the board of commissioners of Campbell county is duly elected for the purpose of determining the status of Crook county in relation to the assessed valuation of the property therein.—*Board of Com'rs of Crook County v. Mulholland*, 136 P. 112.

II. GOVERNMENT AND OFFICERS.

(C) County Board.

§ 46 (Wyo.) Where part of a county which has been set off by statute for a new county was not actually detached for governmental purposes until after the election of an assessor for the old county, though the supervisors of the new county were chosen at the same election as the assessor, the latter's compensation must be based on the valuation of the old county before the severance.—*Board of Com'rs of Crook County v. Mulholland*, 136 P. 112.

§ 63 (Or.) The county court can employ a detective to make investigation looking to the prosecution of criminals.—*McKenna v. McHaley*, 136 P. 340.

(D) Officers and Agents.

§ 101 (Or.) In an action against county officers to compel the return of an amount paid to

a deputy prosecuting officer, in addition to his salary, as compensation for investigation with a view to criminal prosecution, the fact that the statement and warrant pleaded designated it as compensation for extra services as district attorney would not exclude proof as to the authority and circumstances under which the services were rendered.—*McKenna v. McHaley*, 136 P. 340.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

(B) Contracts.

§ 113 (Wash.) County commissioners authorized by Rem. & Bal. Code, § 3890, to construct county buildings, *held* authorized, after adoption of a resolution therefor, to construct a smaller building than that shown by letters and photographs circulated among the voters before election.—*Kelly v. Hamilton*, 136 P. 1148.

In the absence of fraud, the decision of county commissioners, charged by statute with the construction of courthouses, as to the character of courthouse needed, *held* final.—*Id.*

Political matters inducing or influencing votes upon an issue of courthouse bonds *held* not to be considered in an action to enjoin commissioners' construction of smaller building, since such matters could not affect or control the commissioners' final action.—*Id.*

§ 121 (Ariz.) A resolution by the supervisors of a county, that plaintiff superintend the construction of a courthouse at an agreed compensation, does not constitute a contract, and, where defendant did not agree to act as superintendent during the entire period, although he began the discharge of the duties, the county may dismiss him.—*Farrell v. Greenlee County*, 136 P. 637.

§ 122 (Wash.) If the officers of a county have power to make a contract for services or property and to agree to pay therefor in some manner, the county is not excused from making payment because the contract provides for payment in an illegal manner or from a fund not applicable to such a debt.—*Osborne, Tremper & Co. v. King County*, 136 P. 138.

§ 124 (Or.) Where an account of the deputy district attorney for compensation additional to his salary was one that the county court might legally contract, it could ratify it when the services rendered were at the request of a member of the court.—*McKenna v. McHaley*, 136 P. 340.

§ 124 (Wash.) Where the officers contracting for the payment of money do not have legal authority to make the contract, it is void and unenforceable.—*Osborne, Tremper & Co. v. King County*, 136 P. 138.

If the officers do not have power to make a particular contract, the county will not be estopped to defeat payment by accepting benefits thereunder.—*Id.*

Where no antecedent intention by the United States government to construct a canal was shown by any act of Congress as required by Acts 1907, c. 236, § 1 (Rem. & Bal. Code, § 8148), as a condition of the establishment of an assessment district by a county for aiding in making canal improvements, *held*, that all of the proceedings by the county looking to that end were void so that one contracting with a commission for furnishing an assessment roll to the county who was to be paid out of the assessment made could not enforce payment for his services out of any county fund.—*Id.*

If a contract by a county river and harbor improvement commission to pay for procuring an assessment roll for assessing property in a canal improvement district was void because the commissioners had no power to create the improvement district, under Acts 1907, c. 236, § 1 (Rem. & Bal. Code, § 8148), the contract could not be ratified and was not revived by subsequent acts of Congress declaring such intention.—*Id.*

V. CLAIMS AGAINST COUNTY.

§ 197 (Colo.) Under Rev. St. 1908, § 1337, *held*, that claims of committee appointed to examine county treasurer's account should be presented to the county board of commissioners in the usual way, and the district court had no power to allow them and order the county commissioners to pay them without giving the county an opportunity to be heard.—*Nordloh v. District Court of First Judicial Dist.*, 136 P. 64.

VI. ACTIONS.

§ 222 (Idaho) The complaint *held* sufficient where it alleged that the work was done and material furnished at the special request of the county.—*Twin Falls Bank & Trust Co. v. Twin Falls County*, 136 P. 804.

COUNTY COURTS.

See Counties, § 63; Courts, § 163.

COURTHOUSES.

See Counties, §§ 113, 121.

COURTS.

See Constitutional Law, §§ 70, 73; Contempt; Counties, § 63; Criminal Law, §§ 90-105; Justices of the Peace; Prohibition; Trial, §§ 191-199, 370-405.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.**(A) Creation and Constitution, and Court Officers.**

§ 42 (Okl.) Section 6 of Act March 22, 1913, entitled "An act amending section 1 of article 7 of chapter 14 of Session Laws 1909, etc." (Laws 1913, c. 77), applies to superior courts continued by said act until January, 1915, as well as to those continued indefinitely by the act.—*State v. Superior Court of Oklahoma County*, 136 P. 424.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 89 (Or.) The doctrine of *stare decisis* should not be departed from, unless it appears on subsequent examination of the question that the former case was decided contrary to sound principle.—*State v. McAllister*, 136 P. 354.

§ 92 (Colo.App.) Where one of the parties claimed that a certain case controlled the decision and the other party claimed that other cases ruled, but the judge writing the opinion held that the statute controlled and based his decision thereon, any further remarks by him about the general rules of law applicable were *obiter dictum* and not authority.—*Modern Woodmen of America v. International Trust Co.*, 136 P. 806.

§ 97 (Idaho) The rule as to law of the case does not apply where a federal question is involved that may be reviewed on writ of error from the Supreme Court of the United States, and where that court after the decision of the state court has arrived at a different conclusion than that of the state court prior to the hearing on a subsequent case involving the same question.—*A. B. Moss & Bro. v. Ramey*, 136 P. 608.

§ 97 (Okl.Cr.App.) The strict construction placed by the federal courts upon Act Feb. 12, 1793, c. 7 (1 Stat. 302), relative to extradition proceedings between states, is binding on state courts.—*Ex parte Owen*, 136 P. 197.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 163 (Okl.) In an action in the county court on a note, an answer, alleging that the note is

for the balance of the price of real estate, title to which was defective, did not present a question as to the title to real estate ousting the jurisdiction.—*Taylor v. Cox*, 136 P. 576.

A mere statement of a conclusion in a pleading that the title to real estate was involved was insufficient to oust the jurisdiction of the county court.—*Id.*

§ 185 (Okl.) A party to a civil action pending in the superior court who seeks to remove the cause to the district court under section 6 of the act of March 22, 1913 (Laws 1913, c. 77), must, under Act March 22, 1911 (Laws 1910-11, c. 121), amending Laws 1909, c. 14, art. 7, § 10, file his motion for such transfer before the cause is set for trial in the superior court.—*State v. Superior Court of Oklahoma County*, 136 P. 424.

V. COURTS OF PROBATE JURISDICTION.

§ 201 (Wash.) Const. art. 4, § 6, and *Balinger's Ann. Codes & St.* § 6355, conferring probate jurisdiction on the superior court, did not deprive the court of its legal and equitable jurisdiction; and hence, on an application of an alleged surviving partner of a firm for appointment as administrator of the firm's assets, the court had jurisdiction to determine a contest as to the existence of the firm.—*State v. Superior Court of Pierce County*, 136 P. 147.

§ 202 (Idaho) Under Rev. Codes, § 4831, a probate decree is appealable.—*Connolly v. Probate Court in and for Kootenai County*, 136 P. 205.

Under Const. art. 5, § 20, if the probate court errs, an appeal is provided to the district court.—*Id.*

A probate judgment becomes final after the expiration of the term at which it is rendered, and it cannot be vacated, modified or set aside thereafter except under Rev. Codes, § 4229.—*Id.*

VI. COURTS OF APPELLATE JURISDICTION.**(A) Grounds of Jurisdiction in General.**

§ 207 (Colo.) The Supreme Court has jurisdiction of an original proceeding in *mandamus* to compel the State Auditor to issue certificates to defray the expenses and compensation of the militia when called out to suppress riots; the question being one of a public nature, and affecting the people of the entire state.—*People v. Kenehan*, 136 P. 1033.

(B) Courts of Particular States.

§ 212 (Cal.App.) The District Court of Appeals, having no appellate jurisdiction on appeals from the superior courts in cases at law involving the title and possession of real estate, since Const. art. 6, § 4, confers such jurisdiction upon the Supreme Court, could not dismiss the appeal but would transfer the appeal together with the motion to dismiss it to the Supreme Court.—*Thomas v. Thomas*, 136 P. 510.

§ 251 (Wash.) Where the original amount in controversy was \$630, with interest at 10 per cent. on \$200 from February 3, 1913, defendant's tender into court of \$430 did not reduce the amount in controversy below a sum sufficient to sustain an appeal, under the rule that such amount includes interest when recoverable, computed to the commencement of the action.—*Pickford v. Borland*, 136 P. 128.

VII. UNITED STATES COURTS.**(K) Territorial and Provisional Courts.**

§ 431 (Okl.Cr.App.) The district court has jurisdiction to try a defendant where he was indicted prior to statehood.—*Washmood v. United States*, 136 P. 184.

CREDIBILITY.

See Witnesses, §§ 330-405.

CREDITORS.

See Bankruptcy; Partnership.

CREDITORS' SUIT.

§ 8 (Colo.) A creditor's bill will not lie to reach assets of the debtor which he cannot recover in an action in his own name.—*Noonan v. Stein*, 136 P. 1181.

§ 13 (Or.) A judgment creditor of a partner who has no judgment against, and has not attached, the property of the other partner or the firm cannot maintain a creditors' bill against the firm or the second partner.—*Ryckman v. Manerud*, 136 P. 826.

CRIMINAL LAW.

See Abortion; Adultery; Assault and Battery, § 91; Bail, §§ 77-84; Bridges; Burglary; Conspiracy; Costs, § 308; Embezzlement; Escape; Extradition; False Pretenses; Forgery; Grand Jury; Habeas Corpus; Homicide; Husband and Wife, §§ 303-314; Indictment and Information; Intoxicating Liquors; Judgment, § 751; Jury, §§ 110, 131; Larceny; Lewdness; Libel and Slander, § 155; Pardon; Perjury; Rape; Robbery; Sodomy; Statutes, § 178; Witnesses, § 337.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 9 (N.M.) Under C. L. 1897, § 3422, common-law crimes are punishable in New Mexico.—*Ex parte De Vore*, 136 P. 47.

As used in C. L. 1897, § 3422, providing that the common law as recognized by the United States shall be the rule of practice, the word "recognized" means "known," and was intended to adopt the common law of crimes as known in the United States and the several states.—*Id.*

§ 15 (Okla.Cr.App.) Under the common law the repeal of a penal statute operated as a remission of all penalties for violation thereof before its repeal, unless the right to continue such prosecution was expressly reserved, but under Const. art. 5, and Comp. Laws 1909, § 2972, this rule is abrogated, and the right of further prosecution reserved to the state.—*Jones v. State*, 136 P. 182.

§ 27 (Colo.) Under Const. art. 18, § 4, an offense punishable by imprisonment in the penitentiary is a "felony," though the Legislature calls it a "high misdemeanor."—*People v. Godding*, 136 P. 1011.

In Const. art. 18, § 4, defining a felony as an offense punishable by death or imprisonment in the penitentiary, "and none other," the quoted words held not to limit felonies to offenses punishable exclusively by death or imprisonment.—*Id.*

IV. JURISDICTION.

§ 90 (Ariz.) Under Const. art. 2, § 24, Pen. Code 1901, §§ 708, 1187, and Civ. Code 1901, par. 2046, the criminal jurisdiction of a justice of the peace extends throughout the county.—*Branch v. State*, 136 P. 628.

§ 90 (Utah) Under Comp. Laws 1907, § 5132, relating to change of venue for prejudice in justices' courts, sections 239, 240, relating to criminal procedure in courts of city justices, and section 242, providing that, on disqualification of a city justice, the mayor shall appoint another justice to act, held, that defendant, who alleged prejudice of a city justice, was required to proceed under section 242, and not under section 5132.—*State v. First*

Judicial Dist. Court of Cache County, 136 P. 785.

Under either Comp. Laws 1907, § 5132, relating to criminal procedure in justices' courts and affidavit of prejudice, or section 242, relating to similar affidavits in the court of a city justice, held that, as the statutes did not expressly so declare, the filing of such an affidavit did not oust the jurisdiction of a city justice.—*Id.*

§ 98 (Ariz.) Where accused was arrested under a warrant issued on a complaint before a justice and was present at his trial and conviction before the justice, the justice had jurisdiction of his person.—*Branch v. State*, 136 P. 628.

§ 99 (Colo.) The filing of an information in the district court by the district attorney gives that court jurisdiction of the offense charged.—*Laffey v. People*, 136 P. 1031.

§ 101 (Okla.Cr.App.) In transferring a criminal case from a place of holding court in the Indian Territory to another place in the same district, it is not necessary that the seal of court be attached to the certificate of transfer.—*Washmood v. United States*, 136 P. 184.

§ 105 (Okla.Cr.App.) By moving change of venue accused waives the right to object that no seal was attached to the certificate of transfer from one court to another.—*Washmood v. United States*, 136 P. 184.

V. VENUE.**(B) Change of Venue.**

§ 125 (Kan.) When a trial judge is conscious that he has no prejudice against accused, he may refuse a change of venue sought on the ground that he is prejudiced.—*State v. Sexton*, 136 P. 901.

VI. LIMITATION OF PROSECUTIONS.

§ 147 (Colo.) Violation of Rev. St. 1908, § 345, relative to receipt of deposits by insolvent banks, held a "felony," and not a "misdemeanor," within section 1949, prescribing the limitations, in view of Const. art. 18, § 4.—*People v. Godding*, 136 P. 1011.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 260 (Utah) On certiorari on the ground that a city justice was ousted of jurisdiction of a prosecution by the filing of an affidavit for change of venue, so that the district court itself was without jurisdiction, proceedings had in a prosecution against relator for the same offense, and his satisfaction of that judgment, not raised by a plea below of former jeopardy, could not be considered.—*State v. First Judicial Dist. Court of Cache County*, 136 P. 785.

X. EVIDENCE.**(A) Judicial Notice, Presumptions, and Burden of Proof.**

§ 308 (Ariz.) The presumption of innocence extends to all persons accused of crime, and is not withdrawn during the trial, no matter how strong the evidence against him may be.—*Crowell v. State*, 136 P. 279.

§ 331 (Nev.) Notwithstanding Rev. Laws, § 7163, an accused person, relying on the defense of insanity, has the burden of proof, and must satisfy the jury by a preponderance of the evidence that he is insane, there being a presumption of sanity.—*State v. Nelson*, 136 P. 377.

(B) Facts in Issue and Relevant to Issues, and Res Gestae.

§ 339 (Utah) While evidence of the sound of voice is admissible for identification purposes, it should be reasonably positive and certain, and based upon some peculiarity of the voice

or upon sufficient previous knowledge by the witness thereof.—*State v. Karas*, 136 P. 788.

§ 351 (Okla.Cr.App.) In a prosecution for larceny, it was error to admit testimony that defendant's father had offered witness \$50 to testify for defendant, where there was no proof that such offer was made with defendant's knowledge or consent.—*Williams v. State*, 136 P. 778.

(C) Other Offenses, and Character of Accused.

§ 369 (Ariz.) The killing not having been done by accused, but by a third person, evidence that the third person had assaulted another man at the direction of accused is not admissible, where it did not appear that the killing was in any way connected with the assault in question.—*Crowell v. State*, 136 P. 279.

§ 369 (Or.) In a prosecution for committing the crime against nature with a male person, evidence that accused had committed the same offense with others than the person named in the indictment was not admissible.—*State v. McAllister*, 136 P. 354.

§ 371 (Colo.) In a prosecution for assault and battery, evidence tending to prove that defendant had tried to hire witness to assault the same person was admissible.—*Rice v. People*, 136 P. 74.

(D) Materiality and Competency in General.

§ 384 (Colo.) In a prosecution for assault and battery, where it appeared that trouble had continued between defendant and the person assaulted for about 7 years, evidence that defendant, about 17 months before the assault, had had it in his mind to have the assault made was not objectionable for remoteness.—*Rice v. People*, 136 P. 74.

(E) Best and Secondary and Demonstrative Evidence.

§ 404 (Cal.App.) A board from the floor, in its condition just after the homicide, with testimony of witnesses that they saw therein after the killing what appeared to be a bloody bullet hole about where deceased's head lay, is admissible.—*People v. Barrett*, 136 P. 520.

(F) Admissions, Declarations, and Hearsay.

§ 406 (Cal.App.) Where an eyewitness to the killing, who was not called, stated in accused's presence that he saw him shoot deceased, and accused asked him if he could state how far back accused was when he fired the shot, evidence of the witness' accusation and accused's reply thereto is admissible as an admission.—*People v. Bradley*, 136 P. 955.

§ 415 (Wash.) While in a prosecution for sodomy, evidence was admissible that prosecutrix, a child 2½ years of age, had complained about the time of the alleged act, evidence of the details as stated to witness by prosecutrix was not admissible, if not a part of the res gesta.—*State v. Beaudin*, 136 P. 137.

§ 417 (Ariz.) Evidence of a warning given by accused's wife to the wife of deceased is inadmissible; the statement being made in the absence and out of the hearing of accused.—*Crowell v. State*, 136 P. 279.

§ 417 (Ariz.) The prosecuting witness is not a party to the cause, and contradictory statements made by him when not under oath are material only for the purposes of impeachment.—*Young Chung v. State*, 136 P. 631.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 422 (Okla.Cr.App.) It was error to admit in evidence statements of a codefendant made in the absence of the defendant, where such declarations were not so connected with the of-

fense charged as to constitute a part of the res gesta.—*Payne v. State*, 136 P. 201.

§ 423 (Okla.Cr.App.) Where, in a murder case, a conspiracy is shown to have existed, statements and acts of each of the conspirators made or done pursuant to a common design may be proven against the others.—*Washmood v. United States*, 136 P. 184.

§ 424 (Ariz.) In view of Pen. Code 1901, § 925, allowing a severance in criminal trials, the declarations or acts of one co-conspirator, made or performed after the object of the conspiracy has been effected, are not admissible against the other.—*Crowell v. State*, 136 P. 279.

§ 424 (Okla.Cr.App.) Where, in a murder case, a conspiracy is shown to have existed, statements and acts of each of the conspirators said or done by them after the crime has been accomplished is admissible.—*Washmood v. United States*, 136 P. 184.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 430 (N.M.) In a prosecution for the larceny of a horse, compliance with Comp. Laws 1897, §§ 67, 107, requires only the introduction in evidence of a certified copy of the recorded brand, where the evidence of ownership depends on the brand.—*State v. Analla*, 136 P. 600.

§ 438 (Wash.) It was proper to admit a photograph of the witness robbed showing the injured condition of his neck, where the evidence showed that the photograph correctly showed its condition immediately after the assault, allowing for the ordinary change caused in five or six days.—*State v. Fateh-Mohamed*, 136 P. 676.

(I) Opinion Evidence.

§ 448 (Ariz.) Where it was claimed that accused had another kill deceased, evidence that accused's wife warned the wife of deceased to look out for her husband, and that there was going to be trouble, is inadmissible, being the conclusion of witness.—*Crowell v. State*, 136 P. 279.

§ 448 (Ariz.) The testimony of a witness asked to describe the wounds on the bodies of two persons killed in a fight that they were similar in nature and in his opinion made by the same instrument was a conclusion.—*Marinoni v. State*, 136 P. 626.

§ 476 (Wash.) Where in a prosecution for sodomy a physician had testified for the state that the condition of prosecutrix's person, discovered shortly after the alleged offense, might have resulted from the act charged, a physician testifying for accused could testify as to whether any other causes would produce the condition testified to.—*State v. Beaudin*, 136 P. 137.

(L) Evidence at Preliminary Examination or at Former Trial.

§ 542 (Okla.Cr.App.) Testimony given at a preliminary hearing is admissible upon proper proof of the witness' death.—*Washmood v. United States*, 136 P. 184.

§ 543 (Okla.Cr.App.) Where a witness testifying on a prior trial of a murder case cannot be found in the county at the subsequent trial, his testimony on the prior trial is admissible.—*Henry v. State*, 136 P. 982.

(M) Weight and Sufficiency.

§ 561 (Utah) The accused must be proven guilty by the evidence beyond a reasonable doubt.—*State v. Karas*, 136 P. 788.

§ 564 (Okla.Cr.App.) Evidence in an adultery case held sufficient to sustain the allegation of venue.—*Woody v. State*, 136 P. 430.

§ 564 (Wash.) Evidence held sufficient to prove the venue of the offense.—*State v. Chin Sam*, 136 P. 1146.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 576 (Kan.) As used in Gen. St. 1909, § 6800, providing for the discharge of a defendant not brought to trial before the end of the third term, unless the delay is caused by want of "time to try the cause," at such term, the phrase quoted refers to the time that can be reasonably given for trial, consistent with an orderly and diligent dispatch of business.—*State v. Hecht*, 136 P. 251.

At the hearing of a motion for discharge under Gen. St. 1909, § 6800, of a defendant not brought to trial before the end of the third term, affidavits that the delay was not occasioned by want of time to try the cause at such term were properly considered, though the court had previously continued the case because of the illness of the county attorney.—*Id.*

§ 586 (Nev.) The question of continuance in criminal cases is always within the sound discretion of the trial court.—*State v. Nelson*, 136 P. 377.

§ 593 (Okla. Cr. App.) Absence of leading counsel for accused is not ground for continuance where he is duly represented by his other counsel.—*Payne v. State*, 136 P. 201.

§ 594 (Nev.) To entitle an accused to a continuance on the ground of the absence of witnesses it must appear that the witnesses are really material, that the accused has been guilty of no negligence, and that the attendance of the witnesses can be had at the time to which the trial is deferred.—*State v. Nelson*, 136 P. 377.

§ 594 (Okla. Cr. App.) Refusal of a continuance because of the absence of witnesses *held* error, where it appeared that due diligence was used to procure the attendance of such witnesses and that the facts proposed to be proved were material.—*Payne v. State*, 136 P. 201.

§ 594 (Okla. Cr. App.) Refusal of a continuance *held* not error where it appeared improbable that the absent witness would swear to the facts stated in defendant's affidavit and defendant was not tried until more than one year after indictment.—*McCarty v. State*, 136 P. 1122.

§ 603 (Nev.) An affidavit for a continuance on the ground of the absence of material witnesses, which only shows that subpoenas had been placed in the hands of the sheriff, shows the very slightest diligence.—*State v. Nelson*, 136 P. 377.

Where an affidavit showed that there was another witness by whom the same facts could be proven, it was not an abuse of discretion to refuse the continuance.—*Id.*

An affidavit *held* insufficient to show that plaintiff was entitled to the continuance, or that there was any reasonable ground for the belief that the attendance of the witnesses could be procured at a subsequent term.—*Id.*

§ 603 (N.M.) The supporting affidavits should show materiality of the facts which accused claims the absent witness will substantiate.—*State v. Analla*, 136 P. 600.

The affidavit was fatally defective where it failed to aver the truth of the facts which an absent witness would substantiate, or defendant's belief that such facts were true.—*Id.*

§ 603 (Okla. Cr. App.) It was not error to refuse a continuance where accused failed to show that a precept had been filed or subpoenas served upon absent witnesses, and he did not state that the witnesses were not absent through his procurement.—*Romine v. State*, 136 P. 775.

A motion for a continuance should show diligence on the part of accused to procure the attendance of absent witnesses.—*Id.*

§ 611 (Kan.) It is not error to deny an application for continuance because of defendant's illness, based upon conflicting evidence.—*State v. Sexton*, 136 P. 901.

XII. TRIAL.**(A) Preliminary Proceedings.**

§ 622 (Kan.) Where defendants, charged with burglary, first moved for a severance after denial of a motion for continuance and after the jury had been called and sworn and the case stated by the county attorney, denial of such motion was not an abuse of discretion; the right to a severance under Gen. St. 1909, § 6797, having been waived by the delay.—*State v. Madden*, 136 P. 327.

§ 622 (Okla. Cr. App.) It was error for the court on its own motion, and without any request of the county attorney, to order the severance provided for by Rev. Laws 1910, § 5878.—*Payne v. State*, 136 P. 201.

(B) Course and Conduct of Trial in General.

§ 636 (Kan.) A defendant at liberty on a bond cannot, by voluntarily leaving the courtroom, nullify the proceedings or impair the validity of a verdict against him in his absence.—*State v. Bland*, 136 P. 947.

§ 636 (Okla. Cr. App.) It is not necessary that accused be present on argument and submission of motions for change of venue, for continuance, or for new trial.—*Henry v. State*, 136 P. 982.

§ 636 (Wash.) Under Rem. & Bal. Code, § 2145, it was fatal error to give an instruction to the jury in accused's absence.—*State v. Beaudin*, 136 P. 137.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 696 (Cal. App.) Accused cannot predicate error on the refusal of the court to strike out alleged incompetent evidence, admitted without objection and under the stipulation of accused's counsel as to the mode of admission.—*People v. Bradley*, 136 P. 955.

(E) Arguments and Conduct of Counsel.

§ 706 (Cal.) Prosecuting attorney, in trial of railroad policeman for homicide, by cross-examining witness as to brutal acts of accused, and offering to admit evidence of his record, if the prosecution would be allowed to prove such acts, which it made no attempt to do, *held* guilty of misconduct, which required a reversal where there was grave doubt, under the evidence, as to accused's guilt.—*People v. Fleming*, 136 P. 291.

§ 719 (Cal.) On trial of railroad policeman for homicide, statement of prosecuting attorney in argument that the railroad company tried to bribe the prosecution's witness, based on no evidence except hearsay evidence which had been stricken out, *held* improper.—*People v. Fleming*, 136 P. 291.

§ 723 (Cal. App.) In a prosecution for attempting to dynamite a building, argument of prosecuting attorney that the jury could not sleep quietly if they turned defendant loose, and that, if they did turn him loose, the attorney hoped they would "have the experience we had," *held* not proper.—*People v. Warr*, 136 P. 304.

§ 728 (Cal. App.) Improper argument of prosecuting attorney, the effect of which could have been removed by instructions, but none was requested, *held* not reversible error.—*People v. Warr*, 136 P. 304.

(F) Province of Court and Jury in General.

§ 741 (Utah) While the jury are the judges of the facts and the weight of the evidence and credibility of the witnesses, and evidence tending to prove an issue, however slightly, is admissible, it is a preliminary question for the court, and not the jury, to decide in every case whether the evidence will justify a verdict for the party adducing it.—*State v. Karsa*, 136 P. 788.

§ 762 (Or.) A statement by the court in a prosecution for the crime against nature that the court thought that only a person of abnormal sexual sense would be capable of committing it, so that, if the jury were satisfied that one was possessed of such abnormal sense they might infer that he had a motive, etc., *held* an improper statement of fact contrary to L. O. L. § 139.—State v. McAllister, 136 P. 354.

The court should not express an opinion on any fact in the case in charging the jury; it being for the jury to determine what the facts are.—Id.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 778 (Okl.Cr.App.) An instruction in a homicide case to find defendant not guilty if the evidence showed he was not present, and did not aid, abet, encourage, or advise the killing, *held* erroneous as placing the burden of proof upon defendant.—Washmood v. United States, 136 P. 184.

§ 778 (Wash.) A part of an instruction on the burden of proof and presumption of innocence, to the effect that, if accused "is the man who is to blame you must say so, if he is not to blame you must say so," *held* not erroneous as tending to destroy the legal presumption of innocence.—State v. Aurand, 136 P. 1139.

§ 804 (Kan.) A statement by the judge in response to a question from the jury that there would be nothing improper in a verdict recommending clemency, but that he would not say whether the recommendation would be considered, related only to the form of the verdict, and it was not necessary that it be in writing.—State v. Evans, 136 P. 270.

§ 823 (Okl.Cr. App.) An instruction in a homicide case which tended to tell the jury that they might convict, though they did not believe defendant guilty beyond a reasonable doubt, *held* cured by another instruction which told them that the evidence must not be susceptible of any other reasonable conclusion than that to a moral certainty the defendant was guilty as charged.—Washmood v. United States, 136 P. 184.

An instruction erroneously placing the burden of proof upon accused in a homicide case *held* not cured by other instructions in the usual form on the subjects of presumption of innocence and reasonable doubt.—Id.

(H) Requests for Instructions.

§ 824 (Cal.App.) If accused desires a charge upon any particular portion of the case, he should request it.—People v. Stirgios, 136 P. 957.

§ 826 (Kan.) Under Gen. St. 1909, §§ 6815, 6816 (Code Cr. Proc. §§ 236, 237), it was error to refuse a proper instruction on the ground that the request therefor came too late, where it was made before the jury retired.—State v. Bloom, 136 P. 951.

§ 829 (Cal.App.) Where the prosecution claimed that defendant was guilty of the particular crime charged or of no offense, and the jury were so told, and the instructions on that issue were full and fair, defendant could not complain of a refusal to charge that, while he might not be guilty of the greater offense, he might be guilty of a lesser offense.—People v. Warr, 136 P. 304.

§ 829 (Cal.App.) A requested instruction, in an embezzlement prosecution, on the defense that the property was appropriated openly and under claim of title *held* sufficiently covered by other instructions.—People v. Holt, 136 P. 501.

§ 829 (Kan.) It was not error to refuse requested instructions covered by those given.—State v. Chiles, 136 P. 225.

§ 829 (Okl.Cr.App.) It is not error to refuse instructions covered by those given.—Kincaid v. State, 136 P. 779.

§ 833 (Cal.App.) The order in which instructions are given is immaterial, so that accused cannot object that the court gave his instructions before those offered by the people were given.—People v. Holt, 136 P. 501.

(J) Custody, Conduct, and Deliberations of Jury.

§ 850 (Ariz.) On trial for robbery, deputy sheriff's testimony *held* not to show such prejudice against accused as rendered it improper to place him in charge of the jury.—Young Chung v. State, 136 P. 631.

A deputy was not disqualified to act as the jury bailiff merely because he arrested accused.—Id.

§ 854 (Ariz.) Under Pen. Code 1901, § 949, where no written request that the jury be kept together was made by counsel, court *held* not to have exhausted its discretion by ordering them to be kept together but to have power thereafter to permit them to separate.—Young Chung v. State, 136 P. 631.

Under Pen. Code 1901, § 949, trial court, after ordering jury to be kept together, *held* not to have abused discretion by permitting the bailiff to take one of the jurors apart from the others for the purpose of having a wounded arm dressed.—Id.

§ 855 (Cal.) It is the duty of the courts to see that public sentiment is not expressed to or in the presence of the jury in such a way as to be likely to influence their determination or to overawe the jury.—People v. Fleming, 136 P. 291.

§ 855 (Okl.Cr.App.) The statutory rule (Rev. Laws, § 5906), prohibiting conversation between the jurors and the officer in charge, will not prevent the officer from enforcing an order of the court in a criminal case by telling the jurors to keep out of the open windows of the jury room.—Horton v. State, 136 P. 177.

§ 858 (Cal.App.) Allowing the jury on retiring to take with them certain exhibits, articles offered in evidence, is not obnoxious to Pen. Code, § 1137, stating a list of papers the jury may take with them on retiring, making exception only of depositions.—People v. Barrett, 136 P. 520.

§ 868 (Ariz.) Objection that a deputy sheriff was disqualified to take charge of jury because he was a witness for the prosecution *held* waived where not made until after verdict.—Young Chung v. State, 136 P. 631.

(L) Waiver and Correction of Irregularities and Errors.

§ 895 (Okl.Cr.App.) Accused may waive any statutory or constitutional right when this can be done without affecting the rights of others or the jurisdiction of the court as to the subject-matter and without detriment to the public.—Henry v. State, 136 P. 982.

§ 898 (Wash.) Error in giving instruction to the jury in accused's absence, was not cured by recalling the jury and repeating the same instruction in accused's presence.—State v. Beaudin, 136 P. 137.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 918 (Kan.) Where, in a misdemeanor case, the court entered a plea of not guilty, and defendant's counsel cross-examined the witnesses, and defendant personally appeared after verdict and received sentence, *held*, that defendant's failure to appear and plead did not entitle him to a new trial.—State v. Sexton, 136 P. 901.

§ 923 (Okl.Cr.App.) For a prior expression of opinion by jurors, as to the guilt of accused, to be ground for new trial, it must appear that

neither accused nor his counsel knew the facts relative thereto when the jury was impaneled.—*Horton v. State*, 136 P. 177.

Where accused accepts a juror without examining him or challenging him for cause, he cannot object, as ground for new trial, that the juror had expressed an opinion.—*Id.*

§ 925 (Kan.) That some reference was made in the jury room as to the failure of the wife of the accused to testify *held* not ground for new trial, where it appeared that the jury gave no weight to the matter.—*State v. Evans*, 136 P. 270.

§ 932 (Ariz.) Under Pen. Code 1901, § 988, subds. 10, 11, statement of juror to the others that character witnesses were Chinese Masons and would naturally testify to such character, and of another juror that he knew they were Chinese Masons, *held* not to require a new trial where it was not shown that they affected the result.—*Young Chung v. State*, 136 P. 631.

§ 938 (Ariz.) Under Pen. Code 1901, § 988, subd. 13, a new trial will not be granted for new evidence of an impeaching and cumulative character not of a nature reasonably calculated to change the result.—*Young Chung v. State*, 136 P. 631.

§ 938 (Wash.) A new trial for newly discovered cumulative evidence was properly refused, where it was not shown that it could not have been discovered with reasonable diligence before the trial.—*State v. Fateh-Mohamed*, 136 P. 676.

§ 942 (Ariz.) Under Pen. Code, § 988, subd. 13, new trial *held* not to be granted to permit introduction of impeaching testimony which would have been inadmissible on the trial because no foundation was laid.—*Young Chung v. State*, 136 P. 631.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 996 (Kan.) The court can at any time make an order correcting a mistake in the record of a judgment in a criminal case.—*State v. Johnson*, 136 P. 940.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1024 (Kan.) Under Code Cr. Proc. § 283, subd. 3 (Gen. St. 1909, § 6857), the state may appeal from a decision refusing to allow attorney fees to the Attorney General for convictions for violations of the prohibitory law.—*State v. Bland*, 136 P. 947.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1036 (Cal.App.) Admission of evidence to defendant's statement to the examining magistrate that he was going to plead guilty in the superior court was not reviewable on appeal where defendant saved no objection thereto.—*People v. Warr*, 136 P. 304.

§ 1037 (Cal.) An appellate court will not consider a claim as to the misconduct of counsel in argument unless objection is made thereto at the time.—*People v. Fleming*, 136 P. 291.

§ 1038 (N.M.) The giving or refusing of instructions to which no objections were made by accused will not be reviewed.—*State v. Analla*, 136 P. 600.

§ 1043 (Cal.App.) Objections to the production of a transcript of shorthand notes taken at his preliminary examination *held* a waiver of other objections thereto, so that the defendant could not on appeal urge that the witness did not need it to refresh his recollection.—*People v. Warr*, 136 P. 304.

§ 1044 (Ariz.) Where, in answer to a proper question, the witness by an unresponsive answer gave incompetent testimony which should have been stricken on a proper motion, but no

such motion was made, error could not be based on the answer.—*Marinoni v. State*, 136 P. 626.

§ 1044 (Or.) A motion to quash the indictment and discharge accused should be filed in the trial court, and may not be made in the Supreme Court, under L. O. L. § 1625, and Supreme Court rule 4 (117 Pac. ix).—*State v. McAllister*, 136 P. 354.

§ 1054 (Cal.App.) Admission of evidence to defendant's statement to the examining magistrate that he was going to plead guilty in the superior court was not reviewable on appeal where defendant saved no exception thereto.—*People v. Warr*, 136 P. 304.

§ 1056 (N.M.) The giving or refusing of instructions to which no exceptions were saved by accused will not be reviewed.—*State v. Analla*, 136 P. 600.

(D) Record and Proceedings Not in Record.

§ 1086 (Cal.) To present question as to argument of counsel, *held*, that phonographic reporter's transcript of his notes, showing the argument, objection, and action of the trial court, should be brought to the appellate court.—*People v. Fleming*, 136 P. 291.

§ 1086 (Okla.Cr.App.) The errors in the instructions or argument of the prosecuting attorney, which are not fundamental, will not be reviewed, where the record does not show that proper objections and exceptions were reserved below.—*Woody v. State*, 136 P. 430.

§ 1098 (Okla.Cr.App.) On appeal defendant's counsel should attach a petition in error to the case-made as provided by law and the rules of court.—*Roberts v. State*, 136 P. 201.

§ 1099 (Okla.Cr.App.) A case-made not served upon the county attorney at the time fixed by the trial court will not be considered.—*Philips v. State*, 136 P. 776.

§ 1104 (Cal.) Under Pen. Code, §§ 1246, 1247, 1247a, 1247b, 1247c, 1247d, affidavits on a motion for a new trial *held* properly included in the clerk's transcript certified by him alone, whether or not they might have been included in the phonographic reporter's transcript certified by the trial judge.—*People v. Fleming*, 136 P. 291.

§ 1110 (Okla.Cr.App.) It is not necessary that accused be present when an investigation is made to correct a case-made or transcript; Rev. Laws 1910, § 5761, requiring defendant's presence in a felony case only at the trial.—*Philips v. State*, 136 P. 776.

Under Rev. Laws 1910, § 1771, authorizing appellate court to ascertain jurisdictional matters, and section 5248, relative to the effect of a case-made, where a statement in a case-made or transcript is questioned on appeal, the court may order an investigation and make proper corrections.—*Id.*

§ 1111 (N.M.) The appellate court is bound by the record, though counsel for accused contends in his brief that certain exceptions made and saved are not shown by the record.—*State v. Analla*, 136 P. 600.

§ 1119 (Ariz.) Misconduct of counsel could not be reviewed where the only record disclosing such misconduct was contained in the motion for a new trial, which was also designated as one of the assignments of error and verified only by appellant's attorney.—*Young Chung v. State*, 136 P. 631.

§ 1120 (Okla.Cr.App.) An objection that the court erred in refusing to admit an almanac in evidence cannot be reviewed where the purported almanac is not in the record.—*Narcome v. State*, 136 P. 783.

§ 1121 (N.M.) Where accused relies upon a failure of proof as to the ownership of an alleged stolen animal, he should present a complete transcript of all the evidence.—*State v. Analla*, 136 P. 600.

(E) Assignment of Errors and Briefs.

§ 1129 (Colo.) The statute, as well as the rules of the Supreme Court, require that an appellant shall file an assignment of errors relied on for reversal, and errors not assigned will not be reviewed where the state objects.—*Rice v. People*, 136 P. 74.

§ 1130 (Okla.Cr.App.) On appeal defendant's counsel should file briefs as provided by law and the rules of court.—*Roberts v. State*, 136 P. 201.

§ 1130 (Okla.Cr.App.) Where counsel rely upon Oklahoma cases in support of their propositions on appeal, they must in their briefs cite the page and volume of the Oklahoma Reports on which such cases can be found.—*Henry v. State*, 136 P. 982.

(G) Review.

§ 1134 (Cal.) Under Const. art. 6, § 4½, and notwithstanding section 4, appellate courts held required to consider the entire cause, including the evidence, in determining whether errors have resulted in a miscarriage of justice.—*People v. Fleming*, 136 P. 291.

In determining prejudicial effect of errors, affidavits on motion for new trial, showing the hostile feeling of the community, the publication of hostile newspaper articles, and the hostile feeling of those present at the trial, held to be considered.—*Id.*

§ 1134 (Okla.Cr.App.) Where the record clearly shows defendant's guilt and that he was deprived of no substantial right, matters of law will not be reviewed merely to settle abstract questions.—*Woody v. State*, 136 P. 430.

§ 1137 (Cal.) Cross-examination of witness for accused as to discreditable acts by accused, statements that such acts would be proved, and intimations that such evidence was excluded by the rules of evidence, held not invited by accused's counsel by asking such witness as to accused's record, nor by assenting to the prosecuting attorney's proposition that he be permitted to show such acts.—*People v. Fleming*, 136 P. 291.

§ 1141 (Okla.Cr.App.) Since error will never be presumed, it must affirmatively appear from the record to avail accused.—*Chappelear v. State*, 136 P. 978.

§ 1144 (Colo.) Where no reason for overruling a motion to quash was given, it will be presumed on appeal that the court acted upon a valid existing reason.—*Laffey v. People*, 136 P. 1031.

§ 1144 (Okla.Cr.App.) Where the record shows that accused was present when trial began but is silent as to his presence during the trial, it will be presumed that he was present throughout the trial.—*Henry v. State*, 136 P. 982.

§ 1151 (Nev.) Unless the trial court tribunal abuses its power on the question of continuance, its determination cannot be reviewed on appeal.—*State v. Nelson*, 136 P. 377.

§ 1152 (N.M.) The discretion conferred on the court by Laws 1905, c. 116, § 12, to return to the box the name of any juror who resides at too great a distance to render it expedient to summon him, will not be reviewed, in the absence of abuse.—*State v. Analla*, 136 P. 600.

§ 1159 (Ariz.) Where the question of malice aforethought was determined by the jury adversely to defendant, and there was sufficient competent evidence to support the verdict, the Supreme Court cannot interfere.—*Bennett v. State*, 136 P. 276.

§ 1159 (Ariz.) Under the law making the jury the sole judges of the credibility of the witnesses and the weight of their testimony, where, though the evidence is conflicting, there is substantial evidence supporting the verdict, it will not be disturbed.—*Young Chung v. State*, 136 P. 631.

§ 1159 (Cal.) Where there was testimony supporting finding of guilt, held, that credibility of witnesses was exclusively for the jury, although the evidence was unsatisfactory to an appellate court.—*People v. Fleming*, 136 P. 291.

§ 1159 (Colo.) Where the evidence in a prosecution for assault and battery was such that the jury might have either acquitted or convicted defendant, the court cannot say that the evidence did not warrant a conviction.—*Rice v. People*, 136 P. 74.

§ 1159 (Okla.Cr.App.) A conviction on conflicting evidence will not be disturbed.—*Jones v. State*, 136 P. 182.

§ 1160 (Ariz.) Where there is material evidence tending to prove guilt, and the trial court refuses to set the verdict aside, an appellate court will not reverse.—*Marinoni v. State*, 136 P. 626.

§ 1160 (Okla.Cr.App.) A finding of fact on a motion for new trial will not ordinarily be disturbed when reasonably supported by evidence.—*Horton v. State*, 136 P. 177.

§ 1166 (Nev.) Since the state could have prosecuted the offense of horse stealing by information, special injury will not result to accused by trying him upon an indictment, though one of the grand jurors who found it was a nonresident.—*McComb v. Fourth Judicial Dist. Court in and for Elko County*, 136 P. 563.

§ 1166½ (Kan.) A statement by the judge in the absence of defendant that the jury could return a verdict recommending clemency, but that he would not say whether it would be considered, held harmless, where made in response to a question by the jury, and where it did not appear that the jury were induced thereby to convict on an implied promise of leniency.—*State v. Evans*, 136 P. 270.

§ 1166½ (Okla.Cr.App.) A conviction will not ordinarily be set aside for disqualification of a juror, unless it appears from the whole case that accused was injured thereby.—*Horton v. State*, 136 P. 177.

§ 1168 (Okla.Cr.App.) Erroneous rulings on evidence are harmless where the legal evidence conclusively shows defendant's guilt.—*Woody v. State*, 136 P. 430.

§ 1169 (Cal.App.) Where the whole evidence as to defendant's guilt was practically uncontradicted, the error, if any, in the admission of evidence that he had stated that he would plead guilty in the superior court could not have been prejudicial.—*People v. Warr*, 136 P. 304.

§ 1169 (Cal.App.) If the overcoat worn by deceased when killed was immaterial and without any weight, its admission in evidence was harmless.—*People v. Barrett*, 136 P. 520.

§ 1169 (Colo.) In a prosecution for assault and battery arising out of a fight, evidence that during the afternoon, some time after the fight, defendant told a third person to assault the witness was so entirely irrelevant that the court could not say that it was prejudicial.—*Rice v. People*, 136 P. 74.

§ 1169 (Kan.) The admission of evidence, in a forgery case, of a photographic copy of a paper which itself had been introduced in evidence, is harmless, where the photograph was a true copy of the original.—*State v. Stickler*, 136 P. 329.

§ 1169 (Nev.) In a criminal prosecution, the improper admission of evidence of the description of the criminal, given to the arresting officer by a third person, was harmless, where it appeared that the officer received and acted on a description given directly to him by the prosecutrix.—*State v. Nelson*, 136 P. 377.

§ 1169 (Okla.Cr.App.) Error in the admission of evidence is harmless, where defendant as a witness admits the truth of such evidence.—*Henry v. State*, 136 P. 982.

§ 1170 (Kan.) In a prosecution for libeling a fraternal beneficiary society, the erroneous exclusion of reports made by the society to the superintendent of insurance was harmless, where such reports would not have strengthened defendant's case.—*State v. Chiles*, 136 P. 225.

§ 1171 (Okla. Cr. App.) A statement of the prosecutor in his argument *held* harmless where the evidence proved guilt beyond all reasonable doubt.—*Kincaid v. State*, 136 P. 779.

§ 1172 (Colo.) In a prosecution for assault and battery, error, if any, in an instruction as to the presumption of natural and ordinary consequences of words and gestures *held* not prejudicial.—*Rice v. People*, 136 P. 74.

§ 1174 (Cal. App.) Allowing the jury on retiring to take with them certain articles admitted in evidence, if error, cannot be complained of; it not appearing any use was made thereof which could have prejudiced defendant.—*People v. Barrett*, 136 P. 520.

§ 1174 (Okla. Cr. App.) That the sheriff, upon being instructed to tell the jurors in a criminal case to keep away from the open windows of the jury room, told them to get out of the windows and "get together and reach a verdict" *held* harmless.—*Horton v. State*, 136 P. 177.

(H) Determination and Disposition of Cause.

§ 1182 (Okla. Cr. App.) Where no petition in error is attached to the case-made, no briefs filed, and no appearance made for oral argument, such appeal may be either dismissed or the judgment affirmed in the appellate court's discretion.—*Roberts v. State*, 136 P. 201.

§ 1183 (Okla. Cr. App.) Under Rev. Laws 1910, § 6003, the Criminal Court of Appeals may modify any judgment by reducing the sentence.—*Williams v. State*, 136 P. 599.

§ 1186 (Cal.) Under Const. art. 6, § 4½, evidence, though technically sufficient to sustain a verdict, may be so unsatisfactory as to require a reversal for what would otherwise be an absolutely harmless error.—*People v. Fleming*, 136 P. 291.

Under Const. art. 6, § 4½, appellate courts are necessarily vested with a large discretion in determining the effect of errors in criminal cases, and each case must depend upon its own circumstances.—*Id.*

§ 1186 (Kan.) In a prosecution for libeling a fraternal beneficiary society by charging it with dishonesty, evidence that the society's plan of insurance was unwise, and that it would be unable to meet its obligations, was admissible only on the theory that the plan was so impractical as to constitute a swindle, and hence, under Gen. St. 1909, § 6867, its exclusion was harmless, where the issue whether the society was fleecing the people was fully tried.—*State v. Chiles*, 136 P. 225.

§ 1186 (Kan.) Under Gen. St. 1909, § 6867 (Code Cr. Proc. § 293), error, if any, in permitting an information for robbery to be amended so as to state the ownership of the property was not ground for reversal, where defendant was given an opportunity to plead to the new information.—*State v. Moberly*, 136 P. 324.

§ 1186 (Okla. Cr. App.) It was not ground for the reversal of a conviction of adultery that such conviction would "mean the ruination of two families."—*Woody v. State*, 136 P. 430.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1206 (N.M.) Common-law penalties are not inflicted for common-law crimes, but the punishment therefor is prescribed by C. L. 1897, § 1054.—*Ex parte De Vore*, 136 P. 47.

As used in C. L. 1897, § 1054, providing the punishment for a criminal convicted of a felony for which no punishment is "prescribed by law," the phrase quoted means prescribed by statute law, not by common law.—*Id.*

CROPS.

See Chattel Mortgages, § 138; Damages, § 112; Landlord and Tenant, §§ 229, 260, 326, 328.

CROSS-BILL.

See Pleading, § 148.

CROSS-EXAMINATION.

See Witnesses, §§ 268-286, 330, 349, 388, 405.

CROSSINGS.

See Railroads, §§ 300-350.

CRUELTY.

See Divorce, § 27.

CUSTODY.

See Trial, §§ 305, 311.

CUSTOMS AND USAGES.

See Master and Servant, § 270.

§ 17 (Kan.) Parol evidence was inadmissible to vary the terms of a lease, in respect to the repair of fences, by showing a local custom in respect thereto.—*Eckhardt v. Taylor*, 136 P. 218.

DAMAGES.

See Death, §§ 88, 99; Eminent Domain, §§ 90-148; Guaranty, §§ 36, 75; Logs and Logging; Malicious Prosecution, §§ 52, 68, 69; New Trial, §§ 77, 128; Sales, §§ 418, 442; Trespass, §§ 19, 43.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 40 (Or.) Where defendant compensated certain contractors for injuries to a building in process of construction by an excessive explosion, defendant was not further liable for loss of profits which the contractors expected to make on the completion of their contract.—*Winniford v. MacLeod*, 136 P. 25.

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 62 (Wash.) In action for obstructing street, demurrage charge on lumber which plaintiff was unable to haul to its factory *held* not recoverable in the absence of evidence of the reasonable charge for storage if removed from the cars, or the additional cartage.—*Spokane Casket Co. v. Mitchell*, 136 P. 481.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 79 (Colo. App.) If there is a doubt as to whether a forfeiture is intended as liquidated damages or a penalty, and the damage is easily computed or readily reduced to a certain amount, the courts will construe the provision as a penalty.—*Wilson v. Agnew*, 136 P. 96.

§ 81 (Kan.) A clause in a contract providing that a certain sum placed with a stakeholder by each party should be forfeited, by the one breaching the contract, *held* a provision for forfeiture, and unenforceable, where the amount of the stake was fixed without reference to the probable damages, which could be readily computed.—*Benfield v. Croson*, 136 P. 262.

V. EXEMPLARY DAMAGES.

§ 87 (Kan.) Exemplary damages are imposed by way of punishment in cases characterized by malice, fraud, or wanton disregard of plaintiff's rights, and not because of any special merit in plaintiff's case.—*Stalker v. Drake*, 136 P. 912.

§ 87 (Wash.) Exemplary damages are not recoverable in a statutory action for damages unless the statute expressly authorizes them.—*Longfellow v. City of Seattle*, 136 P. 855.

VI. MEASURE OF DAMAGES.

(B) Injuries to Property.

§ 112 (Okl.) The measure of damages for destruction of a growing crop is the value of the crop in the condition in which it was at the time of its destruction.—*Missouri, O. & G. Ry. Co. v. Brown*, 136 P. 1117.

In determining the value of a growing crop at the time of its destruction, the difference between the probable value of such crop, had it matured and been harvested, and the cost of finishing the cultivation, and harvesting, and transportation to market will ordinarily represent the value at the time of loss.—*Id.*

The value of labor bestowed on a growing crop at the time of its wrongful destruction does not ordinarily afford a proper measure of damages.—*Id.*

(C) Breach of Contract.

§ 124 (Mont.) Under the express provision of Rev. Codes, § 6048, the measure of recovery upon defendant's wrongful act preventing a complete performance of a contract is the difference between the contract price and the cost to plaintiff of doing the work; but, if plaintiff could not reasonably expect any profit from its completion, he was not damaged.—*McFarland v. Welch*, 136 P. 394.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132 (Wash.) Verdict of \$6,000 for personal injuries necessitating surgical operations, indefinitely impairing plaintiff's health, and necessitating an expense of over \$1,000, held not excessive.—*Erickson v. Washington-Oregon Corporation*, 136 P. 376.

§ 132 (Wash.) In an action for personal injuries, where plaintiff was practically a physical wreck, and in constant pain, and his earning capacity reduced about \$3 a day, a verdict for \$10,000 held not excessive.—*Frostman v. Stirrat & Goetz Inv. Co.*, 136 P. 1144.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 163 (Cal.App.) A party suing for damages sustained through another's breach of a contract must show what damages he has actually sustained.—*Newmire v. Ford*, 136 P. 504.

§ 163 (Mont.) Plaintiff, in an action to recover damages upon defendant's wrongful act preventing the completion of a contract, must show that he was injured thereby, and the amount or extent of such injury.—*McFarland v. Welch*, 136 P. 394.

§ 184 (Wash.) Assuming that overhead charges could be recovered for obstruction of street necessitating closing of factory, they could not be recovered when items on which there was no loss were not segregated in the evidence.—*Spokane Casket Co. v. Mitchell*, 136 P. 481.

(C) Proceedings for Assessment.

§ 208 (Wash.) Where the jury might well have found under the evidence that operations on plaintiff's ovaries were necessitated by personal injuries rather than by the previous cystic condition thereof, the allowance of damages for injuries thereto was for the jury.—*Erickson v. Washington-Oregon Corporation*, 136 P. 376.

§ 217 (Or.) Where repairs to a building made necessary by defendant's negligent blasting according to plaintiff's testimony, required an

outlay of \$850, an instruction authorizing a recovery of such sum, and also for plaintiff's loss of time occasioned by the blast, was erroneous as authorizing a double recovery.—*Winniford v. MacLeod*, 136 P. 25.

DAYS OF GRACE.

See Usury, § 50.

DEATH.

See Appeal and Error, §§ 1048, 1140; Election of Remedies; Evidence, § 127; Landlord and Tenant, §§ 164, 169; Master and Servant, §§ 99, 286; Street Railroads, §§ 98, 113, 114.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 9 (Wash.) Laws 1909, c. 50, § 8, authorizing a pension equal to half the salary of a fireman leaving a widow and children under 16 years of age, did not impliedly repeal the general statute giving a right of action for wrongful death.—*Longfellow v. City of Seattle*, 136 P. 855.

§ 11 (Mont.) At common law there was no civil right of action for death caused by wrongful act.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

§ 15 (Mont.) The right of action for death by wrongful act or neglect, given by Rev. Codes, § 6486, to decedent's heirs or personal representatives, can only be maintained if decedent could have maintained an action had he survived.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

§ 21 (Mont.) In an action for death by a negligent act, which is also a crime, defendant is not limited to the defenses available in a criminal prosecution for the same offense, enumerated by Rev. Codes, § 9209, but may make all defenses available in an ordinary action for negligence.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

§ 23 (Mont.) If one employed to open and close the cage doors of a shaft mine cage, pursuant to Rev. Codes, § 8536, neglected his duties while being lowered or hoisted, his heirs could not recover against the employer for his death therefrom.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

(D) Pleading and Evidence.

§ 60 (Cal.) In an action for the wrongful death of a husband and father, evidence of subsequent illnesses sustained by members of the family is not admissible, notwithstanding the fact that permanent disabilities of the children dependent on deceased for support may be shown.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

§ 68 (Cal.App.) In an action for wrongful death, it was not error to permit a witness to testify that decedent was kind and loving to his minor children.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 69 (Cal.App.) In an action for wrongful death, decedent's daughter was properly permitted to testify that the surviving family consisted of widow, the witness, and three minor children.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

(E) Damages, Forfeiture, or Fine.

§ 88 (Cal.App.) Loss of society, comfort, and care to decedent's wife and children, as well as their support, may be considered in so far as they affect the question of pecuniary loss.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 99 (Cal.App.) A verdict of \$20,000 for the death of a married man 25 years of age, of good habits, and 38 years' life expectancy, earn-

ing \$20 a week, *held* not so excessive as to indicate passion and prejudice.—*McGrory v. Pacific Electric Ry. Co.*, 136 P. 303.

§ 99 (Cal.App.) In an action for wrongful death, a verdict awarding plaintiff \$8,000 *held* not excessive.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

DEBTOR AND CREDITOR.

See Partnership.

DECLARATION.

See Pleading.

DECLARATIONS.

See Criminal Law, §§ 422-424; Evidence, §§ 271-282.

DECREE.

See Divorce, § 171.

DEDICATION.

I. NATURE AND REQUISITES.

§ 1 (Nev.) A dedication of land for public purposes is simply a devotion of it, or an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact.—*Shearer v. City of Reno*, 136 P. 705.

§ 19 (Nev.) By filing a plat as an addition to a town, and advertising and selling lots, the designated streets, avenues, and public parks become dedicated.—*Shearer v. City of Reno*, 136 P. 705.

§ 29 (Nev.) Where there is nothing beyond the owner's declaration, and there is no acceptance thereof by the public, the dedication may be revoked at the pleasure of the owner.—*Shearer v. City of Reno*, 136 P. 705.

If nothing beyond a declaration is made, and no interest in the property is acquired by the third person, the dedication may be recalled at the pleasure of the owner; but, where contracts are made upon the supposed appropriation, the dedication becomes irrevocable.—*Id.*

The irrevocable character of a dedication, after sales made with reference thereto and induced thereby, is not affected because the property is not at once subjected to the uses designed.—*Id.*

§ 31 (Nev.) No formal acceptance of a dedication by the public authorities is necessary to preclude the original owner from revoking it, although the formal acceptance by the public authorities may be necessary to impose upon them the duty of protecting the property, and keeping it in a condition to meet the uses intended.—*Shearer v. City of Reno*, 136 P. 705.

II. OPERATION AND EFFECT.

§ 51 (Wash.) A plat of a street, part of a city addition, *held* to show an intention on the part of the dedicators to include a triangular strip of land between high-tide line and the north boundary of a turn in the street.—*Olson Land Co. v. City of Seattle*, 136 P. 118.

§ 53 (Or.) Property dedicated to the public cannot be sold by the board of trustees and recorder of the town to which it has been dedicated.—*Haberly v. Treadgold*, 136 P. 334.

§ 63 (Nev.) Notwithstanding a city council might be bound by its order on petition of the property owners, changing the northerly boundary line of an avenue, such order in no way added anything to the alleged title of an intruder upon the land formerly included within and dedicated as the avenue.—*Shearer v. City of Reno*, 136 P. 705.

Where the owner of land dedicated part of it as an avenue by filing a map, and selling lots with reference thereto, a mere intruder upon land originally within the boundaries of an avenue who fenced and built thereon acquires no right as against the public.—*Id.*

§ 63 (Wash.) Where a triangular piece of ground in controversy had been dedicated for a street and was within the street lines as shown on the plat thereof and was necessary to afford access to tide water, the fact that it had never been improved or used with the rest of the street did not constitute an automatic vacation thereof under Rem. & Bal. Code, § 3803.—*Olson Land Co. v. City of Seattle*, 136 P. 118.

§ 65 (Nev.) Where city authorities close an avenue dedicated as such, the right to it reverts to the dedicator's estate, and not to an intruder thereon.—*Shearer v. City of Reno*, 136 P. 705.

DEEDS.

See Acknowledgment, §§ 48, 57; Adverse Possession, §§ 79, 84; Cancellation of Instruments; Ejectment, § 9; Evidence, §§ 370, 461; Mortgages; Remainders; Specific Performance, § 96; Taxation, § 789; Trusts, §§ 21, 70; Vendor and Purchaser, §§ 76, 150, 232, 243; Waters and Water Courses, § 156.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 7 (Kan.) As used in Gen. St. 1888, c. 22, § 3, authorizing conveyances by deed, the words "conveyances of land" mean the land itself in fee simple, and "any other estate or interest therein" includes estates of freehold and less than freehold, etc., and any kind a grantor may choose to invent consistent with public policy.—*Miller v. Miller*, 136 P. 953.

(D) Delivery.

§ 54 (Kan.) There must be an actual or constructive delivery of the deed to the grantee.—*Sanderson v. Sanderson*, 136 P. 791.

§ 59 (Kan.) The recording of a deed by the grantor makes it effective as to all persons benefited by it who do not dissent.—*Miller v. Miller*, 136 P. 953.

(E) Validity.

§ 68 (Okla.) A deed executed by a person unable to know the nature of his act is voidable by the person himself, though the incompetency be produced by voluntary intoxication.—*Coody v. Coody*, 136 P. 754.

§ 76 (Kan.) In a voluntary conveyance of land to the grantor's son, remainder to others, *held*, that the provision for the son was not so complicated with the other gifts specified that the son's refusal to accept destroyed such other gifts.—*Miller v. Miller*, 136 P. 953.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 93 (Kan.) A grantor's intention is to be ascertained from the language of the deed.—*Miller v. Miller*, 136 P. 953.

§ 109 (Kan.) In case of doubt the interpretation of a deed may be aided by evidence of the grantor's circumstances and relation to the grantees.—*Miller v. Miller*, 136 P. 953.

(C) Estates and Interests Created.

§ 133 (Kan.) A deed of a life estate, with remainder over to the life tenant's heirs, could vest nothing in the life tenant's children, unless they outlived their father.—*Miller v. Miller*, 136 P. 953.

IV. PLEADING AND EVIDENCE.

§ 211 (Or.) Evidence held to sustain the validity of a deed attacked for fraud.—*Cartwright v. Moffett*, 136 P. 881.

DE FACTO CORPORATIONS.

See Corporations, § 28.

DE FACTO OFFICERS.

See Officers, § 42.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Judgment, §§ 106-155.

DELIVERY.

See Carriers, §§ 82-94; Deeds, §§ 54, 59; Es-
crows; Fraudulent Conveyances, § 135;
Sales, §§ 82, 151-181; Vendor and Purchas-
er, § 282.

DEMAND.

See Trover and Conversion, § 9.

DEMURRER.

See Pleading, §§ 194-214, 418.

DEPOSITIONS.

§ 39 (Cal.App.) Under Code Civ. Proc. §
2024, on a stipulation for the taking of de-
positions by F., "a notary public," the court was
justified in treating that term as one of de-
scription and to issue the commission to F. not
in his official capacity but as the person agreed
upon.—Henry v. Caswell, 136 P. 728.

§ 76 (Cal.App.) Where a commission to take
depositions was issued under Code Civ. Proc. §
2024, to one F. as an unofficial person, his seal
as notary need not be attached to the certi-
cate.—Henry v. Caswell, 136 P. 728.

DEPOSITS.

See Banks and Banking, §§ 140-154.

DEPOSITS IN COURT.

§ 12 (Kan.) An order of a district court, di-
recting the clerk to pay certain money to a per-
son named is a final order, and erroneous,
where the record showed that the fund never
came into the hands of the clerk, but into those
of her predecessor, and was paid out by him
under order of the court.—Sanderson v. Sander-
son, 136 P. 791.

DEPOTS.

See Carriers, §§ 286, 347; Railroads, § 274.

DESCENT AND DISTRIBUTION.

See Aliens, §§ 9, 10; Escheat; Executors and
Administrators; Wills.

**I. NATURE AND COURSE IN GEN-
ERAL.**

§ 1 (Idaho) Under Rev. Codes, § 5700, "suc-
cession" is the coming in of another to take
the property of one who dies without dispos-
ing of it by will.—Connolly v. Probate Court in
and for Kootenai County, 136 P. 208.

**II. PERSONS ENTITLED AND THEIR
RESPECTIVE SHARES.****(A) Heirs and Next of Kin.**

§ 51 (Okla.) That a husband murdered his
wife did not preclude him from inheriting her
estate. Comp. Laws 1909, §§ 8984, 8985.—
Holloway v. McCormick, 136 P. 1111.

**III. RIGHTS AND LIABILITIES OF
HEIRS AND DISTRIBUTIBLES.****(A) Nature and Establishment of Rights
in General.**

§ 71 (Colo.) A petition by a surviving husband
to have the court declare him entitled to one-

half of the property of his deceased wife, filed
under Rev. St. 1908, §§ 7050, 7051, must be dis-
missed where the only question he desired ad-
judicated was the validity of a postnuptial
agreement under which other persons were
claiming he was not entitled to share in his
wife's estate.—Doyle v. Naughton, 136 P. 73.

§ 84 (Or.) Where title to land in controversy
was in certain heirs, some of who were minors,
authority given by the oldest heir alone, who
was of age, to an agent to sell the property
could affect only his own interest and did not
bind the other heirs.—Haberly v. Treadgold,
136 P. 334.

DESERTION.

See Husband and Wife, §§ 303-314.

DETECTIVES.

See Counties, § 63.

DILIGENCE.

See Specific Performance, § 96.

DIRECTING VERDICT.

See Trial, §§ 178.

DISCHARGE.

See Master and Servant, § 33.

DISCOVERED PERIL.

See Negligence, § 83.

DISCRETION OF COURT.

See Appeal and Error, §§ 966-979; Attorney
and Client, § 140; Continuance, § 7; Crimi-
nal Law, §§ 586, 1151, 1152; Divorce, §
249; Exceptions, Bill of, § 40; Jury, § 92;
New Trial, §§ 6, 70; Quietling Title, § 47;
Witnesses, §§ 240, 349.

DISMISSAL AND NONSUIT.

See Appeal and Error, §§ 773, 781; Descent
and Distribution, § 71; Divorce, §§ 139½;
Equity, § 42; Justices of the Peace, § 159;
Trial, §§ 139, 159, 165.

I. VOLUNTARY.

§ 19 (Cal.App.) In an action to quiet title,
as authorized by Code Civ. Proc. § 738, de-
fendant may ask affirmative relief either by
way of counterclaim or by cross-complaint on
the ground that such claim, based upon suffi-
cient facts, would confer the protection of
Code Civ. Proc. § 581, forbidding a dismissal
by plaintiff before trial, where a counterclaim
has been prayed for or affirmative relief sought.
—Brooks v. White, 136 P. 500.

§ 19 (Kan.) In a suit to have two deeds ad-
judged mortgages and for an accounting, where
in judgment was entered declaring the deeds to
be mortgages and the hearing on the account-
ing was continued, plaintiffs' motion to dis-
miss their action for accounting was properly
overruled, where it appeared that defendant
had rights which should be determined in the
action in which the deeds were declared to
be mortgages.—Holmes v. Holt, 136 P. 246.

§ 19 (Or.) In a suit to restrain the mainte-
nance of a partition fence, where defendant fil-
ed a counterclaim for damages by surface wa-
ters, plaintiff's motion to dismiss was properly
denied.—Tokstad v. Daws, 136 P. 844.

§ 24 (Colo.) Where a party defendant has
been improperly joined, it is the duty of the
court to permit the plaintiff to dismiss as to
such defendant.—McKeown v. Lawrence, 136
P. 1014.

II. INVOLUNTARY.

§ 53 (Colo.) In action for breach of an agreement for a building loan secured by plaintiff's note and deed of trust, asking for specific performance, or in the alternative for rescission, held, that defendant should have been required to plead and that the dismissal of the proceeding was error.—McKeown v. Lawrence, 136 P. 1014.

§ 60 (Cal.App.) Code Civ. Proc. § 581a, does not prevent the court, in its discretion, from dismissing, for delay in prosecution, an action in which such service and return has not been made, though less than three years has elapsed.—Caldwell v. Regents of University of California, 136 P. 731.

Statement that the time had been used in efforts, successful before motion to dismiss, to raise money to tender defendant is not an excuse for delaying the serving of summons 19 months after the filing of the complaint, where the action to quiet title was commenced ten years after accrual of the cause of action and lis pendens recorded.—Id.

DISQUALIFICATION.

See Judges.

DISSOLUTION.

See Corporations, §§ 617, 630.

DISTRICT AND PROSECUTING ATTORNEYS.

See Costs, § 308; Criminal Law, §§ 706-723; Trial, § 306.

DISTRICTS.

See Waters and Water Courses, §§ 224, 226.

DIVIDENDS.

See Corporations, § 157.

DIVORCE.

See Process, § 158.

II. GROUNDS.

§ 27 (Cal.App.) Acts of a husband causing grievous bodily injury and mental suffering, and making it dangerous for the wife to live with him, held to constitute extreme cruelty under Civ. Code, § 94.—Knapp v. Knapp, 136 P. 719.

§ 27 (Okl.) The intention and ability of the accused spouse to inflict the extreme cruelty alleged, and the susceptibility and provocative disposition of the complaining spouse, and the demeanor of the parties at the trial, are matters proper to be considered.—Wells v. Wells, 136 P. 738.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(A) Jurisdiction, Venue, and Limitations.**

§ 62 (Or.) L. O. L. § 396, providing that suits for dissolution of marriage may be commenced and tried in any county in which either party resides, is mandatory, and hence, where both parties resided in M. county, a suit commenced in C. county, where neither had ever resided, gave the court no jurisdiction.—Hubner v. Hubner, 136 P. 667.

§ 63 (Or.) A wife, whose husband by his misconduct has rendered life with him unbearable, may acquire a separate domicile, based on which she may institute a divorce suit.—Miller v. Miller, 136 P. 15.

(D) Evidence.

§ 109 (Or.) Without a showing by affidavit that neither of the parties to a divorce suit resided in the county in which the suit was

brought, so that service of summons in another county would be valid, it would be presumed that one of the parties resided in the county of suit.—Hubner v. Hubner, 136 P. 667.

§ 124 (Or.) That one after registering as a voter in Oregon went into another state and there voted is not conclusive of his domicile there, as regards jurisdiction of an action for divorce; L. O. L. § 3313, being a rule governing judges of election in determining right to vote in the state.—Miller v. Miller, 136 P. 15.

Evidence, in a divorce suit as to temporary purpose of absence and intention to return, held to show the domicile of the parties, who, having had a permanent home in the state, went to another state and then returned, to be in the state, within L. O. L. § 509.—Id.

§ 125 (Or.) Statement of a wife in a complaint for divorce, which she caused to be prepared in one state, that she was a resident thereof is not conclusive against her in a subsequent divorce suit, instituted by her in another state, but is only an admission against interest.—Miller v. Miller, 136 P. 15.

(E) Dismissal, Trial or Hearing, and New Trial.

§ 139½ (Or.) Where it was shown by affidavit that neither of the parties resided in the county, service made in another county should be quashed and the suit dismissed; as the defect of jurisdiction could not be cured by any amendment while defendant objected thereto.—Hubner v. Hubner, 136 P. 667.

(F) Judgment or Decree.

§ 171 (Cal.App.) A wife having sued for divorce for alleged misconduct of her husband with another, but the court having found the charge untrue and dismissed the action, the decree was res judicata and a bar to the wife's right to rely on the same facts as justifying her desertion in a subsequent suit for divorce by the husband on that ground.—Civille v. Civille, 136 P. 503.

(G) Appeal.

§ 184 (Okl.) Where the evidence is such that the demeanor and appearance of the parties at the trial might be effective in determining the sufficiency of the evidence to prove extreme cruelty, the decree will not be disturbed on appeal.—Wells v. Wells, 136 P. 738.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 249 (Cal.App.) Under Civ. Code, § 146, where a divorce is rendered for extreme cruelty, the disposition of the community property is in the discretion of the trial court.—Knapp v. Knapp, 136 P. 719.

§ 286 (Cal.App.) Where the court found certain property to be community property, and set aside two-thirds to defendant and one-third to plaintiff, wife, it must be assumed, in the absence of evidence, that the facts warranted such distribution.—Knapp v. Knapp, 136 P. 719.

In view of Civ. Code, § 146, which contemplates that a decree of divorce shall dispose of the community property only, a failure of the trial court to accord all her rights to the plaintiff, wife, in her separate property could not be complained of by the defendant.—Id.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 295 (Or.) The question of support of the children may be left open by the decree of divorce, there being no evidence as to what is proper or requisite therefor; L. O. L. § 514, authorizing modification of a divorce decree, at any time after it is given, as to support of the children.—Miller v. Miller, 136 P. 15.

VII. OPERATION AND EFFECT OF DIVORCE AND RIGHTS OF DIVORCED PERSONS.

§ 320 (Cal.App.) The statute prohibiting divorced persons, under penalty, from marrying again within six months has no extraterritorial force, and, the marriage being completely dissolved, a remarriage by a divorced person outside the jurisdiction is not invalid by reason of the statute.—*People v. Woodley*, 136 P. 312.

Under Civ. Code, § 63, the courts in determining the validity of a marriage celebrated without the state are bound by the law of the place of the celebration.—*Id.*

A local statute prohibiting divorced persons from remarrying within the period in which an appeal may be taken applies only to residents, and will not render invalid a marriage celebrated within the state by nonresidents, even though the divorce of the spouses in another state had not been granted for the length of time required.—*Id.*

§ 324 (Okla.) Under Rev. Laws 1910, §§ 4367, 4376, 4377, where a divorce decree gave the custody of an infant child to the mother, her father was not entitled to recover compensation from the child's father for necessities voluntarily furnished to the child while in the mother's custody.—*Bondies v. Porter*, 136 P. 417.

§ 324 (Okla.) Under Rev. Laws 1910, § 4367, the father of a minor child after divorce may be required to contribute to its support after commencement of an action therefor, whether such action be by independent suit or in the divorce proceeding, though the divorce decree is silent on the subject.—*Bondies v. Bondies*, 136 P. 1089.

Under Rev. Laws 1910, § 4367, where a mother was awarded custody of a minor child on divorce and the decree was silent as to its support, and she voluntarily supported the child for several years without objection, she could not recover therefor from her former husband.—*Id.*

DOCTORS.

See Physicians and Surgeons.

DOMICILE.

See Venue, § 18.

§ 1 (Or.) The domicile of a person is that fixed place of abode to which he intends to return habitually when absent.—*Miller v. Miller*, 136 P. 15.

DONATIONS.

See Gifts.

DRAINS.

See Highways, § 120.

DRAMSHOPS.

See Intoxicating Liquors.

DRUNKARDS.

See Deeds, § 68; Trial, §§ 234, 236.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 278-293.

DUPLICITY.

See Indictment and Information, § 125; Pleading, § 64.

EARNEST.

See Frauds, Statute of, § 94.

EASEMENTS.

I. ORATION, EXISTENCE, AND TERMINATION.

§ 8 (Kan.) A license to use a road over another's land will not ripen into an easement by prescription, however long continued.—*Sexton v. Holt*, 136 P. 934.

Where two brothers orally agreed that a driveway should remain between their lands and used it in common for more than 15 years, no prescriptive rights were acquired.—*Id.*

EJECTMENT.

See Appeal and Error, § 835; Evidence, § 471; Quieting Title, § 4; Taxation, § 806.

I. RIGHT OF ACTION AND DEFENSES.

§ 9 (Kan.) A deed intended merely as security leaves the grantor the real owner, with rights sufficient to entitle him to maintain ejectment against a stranger to the deed in possession under a redeemable tax lien.—*Hulsman v. Deal*, 136 P. 220.

III. PLEADING AND EVIDENCE.

§ 89 (Kan.) A paper describing land as "476 acres of land near H., Kan., that W. B. & Co. got from Z. M." held sufficiently definite to identify the land in controversy and authorized admission of the paper in evidence in ejectment.—*Work v. Work*, 136 P. 236.

ELECTION OF REMEDIES.

§ 3 (Wash.) Where the general statute permitting recovery for death by wrongful act and the Firemen's Pension Act, Laws 1909, c. 50, § 8, are both applicable, the remedies are separate and not cumulative, so that recovery under one would bar recovery under the other.—*Longfellow v. City of Seattle*, 136 P. 855.

§ 7 (Wash.) Under the Firemen's Pension Act, Laws 1909, c. 50, § 8, entitling the daughter of a fireman to a pension only until 16 years old, an action for a pension for a daughter older than 16 was not an election of remedy barring her action against the city under the general death act.—*Longfellow v. City of Seattle*, 136 P. 855.

§ 14 (Wash.) The adoption of one remedy by one having the choice of several remedies bars his right to invoke another remedy.—*Longfellow v. City of Seattle*, 136 P. 855.

ELECTIONS.

See Municipal Corporations, § 124; Sales, § 91; Statutes, § 255.

ELECTRICITY.

See Property.

§ 14 (Or.) Where hay derricks similar to that one which plaintiff was driving when it came in contact with defendant's electric wires strung over the highway were common in the county, it was defendant's duty to use care to maintain its wires at highway crossings so as to minimize the danger to persons lawfully using the highway.—*Greenwood v. Eastern Oregon Light & Power Co.*, 136 P. 336.

§ 19 (Cal.App.) An electric power company not being bound to examine or test the appliances used by its customers, an injury to one who comes in contact with the dangerous current through such an appliance does not authorize the application of the doctrine of *res ipsa loquitur*.—*Hill v. Pacific Gas & Electric Co.*, 136 P. 492.

§ 19 (Or.) In an action for personal injuries caused by contact of the top of plaintiff's hay derrick with electric wires strung by defendant

over a highway, whether plaintiff was negligent in attempting to drive under the wires *held* a question for the jury.—*Greenwood v. Eastern Oregon Light & Power Co.*, 136 P. 336.

Whether defendant was negligent in allowing its wires to be maintained as low as they were *held* a jury question.—*Id.*

ELEVATORS.

See Carriers, §§ 240, 280; Landlord and Tenant, §§ 167, 169; Master and Servant, §§ 88, 191, 270, 293.

EMBEZZLEMENT.

See Criminal Law, § 829.

§ 44 (Cal.App.) Evidence *held* to sustain a conviction for embezzlement.—*People v. Holt*, 136 P. 501.

EMINENT DOMAIN.

See Certiorari, § 16; Judgment, § 736; Jury, § 19; Municipal Corporations, § 508; Prohibition, § 10.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (Colo.) To enforce a special assessment for a purpose which does not confer a special benefit upon the property would result in taking private property without compensation.—*Pomroy v. Board of Public Waterworks*, Dist. No. 2, of City of Pueblo, 136 P. 78.

§ 58 (Mont.) The width of a railroad right of way prescribed by Rev. Codes, § 4275, subd. 4, authorizing railroads to condemn a strip 200 feet wide for a right of way, is a limitation; and such section does not permit the railroad company to take such an amount without necessity against the will of the owner or the necessities of a competing railroad.—*Great Falls & T. C. Ry. Co. v. Ganong*, 136 P. 391.

§ 59 (Kan.) The right given railroad companies under Gen. St. 1909, § 1800, to condemn land for shop grounds and terminal facilities is a continuing one, and may be exercised whenever such further acquirement is necessary.—*Smith v. Missouri Pac. Ry. Co.*, 136 P. 253.

§ 63 (Mont.) Mere mental selection of a particular tract of ground, wanted for railroad purposes, by the officers of a railroad company, did not give it a preference right to acquire the ground by condemnation, as against another railroad company.—*Great Falls & T. C. Ry. Co. v. Ganong*, 136 P. 391.

Facts *held* insufficient to confer on defendant railroad company prior rights to a strip of land east of G. street in a town for railroad purposes as against the right of a competing railroad to condemn the same for a right of way.—*Id.*

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 90 (Kan.) Where a railroad company condemns lands for shop grounds and terminal facilities, no allowance can be made as damages for adjacent lands not taken, unless such lands are reduced in value by the appropriation and use of the land taken.—*Smith v. Missouri Pac. Ry. Co.*, 136 P. 253.

(C) Measure and Amount.

§ 124 (Wash.) Damages in condemnation proceeding *held* to be ascertained as of the time of the trial, notwithstanding a previous appropriation of the property.—*Distler v. Grays Harbor & P. S. Ry. Co.*, 136 P. 364.

§ 145 (Kan.) The term "right of way" as used in Const. art. 12, § 4, providing that no right of way shall be appropriated until compensation be made or secured, means the strip of land ordinarily acquired for a railroad track,

and not exceeding 100 feet in width, as provided by Gen. St. 1909, § 1800, and does not include additional lands appropriated for shop grounds and terminal facilities; and hence the additional provision of such section that compensation shall be made "irrespective of any benefit from any improvement proposed" does not apply to the compensation to be paid for such additional grounds.—*Smith v. Missouri Pac. Ry. Co.*, 136 P. 253.

§ 148 (Kan.) On trial in the district court, on appeal from an award of damages for land taken by a railroad company for shop grounds and terminal facilities, the jury should allow interest at the rate of 6 per cent. from the time of the appropriation.—*Smith v. Missouri Pac. Ry. Co.*, 136 P. 253.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 263 (Kan.) Where the verdict on appeal from an award of damages in condemnation proceedings, fails to include interest, and it clearly appears what interest should be allowed, the court may compute same and include it in the judgment.—*Smith v. Missouri Pac. Ry. Co.*, 136 P. 253.

EMPLOYERS' LIABILITY ACTS.

See Master and Servant, §§ 87, 108, 116.

EMPLOYÉS.

See Master and Servant.

ENTRY.

See Judgment, § 279.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, §§ 229, 240.

EQUITY.

See Account; Appeal and Error, § 1009; Cancellation of Instruments; Contribution; Creditors' Suit; Estoppel; Exchange of Property, § 8; Indians; Injunction; Judgment, § 418; Jury, § 14; Quieting Title; Reformation of Instruments; Specific Performance; Trial, §§ 370, 374; Trusts.

I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

§ 39 (Kan.) Where equity acquires jurisdiction in an action to determine whether apparent deeds are mortgages, it will retain jurisdiction to adjudicate all differences between the parties growing out of the transaction.—*Holmes v. Holt*, 136 P. 246.

§ 39 (Or.) Where equity obtains jurisdiction, it rightfully retains it to administer complete relief with respect to the entire subject-matter.—*Tokstad v. Daws*, 136 P. 844.

§ 42 (Or.) When facts showing jurisdiction are stated in the pleading, but denied, the question of jurisdiction becomes one of fact, and, when the lack thereof appears, the court must dismiss the suit.—*Tokstad v. Daws*, 136 P. 844.

Where a cause is without the field of equitable jurisprudence, no act of the adverse party can confer jurisdiction; but, where a particular element is lacking, the objection is waived unless raised at the proper time.—*Id.*

II. LACHES AND STALE DEMANDS.

§ 87 (Ariz.) Where the circumstances are particularly unconscionable, and the complaining party is also at fault, equity will refuse relief on the ground of laches, though the remedy invoked is not barred by the statute of limita-

tions.—*Fleming v. Black Warrior Copper Co. Amalgamated*, 136 P. 273.

As a rule a court of equity is bound by the statute of limitation.—*Id.*

ERROR, WRIT OF.

See Appeal and Error.

ESCAPE.

§ 4 (N.M.) A prison breach by a person confined on a felony charge is a felony under the common law.—*Ex parte De Vore*, 136 P. 47.

ESCHEAT.

§ 3 (Idaho) Under Rev. Codes, § 5716, when succession is not claimed as provided by Rev. Codes, § 5715, the property of the deceased, except real estate, may be reduced to the possession of the state to be disposed of as provided by the former section.—*Connolly v. Probate Court in and for Kootenai County*, 136 P. 205.

A nonresident alien cannot, by failure to apply to succeed to an estate, deprive resident heirs of the right to succeed thereto.—*Id.*

Under Rev. Codes, §§ 5701, 5702, *held*, that first cousins of the deceased who were resident citizens of the United States were entitled to the estate as against the state.—*Id.*

Property escheats to a state only when there are no heirs who claim it.—*Id.*

ESCROWS.

See Vendor and Purchaser, §§ 232, 243.

§ 14 (Okla.) Where the grantor retains actual possession of the land, wrongful delivery of an escrow deed to the grantee by the depository transfers no title to the grantee, an innocent purchaser for value.—*Wood v. French*, 136 P. 734.

§ 15 (Or.) Where an escrow made the exhibit of a receiver's certificate by defendant or of a statement signed by both parties the only evidence of plaintiff's right to the deposit, and this was not presented, delivery to defendant after expiration of time limit does not render depository liable to plaintiff.—*Hartley v. Dye*, 136 P. 1185.

ESTATES.

See Deeds, § 133; Descent and Distribution; Executors and Administrators; Perpetuities; Remainders; Tenancy in Common; Wills.

ESTOPPEL.

See Appeal and Error, § 882; Corporations, §§ 425, 665; Exceptions, Bill of, § 40; Judgment, §§ 582-751; Municipal Corporations, §§ 488, 489; Pleading, § 214; Sales, § 279; States, § 101; Vendor and Purchaser, § 18; Wills, § 227.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

§ 78 (Cal.App.) Where, after defendant had sold hay to plaintiffs, they sold a part thereof to G., who employed L. to remove the same, defendant, having agreed with plaintiffs to accept car weights from L., whereby plaintiffs did not check the weights of hay removed by L., was estopped thereafter to deny such agreement.—*Reed v. McDonald*, 136 P. 506.

§ 85 (Or.) The doctrine of estoppel in pais applies only to representations as to past or present transactions, and not to promises as to the future which, if valid at all, must be binding as contracts.—*Scott v. Hubbard*, 136 P. 653.

EVICITION.

See Landlord and Tenant, §§ 171, 172.

EVIDENCE.

See Adultery, §§ 11, 14; Animals, §§ 10, 95; Appeal and Error, §§ 260, 548, 692, 696, 882, 989-1022, 1048-1053, 1099; Assault and Battery, § 91; Bailment, § 31; Bankruptcy, § 303; Banks and Banking, § 154; Bills and Notes, §§ 503, 509, 518, 527; Brokers, §§ 84, 86; Burglary; Carriers, §§ 94, 136; Chattel Mortgages, § 173; Conspiracy, § 47; Contracts, § 349; Corporations, § 361; Criminal Law, §§ 308-564, 1036, 1054, 1120, 1121, 1159, 1169; Customs and Usages; Damages, §§ 163, 184; Death, §§ 60, 63, 69; Deeds, § 211; Depositions; Divorce, §§ 109-125; Ejectment, § 89; Electricity, § 19; Embezzlement; Exceptions, Bill of, § 13; Executors and Administrators, § 221; Forcible Entry and Detainer, § 29; Forgery, § 38; Fraud, § 58; Fraudulent Conveyances, § 300; Gas, § 14; Gifts, § 82; Homicide, §§ 146-255; Husband and Wife, §§ 263, 264; Indians, § 13; Insurance, §§ 35, 699, 819; Intoxicating Liquors, § 233; Joint Adventures; Judgment, § 712; Landlord and Tenant, § 169; Lewdness, §§ 9, 10; Libel and Slander, §§ 103, 155; Malicious Prosecution, § 24; Master and Servant, §§ 265-278, 329; Mechanics' Liens, § 281; Mines and Minerals, § 38; Mortgages, §§ 38, 294, 608½; Municipal Corporations, §§ 654, 817, 818; Navigable Waters, § 46; New Trial, §§ 70, 102, 140; Parent and Child, § 1; Pleading, §§ 11, 428; Principal and Agent, § 23; Public Lands, § 106; Railroads, §§ 282, 300, 398; Rape, §§ 52, 53; Release, § 57; Replevin, § 71; Robbery; Sales, §§ 52, 181, 339, 397, 439; Sheriffs and Constables, 138; Specific Performance, § 96; Statutes, §§ 61, 286; Street Railroads, §§ 84, 113, 114; Taxation, §§ 789, 810; Tenancy in Common, § 46; Trial, §§ 34-105, 120, 139, 165, 178, 191, 192, 207, 234-236, 250-252, 412; Trover and Conversion, § 40; Trusts, § 88; Usury, § 114; Vendor and Purchaser, §§ 224, 243, 341; Waters and Water Courses, §§ 152, 226; Wills, §§ 163, 166, 289, 302; Witnesses.

I. JUDICIAL NOTICE.

§ 5 (Wash.) The courts will take judicial notice that sidewalks of a grade equal to 13 per cent. are common in the cities of the state and have not been prohibited by legislation.—*Dougan v. City of Seattle*, 136 P. 1165.

§ 18 (Kan.) Judicial notice will be taken of the natural shrinkage of grain in transit; the Legislature having recognized in Gen. St. 1909, § 7103, that wheat in transit will naturally shrink as much as one-fourth of one per cent. of its total weight.—*Cardwell v. Union Pac. R. Co.*, 136 P. 244.

II. PRESUMPTIONS.

§ 82 (Kan.) Where wards have been of age for some time, the presumption is that their guardian has made an accounting which has been approved by the court.—*First Nat. Bank v. Bangs*, 136 P. 915.

§ 83 (Or.) It is presumed that an official duty has been performed, and hence that city commissioners required a contractor with the city to give a bond pursuant to the contract, and as contemplated by L. O. L. § 6266.—*Baker City Mercantile Co. v. Idaho Glazed Cement Pipe Co.*, 136 P. 23.

§ 83 (Wyo.) It is presumed that a notary public acted within his jurisdiction.—*Reynolds v. Morton*, 136 P. 795.

That the venue of an acknowledgment taken by a notary was stated to be "County of C.—ss.," would not overcome the presumption that it was taken in L. county for which he was appointed.—*Id.*

III. BURDEN OF PROOF.

§ 91 (Okl.) The burden of proof of any particular fact ordinarily rests upon the party asserting it.—*Fifth Ave. Library Society v. Phillips*, 136 P. 1076.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 117 (Okl.) In an action on a note by a transferee thereof, defendant cannot introduce evidence as to fraud and failure of consideration until he first substantiates his allegation challenging plaintiff's claim of a bona fide purchase for value before maturity.—*First Nat. Bank v. Walker*, 136 P. 408.

§ 117 (Wash.) Where officer of corporation, sued for price paid him for stock, denied that the sale was made by him, evidence that plaintiff was advised by a fortune teller to purchase such stock and to see defendant held inadmissible in the absence of evidence showing any understanding between defendant and the fortune teller.—*Johnson v. Domer*, 136 P. 1169.

(B) Res Gestæ.

§ 127 (Cal.App.) In an action for death in collision with a street car, evidence that a witness heard an exclamation, "Oh," at about the same time she heard the bumping noise of the car as though it had struck some object held admissible as res gestæ.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

(C) Similar Facts and Transactions.

§ 131 (Wash.) Where plaintiff claimed that the transportation of certain private cars belonging to defendant was dangerous owing to defective loading, defendant was not entitled to prove that another railroad company handled the cars, similarly loaded, over another track on an average of once a month for two years; there being no attempt to show that the conditions were similar.—*Puget Sound Electric Ry. v. Carstens Packing Co.*, 136 P. 117.

V. BEST AND SECONDARY EVIDENCE.

§ 158 (Mont.) In claim and delivery to recover cattle which defendant claimed to have purchased from a third person, checks given in payment thereof held improperly excluded.—*Cuerth v. Arbogast*, 136 P. 383.

§ 158 (Okl.) Since Rev. Laws 1910, § 6109, prescribes the manner in which a surety may be released from liability on a bail bond by a surrender of the principal, parol evidence to prove a surrender in an action on a forfeited bond is inadmissible.—*Edwards v. State*, 136 P. 577.

§ 174 (Cal.App.) A copy of a bill of particulars constituting a statement of account, which was made out by transcribing items from original entries which were in plaintiff's possession, was not admissible.—*Campbell v. Rice*, 136 P. 512.

VII. ADMISSIONS.

(D) By Agents or Other Representatives.

§ 244 (Kan.) Under Code Civ. Proc. § 384 (Gen. St. 1909, § 5979), reports, telegrams, and memoranda relating to a shipment of cattle, made by trainmen at the time in the line of their duty were competent evidence in a shipper's action for damages to a shipment of cattle.—*Cockrill v. Missouri, K. & T. Ry. Co.*, 136 P. 322.

§ 253 (Wash.) In an action to recover a secret profit alleged to have been received by the secretary and general manager of an insurance company for effecting a contract reinsuring its risks in another company, declarations of the secretary of the latter, though in the absence of the secretary of the former company, were

admissible to show the nature of the transaction.—*Johns v. Arizona Fire Ins. Co.*, 136 P. 120.

VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

§ 271 (Cal.App.) On the issue whether land standing in the name of plaintiff's deceased wife was their community property or her separate property, her statement to a third person that plaintiff had used money belonging to her to buy stocks for himself is self-serving.—*Eaton v. Locey*, 136 P. 534.

§ 273 (Cal.App.) The making of a deed by a wife alone of property standing in her name, it not appearing the husband knew thereof, is merely a self-serving declaration, as regards the question of the land being separate or community property.—*Eaton v. Locey*, 136 P. 534.

Declarations of deceased to a third person that her husband had no interest in their joint bank account are self-serving, as regards the question whether land bought therewith was separate or community property.—*Id.*

(B) By Decedents Against Interest.

§ 282 (Colo.App.) In an action against an estate to recover claimant's share of a fee collected by decedent, due to them jointly for legal services, evidence by the client as to statements made by decedent in her and claimant's presence as to the amount and division of the fee was not declarations of a party to a mere stranger.—*Brown's Estate v. Stair*, 136 P. 1003.

IX. HEARSAY.

§ 317 (Colo.App.) In an action against an estate to recover claimant's share of a fee collected by decedent, due to them jointly for legal services, evidence by the client as to statements made by decedent in her and claimant's presence as to the amount and division of the fee was not hearsay.—*Brown's Estate v. Stair*, 136 P. 1003.

§ 317 (Wash.) Evidence that another, who was not connected with defendant, told plaintiff that certain printed matter exploiting the business of defendant insurance company was issued by defendant, was hearsay.—*McDonald v. New World Life Ins. Co.*, 136 P. 702.

X. DOCUMENTARY EVIDENCE.

(A) Public or Official Acts, Proceedings, Records, and Certificates.

§ 332 (Colo.App.) A judgment and the complaint on which it was based, without the judgment roll, is inadmissible to prove the judgment.—*Bovee v. Boyle*, 136 P. 467.

(C) Private Writings and Publications.

§ 354 (Cal.App.) A tradesman's book of original entries is generally admissible, when supported by his oath.—*Campbell v. Rice*, 136 P. 512.

§ 359 (Okl.) In a passenger's action for injuries from a train wreck, photographs of the wreck taken on the day of the accident while the conditions remained unchanged were properly admitted in evidence.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

(D) Production, Authentication, and Effect.

§ 370 (Or.) Under L. O. L. § 7125, deeds executed and acknowledged as provided by statute may be read in evidence without further proof.—*Knolhoff v. Mark*, 136 P. 893.

§ 370 (Wash.) In an action against an insurance company for commission for selling capital stock, printed matter purporting to have been issued by defendant was not admissible against it in the absence of proof that defendant authorized its issuance.—*McDonald v. New World Life Ins. Co.*, 136 P. 702.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 384 (Colo.App.) The parol evidence rule will be enforced in all cases not brought within its exceptions.—*Wilson v. Agnew*, 136 P. 96.

§ 387 (Okla.) Parol evidence is admissible to show that a motion was carried at an annual school meeting to sell certain lumber, where the minutes, kept under Comp. Laws 1909, § 8087, fail to mention same and show on their face that they are a mere abstract of what occurred at the meeting.—*Gilmer v. School Dist. No. 28*, Noble County, 136 P. 1086.

§ 387 (Wash.) An official survey, map, or plat of a dedicated street cannot be contradicted, impeached, or invalidated by parol or other extrinsic evidence unless there is a doubt as to its true location, etc.—*Olson Land Co. v. City of Seattle*, 136 P. 118.

§ 397 (Okla.) In the absence of fraud, accident, or mistake, parol evidence is not admissible to vary the terms of a written contract.—*German Stock Food Co. v. Miller*, 136 P. 426.

§ 423 (Wash.) Where a conditional sale contract reserved a lien for a specified sum, and there was no allegation of inadvertence, mistake, or fraud, parol evidence was inadmissible to show that it was intended that the lien should cover notes given by others as part of the transaction.—*Pickford v. Borland*, 136 P. 128.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Colo.App.) In an action by the assignee of a lessee to recover a deposit by the lessee to insure performance, brought after the landlord had retaken possession, evidence was not admissible to show damage because of alterations made in the building after forfeiture, where the lease did not provide that the deposit should cover such damage.—*Wilson v. Agnew*, 136 P. 96.

A party cannot add to the terms of a written agreement by parol evidence, adding an obligation not contained therein.—*Id.*

§ 441 (Okla.) In an action on a written contract of sale, parol evidence of a contemporaneous, oral agreement to give defendant the exclusive agency for the sale of the merchandise sold in a particular community, and that such agreement was the moving cause inducing the purchase, is inadmissible.—*German Stock Food Co. v. Miller*, 136 P. 426.

§ 441 (Okla.) Where a final contract of sale fully covers the subject-matter of all prior oral negotiations, such negotiations are merged therein.—*J. W. Rippey & Son v. Art Wall Paper Mills*, 136 P. 1080.

§ 445 (Cal.App.) Where a written contract for sale of hay provided a method of approximating the weight, but such method was not followed by the parties, parol evidence of a subsequent agreement to adopt a different method was not objectionable as varying the terms of the written contract.—*Reed v. McDonald*, 136 P. 506.

§ 445 (Or.) Evidence is admissible to show that the time of performance of a written contract within the statute of frauds has been enlarged by a subsequent oral agreement.—*Scott v. Hubbard*, 136 P. 653.

(D) Construction or Application of Language of Written Instrument.

§ 461 (Kan.) A deed cannot be impeached by the grantor's testimony as to his intention.—*Miller v. Miller*, 136 P. 953.

§ 461 (Wash.) The official plat of a city addition is the best evidence of the intention of the dedicators, and, unless uncertain, parol evidence of intention is inadmissible.—*Olson Land Co. v. City of Seattle*, 136 P. 118.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Cal.App.) One may not testify money was not the separate property of a wife.—*Eaton v. Locey*, 136 P. 534.

§ 471 (Colo.App.) Testimony of a maternal aunt that a certain man was the father of assured was a mere conclusion.—*Mutual Life Ins. Co. of New York v. Good*, 136 P. 821.

§ 471 (Kan.) In ejectment, a question whether the witness had ever parted with his interest in the land in controversy was properly excluded as calling for a conclusion.—*Work v. Work*, 136 P. 236.

§ 471 (Okla.) A witness may testify as to who is the owner of personality where such testimony involves a fact, and is not a mere expression of opinion.—*Ft. Smith & W. R. Co. v. Winston*, 136 P. 1076.

§ 471 (Or.) Statement of witness that another "recognized" a certain mortgage is a conclusion.—*Barber v. Toomey*, 136 P. 343.

§ 472 (Colo.App.) It is reversible error to allow an opinion as to ultimate facts unless the witness testifies as an expert or his testimony involves a description or estimate of condition, value, etc., or when it is difficult or impossible to state with sufficient exactness the facts and their surroundings.—*Town of Meeker v. Fairfield*, 136 P. 471.

§ 474 (Cal.App.) Proof of market value of land need not necessarily be made by expert testimony only but may be proven by the testimony of persons living in the neighborhood.—*Konda v. Fay*, 136 P. 514.

§ 492 (Cal.App.) The speed at which a train or other vehicle may be traveling is not within Code Civ. Proc. § 1870, subd. 9, relating to expert testimony, but involves a matter of judgment on which any person may testify.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 500 (Cal.App.) Where a witness testified as to the speed of a street car when it struck deceased, he was properly permitted to state that he had owned and then owned race horses, and was accustomed to observe the time within which horses attached to vehicles would cover certain distances.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 501 (Cal.App.) It was not error to permit an alleged agent to testify that the goods sued for were charged to his account, with the understanding that the other defendants would reimburse him, where the witness was examined as to the foundation for such understanding.—*Weill v. Danziger*, 136 P. 308.

(B) Subjects of Expert Testimony.

§ 506 (Wash.) In an action for injuries to a passenger alighting from a street car by having his foot caught in the gates, both parties having introduced evidence as to the type and construction of the car, and the manner in which the gates were opened and closed, the court properly refused to permit defendant's expert to testify that it would have been impossible for plaintiff to have been injured in the manner he alleged.—*McKay v. Seattle Electric Co.*, 136 P. 134.

§ 512 (Mont.) Opinions of qualified persons as to whether a method employed for thawing dynamite was a safe one are admissible.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

§ 512 (Okla.) In a mine employe's action for injuries from the derailment of a coal car, it was not error to permit experienced miners to state whether the place where the accident occurred was a dangerous place to work.—*Great Western Coal & Coke Co. v. Malone*, 136 P. 403.

(C) Competency of Experts.

§ 535 (Wash.) Opinion of a layman that a physician's treatment of certain cases was unskillful held inadmissible.—*Simon v. Hamilton Logging Co.*, 136 P. 361.

(F) Effect of Opinion Evidence.

§ 570 (Or.) The evidence of experts in all cases should be received and weighed with caution.—*Wendl v. Fuerst*, 136 P. 1.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 575 (Colo.) Ordinarily the testimony of a witness at a former trial cannot be used if the witness is still available for the purpose of testifying at the subsequent trial.—*Rio Grande Southern R. Co. v. Campbell*, 136 P. 68.

The testimony of a witness at a former trial cannot be read to the jury in the form of a deposition, where he was present at the second trial and no physical infirmity kept him from testifying; it appearing merely that between the trials he had forgotten the facts.—*Id.*

XIV. WEIGHT AND SUFFICIENCY.

§ 598 (Mont.) That several witnesses contradicted plaintiff's unsupported statement did not make his statement a mere scintilla of evidence so as to be insufficient to support a verdict for plaintiff.—*Lizott v. Big Blackfoot Milling Co.*, 136 P. 46.

EXAMINATION.

See Witnesses, §§ 240-286.

EXCEPTIONS.

See Appeal and Error, §§ 260, 263, 501.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 117, 544-548, 988.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 13 (Or.) Under L. O. L. § 171, as amended by Laws 1913, p. 650, a bill of exceptions to the admission of evidence should consist only of so much of the evidence as is necessary to explain the point of the objection and should not contain a literal statement of everything said by defendant, counsel, and witnesses.—*West v. McDonald*, 136 P. 650.

§ 20 (Or.) A transcript certified as containing all the evidence except certain exhibits, not styled a bill of exceptions, will not be considered for that purpose by the Supreme Court.—*Litscher v. Alexander*, 136 P. 847.

II. SETTLEMENT, SIGNING, AND FILING.

§ 36 (Idaho) Where a judgment was rendered June, 1910, and no attempt was made to settle the bill of exceptions until October, 1913, held, that there was no such diligence on the part of appellant as showed good faith.—*Behrens-meyer v. Gwinn*, 136 P. 623.

§ 40 (Cal.App.) Under Code Civ. Proc. § 1054, the trial judge cannot extend the time for preparation and service of a proposed bill of exceptions longer than the 30 days allowed by law without the consent of the adverse party.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

Where, after void orders had been entered extending defendant's time to prepare, serve, and file a bill of exceptions, plaintiff stipulated that defendant might have additional time, he was thereby estopped to object to the prior orders.—*Id.*

Extension held not an abuse of discretion, where such extension was made necessary by inadvertent omissions of testimony by the stenographer of defendant's attorneys, to whom the work of typewriting the bill was committed.—*Id.*

§ 42 (Cal.App.) Plaintiff's attorneys, having accepted defendant's bill of exceptions, served under a void order extending the time to serve same, and having secured a stipulation granting them 30 days within which to serve amendments, thereby waived defendant's failure to serve the bill in time.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 43 (Cal.App.) Settlement of proposed bill of exceptions is a "proceeding" within Code Civ. Proc. § 473, providing that the court may relieve a party from default through mistake, inadvertence, or excusable neglect.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 43 (Idaho) Where Rev. Codes, § 4907, amended by Laws 1911, c. 111, par. 1, providing that appeals shall be taken within 60 days, and Rev. Codes, § 4818, as amended by Laws 1911, c. 117, relative to the papers to be furnished, were not complied with, the district judge had no jurisdiction to settle a bill of exceptions.—*Behrensmeyer v. Gwinn*, 136 P. 623.

§ 43 (Utah) Where notice of judgment was served on defendant's attorney in January, 1913, and plaintiff in March, when he was given until April 10th to file bill of exceptions, the district court cannot settle and allow a bill of exceptions not presented until May.—*Mets v. Jackson*, 136 P. 784.

• § 58 (Cal.App.) Where a proposed bill of exceptions was delivered by defendant's attorneys to an express company for transmission to plaintiff's attorneys in another city, the delivery thereof by the company to plaintiff's attorneys was "personal service."—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

Where service is to be made on attorneys residing in a different place, the person making the service may adopt any instrumentality for the transmission and delivery of the bill, and such delivery with proof thereof establishes the service.—*Id.*

EXCESSIVE DAMAGES.

See Damages, § 132.

EXCHANGE OF PROPERTY.

§ 8 (Or.) In a suit in equity to rescind a contract for the exchange of property for fraud, plaintiff was not bound before suit to return or offer to return the consideration received; but it was enough if he alleged a willingness and ability to place the defendant in statu quo.—*Owen v. Jones*, 136 P. 332.

EXCUSABLE HOMICIDE.

See Homicide, § 111.

EXECUTION.

See Appeal and Error, §§ 391, 458, 459; Garnishment; Judgment, § 747; Justices of the Peace, § 147.

VI. CLAIMS BY THIRD PERSONS.

§ 198 (Idaho) The verdict of a jury called by a constable pursuant to Rev. Codes, § 4478, when property levied upon under execution has been claimed by a third person, is merely advisory to the officer and for his protection, and is not res adjudicata.—*Smith v. Graham*, 136 P. 801.

XII. WRONGFUL EXECUTION.

§ 457 (Ok.) Goods belonging to plaintiff having been taken and sold under a void judgment and writ of attachment, the purchaser at the sale is liable in conversion, especially where the purchaser is the plaintiff in the attachment proceedings.—*Bilby v. Jones*, 136 P. 414.

EXECUTORS AND ADMINISTRATORS.

See Certiorari, § 5; Constitutional Law, § 278; Descent and Distribution; Evidence, § 282; Limitation of Actions, § 74; Wills.

I. ADMINISTRATION IN GENERAL.

§ 3 (Kan.) A decision of the probate court refusing to appoint an administrator and grant administration on the estate of a nonresident intestate is appealable under Gen. St. 1909, § 3624, when based on the ground that such intestate left no property in the state to be administered.—*Miller's Estate v. Executrix of Miller's Estate*, 136 P. 255.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 12 (Kan.) The situs of stock in a Kansas corporation owned by a nonresident is, for the purposes of administration at the domicile of the deceased owner, rather than in the state where the corporation is organized and has its place of business; corporate stock being designated as personal estate by Gen. St. 1909, § 1743.—*Miller's Estate v. Executrix of Miller's Estate*, 136 P. 255.

§ 17 (Idaho) Under Rev. Codes, § 5351, specifying 11 classes of persons competent to be appointed administrator, where no one of the first 10 classes applies for appointment, any competent person may be appointed.—*McCormick v. Brownell*, 136 P. 613.

§ 20 (Idaho) Where separate petitions are filed by two different persons as administrator and both alleged testator's death, and the evidence supports such allegations, there is a sufficient compliance with Rev. Codes, § 5364.—*McCormick v. Brownell*, 136 P. 613.

Rev. Codes, §§ 5351, 5365, do not authorize the appointment of a person not of kin to the deceased, unless there is no application by one of kin entitled to the appointment and nomination or written request is made by a person entitled to the appointment.—*Id.*

Under Rev. Codes, §§ 5351, 5365, the right to appoint a person not of kin to deceased depends wholly upon the request of one of kin who is entitled to appointment, if there be such kin and he make such request.—*Id.*

Where the person entitled to appointment requests, under Rev. Codes, § 5365, the appointment of one not of kin, he may withdraw such request and make application for the appointment of himself.—*Id.*

§ 20 (Wash.) Rem. & Bal. Code, § 1437, requiring an application for administration of partnership assets by the surviving partner to be made within five days from the filing of an inventory, does not prohibit the making of such an application before inventory.—*State v. Superior Court of Pierce County*, 136 P. 147.

IV. COLLECTION AND MANAGEMENT OF ESTATE.**(B) Real Property and Interests Therein.**

§ 130 (Or.) An administrator of the estate of a wife was not entitled to possession of real property, in which the surviving husband had a curtesy interest, until his right of possession had been determined in a proceeding to which he was a party.—*Haberly v. Treadgold*, 136 P. 334.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.**(A) Liabilities of Estate.**

§ 221 (Colo.App.) The value at which real estate, accepted by decedent in settlement of an attorney's fee due to him and claimant jointly, was taken, as shown by decedent's receipts, would be at least prima facie evidence of the amount of the joint fee claimed.—*Brown's Estate v. Stair*, 136 P. 1003.

(B) Presentation and Allowance.

§ 225 (Colo.App.) Under Laws 1903, p. 516, § 121, subd. 4, repealing Mills' Ann. St. 1891, § 4780, subd. 4, and classifying demands against an estate "filed" in the county court within one year, and allowed, as the fourth class, notice of intention to exhibit claims is not necessary to arrest the running of limitations; a filing only being necessary.—*Brown's Estate v. Stair*, 136 P. 1003.

§ 227 (Colo.App.) A statement of a claim against an estate which recited that decedent "held in trust and converted the sum of \$2,000 belonging to" claimant, which amount was set out at the right of the claim, and further recited: "Credit—Paid on above account, \$500; balance, \$1,500"—was sufficient under Mills' Ann. St. 1912, § 8002 (Rev. St. 1908, § 7212).—*Brown's Estate v. Stair*, 136 P. 1003.

§ 228 (Colo.) The claim of a surety on the appeal bond of deceased, who paid the amount due under his obligation on the appeal being dismissed, and filed a claim therefor against the estate, was not on a judgment, within Rev. St. 1908, § 7212, providing the manner of exhibiting such a claim, though to the claim was attached the transcript of the judgment docket, bearing the written assignment to him of the judgment.—*German American Trust Co. v. National Surety Co.*, 136 P. 457.

(C) Disputed Claims.

§ 256 (Colo.) On appeal to the district court from the county court's allowance in part of a claim against an estate, trial in the district court is de novo.—*McAfee v. McAfee's Estate*, 136 P. 1051.

On appeal to the district court from a judgment on a claim against an estate, the question of the amount to which claimant was entitled was for the jury and a direction that claimant could not recover an amount more than he did below was erroneous.—*Id.*

§ 256 (Colo.App.) Where the executrix had known long before the filing of a claim against the estate the facts upon which it was based, she could not have been prejudiced by any formal insufficiency in the claim filed.—*Brown's Estate v. Stair*, 136 P. 1003.

Where defendant, in an action to establish a claim against an estate, entered upon trial in the district court on appeal without objecting to that court's jurisdiction on the ground that the probate court did not have jurisdiction to try the issue involved, which was the existence of a constructive trust, the objection to the district court's jurisdiction was waived.—*Id.*

VII. DISTRIBUTION OF ESTATE.

§ 314 (Idaho) Probate proceedings in settlement of estates being in the nature of proceedings in rem, the giving of the statutory notice charges all the world with notice.—*Connolly v. Probate Court in and for Kootenai County*, 136 P. 205.

§ 315 (Idaho) The probate court has no jurisdiction to set aside a decree of distribution entered on a hearing after notice.—*Connolly v. Probate Court in and for Kootenai County*, 136 P. 205.

Where the probate court had jurisdiction and probated an estate and entered a decree of distribution which was not appealed from, such decree became conclusive as to the rights of all heirs and claimants.—*Id.*

The probate of an estate after jurisdiction acquired and notice is conclusive, subject to reversal or modification on appeal, upon all parties, whether they appear and present their claims or not.—*Id.*

The probate court has no jurisdiction to set aside its decree of distribution on application made several years after its entry.—*Id.*

EXEMPLARY DAMAGES.

See Damages; § 87.

EXEMPTIONS.

See Highways, §§ 122, 126; Homestead; Taxation, § 44.

EXPLOSIVES.

See Evidence, § 512; Master and Servant, §§ 129, 217, 264.

EX POST FACTO LAWS.

See Statutes, § 276.

EXTRADITION.

See Courts, § 97; Habeas Corpus, § 19.

II. INTERSTATE.

§ 21 (Okl.Cr.App.) A person can be extradited only in accordance with the laws and Constitution of the United States.—Ex parte Owen, 136 P. 197.

§ 30 (Okl.Cr.App.) That a person leaves the state wherein it is sought to subject him to criminal process constitutes him a fugitive from justice when he is found in another state.—Ex parte Williams, 136 P. 597.

Where a paroled prisoner goes into another state, and his parol is revoked, he is a "fugitive from justice" within the extradition laws.—Id.

§ 35 (Okl.Cr.App.) Under the federal statute (Act Feb. 12, 1793, c. 7 [1 Stat. L. 302]) enacted pursuant to U. S. Const. art. 4, § 2, an application in extradition proceedings must be accompanied with a copy of an indictment found, or affidavit made, before a magistrate, charging the person demanded with having committed some crime.—Ex Parte Owen, 136 P. 197.

A notary public is not a "magistrate" within Act Feb. 12, 1793, c. 7 (1 Stat. L. 302), providing that a copy of an indictment found or an affidavit made before a magistrate must accompany the application in extradition proceedings.—Id.

§ 36 (Okl.Cr.App.) An affidavit verified by prosecuting witness as a matter of belief, is insufficient to authorize the issuance by a magistrate of a warrant for arrest and to become the basis of extradition proceedings.—Ex parte Owen, 136 P. 197.

§ 39 (Okl.Cr.App.) The legality of the revocation of a parol of a convict in Indiana is for the courts of that state.—Ex parte Williams, 136 P. 597.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.**I. CIVIL LIABILITY.**

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 3 (Mont.) Where arrest and imprisonment are legal, but the prosecution is instituted maliciously and without probable cause, it constitutes malicious prosecution, but if the arrest and imprisonment are accomplished without legal process, it is false imprisonment.—Grorud v. Loss, 136 P. 1069.

§ 4 (Mont.) An arrest and imprisonment without legal process gives a right of action for false imprisonment, whether prompted by malice or not.—Grorud v. Loss, 136 P. 1069.

FALSE PRETENSES.

§ 11 (Wash.) Despite Rem. & Bal. Code, § 2303, defining property as both realty and personality, section 2601, declaring that every per-

son who shall obtain possession or title to any property by false pretenses or trick shall be guilty of larceny, does not apply to the procurement of a conveyance of land by false representations.—State v. Klinkenberg, 136 P. 692.

FALSE SWEARING.

See Perjury.

FARES.

See Carriers, § 239.

FEDERAL COURTS.

See Courts, § 431.

FEEBLE MINDED PERSONS.

See Insane Persons.

FEEES.

See Attorney General, § 3; Usury, § 53.

FELLOW SERVANTS.

See Master and Servant, §§ 185-191.

FELONY.

See Statutes, § 178.

FENCES.

See Dismissal and Nonsuit, § 19; Railroads, § 113.

FILING.

See Mechanics' Liens, § 132.

FINDINGS.

See Trial, §§ 343, 365, 396-405.

FIRE INSURANCE.

See Insurance.

FLOWAGE.

See Waters and Water Courses, § 171.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE ENTRY AND DETAINER.**I. CIVIL LIABILITY.**

§ 11 (Okl.) A notice to vacate *held* sufficient, in a forcible entry and detainer action, where it pointed out the premises, though it did not give the name of the county and state.—Avants v. Bruner, 136 P. 593.

§ 12 (Okl.) Forcible entry and detainer may be maintained against a person who has committed a forcible entry and ouster, though he owned the property and was entitled to immediate possession, where the plaintiff at the time of the ouster was in actual peaceable possession.—Howard v. Davis, 136 P. 401.

§ 24 (Okl.) The complaint in an action for forcible entry and detainer *held* sufficient to comply with the requirements of Rev. Laws 1910, § 5508.—Peters v. Holder, 136 P. 400.

§ 29 (Okl.) Deeds and other muniments of title are admissible in evidence, in a forcible entry and detainer suit, to show the character of a party's entry and possession, and to uphold a possession once peaceably obtained.—Howard v. Davis, 136 P. 401.

FORECLOSURE.

See Mortgages, §§ 417, 554.

FOREIGN CORPORATIONS.

See Corporations, § 665.

FORFEITURES.

See Bail, §§ 77, 93; Damages, § 81; Insurance, § 756; Vendor and Purchaser, §§ 18, 76, 97.

FORGERY.

See Criminal Law, § 1169; Indictment and Information, §§ 86, 108; Wills, § 302.

§ 29 (Kan.) An information, alleging the forgery of a check which was apparently valid and the foundation of a legal liability if genuine, need not allege extrinsic facts as to how it might have been used to defraud the drawer.—*State v. Stickler*, 136 P. 329.

§ 30 (Kan.) An information, charging that accused feloniously and falsely altered a check by adding \$100 to the amount with intent to defraud the drawer, sufficiently alleged that the alteration was made without the drawer's authority.—*State v. Stickler*, 136 P. 329.

§ 38 (Kan.) In a prosecution for forging a check, evidence of the disposition made of the check by accused was admissible to show that the forgery was with intent to defraud.—*State v. Stickler*, 136 P. 329.

FORMER ADJUDICATION.

See Judgment, §§ 582-751.

FORNICATION.

See Lewdness.

FRANCHISES.

See Gas, § 8.

FRATERNAL INSURANCE.

See Insurance, §§ 724-819.

FRAUD.

See Cancellation of Instruments; Corporations, §§ 211, 423; Deeds, § 211; Exchange of Property, § 8; Fraudulent Conveyances; Insurance, § 756; Jury, § 14; Release; Sales, §§ 40, 52, 114-126; Trial, § 252; Vendor and Purchaser, § 34; Wills, §§ 163, 166, 282.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 9 (Wash.) A false and fraudulent representation of a material fact relating to the property of a corporation, which necessarily affects the value of the corporate stock, gives a cause of action against one who thereby induced plaintiff to make a purchase.—*Borde v. Kingsley*, 136 P. 1172.

§ 11 (Cal.App.) Under Civ. Code, §§ 331, 332, a false representation that the stock of a corporation is nonassessable is not a mere matter of opinion, but may constitute actionable fraud.—*Browne v. San Gabriel River Rock Co.*, 136 P. 542.

§ 22 (Wash.) Where the subject-matter of a contract is not at hand, and the facts are within the knowledge of one party and cannot be ascertained by the other without trouble and expense, the latter may rely on the representations.—*Borde v. Kingsley*, 136 P. 1172.

§ 23 (Wash.) Where plaintiff, a purchaser of land, knew nothing about alkali land, and that fact was communicated to defendant, who consummated the sale, defendant was liable for misrepresentation as to the freedom of the land sold from alkali even though the parties made an inspection of the land.—*Becker v. Sunnyside Land & Investment Co.*, 136 P. 1147.

II. ACTIONS.**(B) Parties and Pleading.**

§ 45 (Or.) A complaint for false representations must plead that they were false and that the defendant knew it.—*Cobb v. Peters*, 136 P. 656.

§ 46 (Or.) A complaint for false representations must plead that plaintiffs believed and relied on them, to their damage.—*Cobb v. Peters*, 136 P. 656.

§ 49 (Or.) Where a case was tried as one for false representations, a recovery cannot be sustained for want of consideration for a sale.—*Cobb v. Peters*, 136 P. 656.

(C) Evidence.

§ 58 (Wash.) In an action against an officer of a corporation to recover the price of stock, the purchase of which it was claimed was induced by misrepresentations, evidence held to show that the stock was not sold by defendant.—*Johnson v. Domer*, 136 P. 1169.

§ 58 (Wash.) In an action to recover damages for fraud in the sale of corporate stock, evidence held to establish defendant's fraud.—*Borde v. Kingsley*, 136 P. 1172.

(E) Trial, Judgment, and Review.

§ 64 (Or.) Where there was some evidence of fraud, the question was properly submitted to the jury.—*Murphy v. Deal*, 136 P. 658.

FRAUDS, STATUTE OF.

See Trusts, § 88.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 53 (Ok.) A verbal lease of real estate for one year to commence in the future is not invalid under the statute of frauds.—*Sullivan v. Bryant*, 136 P. 412.

VII. SALES OF GOODS.**(A) Contracts Within Statute.**

§ 83 (Wash.) Corporate stock is "goods, wares, and merchandise" within the statute of frauds, whether the stock is issued or to be issued (citing 4 Words and Phrases, p. 8131).—*Hewson v. Peterman Mfg. Co.*, 136 P. 1158.

(C) Giving Earnest or Part Payment.

§ 94 (Wash.) Where plaintiff orally contracted to buy defendant's stock, and defendant agreed to employ plaintiff, that plaintiff resigned his existing position to go to work for defendant, was not a giving of something in earnest to bind the bargain. Rem. & Bal. Code, § 5290.—*Hewson v. Peterman Mfg. Co.*, 136 P. 1158.

§ 95 (Wash.) Where plaintiff orally contracted to buy defendant's stock and defendant agreed to employ plaintiff, that plaintiff gave up his position to go to work for defendant was not a "part payment." Rem. & Bal. Code, § 5290.—*Hewson v. Peterman Mfg. Co.*, 136 P. 1158.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 110 (Cal.App.) A receipt for a deposit on 40 acres of land at \$2,200, signed by a person owning 6 lots containing 120 acres, was insufficient as a memorandum in writing within Civ. Code, § 1624.—*Hines v. Copeland*, 136 P. 728.

The memorandum in writing of a contract for the sale of real property within Civ. Code, § 1624, must contain a description sufficient to readily identify the property without resorting to extrinsic evidence.—*Id.*

IX. OPERATION AND EFFECT OF STATUTE.

§ 129 (Cal.App.) Under Code Civ. Proc. § 1972, payments on purchase price *held* not sufficient part performance to take oral agreement for the sale of land out of the statute of frauds.—*Hines v. Copeland*, 136 P. 728.

§ 129 (Okla.) A parol-agreement for the sale of lands will be enforced where the vendee has paid the price and taken possession in good faith with the owner's consent, and has made improvements.—*Levy v. Yarbrough*, 136 P. 1120. Neither the mere acceptance of the price under an oral contract for the sale of lands nor the fact that the owner orders an abstract of the property, will take the sale out of the statute of frauds.—*Id.*

§ 131 (Or.) Generally where the time for a sale of real property has been postponed by parol agreement on which the vendee has relied, the statute of frauds cannot be invoked to perpetrate a fraud.—*Scott v. Hubbard*, 136 P. 653.

Where a party to a written contract orally agrees to extend the time for performance, he is estopped from taking advantage of the non-compliance with the terms of the writing, and the other party has the extended time within which to perform.—*Id.*

§ 139 (Or.) The statute of frauds is no defense to an action against the purchaser of land for the purchase price, where the deed has been executed, delivered, and accepted, though at direction of the purchaser the deed was to a third person.—*Malzer v. Schisler*, 136 P. 14.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 152 (Colo.App.) Where plaintiff sues on the common count, and therefore does not disclose the foundation of his case until he puts in his evidence, defendant is not required to plead the statute of frauds.—*Anderson v. Dailey*, 136 P. 461.

FRAUDULENT CONVEYANCES.

I. TRANSFERS AND TRANSACTIONS INVALID.

(I) Retention of Possession or Apparent Title by Grantor.

§ 135 (Mont.) As against creditors and bona fide purchasers, the necessity of a delivery of personality sold could not be obviated by some open, visible, and notorious act of ownership by the purchaser, under Rev. Codes, § 6128, providing that every transfer of personality is conclusively presumed to be fraudulent and void as to creditors and bona fide purchasers if not accompanied by an immediate delivery and followed by actual change of possession.—*Western Mining Supply Co. v. Melzner*, 136 P. 44.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(G) Evidence.

§ 300 (Colo.App.) In suit to set aside sale of decedent's realty to pay debts, where there was evidence that the sale was for the full market value, while plaintiffs relied on the fact that some years later the land was resold at a higher price, a finding that it brought its full market value *held* sustained by the evidence.—*Ryan v. Geigel*, 136 P. 804.

§ 300 (Kan.) In a suit to set aside deeds by a husband to his wife as in fraud of creditors, evidence *held* to warrant a finding that during the years the wife gave her husband money she was doing so to aid him in his business and that the relation of debtor and creditor did not exist.—*Commercial State Bank v. Boatman*, 136 P. 218.

FUGITIVES.

See Extradition.

GAMING.

I. GAMBLING CONTRACTS AND TRANSACTIONS.

(B) Rights and Remedies of Parties.

§ 23 (Cal.App.) Contracts of wager are generally void, and the courts will ordinarily give no relief except to those who wish, before the happening of the condition of the wager to withdraw their money from the stakeholder.—*Schenck v. Hirshfeld*, 136 P. 725.

§ 28 (Cal.App.) Bettors upon an election cannot recover from the stakeholder after the election, where he refuses to pay it over; all of the parties being guilty of a misdemeanor under Pen. Code, §§ 60, 659.—*Schenck v. Hirshfeld*, 136 P. 725.

§ 29 (Cal.App.) Where a gaming contract itself does not amount to a violation of a penal statute, either party may withdraw his money from the stakeholder at any time before it is paid over.—*Schenck v. Hirshfeld*, 136 P. 725.

GARAGES.

See Livery Stable Keepers.

GARNISHMENT.

IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.

§ 103 (Kan.) Under Gen. St. 1909, §§ 5821-5841 (Code Civ. Proc. §§ 228-248), relating to garnishment, an order on defendant's motion, setting aside service by publication on the grounds that the garnishee is not indebted to him, is erroneous, where the question of such indebtedness is pending in proceedings pursuant to the Code.—*Chambers v. Bane*, 136 P. 923.

GAS.

§ 8 (Kan.) Where the mortgagee of a gas-distributing company takes possession of the mortgaged plant, with the books and business and carries on the business under the franchises, it presumably obligates itself to respond to the obligations of the franchise or incidental to the collection of rates from consumers.—*Flemming v. Taylor Fuel, Light & Power Co.*, 136 P. 228.

Where a corporation organized by the mortgagee to purchase a gas plant and franchises purchased the property at a mortgage sale for no consideration other than the mortgage debt, and thereafter carried on the business under such franchises, *held* that it was the agent of the mortgagee in the purchase and operation of the plant, and subject to any obligations imposed on the mortgagee by the franchises, or incidental to the collection of rates from consumers.—*Id.*

Where a mortgagee and its agent, after buying in at mortgage sale the mortgaged gas plant and franchises, continued their predecessor's business under such franchises, collecting rates and settling outstanding accounts, the court properly required, as a condition to their discontinuing the business and removing the property, that 30 days' notice be given, and deposits made by the consumers with the mortgagor as security for the payment of gas bills be refunded.—*Id.*

§ 14 (Wash.) Under Public Service Commission Law, §§ 26-28, a proposed change in rates, the rates changed not having been established by any order of the Commission, so as to be governed by section 84, automatically goes into effect on 30 days' notice to the commission, unless suspended or adjudged unreasonable by the Commission under sections 54, 80-82.—*State v. Public Service Commission of Washington*, 136 P. 850.

Under Public Service Commission Law, §§ 54, 80-82, the question of the Commission's entering

on an inquiry on its own motion, as to the reasonableness of a proposed increase in a rate or on an inquiry, instituted at instance of another, beyond the evidence brought by the complainant and the company, is one of discretion in the Commission.—Id.

The burden of proof as to reasonableness of a proposed increase of rate on an inquiry by the Public Service Commission, at instance of another, is not on the company; the proposed rate not being judicially unreasonable, and the rate changed not being one previously fixed by the Commission, so as to be governed by Public Service Commission Law, § 84.—Id.

The reasonableness of a rate is not to be determined by a mere mathematical calculation but, while cost and revenue have no inconsiderable bearing therein, is to an extent within the flexible limit of judgment.—Id.

GIFTS.

II. CAUSA MORTIS.

§ 60 (Or.) While gifts mortis causa should be closely scrutinized with a view to preventing fraud, yet where the intention of the donor is clear, mere formal objections should not be allowed to defeat it.—Baker v. Moran, 136 P. 30.

§ 64 (Or.) Where deceased, after being practically told that he could not recover, handed plaintiff, his best friend, two undorsed drafts, telling him that whatever happened they were for him, there was a complete gift causa mortis.—Baker v. Moran, 136 P. 30.

Upon a gift, where a negotiable instrument is actually delivered, title passes without indorsement.—Id.

Where deceased delivered unto plaintiff two undorsed drafts as a gift mortis causa and thereafter wrote a letter to the bank in which he kept deposits, referring more to the deposits than to the drafts, his retention of that letter until after his death will not defeat the gift.—Id.

§ 82 (Or.) Evidence held to show that deceased intended to make a gift causa mortis of two bank drafts.—Baker v. Moran, 136 P. 30.

GOOD FAITH.

See Specific Performance, § 96; Vendor and Purchaser, §§ 224-243.

GOVERNOR.

See Mandamus, § 147; Pardon; States, §§ 41, 42.

GRAND JURY.

§ 19 (Nev.) Under Rev. Laws, §§ 7005, 7010 accused held to have waived his right to object that a juror was a nonresident.—McComb v. Fourth Judicial Dist. Court in and for Elko County, 136 P. 563.

One held to answer to the grand jury was bound to know the provisions of the Code relating to the time challenges must be interposed to the grand jury.—Id.

GUARANTY.

See Indemnity; Principal and Surety.

I. REQUISITES AND VALIDITY.

§ 16 (Wash.) Money paid by plaintiff to a trust company to take up notes and attached securities, which were obligations of mining companies in which plaintiff was interested, was sufficient consideration for defendant's personal guaranty that they should be placed in her hands after she had taken them up.—Noyes v. Adams, 136 P. 696.

II. CONSTRUCTION AND OPERATION.

§ 36 (Wash.) On breach of defendant's guaranty that notes and securities of a company

would be turned over to plaintiff as collateral if plaintiff would take them up, the measure of damages was the actual loss, and not the amount advanced.—Noyes v. Adams, 136 P. 696.

In an action to recover damages only, such as for breach of a contract of guaranty, failure to prove substantial damages entitles defendant to a judgment, notwithstanding that a technical breach of the contract is shown.—Id.

§ 43 (Wash.) To constitute a substantial compliance with defendant's guaranty that notes and securities of mining companies in which plaintiff was interested should be placed in plaintiff's hands after she had taken them up under an agreement that they be assigned to her with collaterals, all of the notes correctly described in the guaranty, with their collaterals, should be turned over to plaintiff.—Noyes v. Adams, 136 P. 696.

IV. REMEDIES OF CREDITORS.

§ 75 (Wash.) Plaintiff's remedy for breach of defendant's guaranty that notes and securities, which were obligations of companies in which plaintiff was interested, should be placed in her hands after she had taken them up held an action for damages.—Noyes v. Adams, 136 P. 696.

GUARDIAN AND WARD.

See Evidence, § 82.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

§ 112 (Kan.) A mortgage by a guardian of several minor tenants in common, upon their entire estate, is not necessarily invalid when its execution is authorized by the court to enable him to borrow money for their common benefit.—First Nat. Bank v. Bangs, 136 P. 915.

In an action to foreclose such mortgage, the question whether circumstances justified the execution of the mortgage on the entire estate is not open to inquiry.—Id.

A mortgage for money borrowed to purchase personalty to make the realty more productive is not necessarily invalid; and, in an action to foreclose, the question whether justification for the mortgage existed is not open to inquiry.—Id.

Where an order of the probate court authorizes a guardian to execute a mortgage on his ward's realty and a change of guardian is effected before the order is carried out, the new guardian may act upon such authority.—Id.

VI. ACCOUNTING AND SETTLEMENT.

§ 163 (Kan.) A payment on a mortgage by a guardian will on foreclosure be deemed to have been properly made, where the guardian's report showing such payment has been approved by the probate court.—First Nat. Bank v. Bangs, 136 P. 915.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

§ 19 (Okla.Cr.App.) In extradition proceedings, the governor determines in the first instance whether the demand is in compliance with the law, and whether the person whose return is sought is a fugitive from justice; but his decision is subject to review by habeas corpus.—Ex parte Owen, 136 P. 197.

§ 30 (N.M.) The legality of imprisonment depends, not upon the mittimus, but upon the judgment; and hence a person imprisoned under a legal sentence cannot obtain his discharge because of error in the mittimus.—Ex parte De Vore, 136 P. 47.

II. JURISDICTION. PROCEEDINGS, AND RELIEF.

§ 59 (Okl.Cr.App.) On an original application to the Criminal Court of Appeals for a writ of habeas corpus, counsel will not be permitted to take inconsistent positions.—*Ex parte Hawkins*, 136 P. 991.

§ 92 (N.M.) Grounds relied on by the petitioner in an original application for a writ of habeas corpus are waived when not briefed or argued by his counsel.—*Ex parte De Vore*, 136 P. 47.

HARMLESS ERROR.

See Appeal and Error, §§ 1029-1073; Criminal Law, §§ 1166-1177; Homicide, § 341.

HEARSAY EVIDENCE.

See Evidence, § 317.

HEAT.

See Carriers, § 286.

HIGHWAYS.

See Adverse Possession, § 7; Bridges; Damages, § 62; Dedication; Injunction, § 79; Municipal Corporations, §§ 346-508, 648, 654, 762-821; Public Lands, § 64; Railroads, §§ 300-350.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 1 (Mont.) Under Rev. Codes, §§ 1337, 1340, the public use of land for a highway cannot ripen into prescriptive title, until the property is declared a public highway by the board of county commissioners.—*Barnard Realty Co. v. City of Butte*, 136 P. 1064.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 120 (Kan.) Road overseers have authority to construct drains in public highways.—*Marts v. Freeman*, 136 P. 943.

That a road overseer in constructing a drain was advised by the township trustee or county commissioners did not invalidate his act.—*Id.*

That the construction of a drain in a highway was urged by and benefited a landowner did not impair the road overseer's right to make the improvement for public use and benefit.—*Id.*

That the drain was artificial was no justification for obstructing it, though the obstruction only caused the water to flow where it did before the drain was opened.—*Id.*

Where a drain is lawfully constructed in a highway to the damage of a landowner, the landowner cannot recover therefor, and has no right to obstruct the drain.—*Id.*

Where an individual suffers special injury from the obstruction of a drain lawfully constructed by the road overseer in a highway, he may recover therefor against the wrongdoer.—*Id.*

IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

§ 122 (Or.) City Charter of Ashland, art. 17, § 1, exempting city property from county road taxes, held constitutional.—*Johnson v. Jackson County*, 136 P. 874.

§ 126 (Or.) City charter of Ashland, art. 17, § 1, exempting city property from county road taxes, applies not only to the portion of a tax levied under L. O. L. § 6320, which is apportioned to the road districts, but also to the portion expended by the county court in any part of the county.—*Johnson v. Jackson County*, 136 P. 874.

§ 150 (Kan.) In a prosecution of a resident of a city of the second class under the general

road law (Laws 1911, c. 248) for failure to pay poll tax, it was no defense that the city had not passed the ordinance authorized by such statute.—*State v. Simons*, 136 P. 320.

The state under such law can recover the poll tax in a prosecution in the name of the state in a justice's court in the absence of a city ordinance relating to the subject and authorized by such act.—*Id.*

HOLDING OVER.

See Landlord and Tenant, § 291.

HOLIDAYS.

See Statutes, § 64; Sunday.

HOLOGRAPHIC WILLS.

See Wills, § 289.

HOMESTEAD.

See Public Lands, § 35; Taxation, § 5.

I. NATURE, ACQUISITION, AND EXTENT.

(A) Nature, Creation, and Duration of Estate or Right in General.

§ 5 (Or.) Statutes exempting homesteads should be construed to carry out the beneficial policy of the Legislature.—*Wilson v. Peterson*, 136 P. 1187.

(C) Acquisition and Establishment.

§ 45 (Wash.) An unacknowledged declaration of homestead is invalid under Rem. & Bal. Code, § 558.—*Covert v. Burger*, 136 P. 675.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 167 (Or.) Under L. O. L. § 221, the conveyance of a homestead to the debtor's son, a minor, does not abrogate the homestead right.—*Wilson v. Peterson*, 136 P. 1187.

V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§ 193 (Or.) The notice of claim of homestead required by L. O. L. § 224, may be made at any time prior to the sale.—*Wilson v. Peterson*, 136 P. 1187.

HOMICIDE.

See Criminal Law, §§ 369, 404, 406, 417, 423, 424, 448, 543, 706, 719, 778, 823, 1169; Descent and Distribution, § 51; Indictment and Information, § 132; Witnesses, §§ 268, 277, 398.

I. THE HOMICIDE.

§ 3 (Kan.) A "dangerous weapon" is ordinarily defined as one calculated or designed to inflict death, or great bodily harm, or by the manner in which it is used is likely to produce death or great bodily harm.—*State v. Bloom*, 136 P. 951.

II. MURDER.

§ 11 (Ariz.) Under Pen. Code 1901, § 172, defining murder, the term "malice" comprehends more than ill will, hatred, or revenge, and means the intent to kill a human being without legal justification or excuse, and under circumstances which do not mitigate the crime to manslaughter.—*Bennett v. State*, 136 P. 276.

§ 13 (Ariz.) Where accused was present participating in an unprovoked and unnecessary killing of two officers of the law, premeditated design and criminal intent, from which malice might be inferred, were present.—*Losano v. State*, 136 P. 864.

§ 18 (Kan.) Although an instrument is used with the assent of the woman to procure an abortion, yet, where death results the common law will imply malice and hold the person so

using such instrument guilty of murder, regardless of whether she was pregnant with a quick child or with a vitalized embryo.—*State v. Harris*, 136 P. 264.

§ 18 (Okl.Cr.App.) Premeditated design to effect death is not an element of murder committed in the perpetration of a felony.—*Ray v. State*, 136 P. 980.

III. MANSLAUGHTER.

§ 55 (Cal.App.) Where accused was arrested by a police officer in plain clothes who did not disclose his authority, that fact will not reduce the crime from murder to manslaughter, where no force or show of force was resorted to by the policeman.—*People v. Bradley*, 136 P. 955.

§ 65 (Kan.) An information alleging the use of a certain instrument to procure a miscarriage, not medically advised to be necessary to preserve her life, resulting in her death, charges manslaughter in the first degree under Gen. St. 1909, § 2500.—*State v. Harris*, 136 P. 264.

§ 79 (Kan.) The Legislature in defining "manslaughter" in the third degree (Gen. St. 1909, § 2506) and in the fourth degree (section 2514), wherein practically the only distinction is that the killing in the one case should be by a "dangerous weapon," and in the other by a "weapon," recognized the distinction that in the one case the weapon should be dangerous in itself, and in the other it became dangerous only as used.—*State v. Bloom*, 136 P. 951.

V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 111 (Cal.App.) Where accused was arrested by a police officer in plain clothes who did not disclose his authority, that fact will not justify accused in killing the officer, who used no force.—*People v. Bradley*, 136 P. 955.

§ 112 (Okl.Cr.App.) For self-defense to justify a homicide, the slayer must have been free from fault in bringing on the difficulty.—*Larry v. State*, 136 P. 596.

§ 114 (Okl.Cr.App.) A killing done in mutual combat, entered into willingly with knowledge of the probable consequences, cannot be justified on the ground of self-defense unless the slayer refused any further combat and retreated as far as he could with safety before the fatal shot was fired.—*Larry v. State*, 136 P. 596.

VI. INDICTMENT AND INFORMATION.

§ 138 (Kan.) Where an allegation of an information charging manslaughter by an attempted abortion alleges that an instrument was used, it need not allege that it was used without design to effect death.—*State v. Harris*, 136 P. 264.

VII. EVIDENCE.

(A) Presumptions and Burden of Proof.

§ 146 (Ariz.) Where the evidence shows neither mitigation nor justification, malice will be presumed.—*Bennett v. State*, 136 P. 276.

(B) Admissibility in General.

§ 173 (Ariz.) On a trial for murdering B. in a fight in which F. was also killed, evidence as to the description of the wounds on both bodies to enable the jury to determine whether they were inflicted by the same instrument and the same person held competent.—*Marinoni v. State*, 136 P. 626.

§ 174 (Cal.App.) Evidence that defendant, shortly after the killing, which he claimed was in self-defense, drew his revolver, pointed it at himself, and when it was taken from him said, "I couldn't do it," is admissible.—*People v. Barrett*, 136 P. 520.

§ 174 (Okl.Cr.App.) In a prosecution for murder, testimony that other parties jointly indicted with the defendant had been hanged by a mob was improperly admitted.—*Washmood v. United States*, 136 P. 184.

§ 188 (Cal.App.) Defendant, alleging self-defense, may not, to show the reputation of deceased as a violent man, show he was in the habit of swearing, talked too much, and called one of the boys a liar.—*People v. Barrett*, 136 P. 620.

(E) Weight and Sufficiency.

§ 234 (Ariz.) Evidence held sufficient to support a conviction, though no eyewitness saw accused strike deceased.—*Marinoni v. State*, 136 P. 626.

§ 253 (Cal.App.) Evidence held sufficient to support the conviction.—*People v. Bradley*, 136 P. 955.

§ 253 (Okl.Cr.App.) Evidence held to sustain a verdict assessing the death penalty for murder.—*Henry v. State*, 136 P. 982.

§ 255 (Okl.Cr.App.) Evidence held to sustain conviction of manslaughter in the first degree.—*Narcome v. State*, 136 P. 783.

VIII. TRIAL.

(B) Questions for Jury.

§ 268 (Ariz.) In a prosecution for homicide, evidence held sufficient to take the case to the jury.—*Losano v. State*, 136 P. 864.

§ 269 (Ariz.) On the evidence in a prosecution for homicide, held, that the question of malice aforethought was for the jury.—*Bennett v. State*, 136 P. 276.

(C) Instructions.

§ 289 (Okl.Cr.App.) Where, in a prosecution for murder in an attempt to take whisky, there was no evidence that the whisky was kept for an unlawful purpose, it was not error to instruct that a person would be guilty of robbery if he took whisky from the immediate presence of the person killed against his will by force or fear.—*Ray v. State*, 136 P. 980.

§ 300 (Cal.App.) It was proper to instruct, where defendant claimed self-defense, as to the powers, duties, and authority of deceased, acting chief of police, as superior officer of defendant, a policeman.—*People v. Barrett*, 136 P. 520.

There being evidence that the last and fatal shot was fired after deceased had fallen, an instruction that if the jury were satisfied of this, and that, under the circumstances as they then appeared to defendant as a reasonable man, he no longer had cause for fear, it would justify a conviction, was proper.—*Id.*

§ 300 (Okl.Cr.App.) Where accused was the aggressor and without justification, and there was no proof that he had withdrawn from the controversy, refusal to submit the issue of self-defense was not error.—*Ray v. State*, 136 P. 980.

§ 307 (Kan.) On a trial for murder in the first degree, instructions should be given on every crime included in such charge of which there is any evidence.—*State v. Bloom*, 136 P. 951.

§ 309 (Kan.) Where there was evidence that the only weapon in defendant's possession at the time of the difficulty was a penknife, it was error to refuse an instruction defining manslaughter in the fourth degree.—*State v. Bloom*, 136 P. 951.

§ 309 (Okl.Cr.App.) Where the evidence showed an attempt to perpetrate a robbery or other felony, failure to submit the issue of manslaughter was not error.—*Ray v. State*, 136 P. 980.

X. APPEAL AND ERROR.

§ 332 (Ariz.) In a prosecution for homicide, where a conviction was had on sharply conflicting evidence, the verdict will not be disturbed on appeal, especially where the trial court refused a new trial.—*Losano v. State*, 136 P. 864.

§ 340 (Cal.App.) Any error in instructions as to murder in the first degree was harmless; the conviction having been of manslaughter.—*People v. Barrett*, 136 P. 520.

§ 341 (Okla.Cr.App.) Failure to instruct pursuant to Rev. Laws 1910, § 5902, relative to the burden resting on defendant in a murder case to prove mitigation or justification, being error in defendant's favor, is harmless.—*Kincaid v. State*, 136 P. 779.

HOSPITALS.

See Master and Servant, § 250%.

HUMANITARIAN DOCTRINE.

See Negligence, § 83.

HUSBAND AND WIFE.

See Adultery; Appeal and Error, § 1050; Descent and Distribution, § 51; Divorce; Evidence, §§ 271, 273; Executors and Administrators, § 130; Fraudulent Conveyances, § 300; Wills, § 116; Witnesses, § 56.

VI. ACTIONS.

§ 221 (Wash. Under Rem. & Bal. Code, § 181, husband *held* a necessary party to a married woman's action for damages for an indecent assault.—*Schneider v. Biberger*, 136 P. 701.

Under Rem. & Bal. Code, § 181, wife *held* not living separate and apart from her husband at the time of an assault upon her, where, though then residing with her parents, she, a week subsequent thereto, returned to her husband, where she remained until she later commenced an action for divorce.—*Id.*

VII. COMMUNITY PROPERTY.

§ 260 (Wash.) A cause of action for an indecent assault upon a married woman arising during the existence of the marriage was community property.—*Schneider v. Biberger*, 136 P. 701.

§ 263 (Cal.App.) Evidence of plaintiff, claiming land standing in his wife's name was community property, having earned money, under contract with his wife, in buying and selling land for her, and by reason of attending to her lands having neglected his business, is admissible to rebut any inference from defendants showing he earned little from his business.—*Eaton v. Locey*, 136 P. 534.

On the issue whether land standing in the name of plaintiff's deceased wife was their community property or her separate property, her statement to a third person that plaintiff had used money belonging to her to buy stocks for himself is immaterial.—*Id.*

§ 264 (Cal.App.) Evidence *held* to show that property in a wife's name at her death was bought and paid for out of their community funds.—*Eaton v. Locey*, 136 P. 534.

Evidence *held* sufficient to overcome the presumption, under Civ. Code, § 104, that title was thereby vested in her as her separate property or that plaintiff intended the conveyance as a gift to her.—*Id.*

§ 270 (Wash.) Where a wife conducted a hotel, with power of attorney from her husband to do so and to sell and dispose of the business, and in selling the same a cause of action arose in favor of the transferees, they were entitled to judgment over against both husband and wife, enforceable against the community.—*Grote-Rankin Co. v. Brownell*, 136 P. 145.

§ 270 (Wash.) Where a cause of action for assault constituting community property was

not awarded to the wife by a subsequent divorce decree, *held*, that it became common property of the husband and wife, and a suit thereon could not be maintained by the wife alone.—*Schneider v. Biberger*, 136 P. 701.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 283 (Or.) The proceeding, under L. O. L. §§ 7040-7042, for an order on a husband for support of his wife, being essentially equitable in its nature, a wife living separate from her husband, through fault of both, may not have such an order.—*Ivanhoe v. Ivanhoe*, 136 P. 21.

IX. ABANDONMENT.

§ 303 (Kan.) The Desertion Act is a supplement to other remedies for enforcing a husband's duty to support his wife, and is remedial in purpose, and is to be liberally interpreted, though it provides a severe penalty.—*State v. Waller*, 136 P. 215.

As used in the Desertion Act, providing for the punishment of a husband who, without just cause, fails to provide for the maintenance of his wife "in destitute or necessitous circumstances," the phrase quoted covers not only primitive physical needs but those things which are necessary to the particular person left without support.—*Id.*

§ 304 (Kan.) In a prosecution under the Desertion Act for nonsupport of a wife, it is no defense that the necessities of life are furnished the wife by her own labor or by sympathizing relatives, friends, or strangers, so that she does not in fact suffer from the privation.—*State v. Waller*, 136 P. 215.

§ 314 (Kan.) Where, in a prosecution under the Desertion Act, it appears that the wife has a separate estate, the question whether in view of such estate she is "in destitute or necessitous circumstances" is one of fact for the jury.—*State v. Waller*, 136 P. 215.

IMBECILES.

See Insane Persons.

IMPEACHMENT.

See Witnesses, §§ 330-405.

IMPLICATION.

See Statutes, §§ 158, 159.

IMPLIED CONTRACTS.

See Work and Labor.

IMPRISONMENT.

See Escape.

IMPROVEMENTS.

See Municipal Corporations, §§ 294-538.

INCOMPETENT PERSONS.

See Insane Persons.

INDEMNITY.

See Guaranty; Principal and Surety; Sheriffs and Constables, §§ 90, 92.

§ 13 (Or.) Where a traveler recovered damages against a city for personal injuries from a defect in a street crossing, the city could recover over against the street railway company whose nonperformance of its duty was the efficient and primary cause of the injury.—*City of Astoria v. Astoria & G. R. R. Co.*, 136 P. 645.

A city entitled to indemnity from a street railroad company as the party primarily lia-

ble for personal injuries to a traveler could recover for the necessary costs and attorney's fees in defending the action in which such recovery was had.—Id.

§ 14 (Or.) In an action by a city against a street railroad company to recover damages paid and expenses incurred in an action by a traveler for personal injuries from a defective street crossing, the judgment against the city is conclusive of the facts thereby established, if the latter was notified of the former action.—City of Astoria v. Astoria & C. R. R. Co., 136 P. 645.

Notice of suit instituted against a city for personal injuries from a defective street crossing, given before trial to the street railroad company primarily liable therefor, *held* legally sufficient.—Id.

INDEPENDENT CONTRACTORS.

See Master and Servant, §§ 284, 315-329.

INDIANS.

§ 13 (Okl.) Courts of equity have jurisdiction, after the Commission to the Five Civilized Tribes and the Secretary of the Interior have exhausted their jurisdiction, to determine whether the Commission or Secretary has failed to allot land to a Cherokee citizen entitled to same.—Harnage v. Martin, 136 P. 154.

Whether there is any evidence to sustain a finding of fact in a contest before the Commission to the Five Civilized Tribes and the Secretary of the Interior, involving the rights of two Indians to select certain lands, is a question of law, and an error in that respect, resulting in the issuance of a patent to the wrong party may be remedied in equity.—Id.

Evidence in a contest before the Commission of the Five Civilized Tribes and the Secretary of the Interior *held*, on review in equity in a state court, to sustain their findings that the Indian to whom a patent was issued had such an interest in the improvements thereon as entitled her to select the lands in controversy as her allotment, under Act Cong. July 1, 1902, § 11.—Id.

§ 13 (Okl.) The father of a minor allottee as natural guardian cannot contract concerning the minor's land.—Geinne v. Stewart, 136 P. 411.

§ 15 (Okl.) Where a minor Creek Freedman sold his surplus allotment to O., who went into possession, and after reaching majority again sold the land to S. in violation of champerty statute (Rev. Laws 1910, § 2260), *held*, that S. and his assignor could not maintain an action to quiet title against O., who was in possession at the time of the second sale.—Oklahoma Trust Co. v. Stein, 136 P. 746.

§ 15 (Okl.) That a Cherokee Indian was unable to return the consideration received for leases and a mortgage given during minority on his allotted lands did not deprive him of his right to rescind upon attaining his majority, though the instruments were made after Act Cong. May 27, 1908, c. 199, § 312, removing restrictions upon alienation of allotted lands.—Coody v. Coody, 136 P. 754.

§ 36 (Okl.) Rev. Laws 1910, § 2260, making it a misdemeanor for a person to convey land where he or his privies have not had possession or exercised certain possessory rights within a year, *held* to apply where the grantor is an Indian allottee.—Oklahoma Trust Co. v. Stein, 136 P. 746.

INDICTMENT AND INFORMATION.

See Extradition, § 35; Forgery, §§ 29, 30; Homicide, § 138; Larceny, § 40; Lewdness, §§ 5, 6; Rape, § 34; Sodomy, § 5.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§ 48 (Kan.) That an information, entitled "State of Kansas, County of C—s: In the District Court of said County and State," failed to name the place where the information was filed, as required by Laws 1901, c. 156, §§ 1, 2, where the court was held in two places, *held* not to invalidate it.—State v. Bland, 136 P. 947.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 82 (Okl.Cr.App.) In view of Rev. Laws 1910, § 5878, authorizing separate trials, separate informations may be filed against joint offenders held for the commission of a single crime.—Chappelear v. State, 136 P. 978.

§ 86 (Kan.) Under Gen. St. 1909, § 6686, subd. 2, an information for forgery was not insufficient because it stated the place of the offense only in the opening sentence.—State v. Stickler, 136 P. 320.

§ 108 (Kan.) Under Gen. St. 1909, § 6685, subd. 4, relative to the sufficiency of informations, an information for forgery was not defective for failure to allege the statute under which accused was prosecuted.—State v. Stickler, 136 P. 329.

§ 122 (Okl.Cr.App.) An information is not open to the objection that it varies from the preliminary complaint, where the charges made in the two instruments are substantially the same.—Chappelear v. State, 136 P. 978.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 124 (Or.) The parties to the offense of lewd and lascivious cohabitation may be indicted separately.—State v. Naylor, 136 P. 889.

§ 125 (Ariz.) An indictment charging more than one offense is bad for duplicity.—Crowell v. State, 136 P. 279.

§ 132 (Colo.) Under an information charging an assault, an assault with a deadly weapon with intent to commit bodily injury, and an assault with intent to murder, where it appeared that the different counts were not distinct offenses, but related to a single assault charged to have been committed in different ways, the state was not required to elect upon which count it would proceed.—Rice v. People, 136 P. 74.

VIII. AMENDMENT.

§ 159 (Kan.) Under Gen. St. 1909, § 6647 (Code Cr. Proc. § 72), authorizing amendments, an information charging that property was "unlawfully and feloniously taken," and that robbery was committed, may be amended so as to show the ownership of the property.—State v. Moberly, 136 P. 324.

§ 161 (Okl.Cr.App.) By leave of court, an information may be amended as to matters of substance or form, after a plea of not guilty and before trial has begun.—Chappelear v. State, 136 P. 978.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

§ 196 (Colo.) That no lawful preliminary examination was had, and that there was no affidavit verifying the information or upon which it was or could be based, were only irregularities and not jurisdictional and were waived by the filing of a plea to the merits before motion to quash.—Laffey v. People, 136 P. 1031.

INEVITABLE ACCIDENT.

See Trial, § 252.

INFANTS.

See Bastards; Divorce, §§ 295, 324; Guardian and Ward; Indians, §§ 13, 15; Parent and Child.

INFORMATION.

See Indictment and Information.

INJUNCTION.

See Appeal and Error, §§ 781, 1201; Logs and Logging; Schools and School Districts, § 111.

I. NATURE AND GROUNDS IN GENERAL.**(B) Grounds of Relief.**

§ 24 (Or.) Where the enjoining of a particular act might seriously affect the public, the injunction is usually denied, so that, at the suit of a millowner, the diversion by a city of water, at a point above the millway, which might be used for drinking purposes or for the extinguishment of fires would not be enjoined.—Booth-Kelly Lumber Co. v. City of Eugene, 136 P. 29.

II. SUBJECTS OF PROTECTION AND RELIEF.**(C) Contracts.**

§ 60 (Okl.) A teacher cannot enjoin a school board from discharging him in violation of his contract; he having an adequate remedy at law by action for salary or damages.—Greer v. Austin, 136 P. 590.

(E) Public Officers and Boards and Municipalities.

§ 79 (Kan.) A road overseer's exercise of discretion in constructing drains in public highways cannot be controlled by injunction in the absence of fraud or bad faith.—Marts v. Freeman, 136 P. 943.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.**(A) Grounds and Proceedings to Procure.**

§ 143 (Kan.) Gen. St. 1909, § 5847 (Code Civ. Proc. § 253) providing that an injunction shall not be granted against a person who has answered, unless upon notice, does not require notice preliminary to the issuance of a restraining order collateral and incidental to a suit to quiet title.—Juhlin v. Hutchings, 136 P. 942.

IN PAIS.

See Estoppel.

INQUEST.

See Witnesses, § 393.

INSANE PERSONS.

See Criminal Law, § 331; Limitation of Actions, §§ 11, 74.

V. PROPERTY AND CONVEYANCES.

§ 63 (Kan.) The statutes relative to the asylum for feeble-minded (Gen. St. 1909, § 8444 et seq.) do not contemplate a charge for maintenance against the estates of inmates.—State v. Moore, 136 P. 233.

According to the legislative policy, the estate of an inmate of an asylum cannot be charged with the expense of his maintenance therein, where the institution is educational in character though only a small number of its inmates are in fact capable of receiving instruction.—Id.

Where an inmate of an asylum for imbeciles is transferred to a state insane asylum, his estate may be charged with his maintenance

in the latter place, though the requirements of law have not been complied with in his commitment thereto.—Id.

Where an inmate of the asylum for feeble-minded is transferred to a state insane asylum and later retransferred to an asylum for feeble-minded, his estate cannot be charged with his maintenance after the retransfer, though the retransfer has been irregularly made.—Id.

Gen. St. 1909, §§ 8457, 8459, providing that the estate of an inmate of the State Home for Feeble-Minded shall be charged with the expense of his maintenance, which may be recovered by the state "at any time," does not, by the use of the phrase quoted, authorize the state to demand reimbursement for expenses incurred prior to its enactment.—Id.

INSOLVENCY.

See Bankruptcy; Witnesses, § 392.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 778-833; Trial, §§ 191-296.

INSURANCE.

See Appeal and Error, § 882; Constitutional Law, § 70; Evidence, §§ 317, 370, 471; Interest, § 19; Trial, § 48.

II. INSURANCE COMPANIES.**(A) Stock Companies.**

§ 35 (Wash.) Evidence held to warrant a finding that the secretary and general manager of an insurance company obtained a secret profit for negotiating a contract for the reinsurance of the company's risks in another company, and that such commission was in compensation for services in establishing the reinsurer in Washington and looking after the risks.—Johns v. Arizona Fire Ins. Co., 136 P. 120.

Where the secretary and general manager of an insurance company obtained a secret commission in connection with the reinsuring of the company's risks by another company to the knowledge of the latter, both were liable therefor to the receiver of the company whose risks were reinsured.—Id.

V. THE CONTRACT IN GENERAL.**(B) Construction and Operation.**

§ 146 (Colo.App.) A contract of fire insurance will be given the construction which is most probable and natural under the circumstances, so as to attain the object the parties had in making it.—German-American Ins. Co. v. Messenger, 136 P. 478.

§ 165 (Colo.App.) Under the terms of a fire insurance policy on a farm implement business and goods in the yard, held, in view of the insured's offer to take the insurer's agent over to see the goods on a vacant lot diagonally across from his building, that a separator on such lot was included in the policy.—German-American Ins. Co. v. Messenger, 136 P. 478.

XII. RISKS AND CAUSES OF LOSS.**(B) Insurance of Property and Titles.**

§ 424 (Colo.) A policy covering breakage of glass in a building covered loss by breakage by the wrongful act of a third person.—Weaver v. New Jersey Fidelity & Plate Glass Ins. Co., 136 P. 1180.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.**(B) Insurance of Property and Titles.**

§ 507 (Kan.) Where a policy, insuring owner of a building against loss of rent, provided that if the owner should not rebuild the loss should be determined by the time necessary for rebuilding, the loss was to be computed, where the building could not be rebuilt, without con-

sidering loss of time, time for removal of debris, or delay incident to inclement weather.—*Amusement Syndicate Co. v. Milwaukee Mechanics' Ins. Co.*, 136 P. 941.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

§ 603 (Colo.) Generally a recovery by insured from a third person, causing a loss of the property insured, releases the insurer from liability.—*Weaver v. New Jersey Fidelity & Plate Glass Ins. Co.*, 136 P. 1180.

§ 606 (Colo.) Where an insurer indemnifies insured, with full knowledge of an antecedent settlement between him and a third person causing the injury, the insurer cannot recover of the insured under the subrogation clause of the contract.—*Weaver v. New Jersey Fidelity & Plate Glass Ins. Co.*, 136 P. 1180.

XX. MUTUAL BENEFIT INSURANCE.

(A) Corporations and Associations.

§ 695 (Colo.App.) In absence of statute, insurance companies may limit the authority of their agents, and an applicant dealing with an agent whose authority is expressly limited by the application cannot take advantage of any act of the agent in excess of such limited authority.—*Modern Woodmen of America v. International Trust Co.*, 136 P. 806.

§ 699 (Or.) In an action against defendant, which has assumed the obligations of a fraternal order, plaintiff is not bound to prove the terms of the contract between defendant and the order.—*Spande v. Western Life Indemnity Co.*, 136 P. 1189.

Evidence held sufficient, as against a motion for nonsuit, to show the assumption by defendant of the obligations of the order which issued a benefit certificate.—*Id.*

Defendant, assuming the obligations of a benefit certificate for the payment of one assessment, not exceeding \$2,000, has the burden of showing that an assessment will produce less than \$2,000.—*Id.*

A company which has assumed a benefit certificate, and has accepted dues from month to month, cannot assert that its contract is ultra vires.—*Id.*

(B) The Contract in General.

§ 724 (Colo.App.) Statements made to one authorized by a fraternal benefit society to organize a local camp as to insured's habits held mere opinions, and not to charge the agent with the duty of investigating the extent of insured's indulgence in intoxicants.—*Modern Woodmen of America v. International Trust Co.*, 136 P. 806.

Where insured's misrepresentations to the soliciting agent of a fraternal association were willful, the fact that the agent knew that insured's statements were not true would not estop the company from avoiding the certificate upon that ground.—*Id.*

§ 726 (Colo.App.) In absence of statutes, insurance contracts are construed by the same rules as other contracts, in order to effectuate the intention of the parties.—*Modern Woodmen of America v. International Trust Co.*, 136 P. 806.

(D) Forfeiture or Suspension.

§ 756 (Colo.App.) A fraternal benefit company need not tender a return of the premiums in order to forfeit a certificate on the ground of willful misrepresentations by insured in his application as to his intemperate habits, though assessments must be returned on forfeiture in case of an unintentional breach of warranty.—*Modern Woodmen of America v. International Trust Co.*, 136 P. 806.

(F) Actions for Benefits.

§ 819 (Colo.App.) Evidence held to show that the use of intoxicants by insured, who represented he did not regularly use them, was such that no conservative insurance society would have accepted him with knowledge.—*Modern Woodmen of America v. International Trust Co.*, 136 P. 806.

Evidence, held not to show that defendant's agent who assisted in organizing the local society had knowledge of insured's intemperate habits.—*Id.*

Evidence, in an action on a fraternal benefit policy, held not to show that one who solicited insured's application and forwarded it to the general offices had authority to organize a local society, or to do more than to select the examining physician and solicit and forward applications.—*Id.*

INTENT.

See Statutes, §§ 181, 217, 241; Trusts, § 70.

INTEREST.

See Bankruptcy, § 168; Courts, § 251; Eminent Domain, §§ 148, 263; Municipal Corporations, § 518; Usury.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 19 (Wash.) Upon rendering a judgment for an insurance company for a balance due on premiums, interest should be allowed on the amount of the judgment from the time the policy was canceled.—*Casualty Co. of America v. Beattie*, 136 P. 1153.

II. RATE.

§ 33 (Kan.) Contract rates of interest not exceeding 10 per cent. per annum will be allowed by the court.—*Holmes v. Holt*, 136 P. 246.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

See Constitutional Law, §§ 208, 240; Licenses, § 7; Money Received, § 6; Officers; Statutes, §§ 64, 77; Trial, §§ 234, 236.

IV. LICENSES AND TAXES.

§ 46 (Wyo.) A city is not given any power as to the issuance of a county liquor license either by Laramie City Charter (Comp. St. 1910, § 1440), giving the city council power to license and regulate the sale of intoxicants within the city in addition to the county license therefor, and requiring it to collect a licensee fee, or by Comp. St. 1910, §§ 2832, 2838, requiring a county license.—*State v. Smart*, 136 P. 452.

§ 101 (Wyo.) Comp. St. 1910, §§ 2832, 2838, providing for the licensing of the business of selling intoxicants, merely protects the licensee from punishment for an act which would otherwise be unlawful.—*State v. Smart*, 136 P. 452.

A county liquor license is issued subject to the general law of the state and does not protect the licensor from violations of such law.—*Id.*

VI. OFFENSES.

§ 145 (Colo.) Rev. St. 1908, § 1805, prohibiting the sale of liquors in every saloon, bar, or other place after midnight and on Sunday, held to include a regular restaurant, where liquors were sold to guests for consumption with their meals.—*Lendholm v. People*, 136 P. 70.

The character of a place where intoxicating liquors are sold is fixed for the purpose of regulating such traffic by what habitually takes place there, and not by the name of the place.—*Id.*

VIII. CRIMINAL PROSECUTIONS.

§ 233 (Kan.) Exhibits showing shipments of liquor by consignors to themselves, with directions to notify one of their clerks, *held* properly admitted in evidence, where it was shown that such clerks directed a carrier to deliver the shipment to a drayman who delivered them to defendant.—State v. Sexton, 136 P. 901.

INTOXICATION.

See Deeds, § 68.

IRRIGATION.

See Waters and Water Courses, §§ 224, 247.

ISLANDS.

See Navigable Waters, § 42.

JOINDER.

See Indictment and Information, §§ 124, 125.

JOINT ADVENTURES.

§ 5 (Or.) Evidence *held* to require a finding that decedent and defendant had settled their joint adventure in the purchase of certain real property, and that in such settlement it was agreed that defendant should retain the property in controversy.—Sullivan v. King, 136 P. 335.

JOINT TENANCY.

See Tenancy in Common.

JOINT TORT-FEASORS.

See Contribution.

JUDGES.

See Exceptions, Bill of, § 43; Justices of the Peace; Trial, § 29.

IV. DISQUALIFICATION TO ACT.

§ 47 (Colo.App.) Under Code, § 464, county judge *held* not disqualified to enter order for sale of decedent's realty to pay debts, because he had acted as attorney for the administrator before the institution of such proceeding and before his election as county judge.—Ryan v. Geigel, 136 P. 804.

§ 51 (Wash.) Under Laws 1911, c. 121, authorizing a change of judge in any action upon affidavit of prejudice, a motion for such change must be granted if timely made.—State v. Smith, 136 P. 678.

Application for change of judge for prejudice held in time though not made before the case was set for trial as required by rule of court made under Rem. & Bal. Code, § 36.—Id.

JUDGMENT.

See Appeal and Error; Bail, § 93; Certiorari, § 4; Creditors' Suit, § 13; Criminal Law, § 996; Divorce, § 171; Execution; Executors and Administrators, §§ 228, 315; Indemnity, § 14; Justices of the Peace, § 155; Mechanics' Liens, § 304; Pleading, § 343; Sales, § 339; Trial, § 397; Vendor and Purchaser, § 341; Waters and Water Courses, § 247.

IV. BY DEFAULT.**(A) Requisites and Validity.**

§ 106 (Cal.App.) Where an answer in an action to quiet title seeks affirmative relief, a cross-complaint which is a repetition of the answer and presents no new issues is unnecessary, and the failure to answer it does not authorize default.—Brooks v. White, 136 P. 500.

(B) Opening or Setting Aside Default.

§ 145 (Kan.) A petition under Code Civ. Proc. § 600 (Gen. St. 1909, § 6195), after ex-

piration of the term, on the ground that the judgment was taken contrary to an agreement between counsel, *held* insufficient, where it failed to set forth the judgment and facts showing a valid defense.—State v. Soffietti, 136 P. 260.

§ 155 (Kan.) In a proceeding to vacate a judgment under Code Civ. Proc. § 600 (Gen. St. 1909, § 6195), it is essential that a summons shall be issued and served as in the commencement of an action.—State v. Soffietti, 136 P. 260.

VI. ON TRIAL OF ISSUES.**(A) Rendition, Form, and Requisites in General.**

§ 199 (Wash.) Where a verdict is based on conflicting evidence, judgment non obstante veredicto will not be ordered.—Puget Sound Electric Ry. v. Carstens Packing Co., 136 P. 117.

§ 199 (Wash.) In an action for injuries caused by want of barriers in a street, *held*, that a judgment for defendant notwithstanding the verdict was properly denied.—Brown v. City of Walla Walla, 136 P. 1166.

A motion for judgment notwithstanding the verdict invokes no element of discretion and can be granted only when, as a matter of law, the evidence and the inferences therefrom do not sustain the verdict.—Id.

VII. ENTRY, RECORD, AND DOCKETING.

§ 279 (Okla.) The reasons which influence a court to direct a verdict need not be inserted in a formal journal entry of the judgment based on the verdict.—Homeland Realty Co. v. Robison, 136 P. 585.

X. EQUITABLE RELIEF.**(A) Nature of Remedy and Grounds.**

§ 418 (Cal.App.) Corporation, not served so as to give the court jurisdiction and mistakenly substituted as a party defendant in place of another corporation of the same name, *held* to have a right to vacate in equity the judgment suffered therein.—Postal Telegraph-Cable Co. v. Superior Court in and for Yolo County, 136 P. 538.

XI. COLLATERAL ATTACK.**(B) Grounds.**

§ 490 (Colo.) A judgment entered on service by publication was void and could be attacked collaterally because of the insufficiency of the affidavit where such insufficiency was affirmatively disclosed by the record.—Gibson v. Wagner, 136 P. 93.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.**(B) Causes of Action and Defenses Merged, Barred, or Concluded.**

§ 582 (Or.) The original demand on which a judgment is based is merged in the judgment.—Ryckman v. Manerud, 136 P. 826.

§ 585 (Colo.App.) Where, pending defendants' appeal to the Court of Appeals from a decree granting plaintiff's petition for a change of the point of diversion of certain water rights, defendants brought another suit against plaintiff, and obtained a decree by the Supreme Court adjudging that the said water rights were abandoned before plaintiff acquired any rights in the land, such decree was conclusive of the matters involved in the suit in the Court of Appeals.—Monte Vista Land Co. v. San Luis Valley Irrigated Land Co., 136 P. 553.

§ 589 (Kan.) A judgment denying relief, in a suit to enjoin the erection of a viaduct by a city, where nothing was involved except the right to the injunction will not bar a subsequent action by plaintiff for damages.—Meyn v. Kansas City, 136 P. 898.

(C) Persons Who may Take Advantage of the Bar.

§ 628 (Or.) Where a creditor obtains judgment against an individual, knowing that another has an interest as partner, such judgment is a bar to a suit against the firm or the other partner.—*Ryckman v. Manerud*, 136 P. 826.

XIV. CONCLUSIVENESS OF ADJUDICATION.**(A) Judgments Conclusive in General.**

§ 663 (Wash.) Where relator's application for appointment as administrator of an alleged partnership was denied because premature, and also because the court, sitting in probate, had no jurisdiction to determine the existence of the partnership when not conceded, such denial was a final order affecting a substantial right and, relator having sued out certiorari within the time for appeal, it was not res judicata of his right to administration.—*State v. Superior Court of Pierce County*, 136 P. 147.

(B) Persons Concluded.

§ 712 (Or.) In an action for false representations as to land conveyed by a third party to plaintiffs, the judgment roll in a former action is competent evidence that the third party had no title, though the present defendants were not parties to the former action.—*Cobb v. Peters*, 136 P. 656.

(C) Matters Concluded.

§ 713 (Colo.) A former adjudication is conclusive in a subsequent proceeding between the same parties as to all questions which might have been raised and determined in the prior proceeding.—*Bushnell v. Larimer & Weld Irr. Co.*, 136 P. 1017.

§ 715 (Colo.) A judgment in an action involving the same water rights, restraining plaintiff herein from interfering with defendant's water right or the manner of diversion, was a bar to a subsequent suit to restrain defendants from taking necessary water.—*Bushnell v. Larimer & Weld Irr. Co.*, 136 P. 1017.

§ 735 (Wash.) Although a contractor's action of mandamus to compel a city to levy a special assessment sufficient to pay the contract price resulted in a judgment requiring such levy, the owners were still entitled to appeal from the confirmatory ordinance and to sue to restrain collection, under Rem. & Bal. Code, § 7961 (Laws 1911, c. 98, § 21), being still entitled to have the amount of the assessment determined in the proper forum.—*State v. Wright*, 136 P. 482.

§ 736 (Wash.) An order, entered in a proceeding to condemn land for a dam at the outlet of a lake, refusing to permit interveners to file an answer setting up superior rights to the use of the water, and praying that the judgment of condemnation be set aside and their rights adjudicated, was not res judicata as to their rights, where the merits of that question were not attempted to be passed upon.—*State v. Superior Court of Grant County*, 136 P. 144.

(D) Judgments in Particular Classes of Actions and Proceedings.

§ 747 (Colo.) A decree in suit to set aside execution sale, adjudging that a sale of one lot was valid, and directing the sheriff to deliver a deed therefor, unless the judgment debtors redeemed, which they failed to do, held conclusive as to the purchaser's title to the lot.—*Smith v. Schlank*, 136 P. 1008.

§ 751 (Okla.Cr.App.) The acquittal of one defendant on her prior trial for adultery held not to necessitate acquittal of the other defendant on his subsequent trial.—*Woody v. State*, 136 P. 430.

A "verdict of not guilty" is simply a verdict of not proven in the particular case tried and

is not conclusive in favor of any other person than the defendant actually acquitted.—*Id.*

XV. LIEN.

§ 780 (Okla.) Under Comp. Laws 1909, § 5941, the lien of a judgment does not attach to a mere legal title to land held in trust by the judgment debtor, where the equitable title is in another.—*J. I. Case Threshing Mach. Co. v. Walton Trust Co.*, 136 P. 769.

The judgment lien contemplated by Comp. Laws 1909, § 5941, is a lien only on the actual interest of the judgment debtor and not upon an interest which he may appear to have, if in fact he has none.—*Id.*

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 866 (Kan.) Code Civ. Proc. § 437 (Gen. St. 1909, § 6032), which extends to two years the time in which a dormant judgment may be revived, applies where a party dies after judgment and authorizes the administrator to be made a party at any time within that period.—*Harvey v. Wasson*, 136 P. 919.

JUDICIAL NOTICE.

See Evidence, §§ 5, 18.

JUDICIAL POWER.

See Constitutional Law, §§ 70, 78.

JUDICIAL SALES.

See Mortgages, § 554; Sheriffs and Constables, § 92; Taxation, § 697.

JURISDICTION.

See Courts; Criminal Law, §§ 90-105; Divorce, §§ 62, 63; Equity, §§ 39, 42; Exceptions, Bill of, § 43; Executors and Administrators, § 815; Quieting Title, § 4.

JURY.

See Contempt; Grand Jury; New Trial, §§ 47, 143; Quieting Title, § 47; Trial, §§ 139-178, 191-311, 321-365, 370, 374.

II. RIGHT TO TRIAL BY JURY.

§ 14 (Colo.App.) Suit to set aside sale of decedent's realty and subsequent conveyances for fraud and conspiracy held an equity case, and, though a jury was impaneled to try it, the court could discharge the jury and decide the case himself.—*Ryan v. Geigel*, 136 P. 804.

§ 14 (Idaho) An action, under Rev. Codes, § 4538, to determine adverse claims to real property and quiet title thereto is a suit in equity, and the parties are not entitled to a trial by jury as a matter of right.—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

§ 19 (Wash.) A party whose property is taken for the widening of streets is entitled to have his damages assessed by a jury, whose verdict, after being confirmed by judgment, shall be given full faith and credit.—*In re City of Seattle*, 136 P. 488.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 92 (Colo.) That defendant was the family physician of a number of the veniremen is no ground for a challenge for cause, but they may sit as jurors, in the discretion of the trial court.—*First Nat. Bank v. Smith*, 136 P. 460.

§ 110 (Okla.Cr.App.) A known ground of disqualification of a juror in a criminal case is waived by withholding it or declining to raise it until after verdict.—*Horton v. State*, 136 P. 177.

§ 131 (Cal.App.) In a prosecution for attempting to dynamite a certain building, a question of the prosecuting attorney to jurors as to whether they believed in a political doctrine of "direct action" was proper to detect bias.—*People v. Warr*, 136 P. 304.

§ 131 (Cal.App.) It was not error to permit plaintiff to ask jurors whether they would follow a certain instruction.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

JUSTICES OF THE PEACE.

See Criminal Law, §§ 90, 98; Perjury.

IV. PROCEDURE IN CIVIL CASES.

§ 71 (Okla.Cr.App.) Under Wilson's Rev. & Ann. St. 1903, § 6605, a justice of the peace must reside and hold his court in the district for which he was elected or appointed.—*Berry v. State*, 136 P. 195.

Under Wilson's Rev. & Ann. St. 1903, § 6665, a justice of the peace has no jurisdiction to preside over the trial of any case outside the district for which he was elected or appointed.—*Id.*

§ 83 (Okla.) A summons in justice's court against a partnership may be cured by amendment under Rev. Laws 1910, § 4790, where it does not show the individual name of each partner.—*Red River Valley Cotton Co. v. J. W. Stalcup Mercantile Co.*, 136 P. 1115.

§ 86 (Okla.) Under Rev. Laws 1910, §§ 5359, 5361, 5366, defining the time when an action before a justice of the peace shall be deemed commenced and providing that an attachment issue "at or after the commencement thereof," an attachment of goods, in an action in which there is no service of summons or appearance, is void and will not support a sale of the goods attached.—*Bilby v. Jones*, 136 P. 414.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 147 (Okla.) An order overruling a motion to quash an execution issued by a justice is not a "judgment" within Const. art. 7, § 14 (Williams' Ann. Const. § 199, or Comp. Laws 1909, § 6386), and no appeal lies therefrom to the county court.—*Buckholts v. Farrell*, 136 P. 745.

§ 155 (Utah) Comp. Laws 1907, § 3744, providing that notice of entry of a justice's judgment must be given to the losing party and the time of appeal shall date from its service, requires such notice and proof of its service to be filed in the justice court and made a part of the record.—*Tooele Meat & Storage Co. v. Morse*, 136 P. 965.

Comp. Laws 1907, § 3744, contemplates a notice in writing.—*Id.*

Only a substantial compliance with Comp. Laws 1907, § 3744, is required.—*Id.*

A letter from plaintiff's attorney to defendant's attorney giving the title of the case, the name of the justice by whom decided, and stating that a judgment was rendered for plaintiff against defendant and an abstract of judgment filed in the district court, and that the judgment and costs were as stated, held sufficient, under Comp. Laws 1907, § 3744.—*Id.*

Under Comp. Laws 1907, § 3335, formal notice of entry of judgment for plaintiff was properly served upon the attorneys of defendant.—*Id.*

Comp. Laws 1907, § 3744, should receive a reasonable construction and application.—*Id.*

§ 159 (Idaho) An appeal from a justice's court held properly dismissed, where the appeal bond was not filed within the time provided by law.—*Browder v. Etcherson*, 136 P. 612.

§ 164 (Utah) The appellate court on appeal from a justice's judgment should be able to determine its jurisdiction from an inspection of the record.—*Tooele Meat & Storage Co. v. Morse*, 136 P. 965.

§ 173 (Colo.) The theory on which the case was tried in justice's court must be ascertained on appeal from the proceedings at the trial; there being no written pleadings in a justice's action.—*Denver & R. G. R. Co. v. Shaw*, 136 P. 1052.

§ 173 (Okla.) The "trial de novo" required by Williams' Const. art. 7, § 14, on appeal from justices of the peace means a trial anew of the entire case, as if no action had been instituted below.—*Peters v. Holder*, 136 P. 400.

§ 174 (Okla.) Where individuals, in a suit in justice's court and appealed to the county court, joined in a demurrer to the bill of particulars, though they had not been regularly summoned, the court had jurisdiction.—*Red River Valley Cotton Co. v. J. W. Stalcup Mercantile Co.*, 136 P. 1115.

JUSTIFICATION.

See Homicide, § 111.

KNOWLEDGE.

See Municipal Corporations, § 788.

LACHES.

See Equity, § 87.

LAND.

See Indians.

LAND DEPARTMENT.

See Taxation, § 5.

LANDLORD AND TENANT.

See Customs and Usages; Frauds, Statute of, § 53; Indians, § 15.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

§ 79 (Or.) While assignees of a lease are bound by a covenant of the lessee to erect a building, such covenant, not even providing when the building should be erected, does not authorize the lessee, after assigning an interest in the lease, to borrow money with which to erect the building, and to mortgage the interest of the assignees to secure the loan.—*Barber v. Toomey*, 136 P. 343.

§ 81 (Or.) The record of a deed of an undivided interest in a lease and in the lessee's right therein is constructive notice to one thereafter taking from the lessee a mortgage of his interest in the leased property.—*Barber v. Toomey*, 136 P. 343.

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

§ 114 (Okla.) After entry under a void or defective lease for a term of years, creating a tenancy at will, if periodical rent be paid, the tenancy becomes one from year to year until terminated by three months' notice, under Rev. Laws 1910, § 3784.—*Peters v. Holder*, 136 P. 400.

VI. TENANCIES AT WILL AND AT SUFFERANCE.

§ 118 (Okla.) An entry under a void or defective lease for a term of years creates a tenancy at will.—*Peters v. Holder*, 136 P. 400.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(A) Description, Extent, and Condition.

§ 125 (Colo.) There is no implied warranty in a lease that the premises are suitable for hab-

itation, or for the particular use intended, or that they are safe for use, or will continue fit for the purposes for which they were demised.—*Colorado Mortgage & Investment Co. v. Giacomini*, 136 P. 1039, 1051.

(E) Injuries from Dangerous or Defective Condition.

§ 164 (Kan.) Where two tenants occupy two upper portions of a building, connected by a common hallway leading to an outside stairway, and the wife of one is killed from the defective condition of the railing on the stairway, which condition was discoverable with reasonable care by the landlord, he is liable; the stairway being necessarily in his possession and control.—*Hinthorn v. Benfer*, 136 P. 247.

§ 167 (Colo.) Where the owner of a hotel leased the same with its furniture and equipment to be operated as a hotel by the lessee, the hotel was a "semipublic place," and the owner was liable for injuries to a guest by a defect in the elevator, which existed at the time the lease was made.—*Colorado Mortgage & Investment Co. v. Giacomini*, 136 P. 1039, 1051.

The landlord's negligence in omitting to repair the elevator of a hotel amounted to maintenance of a nuisance, rendering him liable to an injured guest.—*Id.*

The landlord's negligence depended on whether the elevator was dangerous when used for the purposes and in the ordinary manner intended, and not whether it was harmless when let alone, or whether it was possible to operate it without accident.—*Id.*

Negligence of the landlord held a proximate, concurring cause with the negligence of the pilot, the servant of the tenant, in bringing about injury to a guest of the hotel by falling into the elevator well, which the pilot had left open while absent, during which time the car had crept from the floor where it had been left.—*Id.*

It was not essential to establish actionable negligence that the particular accident should have been anticipated, or that it should be anticipated that an accident would occur exactly as it did.—*Id.*

§ 169 (Colo.) In an action against a landlord for injuries to a guest of the tenant of leased premises operated as a hotel, by reason of a defect in the elevator, evidence held to warrant a finding that the defect existed at the time of the lease.—*Colorado Mortgage & Investment Co. v. Giacomini*, 136 P. 1039, 1051.

§ 169 (Kan.) Under the evidence in a tenant's action for the death of his wife, due to a defective stairway railing in the possession and control of the landlord, held, that the question whether defendant landlord was negligent was for the jury, though plaintiff testified that the defect could only be discovered by an examination which required the railing to be lifted up.—*Hinthorn v. Benfer*, 136 P. 247.

(F) Eviction.

§ 171 (Colo.) A tenant cannot, by voluntarily surrendering possession of the premises, evict himself.—*Symes Investing Co. v. Wheelock*, 136 P. 65.

§ 172 (Colo.) It is essential, even to a constructive eviction, that the conduct of the landlord be more than a mere trespass and such as to effectually deprive the tenant of the use and benefit of all or some part of the premises.—*Symes Investing Co. v. Wheelock*, 136 P. 65.

Where a tenant notified the landlord of his vacation on a certain date and vacated the premises shortly before that time, and the landlord entered and rented the premises to other tenants during the term, there was an abandonment by the tenant so that the landlord's entry was not an eviction.—*Id.*

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§ 184 (Colo.App.) A landlord, by re-entering upon the lessee's default in rent and taking control of the property, canceled the lease so as to entitle the lessee to a deposit made to secure performance of the lease, whether the deposit was intended as liquidated damages or a penalty; the landlord not being entitled to retake possession and also resort to the deposit made to insure performance.—*Wilson v. Agnew*, 136 P. 96.

§ 194 (Colo.) Where the tenant after notice to the landlord vacated the premises, and the landlord entered and allowed new tenants free rent during the term, such loss was chargeable to the landlord in his action against the former tenant for rent.—*Symes Investing Co. v. Wheelock*, 136 P. 65.

(B) Actions.

§ 229 (Kan.) Though an affidavit in a landlord's attachment proceedings under Gen. St. 1909, §§ 4713, 4717, omitted the amount claimed as rent, it was not void where it gave the total amount of plaintiff's demand and the bill of particulars showed how much was for rent, but under the express provisions of Code Civ. Proc. § 140 (Gen. St. 1909, § 5733), it could be amended, and it was error to set aside the attachment.—*Eckhardt v. Taylor*, 136 P. 218.

The Landlord and Tenant Act (Gen. St. 1909, §§ 4713, 4717) gives a lien for rent enforceable by attachment only on the crop.—*Id.*

(C) Lien.

§ 260 (Kan.) Though an affidavit in a landlord's attachment proceedings under Gen. St. 1909, § 4716, omitted the amount claimed as rent, it was not void where it gave the total amount of plaintiff's demand and the bill of particulars showed how much was for rent, but under the express provisions of Code Civ. Proc. § 140 (Gen. St. 1909, § 5733), it could be amended, and it was error to set aside the attachment.—*Eckhardt v. Taylor*, 136 P. 218.

The Landlord and Tenant Act (Gen. St. 1909, §§ 4713, 4717) gives a lien for rent enforceable by attachment only on the crop, but § 4716 authorizes a general attachment for rent in certain cases on any nonexempt property.—*Id.*

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 291 (Okl.) Where defendant occupied and paid rent for a minor's land for one year under a contract with the minor's father and held over for another year without the payment of rent, the holding over was wrongful, and defendant was not entitled to the statutory notice to vacate.—*Geinne v. Stewart*, 136 P. 411.

X. RENTING ON SHARES.

§ 326 (Okl.) Crop rent for the use of agricultural lands is payable when the crop is ready for harvesting and market and not merely "within a reasonable time" after removal of part of the crop from the premises.—*Crump v. Sadler*, 136 P. 1102.

§ 328 (Okl.) The lien for rent given to Rev. Laws 1910, § 3806, on crops grown on agricultural land, may be enforced by attachment.—*Crump v. Sadler*, 136 P. 1102.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, §§ 351, 430, 1166; Embezzlement.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 40 (Okl. Cr. App.) In a prosecution for larceny of animals, a variance between the information and proof as to the number stolen was immaterial.—*Chappelear v. State*, 136 P. 978.

(C) Trial and Review.

§ 83 (Wyo.) A verdict of "guilty as charged in the information," not finding the value of the property stolen, is insufficient to support the judgment, though the indictment charges larceny of a head of neat cattle.—*Merrill v. State*, 136 P. 795.

LASCIVIOUS COHABITATION.

See Lewdness.

LAST CLEAR CHANCE.

See Negligence, § 83.

LEASE.

See Landlord and Tenant; Mines and Minerals, §§ 56-78.

LEGACIES.

See Wills.

LEGISLATIVE JOURNALS.

See Statutes, § 286.

LETTERS.

See Master and Servant, § 83; Sales, § 32.

LEWDNESS.

See Indictment and Information, § 124.

§ 1 (Or.) Sexual intercourse is essential to complete the crime of lewd and lascivious cohabitation, prohibited by L. O. L. § 2075.—*State v. Naylor*, 136 P. 889.

"Cohabitation," as used in L. O. L. § 2075, prohibiting lewd and lascivious cohabitation, means living together as husband and wife.—*Id.*

"Lewd and lascivious cohabitation" is living together in a state of fornication or adultery.—*Id.*

§ 5 (Or.) Under L. O. L. § 2075, an indictment charging defendant with lewdly and lasciviously cohabiting with a female is sufficient as against the objection that it fails to show that she cohabited with him.—*State v. Naylor*, 136 P. 889.

§ 6 (Or.) The state is not required to prove that the parties to the offense of lewd and lascivious cohabitation were not married.—*State v. Naylor*, 136 P. 889.

§ 9 (Or.) Evidence that the conduct of defendant and the woman was the subject of comment was inadmissible.—*State v. Naylor*, 136 P. 889.

§ 10 (Or.) Evidence held to sustain a conviction.—*State v. Naylor*, 136 P. 889.

LIBEL AND SLANDER.

See Appeal and Error, § 1050; Criminal Law, §§ 1170, 1186.

IV. ACTIONS.

(C) Evidence.

§ 103 (Okl.) In an action for defamation, evidence that plaintiff has a brother not a party to the action or a witness, who is a fugitive from justice, held incompetent.—*Kimberlin v. Ephraim*, 136 P. 1097.

VI. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 155 (Kan.) In a prosecution for libel by publishing articles charging that a fraternal

beneficiary society was a "fake order" and had been proved a "skin game," evidence that defendant had been defeated in a civil suit against the society and had declared that he would break it up, and thereupon published the articles complained of, and also the entire articles, held admissible to show malice.—*State v. Chile*, 136 P. 225.

The report made on the affairs of the society to the superintendent of insurance by a special examiner was admissible to prove the falsity of the publication.—*Id.*

The court did not err in excluding evidence of the condition of the society's affairs prior to November 30, 1909, the date of defendant's defeat in the civil suit against the society, where the libel spoke as of May 5, 1911.—*Id.*

LIBRARIES.

See States, §§ 46, 60.

LICENSES.

See Commerce, §§ 66-77; Constitutional Law, § 205; Corporations, § 630; Intoxicating Liquors; Money Received, § 6; Physicians and Surgeons; Trespass, §§ 19, 43; Waters and Water Courses, § 157.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 5 (Idaho) Laws Ex. Sess. 1912, c. 6, § 3, placing a license tax upon domestic and foreign corporations doing business in the state, is authorized by Const. art. 7, § 2.—*Northern Pac. Ry. Co. v. Gifford*, 136 P. 1131.

As used in Const. art. 7, § 2, authorizing a license tax, the words "doing business in this state" apply only to intrastate business as distinguished from interstate business.—*Id.*

Laws Ex. Sess. 1912, c. 6, § 3, authorizing a license tax on corporations doing business in this state, and enacted under Const. art. 7, § 2, applies only to the local and intrastate business.—*Id.*

§ 7 (Nev.) A city ordinance granting the individual named therein a license to conduct a restaurant with the privilege of selling intoxicants would be void.—*State v. White*, 136 P. 110.

§ 29 (Idaho) Under Laws Ex. Sess. 1912, c. 6, § 3, imposing a license tax on corporations, the authorized capital stock is only used as a basis of measuring the license tax, and not as a basis for taxing the corporate property.—*Northern Pac. Ry. Co. v. Gifford*, 136 P. 1131.

LIENS.

See Agriculture, § 12; Bankruptcy, § 215; Chattel Mortgages, §§ 138, 173; Judgment, § 780; Landlord and Tenant, §§ 229, 260, 328; Logs and Logging, § 34; Mechanics' Liens; Sales, §§ 300, 313; Statutes, § 226; Taxation, § 824; Warehousemen, § 25.

LIEUTENANT GOVERNOR.

See States, § 42.

LIFE ESTATES.

See Deeds, § 133.

LIMITATION OF ACTIONS.

See Adverse Possession; Criminal Law, § 147; Taxation.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

§ 11 (Kan.) The statute of limitations does not run against the state with respect to a charge for the maintenance of an inmate in a state insane asylum.—*State v. Moore*, 136 P. 233.

(B) Limitations Applicable to Particular Actions.

§ 29 (Cal.App.) Where a statement of account was rendered and its correctness verbally admitted, it constituted a stated account and created a new cause of action not founded upon an instrument in writing, and was barred by limitation under Code Civ. Proc. § 339, after two years; the term "open account," as used in Code Civ. Proc. § 337, being in opposition to a stated account the correctness of which is admitted.—*National Lumber Co. v. Tejunga Valley Rock Co.*, 136 P. 508.

II. COMPUTATION OF PERIOD OF LIMITATION.**(A) Accrual of Right of Action or Defense.**

§ 46 (Kan.) Limitations did not begin to run against an attorney's right to a fee, contingent on his collection of a debt owed to the client, until the collection had been made.—*Joyce v. Miami County Nat. Bank*, 136 P. 232.

§ 46 (Wash.) Where defendant, in May, 1906, agreed to permit plaintiff to withdraw from a purchase of bonds at any time upon returning the bonds, plaintiff's rights under the agreement accrued immediately, and her failure to act under the agreement for more than six years barred her right by limitations.—*Brooks v. Trustee Co.*, 136 P. 1152.

§ 55 (Kan.) An owner's right of action for permanent damages from the pollution of a stream by operation of a sewer system and oil refinery held barred by limitations, where action was not brought within two years after the sewer system and refinery were in operation.—*McDaniel v. City of Cherryvale*, 136 P. 899.

(C) Personal Disabilities and Privileges.

§ 74 (Ariz.) Under Rev. St. 1901, par. 2949, as amended by Laws 1903, No. 16, and paragraph 2970, an action by an executor in 1909 to set aside the fraudulent transfer of property of a corporation, in which testator was stockholder, was not barred, where testator was of unsound mind when the fraudulent transactions took place, and continued so until his death in 1909.—*Fleming v. Black Warrior Copper Co. Amalgamated*, 136 P. 273.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 103 (Or.) Limitations run in favor of a trustee only after he repudiates the trust and asserts an adverse claim to the knowledge of the cestui, and while the latter is sui juris and not under undue influence.—*Caro v. Wollenberg*, 136 P. 866.

Limitation does not run against a suit for redemption and accounting till actual notice of a holding in some other right adverse to the mortgage.—*Id.*

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 148 (Cal.) Under Code Civ. Proc. § 360, the acknowledgment of a debt must be a distinct, unqualified, unconditional recognition of an obligation for which the person making it is liable.—*Powell v. Petch*, 136 P. 55.

Under Code Civ. Proc. § 360, letter written creditor by debtor asking about the status of the indebtedness held not to take the debt out of the statute; it not containing a promise to pay a definite debt.—*Id.*

§ 151 (Cal.App.) A stated account, rendered after the right to sue on a prior stated account has been barred by the statute of limitations, will not enlarge the time within which suit may be brought upon the original stated account.—*National Lumber Co. v. Tejunga Valley Rock Co.*, 136 P. 508.

§ 155 (Kan.) A payment made by a guardian from his ward's funds upon a mortgage, executed by himself on the ward's property, upon an order from the probate court, will suspend limitations.—*First Nat. Bank v. Bangs*, 136 P. 915.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 165 (Cal.) Statutes of limitation are statutes of repose and do not extinguish the debt but only bar the remedy.—*Powell v. Petch*, 136 P. 55.

§ 165 (Kan.) The vendee's title under a contract of purchase will not be quieted against the vendor where the consideration has not been paid, though the vendor has failed to enforce payment within the period of limitations.—*Berkley v. Idol*, 136 P. 923.

LIQUIDATED DAMAGES.

See Damages, §§ 79, 81.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

See Statutes, § 276.

LIVERY STABLE KEEPERS.

§ 7 (Or.) Where a garage keeper removed an automobile to a place other than that specified in the contract for storage, and the property is there injured by collapse of the building, he is liable for the damages sustained, independent of the question of negligence.—*Pilson v. Tip-Top Auto Co.*, 136 P. 642.

In an action for injuries to plaintiff's automobile stored in defendant's garage, complaint held to state a cause of action for damages by defendant's negligence in permitting the roof to become heavily loaded with snow and not for conversion.—*Id.*

An instruction that in determining the issue of ordinary care the jury should consider the fall of snow on the roof, its construction, and the fact that the attention of defendant's servant was called thereto was proper.—*Id.*

An instruction that, though there was a latent defect in the garage which would not have been discovered by ordinary care, defendant was still liable if it permitted snow to remain on the roof and it proximately caused the damage was proper.—*Id.*

LIVE STOCK.

See Carriers, § 218; Railroads, § 434.

LOCAL ACTIONS.

See Venue, § 18.

LOCAL LAWS.

See Statutes, § 77.

LOGS AND LOGGING.

See Navigable Waters, § 1.

§ 19 (Or.) Where there is no evidence of specific damages from the floating of logs in a non-navigable stream other than the taking away of a few feet or inches from the banks, the court will allow only \$50 damages, and enjoin further acts.—*Lebanon Lumber Co. v. Leonard*, 136 P. 891.

§ 34 (Or.) A contract for payment for logs as rafts leave the water front, and in no case more than 30 days after the logs are delivered at the water front, held not to defeat the land-

owner's lien on the logs.—West Shore Lumber Co. v. Hollenbeck, 136 P. 671.

Under L. O. L. § 7463, giving a lien to the landowner for the price of timber cut, where he permits rafts to be taken away without payment he loses his lien.—Id.

LOST INSTRUMENTS.

See Trial, § 46.

LUNATICS.

See Insane Persons.

MACHINERY.

See Master and Servant, § 108.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

See Homicide, §§ 11, 13, 18, 146, 269; Malicious Prosecution, § 32.

MALICIOUS PROSECUTION.

See Appeal and Error, §§ 1005, 1033; Corporations, § 493; Pleading, § 376.

I. NATURE AND COMMENCEMENT OF PROSECUTION.

§ 7 (Mont.) It is not necessary to a cause of action for malicious prosecution that plaintiff should have been arrested, imprisoned, or held to bail; it being sufficient if he was maliciously and without probable cause vexed and harassed by a criminal prosecution.—Grorud v. Lossi, 136 P. 1069.

§ 10 (Kan.) Where a person makes an unlawful demand against another, and maliciously endeavors to force same by suit, the injured person may recover damages.—Stalker v. Drake, 136 P. 912.

II. WANT OF PROBABLE CAUSE.

§ 21 (Mont.) That defendant acted in good faith, and upon the advice of counsel, after fully laying the case before him, is a complete defense.—Grorud v. Lossi, 136 P. 1069.

§ 24 (Mont.) Plaintiff's discharge, if not prima facie evidence, held at least some evidence of want of probable cause.—Grorud v. Lossi, 136 P. 1069.

III. MALICE.

§ 32 (Mont.) While the plaintiff must prove both the want of probable cause and malice to make a prima facie case, the jury may infer malice from proof of the want of probable cause.—Grorud v. Lossi, 136 P. 1069.

IV. TERMINATION OF PROSECUTION.

§ 34 (Mont.) It must appear by admissions in the pleadings or by the proof that the prosecution on account of which plaintiff is suing is at an end.—Grorud v. Lossi, 136 P. 1069.

V. ACTIONS.

§ 47 (Kan.) Petition held to state a cause of action for willful and malicious oppression in seeking to enforce unlawful claims against plaintiff, and not to assert a liability for conspiracy of defendant with his agents as co-conspirators, and it was no bar to recovery that there was no conspiracy.—Stalker v. Drake, 136 P. 912.

§ 52 (Mont.) In an action for malicious prosecution, damages were recoverable for mental anxiety and suffering, though the complaint did not specially allege such damages, since mental anxiety and suffering flow naturally and directly from a groundless and malicious prosecution.—Grorud v. Lossi, 136 P. 1069.

§ 68 (Kan.) Where plaintiff borrowed \$25 at a usurious rate, so that the claim amounted to \$200 in a few months, though he had paid \$145.50 thereon, and where defendant maliciously brought proceedings to enforce his claim, and, by shifting such proceedings from state to state, and bringing actions in different places, and using dilatory tactics, caused plaintiff injury, defendant was liable for punitive damages.—Stalker v. Drake, 136 P. 912.

§ 69 (Kan.) Where plaintiff borrowed \$25 at a usurious rate, so that the claim amounted to \$200 in a few months, though he had paid \$145.50 thereon, and where defendant maliciously brought proceedings to enforce his claim and caused plaintiff injury, an award of \$5,000 as punitive damages was not excessive.—Stalker v. Drake, 136 P. 912.

MALPRACTICE.

See Physicians and Surgeons.

MANDAMUS.

See Courts, § 207.

I. NATURE AND GROUNDS IN GENERAL.

§ 3 (Nev.) Since the statute expressly provides that mandamus shall be issued where there is not a plain, speedy, and adequate remedy in the ordinary course of law, the writ will not be issued if such an adequate remedy exists.—State v. Eggers, 136 P. 100.

Mandamus will not issue to compel the State Controller to issue a warrant for traveling expenses of a deputy superintendent of public instruction, though he is entitled to reimbursement therefor; Rev. Laws, §§ 4459, 5653, and 5655, authorizing the presentation of claims against the state for services to the Board of Examiners and Controller, and, on refusal to allow it, authorizing an action to recover the rejected part of the claim, making the judgment the Controller's authority for drawing a warrant in favor of claimant for the amount of the judgment.—Id.

§ 3 (Nev.) Mandamus will not issue when the ordinary legal remedies will give adequate relief.—State v. Eggers, 136 P. 104.

§ 4 (Kan.) Mandamus will not lie where there is another adequate remedy by appeal in a criminal case.—State v. Bland, 136 P. 947.

§ 10 (Nev.) Mandamus will issue only where the right to be protected is clear.—State v. Eggers, 136 P. 104.

§ 10 (Nev.) Mandamus will not issue to compel members of a city council to submit to the electors a proposed ordinance which would be void even if approved by a majority of the electors.—State v. White, 136 P. 110.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 71 (Nev.) Performance of a duty enjoined on an officer by law, without leaving him any discretion in its performance, may be compelled by mandamus, if there is no other adequate remedy.—State v. Eggers, 136 P. 104.

§ 105 (Nev.) If a claim against the state for services authorized by law is presented, the amount of which has been fixed by law and an appropriation made therefor, the claim may be enforced by mandamus.—State v. Eggers, 136 P. 104.

§ 121 (Kan.) Mandamus will lie to require a county treasurer to pay money over to a city in accordance with the statute providing that rebates granted on taxes laid by cities shall be charged to the county (Gen. St. 1909, § 9428), where the purpose of the proceeding is not to ascertain what sum is due but to ascertain to what funds the rebate should be charged and to

determine the treasurer's duty in the premises.—*Kansas City v. Stewart*, 136 P. 241.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 147 (Colo.) The Governor, being charged by article 4, § 2, with seeing that the laws are faithfully executed, has sufficient interest to maintain mandamus to compel the Auditor to audit claims and issue certificates for the subsistence and payment of militia called out to suppress riots.—*People v. Keneshan*, 136 P. 1033.

In view of Const. art. 4, § 1, the Governor has sufficient interest to maintain mandamus to compel the Auditor to audit claims against the state in accordance with Rev. St. 1908, § 6239.—*Id.*

§ 151 (Kan.) In a mandamus proceeding against a county treasurer to require him to pay over moneys due the city under certain statutes, the county was a proper but not a necessary party.—*Kansas City v. Stewart*, 136 P. 241.

§ 154 (Okl.) A petition in mandamus is demurrable where it does not contain allegations of fact which, taken as true, affirmatively show that defendant is under the clear legal duty of doing the thing demanded.—*Board of Medical Examiners of Oklahoma v. Gulley*, 136 P. 1083.

A petition in mandamus against the board of medical examiners to require the issuance of a license without examination held demurrable, where it failed to show that the board was under any legal duty to issue such license.—*Id.*

§ 164 (Colo.) In mandamus to compel the State Auditor to audit claims and issue certificates, in accordance with Rev. St. 1908, § 6239, to pay the militia, that official, having justified his refusal on the ground that the issuance of the certificates was illegal, cannot thereafter claim that he is ready to proceed under the statute as expeditiously as his time will permit.—*People v. Keneshan*, 136 P. 1033.

MANSLAUGHTER.

See Homicide.

MAPS.

See Evidence, § 387.

MARKETABLE TITLE.

See Vendor and Purchaser, § 130.

MARKET VALUE.

See Evidence, § 474.

MARRIAGE.

See Adultery; Breach of Marriage Promise; Divorce; Husband and Wife.

MASTER AND SERVANT.

See Appeal and Error, § 1064; Death, § 23; Evidence, § 512; Money Received, § 9; Pleading, §§ 8, 376; Statutes, § 114; Trial, §§ 192, 253, 256, 260; Work and Labor.

I. THE RELATION.

(C) Termination and Discharge.

§ 33 (Okl.) Conductor's action against a railroad for refusal to give a service letter showing cause of his discharge, as required by Comp. Laws 1909, § 4056, where defendant acted without oppression or malice, and offered such letter providing plaintiff would surrender a prior insufficient letter given him, he could recover only nominal damages.—*St. Louis & S. F. R. Co. v. Fitzmartin*, 136 P. 764.

Where a discharged railroad employé receives without objection, and retains for more than eight months, a service letter in conformity with his contract, the company may refuse an-

other letter stating the cause of his discharge, in conformity with Comp. Laws 1909, § 4056, unless the employé surrender the contract letter.—*Id.*

Under Comp. Laws 1909, § 4056, entitling a railroad employé to a service letter stating the cause of his discharge, a discharged railroad conductor is not entitled to more than one service letter on account of a single discharge.—*Id.*

A contract between an order to which a freight conductor belonged and a railroad held not to entitle the conductor to more than one service letter on account of a single discharge.—*Id.*

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 87 (Or.) In Employers' Liability Law, § 1, relating to the liability of owners, builders, or operators of machines, and requiring all persons responsible for any work involving danger to the employés or to the public to exercise every precaution, does not restrict the requirements to persons mentioned in the first part of the section, but extends its scope.—*Dunn v. Orchard Land & Timber Co.*, 136 P. 872.

§ 88 (Mont.) It was immaterial to the master's liability for injuries sustained by a servant whether the servant knew for whom he was working.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 88 (Or.) The relation of an office clerk, as affecting the care required in the operation of an elevator on which the clerk was being carried to her work, was not that of a servant, but passenger.—*Putnam v. Pacific Monthly Co.*, 136 P. 835.

§ 92 (Wash.) Where a master employs a surgeon for the benefit of its men and without profit to itself, it is not liable for the surgeon's malpractice in case it exercised reasonable care in the selection of a competent surgeon.—*Simon v. Hamilton Logging Co.*, 136 P. 361.

§ 99 (Cal.App.) Where the president of a mining company which used electric power engaged a competent electrician to install the electric fixtures, and the mode of installation was not negligent, neither the president nor the electrician are liable for the wrongful death of a servant electrocuted at one of the machines.—*Hill v. Pacific Gas & Electric Co.*, 136 P. 492.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Cal.) While it is the duty of employers to take all reasonable precautions against the careless dropping of tools or materials, they are not insurers.—*Colen v. Gladding, McBean & Co.*, 136 P. 289.

§§ 101, 102 (Mont.) A master must exercise ordinary diligence to furnish the servant with a reasonably safe place of work.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§§ 101, 102 (Okl.) As applied to a master's duty to a servant, the two terms "reasonably safe place" and "reasonable care in providing a safe place," as a general rule, are used interchangeably; and an instruction embodying the former phrase will not be held erroneous as prescribing too high a degree of care.—*Great Western Coal & Coke Co. v. Malone*, 136 P. 403.

§ 103 (Mont.) The master cannot delegate to another his duty to furnish employés with a reasonably safe place of work so as to avoid the responsibility for failure to discharge such duty.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 103 (Okl.) The master's duty to furnish safe place to work and reasonably safe tools and appliances cannot be delegated so as to re-

lieve him of liability.—*Great Western Coal & Coke Co. v. Malone*, 136 P. 403.

§ 107 (Mont.) The rule requiring an employer to furnish a safe place of work does not apply, where the employé is engaged in making a dangerous place safe, or where the place of work is made by the employé as he proceeds in the work.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 108 (Or.) A slab haul, with a system of dead rolls for conveying slabs from a sawmill, is "machinery" within Employers' Liability Law, § 1.—*Dunn v. Orchard Land & Timber Co.*, 136 P. 872.

§ 116 (Or.) Hauling slabs along a slab haul 50 feet high is work "involving risk or danger" within Employers' Liability Law, § 1, imposing duties on persons responsible for such work.—*Dunn v. Orchard Land & Timber Co.*, 136 P. 872.

§ 118 (Mont.) That a penalty is imposed for a violation of Rev. Codes, § 8536, requiring the doors on the safety cage in a shaft mine to be closed when carrying men, would not make one violating it immune from civil liability.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

Such statute imposed an absolute duty, and the employer cannot excuse nonperformance on the ground that he cannot comply with the statute by exercising ordinary care.—*Id.*

Such statute does not create any right of action or destroy any defense available when it was enacted.—*Id.*

Rev. Codes, § 8536, providing that the doors of a shaft mine safety cage "must be closed" when carrying men, does not require the employment of a man solely to tend the doors or prohibit the employer from imposing that duty upon one having other duties not interfering therewith.—*Id.*

Such statute must be given a reasonable construction in view of the evil sought to be remedied by it.—*Id.*

§ 121 (Cal.) An employer held not negligent in failing to sheath or cover temporary freight elevator in building in course of construction and hence not liable for injuries to an employé, caused by a piece of wood precipitated into the shaft by some unknown cause.—*Colen v. Gladding, McBean & Co.*, 136 P. 289.

§ 129 (Cal.) Proximate cause of injury to employé, while in uncovered temporary elevator, from a piece of wood falling held to be the careless dropping of the piece of wood.—*Colen v. Gladding, McBean & Co.*, 136 P. 289.

§ 129 (Mont.) Causal connection between the negligence per se in storing in a mine more than 3,000 pounds of explosives, in violation of Rev. Codes, § 8546, and injury of an employé therein is shown by the presence and explosion of such quantity, and the injury from the explosion; whether the same thing would have occurred had there been less than 3,000 pounds not being open to inquiry.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

There is no causal connection between the negligence per se of violating Rev. Codes, § 8546, prohibiting the storing of explosives in a mine where its accidental explosion would cut off the escape of miners working in a mine, and injury to a miner therein from explosion of dynamite near the shaft, where he was so located that his means of egress were not affected by the explosion.—*Id.*

§ 129 (Or.) An allegation that a miner's injury was due to defendant's failure to timber a stope is not sustained where the rock which caused the injury had fallen long before the accident.—*Knauff v. Highland Development Co.*, 136 P. 846.

(C) Methods of Work, Rules, and Orders.

§ 136 (Okla.) Where a mine employé was injured from the derailment of a coal car on which he was riding, due to the defective con-

dition of the track, together with excessive speed of the cars, the fact that the engineer running the car may not have known the condition of the track could not relieve the employer from liability.—*Great Western Coal & Coke Co. v. Malone*, 136 P. 403.

(E) Fellow Servants.

§ 185 (Or.) In matters affecting the safety of the place for a servant to work, the master cannot escape liability by delegating the duty to another.—*Anderson v. Meier & Frank Co.*, 136 P. 660.

§ 189 (Mont.) An employer is responsible for injuries caused by the negligence of his superintendent.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 191 (Or.) The operator of an elevator is not a "fellow servant" with an office clerk killed through the negligence of the operator.—*Putnam v. Pacific Monthly Co.*, 136 P. 835.

(F) Risks Assumed by Servant.

§ 206 (Mont.) An employé assumes the risk of such dangers as are incident to his work.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 213 (Cal.) Employés working on buildings in course of construction assume the usual risks of their employment.—*Colen v. Gladding, McBean & Co.*, 136 P. 289.

§ 217 (Mont.) Though an employé assumed the risk of dangers incident to the presence of dynamite as he saw them, he did not assume the risk from negligent method of thawing dynamite of which he did not know.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

(G) Contributory Negligence of Servant.

§ 233 (Mont.) If one employed to open and close the cage doors of a shaft mine cage, pursuant to Rev. Codes, § 8536, neglected his duties while being lowered or hoisted and was injured therefrom, he could not recover against the employer.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

(H) Actions.

§ 250¾ [New, vol. 16 Key-No. Series] (Or.) The Commission being authorized by Act Feb. 25, 1913, c. 112, the "Workmen's Compensation Act," § 23, to furnish hospital accommodations only for workmen "entitled to benefits hereunder," who must be injured after June 30, 1914, the Secretary of State properly refuses to audit a claim for the amount the Commission contracts to pay a hospital for accommodations during December, 1913, for workmen entitled to benefits under such law.—*Salem Hospital v. Olcott*, 136 P. 341.

§ 250¾ [New, vol. 16 Key-No. Series] (Wash.) Under Workmen's Compensation Act 1911, §§ 1, 5, an injured employé could not maintain an injury action against the president of his corporate employer.—*Peet v. Mills*, 136 P. 685.

§ 258 (Mont.) The allegation of the complaint, in an action for injury to a miner from explosion of dynamite, that defendant negligently stored it at such a place in the mine that, should an explosion occur, the lives of persons working in the shaft, of whom plaintiff was one, would be imperiled, sufficiently charges violation of duty as to safe place to work.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

§ 258 (Or.) An allegation that defendant's foreman directed plaintiff and another to remove the ore and leave the waste which had fallen in a stope, without showing specific negligence, was insufficient to show defendant liable.—*Knauff v. Highland Development Co.*, 136 P. 846.

§ 264 (Mont.) The complaint, in a servant's action for injury from explosion of dynamite, by charging the explosion occurred by reason of the dynamite being overheated, does not limit

plaintiff to showing a spontaneous explosion from heat alone, but posits a *conditio sine qua non*.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

While, in a servant's action for injury from explosion of dynamite by reason of its being overheated through an improper method of thawing, it is not necessary for him to show whether the dynamite thus overheated exploded spontaneously or because susceptible through its overheating to some impulse otherwise inadequate, he may show that an electric bulb in the thawer might be expected to collapse, and that this would suffice to explode the dynamite when heated to the degree possible in the thawer.—*Id.*

The complaint of a servant for injury from explosion of dynamite in a mine not charging that it was negligence to thaw dynamite by electricity in any event, but merely that it was negligence to use electricity for thawing in the manner and to the extent employed by defendant, evidence that electricity was not employed as a thawing agent in other mines is inadmissible.—*Id.*

§ 264 (Or.) If it was negligence to leave waste rock which had fallen in a mine, the plaintiff must allege and prove it.—*Knauff v. Highland Development Co.*, 136 P. 846.

§ 265 (Cal.App.) The burden of proving the contributory negligence rests on the master.—*Hill v. Pacific Gas & Electric Co.*, 136 P. 492.

§ 265 (Mont.) The burden was upon one suing for alleged negligent injuries while in defendant's employ to prove that the relation of master and servant remained upon him throughout the trial, under Rev. Codes, § 7972.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 265 (Ok.) The burden was on defendant to prove that plaintiff assumed the risk of injury from working in an unsafe place after its defective condition was discovered.—*Great Western Coal & Coke Co. v. Malone*, 136 P. 403.

§ 267 (Mont.) In an action against a water company for injuries by the caving in of a ditch, evidence that plaintiff saw defendant's foreman on the ditch line the day before the accident, and that such foreman had ordered the foreman in charge to keep the crew at work there, was admissible to show how far defendant retained control of the work.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 270 (Mont.) Were it in issue whether a master was negligent in using electricity for his dynamite thawer in a mine, the fact that electricity was not used in other mines as a thawing agency would be proper evidence, though not conclusive, of negligence.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

§ 270 (Or.) Where an elevator well was not inclosed five feet high on each floor as required by statute, and plaintiff was injured, the failure to construct the statutory inclosure at places other than where the injury was received was immaterial.—*Schulte v. Pacific Paper Co.*, 136 P. 5.

§ 270 (Or.) Under L. O. L. § 727, subd. 12, authorizing evidence of usage to explain the true character of an act, in an action for injuries from the falling of boxes, evidence as to the usual method of piling was admissible.—*Anderson v. Meier & Frank Co.*, 136 P. 660.

§ 270 (Wash.) In an action against a master for the negligence of a surgeon employed by it to treat its servants, evidence of malpractice on the part of the surgeon some six years previous is too remote to be admissible to show that the master did not exercise reasonable care in selecting the surgeon.—*Simon v. Hamilton Logging Co.*, 136 P. 361.

A single act of negligence on the part of the physician will not establish his incompetency, but such acts may be shown as touching on

the question whether the employer knew that the physician was incompetent.—*Id.*

Evidence of the acts of incompetency occurring after the negligence on the part of the surgeon which was complained of is inadmissible.—*Id.*

Evidence of the physician's unskillful treatment of cases some miles from the place of the master's business, and not shown to have been known to the master, and tending to show that the physician was an unskillful obstetrician, is inadmissible to show that he was incompetent to treat the men in a lumber camp.—*Id.*

§ 276 (Mont.) Evidence, in an action by an employé of a water company for injuries by the caving in of a ditch, held not to show that the caving was caused by failure to crib the walls of the completed part of the ditch as alleged, but merely to show that plaintiff was injured by the caving of the walls.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

An injured servant must show, by substantial evidence, that the employer's alleged negligence proximately caused the injury.—*Id.*

The proximate cause of a servant's injuries may be shown by indirect evidence which affirmatively shows that the negligent act caused the injuries, and excludes the idea that it resulted from any other cause.—*Id.*

§ 276 (Mont.) Evidence held to sustain a finding that decedent was to all intents a station tender and required to close the door of a mine cage when he entered the cage to be hoisted.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

§ 276 (Wash.) Evidence held to show that the proximate cause of the accident was the pinching of a board against a saw and not negligence of decedent in allowing the board to catch the saw.—*Jensen v. Shaw Show Case Co.*, 136 P. 698.

§ 277 (Mont.) Evidence held to sustain a finding that all of the men engaged in the work, including plaintiff, were employés of the defendant water company, and not of any independent contractor.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

Plaintiff, to recover for personal injuries sustained while in defendant's employment, must show *prima facie* that the relation of master and servant existed.—*Id.*

§ 278 (Mont.) Evidence, in a servant's action for injury from explosion of dynamite in the mine in which he was working, held sufficient to show negligence in selecting a method, not reasonably safe, of thawing the dynamite for use, whereby it was overheated.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

Evidence held sufficient to show the overheating of dynamite in the thawer caused the explosion, either directly or as an indispensable condition.—*Id.*

§ 278 (Or.) Evidence held insufficient to show negligence of the employer.—*Knauff v. Highland Development Co.*, 136 P. 846.

§ 284 (Cal.App.) The question of the employer's liability is for the court, when the facts on which its liability must be based are undisputed.—*Hill v. Pacific Gas & Electric Co.*, 136 P. 492.

§ 284 (Mont.) Whether a contract of employment creates the relation of independent contractor or of employer and employé between the parties is for the court.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

Where a contract of employment is verbal, its construction as to the relation created is for the jury, though it would be a question for the court if the evidence clearly showed its terms without controversy.—*Id.*

§ 286 (Cal.App.) In an action for the wrongful death of a servant killed in attempting to start a pump operated by electric power, the question of negligence is for the jury, where

the reason for the accident is not apparent.—*Hill v. Pacific Gas & Electric Co.*, 136 P. 492.

§ 286 (Mont.) Evidence, in an action for injury to a miner working in a shaft of the mine from explosion of dynamite, held sufficient to go to the jury on the question of negligent failure in respect to the duty of furnishing a safe place to work.—*Westlake v. Keating Gold Mining Co.*, 136 P. 38.

§ 286 (Okl.) In a mine employe's action for injuries from the derailment of a coal car the question whether the engineer was negligent was for the jury.—*Great Western Coal & Coke Co. v. Malone*, 136 P. 403.

§ 286 (Wash.) Whether the equipping of a saw with a hood which was inadequate, without providing a spreader which would have prevented the injury, complied with factory act was for the jury.—*Jensen v. Shaw Show Case Co.*, 136 P. 698.

Except where the minds of reasonable men could not differ, whether an employer has complied with the factory act is for the jury.—*Id.*

§ 288 (Mont.) Whether plaintiff assumed the risk of injury from the caving in of a ditch held a jury question.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 289 (Cal.App.) The question of contributory negligence held under the evidence for the jury.—*Hill v. Pacific Gas & Electric Co.*, 136 P. 492.

A servant's contributory negligence is for the jury, unless but one conclusion can reasonably be reached from the evidence.—*Id.*

§ 291 (Okl.) Instructions given, in a mine employe's action for injuries from the derailment of a coal car on which he was riding, due to a defective switch and excessive speed, held not erroneous.—*Great Western Coal & Coke Co. v. Malone*, 136 P. 403.

§ 291 (Or.) In an action for injuries to plaintiff by falling into a hole in a hallway of a building under construction, evidence held insufficient to justify instructions on the question of unavoidable accident.—*Scheurmann v. Mathison*, 136 P. 330.

§ 293 (Or.) Where the court was of the opinion that an action for injuries was brought under a statute regulating the guarding of elevator wells, and also that there were elements of liability independent of the statute, it should have distinguished them in its instructions, and specifically stated the issues of fact and defenses applicable to each, instead of submitting them to the jury to determine the issues of law and adopt its own application thereof to the facts.—*Schulte v. Pacific Paper Co.*, 136 P. 5.

§ 297 (Kan.) Where, in an action for injuries from a conveyor belt alleged to have started in gear automatically, the jury in answer to special question whether such belt got into gear automatically answered, "No evidence to show how it got back," a general verdict for plaintiff should have been set aside.—*Estes v. Edgar Zinc Co.*, 136 P. 910.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 311 (Mont.) If it was the particular duty of one of two employes who had the superintendence of certain work to take precaution to protect the workmen, the superintendent who was not under that particular duty would not be responsible for the negligent failure of the other employe to take such precaution.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

(B) Work of Independent Contractor.

§ 315 (Okl.) In an action for tort, it is no defense that the unlawful act was committed by an independent contractor employed by defendant to commit the same.—*Missouri, O. & G. Ry. Co. v. Brown*, 136 P. 1117.

§ 316 (Or.) Where defendant corporation employed L. to grade certain streets and lots, and in doing so he set off an excessive blast, by which a building in process of construction by plaintiffs was injured, the corporation was not liable in the absence of proof of privity of contract or concurrence of action between it and L.—*Winniford v. MacLeod*, 136 P. 25.

Contract for the grading and improvement of certain streets and lots construed, and held to leave to the contractor the selection of the manner of doing the work, and, being a lawful undertaking in itself, the employer was not liable for injuries from an excessive blast set off by him in the process of the work.—*Id.*

Where a project of grading certain streets and lots, or the manner of executing the same under a contract, was not a nuisance, and the employer did not retain control of the premises, he would not be responsible for nuisances created by the contractor doing the work.—*Id.*

§ 320 (Or.) The rule that, where the entire work is committed to a contractor, he alone is responsible for injuries to third persons from the prosecution of the work is subject to an exception that the owner must respond, if the manner provided for carrying out the work is itself dangerous, or if the project is manifestly dangerous to others.—*Winniford v. MacLeod*, 136 P. 25.

(C) Actions.

§ 329 (Mont.) The defense of independent contractor is not an affirmative defense to be established by a preponderance of the evidence, and is available under the Code under a general denial.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

MEASURE OF DAMAGES.

See Damages, §§ 112, 124.

MECHANICS' LIENS.

See Appeal and Error, § 1178; Parties, § 84; Statutes, § 226.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 5 (Colo.App.) Mechanics' lien statutes are to be construed favorably to subcontractors and materialmen.—*Great Western Sugar Co. v. F. H. Gilcrest Lumber Co.*, 136 P. 553.

§ 5 (Kan.) In view of the liberal rule of construction prescribed by Gen. St. 1909, § 9850, the Mechanics' Lien Law is not to be strictly construed because in supposed derogation of the common law.—*Southwestern Paint & Wall Paper Co. v. Perkins*, 136 P. 324.

§ 5 (Okl.) The mechanic's lien law (Comp. Laws 1909, § 6151 et seq.) will be interpreted so as to give security to the class of persons named in it, where its provisions have been substantially complied with in good faith.—*Eberle v. Drennan*, 136 P. 162.

§ 13 (Okl.) In the absence of statute expressly authorizing it, there can be no mechanic's lien on a public school building of a city.—*Western Terra Cotta Co. v. Board of Education of City of Shawnee*, 136 P. 595.

II. RIGHT TO LIEN.

(C) Agreement or Consent of Owner.

§ 72 (Okl.) A contract with the owner's agent is a contract with the owner within Comp. Laws 1909, § 6151, requiring that labor or material for which a lien is claimed be furnished under contract with the owner.—*Eberle v. Drennan*, 136 P. 162.

(E) Subcontractors' and Contractors' Workmen and Materialmen.

§ 94 (Colo.App.) Subcontractors' liens are allowed directly because of the enhanced value of the property from the labor and material so contributed to it by the consent of its owner

through his agent, the principal contractor.—*Great Western Sugar Co. v. F. H. Gilcrest Lumber Co.*, 136 P. 553.

§ 94 (Okla.) Under Comp. Laws 1909, § 6153, materialmen and laborers who furnish material and perform labor in the construction of a building under contract with the contractor are entitled to a lien upon the land.—*Eberle v. Drennan*, 136 P. 162.

§ 99 (Colo.App.) Under Rev. St. 1908, §§ 4025, 4026, 4033, giving liens to subcontractors and permitting the owner to limit his liability to them by filing the contract, *held* that, where the contract was for less than \$500 and hence not required to be filed, there was a lien regardless of notice to the owner or the state of accounts between him and the principal contractor.—*Great Western Sugar Co. v. F. H. Gilcrest Lumber Co.*, 136 P. 553.

The notice required of subcontractors under Rev. St. 1908, § 4026, *held* not necessary where the contract was for \$500 or less or, if for a larger sum, was not in writing, or where it or a sufficient memorandum thereof was not filed for record.—*Id.*

§ 100 (Colo.App.) Under Rev. St. 1908, §§ 4025, 4026, giving liens to subcontractors and providing that the owner may in certain cases limit his liability to them by filing for record the contract or a memorandum thereof showing terms of payment, etc., *held*, that the burden of watchfulness in protecting the claims of the subcontractors was upon the owner.—*Great Western Sugar Co. v. F. H. Gilcrest Lumber Co.*, 136 P. 553.

Rev. St. 1908, §§ 4025, 4026, requiring building contracts for amounts over \$500 to be in writing, and providing that they might be recorded by the owner as notice of their terms and for notice by subcontractors requiring the owner to retain sufficient to satisfy their claims, refer only to written contracts for amounts over \$500.—*Id.*

§ 110 (Kan.) The liability for subcontractors' liens was not limited by a price fixed for the building by the owner and contractor in a settlement made after the building was completed.—*Southwestern Paint & Wall Paper Co. v. Perkins*, 136 P. 324.

III. PROCEEDINGS TO PERFECT.

§ 132 (Or.) Where one employed as a carpenter by the day quit work September 12th, the fact that on January 23d he did additional work and furnished additional materials without the knowledge of the owner does not extend the time for filing a lien.—*Fudge v. Bilger*, 136 P. 876.

§ 141 (Okla.) A subcontractor's lien, which named as contractor an individual instead of the firm to which the individual belonged, was not invalidated by the mistake, where the owner was not misled or injured therefrom.—*Eberle v. Drennan*, 136 P. 162.

§ 149 (Kan.) Where adjoining owners employed the same contractor to erect buildings according to the same plan, and the material furnished was used in both buildings, *held*, that lien statements filed against one owner were sufficient where one statement charged all the items furnished for both buildings, gave credit for payments in full made by one owner, and claimed a lien for the balance, and the other statement separated the items which went into the building against which the lien was claimed.—*Southwestern Paint & Wall Paper Co. v. Perkins*, 136 P. 324.

§ 156 (Kan.) Written notice of the filing of a mechanic's lien is sufficient where it is served by registered mail and reaches the owner personally.—*Southwestern Paint & Wall Paper Co. v. Perkins*, 136 P. 324.

VII. ENFORCEMENT.

§ 263 (Okla.) Under the express provisions of Comp. Laws 1909, § 6156, the original contractor is an indispensable party to an action by a subcontractor or materialmen to foreclose a lien against the owner's property.—*Eberle v. Drennan*, 136 P. 162.

§ 281 (Colo.App.) Proof of the agency of the one upon whom the copy of the statement was served *held* sufficient.—*Great Western Sugar Co. v. F. H. Gilcrest Lumber Co.*, 136 P. 582.

Evidence *held* sufficient to show that the materials were used in the construction of a certain building.—*Id.*

§ 304 (Kan.) Where, on foreclosure of subcontractors' liens, it appeared that the contractor was really the owner's agent, a personal judgment against the owner was proper.—*Southwestern Paint & Wall Co. v. Perkins*, 136 P. 324.

MEMORANDA.

See *Frauds*, Statute of, § 110; *Witnesses*, §§ 255, 259.

MENTAL CAPACITY.

See *Wills*, § 282.

MERGER.

See *Judgment*, § 582.

MILITIA.

See *Courts*, § 207; *States*, § 137; *Trial*, § 252.

MINES AND MINERALS.

See *Death*, § 23; *Evidence*, § 512; *Master and Servant*, §§ 99, 118, 129, 186, 217, 233, 258, 264, 278, 286, 291; *Trial*, § 256.

I. PUBLIC MINERAL LANDS.

(B) Location and Acquisition of Claims.

§ 20 (Cal.App.) A claim may be marked at any time before an intervening right is acquired, irrespective of whether the time of marking is reasonable.—*Gobert v. Butterfield*, 136 P. 516.

§ 21 (Cal.App.) A notice of the location of mineral land may be amended if that can be done without prejudicing the rights of others.—*Gobert v. Butterfield*, 136 P. 516.

§ 29 (Cal.App.) The inchoate rights of a locator of a mining claim cannot be defeated by the torts or trespasses of others.—*Gobert v. Butterfield*, 136 P. 516.

An amended notice of location relates back to the original notice, notwithstanding intervening locations, if made to cure obvious defects without including any new ground.—*Id.*

A location in excess of the statutory limit is voidable only as to the excess, if it is made in good faith and does not injure any one else.—*Id.*

If a claim is sufficiently marked, and all necessary acts of location are done, the rights acquired cannot be divested by the subsequent obliteration of the location marks or removal of the stakes without the locator's fault.—*Id.*

§ 38 (Cal.App.) Evidence *held* to show that plaintiff's original location was not intended to and did not include the land in controversy.—*Gobert v. Butterfield*, 136 P. 516.

Evidence *held* to sustain a finding that plaintiff's only purpose in amending his original notice of location was to take advantage of a subsequent discovery made by one who had, at the time, located the ground in good faith, and that plaintiff did not originally intend to claim the ground.—*Id.*

II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

§ 56 (Colo.App.) Where defendant paid no consideration for an oil and gas lease which obligated him only to pay a percentage of the proceeds if oil and gas should be discovered on the land, the contract was a mere lease option and voidable at any time prior to performance by the lessee.—*Davis v. Riddle*, 136 P. 551.

§ 78 (Colo.App.) Where an oil and gas lease ran for 40 years without specifying any time within which development work by the lessee must be commenced, the lessee's failure to do anything to develop the land for nearly a year and a half was sufficient to work a forfeiture.—*Davis v. Riddle*, 136 P. 551.

§ 78 (Okl.) Under Rev. Laws 1910, § 4773, relating to pleading of conditions precedent, and section 4737, requiring that the pleader state the facts constituting the facts in ordinary and concise language, the petition, in an action wherein plaintiff relied upon an oil and gas lease, *held* to sufficiently allege the conditions.—*Cahill v. Pine Creek Oil Co.*, 136 P. 1100.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

§ 103 (Wash.) In view of Rem. & Bal. Code, §§ 3677, 7347, a mining corporation whose capital stock had not been subscribed and which did not own the mining property was not a going concern entitled to sell stock.—*Borde v. Kingsley*, 136 P. 1172.

MISREPRESENTATION.

See Sales, §§ 40, 114-126.

MODIFICATION.

See Sales, § 91.

MONEY RECEIVED.

See Sales, § 397; Vendor and Purchaser, § 841.

§ 1 (Colo.App.) At common law, an action could be maintained in assumpsit or debt as for money had and received, upon the theory of a quasi or constructive contract to recover money belonging to plaintiff, but improperly converted by defendant in breach of contract.—*Brown's Estate v. Stair*, 136 P. 1003.

§ 6 (Wash.) Where, in view of the fact that there could legally be only ten liquor licenses granted, the thirteen holders of licenses in a town agreed to pay \$500 to each of three saloonkeepers who should not reapply for a license, and defendant collected the money for payment to plaintiff and two others, plaintiff could recover such money from defendant as money received for plaintiff's benefit.—*Jones v. Maes*, 136 P. 680.

§ 9 (Colo.App.) Claimant *held* entitled to maintain an action for money had and received to recover the value of one-half of real estate received by decedent from a client in payment of a fee, where the parties had agreed to equally divide the fee.—*Brown's Estate v. Stair*, 136 P. 1003.

Where a liability is discharged by payment to one who does not assert a hostile claim to the money, another claimant who is entitled to his share in the amount may maintain an action against the person receiving the fund as for money had and received.—*Id.*

§ 9 (Or.) Where defendant, who contracted with a city to construct a pipe line and employed A. to do the work, deducted from the wages of the laborers employed by A. a sufficient amount to pay for the supplies furnished by plaintiff in maintaining the men, defendant in equity and good conscience should pay plaintiff for such supplies, under the equitable doctrine of liabil-

ity for money had and received.—*Baker City Mercantile Co. v. Idaho Glazed Cement Pipe Co.*, 136 P. 23.

MORTGAGES.

See Chattel Mortgages; Dismissal and Nonsuit, § 19; Evidence, § 471; Gas, § 8; Guardian and Ward, §§ 112, 163; Indians, § 15; Landlord and Tenant, § 81; Limitation of Actions, § 103; Tenancy in Common, § 46.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 27 (Or.) To constitute even an equitable mortgage, there must be some kind of an agreement by the owner of the property that it shall be held as security for a debt.—*Barber v. Toomey*, 136 P. 343.

§ 32 (Okl.) Though the parties agree that, upon default in payment within a fixed time, a deed given as a mortgage shall become absolute, such deed is in effect a mortgage.—*Farrow v. Work*, 136 P. 739.

A deed given merely as security, and so intended, is a mortgage, with the right of redemption, though absolute on its face.—*Id.*

If the debt remains for which a conveyance is security, and collection may be enforced independently of such security, the transaction is in law a mortgage, whatever language the parties may have used in expressing their agreement.—*Id.*

§ 32 (Or.) To determine whether a deed is in equity a mortgage, the test is whether a debt was created or continued for which the deed was designed as security.—*Caro v. Wollenberg*, 136 P. 866.

§ 38 (Wash.) The rule that one who attempts to have a deed absolute in form decreed a mortgage is required to make strict proof of the fact by evidence that is clear, unequivocal, and convincing is one of substance, and should be applied in such an action where the evidence does not preponderate in favor of the party seeking to have the instrument declared a mortgage.—*Hansen v. Abrams*, 136 P. 678.

In a suit to declare both a deed and a bill of sale absolute on their face mortgages, *held* that the finding against plaintiff was not contrary to the preponderance of the evidence.—*Id.*

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates of Parties Therein.

§ 139 (Or.) Where a mortgagee took possession under a deed which was in equity a mortgage, he held possession as mortgagee, and the relation was analogous to that of trustee and cestui que trust.—*Caro v. Wollenberg*, 136 P. 866.

§ 143 (Or.) The relation of mortgagor and mortgagee must terminate before either party in possession can interpose limitations as against the other.—*Caro v. Wollenberg*, 136 P. 866.

When by agreement the mortgagee is to hold possession to satisfy his claims from rents and profits, his claim is not adverse till his demand is satisfied or he gives distinct notice to mortgagor that he asserts absolute title.—*Id.*

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 191 (Or.) When a mortgagee obtains possession after condition broken, he may retain it as against the mortgagor till the debt is paid.—*Caro v. Wollenberg*, 136 P. 866.

§ 199 (Kan.) Where the grantee under deeds given as mortgages acquires possession believing himself to be the owner, the damage allowable against him is the ordinary rental value for the time such possession is retained, less the value

of permanent improvements made by him thereon.—*Holmes v. Holt*, 136 P. 246.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 294 (Or.) Though the mortgagor may sell to the mortgagee in satisfaction of the debt, the burden is on the mortgagee to show that the sale was voluntarily made and that his conduct was fair.—*Caro v. Wollenberg*, 136 P. 866.

X. FORECLOSURE BY ACTION.

(B) Right to Foreclose and Defenses.

§ 417 (Idaho) Where G., the holder of a note and mortgage for \$3,000, delivered them to a bank as security for \$602.44, and thereafter assigned them to T. M. as security for borrowed money, and while they were in the hands of the bank assigned his interest to B. M. and S. on agreement that they pay his indebtedness to the bank, *held*, that B. M. and S. held the note and mortgage as collateral for the balance due on the debt for which they were hypothecated, and it was error to give them a decree foreclosing the mortgage, but that G.'s equity belonged to T. M.—*Mellen v. Garrett*, 136 P. 437.

(J) Sale.

§ 554 (Idaho) Where a sheriff conducting a foreclosure sale in 1875 under a territorial statute executed a deed to the purchaser, instead of issuing to him a certificate of sale, the owner cannot, 35 years thereafter, object to the form of the conveyance; he not having during that time offered or sought to redeem.—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

XI. REDEMPTION.

§ 591 (Or.) Both at common law, and under L. O. L. §§ 335, 422, the right to redeem is favored by a court of equity, and will not be taken away except by strict compliance with the necessary steps.—*Caro v. Wollenberg*, 136 P. 866.

§ 608½ (Or.) In a suit to have a deed declared a mortgage and to redeem, evidence *held* to show that the mortgagee went into possession under an agreement to apply the rents to the debt, and insufficient to sustain the defense of adverse possession.—*Caro v. Wollenberg*, 136 P. 866.

The heirs of a deceased grantor, as well as the surviving grantor, should be made parties to a suit to declare the deed a mortgage and for an accounting.—*Id.*

MOTIONS.

See Criminal Law, §§ 603, 698, 1044; Judges; New Trial, §§ 127-155; Pleading, §§ 343-364; Process, § 158; Trial, §§ 96, 139, 165, 178; Venue, § 77.

MOUNTED POLICE.

See States, § 57.

MUNICIPAL CORPORATIONS.

See Appeal and Error, §§ 781, 1050; Constitutional Law, § 205; Counties; Damages, § 62; Death, § 9; Dedication; Election of Remedies; Evidence, §§ 5, 83; Highways, §§ 122-150; Indemnity; Injunction, § 24; Intoxicating Liquors, § 46; Judgment, § 735; Licenses, § 7; Mandamus, §§ 10, 71; Pleading, § 214; Schools and School Districts; Street Railroads; Taxation, § 913; Trial, §§ 105, 412; Waters and Water Courses, §§ 157, 182, 183½.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

§ 29 (Or.) Under Const. art. 11, § 2, and L. O. L. § 3209, a city could not lawfully annex territory where the number of legal voters residing on land to be annexed was not sufficient to enable the city to hold the required election.—*Couch v. Marvin*, 136 P. 6.

The words "local," "special," and "municipal," used in Const. art. 11, and article 4, § 1a, conferring on cities local self-government, *held* to refer to enactments, intended to affect certain persons only, or to operate in certain localities, and did not confer on cities jurisdiction to annex territory, except in accordance with provisions of the general law.—*Id.*

§ 30 (Kan.) Laws 1889, c. 261, vacating parts of certain town sites, did not affect portions of town sites which had never been platted, although mentioned and described in the act.—*Beaty v. Shinkle*, 136 P. 928.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 111 (Nev.) An ordinance in violation of charter provisions would be void.—*State v. White*, 136 P. 110.

If an ordinance would be void if adopted by the city council, it would also be void if adopted by a vote of the electors of the city, under the initiative and referendum provisions of the city charter.—*Id.*

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

§ 124 (Wash.) As both the constitutional amendment of 1912, which was incorporated in the Constitution as article 1, §§ 33, 34, and Laws 1913, c. 146, enacted in pursuance of the amendment, are expressly made applicable to cities of the first class and constitute the general law on the subject of the recall of officers, they supersede the charter provisions of such cities relating to the recall, and a petition for recall election must comply with their requirements to be acted upon.—*State v. Fairley*, 136 P. 374.

(B) Municipal Departments and Officers Thereof.

§ 200 (Wash.) Where the amount of pension paid to a widow under the Fireman's Pension Act, Laws 1909, c. 50, § 8, equals interest at statutory rate on a sum three times that claimed by the widow in an action, under the general death statute, it cannot be said that the pension act is inadequate.—*Longfellow v. City of Seattle*, 136 P. 855.

IX. PUBLIC IMPROVEMENTS.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 294 (Or.) Notice *held* invalid as not sufficiently describing the proposed improvement and to give the city council no jurisdiction to complete it.—*Dyer v. City of Bandon*, 136 P. 652.

(C) Contracts.

§ 346 (Kan.) A bond given by a city street improvement contractor under Laws 1887, c. 179, *held* enforceable by laborers and materialmen, though not filed for record with the clerk of the court as required by the statute.—*Griffith v. Stucker*, 136 P. 937.

The terms of a street improvement contractor's bond given under Laws 1887, c. 179, will

be interpreted as intended to accomplish the purpose of the statute to protect laborers and materialmen on public works.—*Id.*

A street improvement contractor's bond given under Laws 1887, c. 179, held enforceable as against objection that it was given simply on a past consideration, and though there was delay in giving it.—*Id.*

§ 347 (Kan.) Laborers and materialmen may resort to a city street contractor's bond given under Laws 1887, c. 179.—*Griffith v. Stucker*, 136 P. 937.

Labor and material furnished by a subcontractor held within a bond furnished by a street improvement contractor under Laws 1887, c. 179.—*Id.*

Where a street improvement contractor took a bond from a subcontractor on condition that the subcontractor would pay for what was used in the performance of the contract, the subcontractor's laborers and materialmen could resort to such bond, though they did not know or act upon the faith of it.—*Id.*

(E) Assessments for Benefits, and Special Taxes.

§ 406 (Colo.) The power of a municipality to levy assessments depends upon the express provisions of the charter or general statute, and hence a municipality cannot without an express grant of power, levy assessments on property which merely abuts on streets carrying water or gas mains.—*City of Delta v. Lamb*, 136 P. 77.

§ 408 (Colo.) Amendment by Laws 1893, p. 464, of Gen. Laws 1877, § 2656, which in subsection 71 authorized municipal corporations constructing water and gas plants to tax property abutting on the mains, held to deprive the municipality of such power.—*City of Delta v. Lamb*, 136 P. 77.

While Laws of 1879, p. 195, authorized municipalities to levy frontage taxes on all lots abutting on water mains, yet as Act 1893, p. 464, which amended Gen. Laws 1877, § 2656, giving municipalities such power, did not authorize any such tax, the act of 1879 must be construed as repealed by implication.—*Id.*

§ 437 (Colo.) The test of the validity of a special assessment is not whether any purpose to which tax may be applied is valid, but whether the property against which it is levied is especially benefited by the purposes to which the tax may be applied.—*Pomroy v. Board of Public Waterworks, Dist. No. 2, of City of Pueblo*, 136 P. 78.

§ 439 (Colo.) A special or local assessment to be valid must be levied for a local improvement which enhances the value of the property assessed in an amount at least equal to the assessment.—*Pomroy v. Board of Public Waterworks, Dist. No. 2, of City of Pueblo*, 136 P. 78.

Special benefits which will sustain a special assessment must be immediate, and of such a character that they can be seen and traced, and not remote or contingent benefits enjoyed by the general public.—*Id.*

§ 472 (Wash.) An assessment of benefits for the opening of streets which took part of appellant's land is arbitrary and excessive, where the benefits assessed were three times those assessed against the land directly opposite.—*In re City of Seattle*, 136 P. 488.

§ 473 (Wash.) Where a street was widened by the taking of plaintiff's land, the eminent domain commission proceeded upon a fundamentally wrong basis when it charged back against the remainder of appellant's land the amount of the condemnation award made by the jury and then assessed full benefits on the remainder, for the verdict of the jury as to the amount of damages is conclusive.—*In re City of Seattle*, 136 P. 488.

§§ 488, 489 (Or.) Where there is an entire lack of jurisdiction to order the improvement, a property holder is not estopped from asserting the

invalidity of the proceedings by reason of having failed to assert their invalidity before the work is completed.—*Dyer v. City of Bandon*, 136 P. 652.

§ 508 (Wash.) The action of the eminent domain commission in assessing benefits for the widening of a public street will not be disturbed by the courts, unless it acted arbitrarily or fraudulently or proceeded on a fundamentally wrong basis.—*In re City of Seattle*, 136 P. 488.

Where the evidence in the record of an appeal from an assessment of benefits by the eminent domain commission is not sufficient to enable the appellate court to determine what would be a proper assessment, the proceeding must be reversed and remanded; the commission having assessed the benefits on an erroneous theory.—*Id.*

§ 518 (Wash.) Interest on the contract price of a municipal improvement was collectible from the date of the commissioners' approval of the assessment roll.—*State v. Wright*, 136 P. 482.

(F) Enforcement of Assessments and Special Taxes.

§ 538 (Or.) Where plaintiffs, in an action to enjoin the collection of an assessment for improvements, had the same common ground for relief, that being lack of jurisdiction in the council to order the improvement, there was no improper joinder of parties plaintiff.—*Dyer v. City of Bandon*, 136 P. 652.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 648 (Mont.) Rev. Codes, §§ 1337, 1340, providing that title to a highway cannot be acquired by use until so declared by the board of county commissioners, evince a general legislative intent and require similar action by the municipal authorities, notwithstanding section 3259 makes streets subject to the control of municipal authorities.—*Barnard Realty Co. v. City of Butte*, 136 P. 1064.

Rev. Codes, §§ 1337, 1340, although establishing a rule of public policy as to municipalities, do not repeal sections 3212, 3213, 3259, 3466, 3479, and 3480, relating to the power of the municipal authorities to establish, open, widen, and vacate streets.—*Id.*

§ 654 (Mont.) Where a city claimed that it had acquired the property as a street by adverse possession, it assumed the burden of proving every element necessary to constitute its title.—*Barnard Realty Co. v. City of Butte*, 136 P. 1064.

It has the burden of showing the definite date when its occupancy of the land and work upon it as a highway began.—*Id.*

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 741 (Wash.) Rem. & Bal. Code, § 7998, requiring claims for damages against a city or town of the second, third, or fourth class to be filed within 30 days, held mandatory, and failure to file same could not be excused because of physical incapacity of the claimant.—*Ransom v. City of South Bend*, 136 P. 365.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 762 (Or.) A city failing to require a street railroad company to maintain approaches to crossings sufficient to protect the public, and in not seeing that proper barriers were placed along the tracks where injury was possible, was liable to a traveler, who was injured in consequence thereof.—*City of Astoria v. Astoria & C. R. R. Co.*, 136 P. 645.

§ 788 (Kan.) Where a city gives permission to a third person to plow in a street, it is charge-

able with knowledge of the condition of the street as the result of such plowing.—*Tepfer v. City of Wichita*, 136 P. 817.

§ 817 (Wash.) That a sidewalk was negligently constructed at an excessive grade will not be presumed because plaintiff fell thereon and was injured.—*Dougan v. City of Seattle*, 136 P. 1165.

§ 818 (Colo.App.) In an action against a town for personal injuries from falling upon a crosswalk, the admission of evidence that soon after the accident sand and gravel were placed on the crosswalk to make it more level and safer for pedestrians was error.—*Town of Meeker v. Fairfield*, 136 P. 471.

Evidence that prior to the accident other persons had slipped and fallen upon the same walk was admissible only on the issue of defendant's notice of the condition of the crosswalk.—*Id.*

§ 821 (Wash.) In an action by one injured by a fall on a sidewalk which was at a grade of about 13 per cent, the court cannot as a matter of law hold that the municipality was negligent in laying it without cleats.—*Dougan v. City of Seattle*, 136 P. 1165.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

§ 870 (Wash.) Issuance of warrants by municipal corporation to contractor to be later exchanged for bonds when issued *held* not a loan of the municipal corporation's credit to the contractor in violation of the constitutional provision.—*Washington-Oregon Corporation v. City of Chehalis*, 136 P. 681.

(B) Administration in General, Appropriation, Warrants and Payment.

§ 887 (Wash.) Under Rem. & Bal. Code, § 8008, where ordinance for constructing water plant provided for two funds, one of the revenues of the plant and the other from which the bonds were to be paid to be created by transferring from the first a fixed sum, the second fund *held* not invalid.—*Washington-Oregon Corporation v. City of Chehalis*, 136 P. 681.

(C) Bonds and Other Securities, and Sinking Funds.

§ 921 (Wash.) Under Rem. & Bal. Code, § 8007, *held*, that a city could deliver general fund bonds to a contractor in payment for the construction of a water plant at their face value; this being a "sale" within the statute.—*Washington-Oregon Corporation v. City of Chehalis*, 136 P. 681.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 695-819.

NAVIGABLE WATERS.

See Quietting Title, § 4; Waters and Water Courses.

I. RIGHTS OF PUBLIC.

§ 1 (Or.) The test whether a stream is navigable for logs is whether it is inherently capable of use for commerce for periods recurring with reasonable certainty and continuing long enough to be beneficial to the general public.—*Lebanon Lumber Co. v. Leonard*, 136 P. 891.

McDowell creek, which floats logs during freshets three or four times a winter, which do not recur regularly, is not navigable for sawlogs.—*Id.*

§ 18 (Or.) Where the bed and banks of a stream are owned by the riparian proprietor, its navigability does not give the navigator a right of way over the land.—*Lebanon Lumber Co. v. Leonard*, 136 P. 891.

II. LANDS UNDER WATER.

§ 36 (Idaho) A riparian owner on a navigable meandered stream or body of water takes title to the center or thread of the stream.—*A. B. Moss & Bro. v. Ramey*, 136 P. 608.

§ 36 (Or.) The title to tidelands vested in the state is subject to the paramount right of navigation and of Congress to regulate commerce between the states.—*Rasmussen v. Walker Warehouse Co.*, 136 P. 661; *Kronenberg v. Same*, *Id.* 666.

§ 37 (Or.) The ownership of the upland and adjoining land under water, whether tidewater or fresh streams or rivers, may be separated.—*Rasmussen v. Walker Warehouse Co.*, 136 P. 661; *Kronenberg v. Same*, *Id.* 666.

The separation of ownership of land under water from that of the adjoining upland confers ownership of the water on the owner of the bed of the stream.—*Id.*

To separate the ownership of the upland from that of the adjoining land under water, the intention must clearly appear, and a grant in ordinary form, bounded, passes the land below as well as that above the water.—*Id.*

Land under water may be reserved in a grant by the reservation of a strip along the shore.—*Id.*

III. RIPARIAN AND LITTORAL RIGHTS.

§ 39 (Or.) "Riparian right" is defined to be "a form of enjoyment of the land and of the river in connection with the land."—*Rasmussen v. Walker Warehouse Co.*, 136 P. 661; *Kronenberg v. Same*, *Id.* 666.

§ 42 (Idaho) An island in Snake river, surrounded by well-defined channels and existing when the state was admitted into the Union, and larger in area than a legal subdivision under the United States land surveys, did not pass to the riparian owner of abutting subdivisions, but the title thereof remained in the United States.—*A. B. Moss & Bro. v. Ramey*, 136 P. 608.

§ 46 (Or.) Under L. O. L. 5201, authorizing riparian owners in incorporated towns to build wharves, where a party conveys land bounded by water it is not presumed that he reserves rights in front of the land, and the fact that the boundary is shown by a line in the plat does not limit the grant.—*Rasmussen v. Walker Warehouse Co.*, 136 P. 661; *Kronenberg v. Same*, *Id.* 666.

By the platting and dedication of a tract bordering on navigable water and conveyance of lots with reference to the map, riparian rights are severed from the inside lots and attached to the outside ones.—*Id.*

A trust agreement, describing land as extending to low water, and reciting the purpose to dedicate the tract when surveyed, indicated an intent to sell all the land to low-water mark.—*Id.*

NEGATIVE PREGNANT.

See Pleading, § 126.

NEGLIGENCE.

See Acknowledgment, § 22; Appeal and Error, §§ 999, 1001; Bailment, §§ 14, 33; Carriers, §§ 280-347; Electricity; Landlord and Tenant, § 167; Master and Servant; Municipal Corporations, §§ 762-821; Railroads, §§ 273½-398; Street Railroads; Trial, §§ 192, 250, 252, 256, 260, 296; Waters and Water Courses, § 171.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**(A) Personal Conduct in General.**

§ 1 (Utah) There is no distinction between negligence arising from negative acts of omission and positive acts of commission.—Gilligan v. Denver & R. G. R. Co., 136 P. 953.

III. CONTRIBUTORY NEGLIGENCE.**(A) Persons Injured in General.**

§ 83 (Mont.) Last clear chance rule *held* to apply only where the peril was caused by the injured person's negligence, and defendant after discovering such situation failed to use ordinary care.—Dahmer v. Northern Pac. Ry. Co., 136 P. 1059.

IV. ACTIONS.**(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.**

§ 102 (Mont.) At common law a person injured by negligence could sue either in trespass or in case, whether the action be tort or a crime; trespass for direct injury, and case for consequential injury, when negligence must be alleged.—Maronen v. Anaconda Copper Mining Co., 136 P. 963.

§ 113 (Okl.) An allegation in a petition for injuries due to the falling of a water tank placed by defendant in plaintiff's kitchen *held* not to amount to a confession of knowledge of the defective condition of the tank so as to import an assumption of the risk of injury therefrom.—Moore v. Johnson, 136 P. 422.

§ 117 (Or.) Where the answer denies negligence, and alleges negligence of the person hurt, the special plea is not a confession and avoidance.—Edlefsen v. Portland Ry., Light & Power Co., 136 P. 832.

Contributory negligence is an affirmative defense, and the answer must show a want of ordinary care of plaintiff which, concurring with defendant's negligence, contributed to the injury.—Id.

§ 119 (Mont.) Negligence in all particulars alleged in the complaint need not be proved, but proof that negligence in any of such particulars caused plaintiff's injuries is enough.—Westlake v. Keating Gold Mining Co., 136 P. 83.

§ 119 (Or.) Where the complaint does not negate plaintiff's negligence, proof of his negligence is not admissible under the general issue.—Edlefsen v. Portland Ry., Light & Power Co., 136 P. 832.

(C) Trial, Judgment, and Review.

§ 136 (Okl.) The fact that plaintiff complained to defendant of the defect in a tank placed by defendant in plaintiff's kitchen *held* not to establish contributory negligence as matter of law precluding recovery for injuries received by the falling of the tank.—Moore v. Johnson, 136 P. 422.

§ 136 (Or.) Contributory negligence is a question of law only where the facts are undisputed or where but one inference can be drawn from the evidence, but is for the jury if the evidence conflicts, or different inferences may be drawn therefrom.—Greenwood v. Eastern Oregon Light & Power Co., 136 P. 336.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See New Trial, § 102.

NEW MATTER.

See Witnesses, § 286.

NEW TRIAL.

See Appeal and Error, §§ 110, 284-301, 502, 706, 933, 977, 979, 1015; Criminal Law, §§ 918-942.

I. NATURE AND SCOPE OF REMEDY.

§ 1 (Okl.) The grounds for new trial enumerated in St. 1893, § 4196 (Rev. Laws 1910, § 5033) are exclusive.—St. Louis, I. M. & S. Ry. Co. v. Lewis, 136 P. 396.

§ 1 (Wash.) A motion for a new trial invokes both the discretionary and the judicial functions of the trial court.—Brown v. City of Walla Walla, 136 P. 1166.

§ 6 (Okl.) Courts are vested with a large discretion in granting new trials.—Sipes v. Dickinson, 136 P. 761.

II. GROUNDS.**(C) Rulings and Instructions at Trial.**

§ 39 (Kan.) The granting of a new trial because of an instruction wherein the court expressed an opinion on the facts *held* not error.—Busalt v. Doidge, 136 P. 904.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 47 (Or.) A surmise, unsupported by direct evidence, that misconduct of plaintiff and a juror was procured by defendant will not prevent a new trial.—Goodeve v. Thompson, 136 P. 670.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 68 (Wash.) Trial judge *held* to have abused discretion in denying new trial because he thought a different result would not be reached on a new trial, where he believed the verdict contrary to the evidence.—Johnson v. Domer, 136 P. 1169.

§ 70 (Mont.) A new trial for insufficiency of the evidence should only be granted where the alleged insufficiency is convincingly shown.—Western Mining Supply Co. v. Melzner, 136 P. 44.

§ 70 (Mont.) The district court has a certain discretion in the granting or refusing a new trial on the ground that the verdict is not supported by the evidence.—Lizott v. Big Blackfoot Milling Co., 136 P. 46.

§ 70 (Wash.) Though the jury are the exclusive judges of facts, the trial judge, on a motion for a new trial, must determine whether the evidence sustains the verdict.—Johnson v. Domer, 136 P. 1169.

§ 77 (Okl.) Excessive damages are not ground for new trial, unless so great as per se to indicate that they were given under the influence of passion or prejudice.—St. Louis, I. M. & S. Ry. Co. v. Lewis, 136 P. 396.

§ 77 (Wash.) Where the jury might well have found under the evidence that operations on plaintiff's ovaries were necessitated by personal injuries rather than by a previous cystic condition, the allowance of damages for injuries could not be said to show passion or prejudice requiring a new trial.—Erickson v. Washington-Oregon Corporation, 136 P. 376.

(G) Surprise, Accident, Inadvertence, or Mistake.

§ 86 (Kan.) The granting of a new trial after judgment, in the absence of plaintiff and his counsel, *held* not an abuse of discretion, where just before trial one of plaintiff's counsel was called away by sickness and his partner, engaged in other trials, overlooked the case, and defendant's counsel had previously suggested that additional time might be needed to take depositions.—Turner v. Elbing State Bank of Elbing, 136 P. 917.

(H) Newly Discovered Evidence.

§ 102 (Or.) A motion for new trial for newly discovered evidence is properly denied, where

the proposed new witnesses were in courtroom during trial, and their testimony could have been had by diligence.—*Goodeve v. Thompson*, 136 P. 670.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 127 (Okl.) A cause for new trial is waived unless stated in the motion therefor.—*St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 396.

§ 128 (Okl.) A motion for new trial for "excessive damages" which did not charge that they were given under the influence of passion or prejudice, *held* not to comply with the requirements of St. 1893, §§ 4196, 4199 (Rev. Laws 1910, §§ 5033, 5036), relative to such motion.—*St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 396.

§ 128 (Wyo.) Motion for new trial specifying as grounds errors occurring at the trial and excepted to, and other manifest errors apparent on the face of the record, *held* indefinite and insufficient.—*Iowa State Savings Bank v. Henry*, 136 P. 863.

§ 140 (Kan.) Code Civ. Proc. § 307 (Gen. St. 1909, § 5901), providing that, where the ground of a motion for new trial is the exclusion of evidence, such evidence shall be produced at the hearing, does not apply where it appears from the testimony at the trial what the excluded evidence would have been.—*Treiber v. McCormack*, 136 P. 268.

§ 143 (Okl.) Jurors will not be permitted, by affidavit or other testimony, to impeach their verdict or show the grounds on which it was rendered, or that it was the result of misunderstanding.—*Tulsa St. Ry. Co. v. Jacobson*, 136 P. 410.

§ 155 (Idaho) Where Rev. Codes, § 4441, amended by Laws 1911, c. 118, providing the procedure on motion for a new trial, and section 4442 requiring such an application to be heard at the earliest period after notice, were not complied with, the district judge had no jurisdiction to entertain the motion.—*Behrensmeyer v. Gwinn*, 136 P. 623.

The statute relative to motions for new trial (Rev. Codes, § 4441, amended by Laws 1911, c. 118, and section 4442), though it fixes no time within which the motion must be heard, contemplates that the party moving for a new trial shall with diligence prosecute such action.—*Id.*

Where a judgment was rendered June, 1910, and no attempt made to settle the bill of exception until October 18, 1913, *held*, that the motion for new trial was not heard at the earliest practical period after notice of motion within Rev. Codes, § 4442.—*Id.*

NON OBSTANTE VEREDICTO.

See Judgment, § 199.

NONRESIDENCE.

See Executors and Administrators, §§ 3, 12.

NONSUIT.

See Dismissal and Nonsuit.

NONSUPPORT.

See Parent and Child.

NOTARIES.

See Acknowledgment, §§ 22, 48; Depositions, § 76; Evidence, § 83; Extradition, § 35.

NOTES.

See Bills and Notes.

NOTICE.

See Carriers, § 218; Executors and Administrators, §§ 225, 314; Forcible Entry and Detainer, § 11; Homestead; Indemnity, § 14; Injunction, § 143; Justices of the Peace, § 155; Landlord and Tenant, §§ 81, 114, 291; Mechanics' Liens, §§ 99, 156; Mines and Minerals, § 21; Municipal Corporations, §§ 294, 788; Pleading, § 376; Railroads, § 218; Sales, § 121; Taxation, § 789; Vendor and Purchaser, §§ 84, 224, 243; Warehousemen, § 25.

§ 9 (Utah) While a particular form of notice required by statute must usually be followed with reasonable strictness, it is generally sufficient if the notice proceeds from an authentic source and fully informs the party to be notified of the substance of the matters required to be noticed.—*Tooele Meat & Storage Co. v. Morse*, 136 P. 965.

NOVATION.

See Statutes, § 255.

NUISANCE.

See Master and Servant, § 316.

OBJECTIONS.

See Jury, §§ 92-131; Process, § 158; Trial, § 408.

OFFER.

See Trial, § 46.

OFFICERS.

See Acknowledgment, § 39; Assault and Battery, § 26; Attorney General; Constitutional Law, §§ 73, 77; Corporations, §§ 294-361; Counties, §§ 16-101; Evidence, § 83; Justices of the Peace; Mandamus; Municipal Corporations, §§ 124, 200; Pardon; Public Lands, § 108; Schools and School Districts, §§ 47, 111; Sheriffs and Constables; States, §§ 130-137, 169; Statutes, § 107.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(D) De Facto Officers.

§ 42 (Kan.) Although a county treasurer was holding the office under a certificate of election and judgment of a court of competent jurisdiction, the execution of which was not stayed pending appeal, the person entitled to the office was nevertheless the de jure county treasurer.—*Lawrence v. Wheeler*, 136 P. 315.

(G) Resignation, Suspension, or Removal.

§ 61 (Wash.) Laws 1913, c. 146, adopted to carry into effect a recall amendment of the Constitution adopted in 1912, sufficiently provided for carrying out the provisions of the amendment and was not defective in that the truth of the charges against the officer was triable before the people instead of the courts.—*Cudihee v. Phelps*, 136 P. 367.

Laws 1913, c. 146, *held* retroactive so as to make the right of recall effective from the date of its creation, to wit, the adoption of the amendment.—*Id.*

§ 70½ (New, vol. 17 Key-No Series) (Wash.) Const. art. 1, §§ 33, 34, added by amendment 1912, providing for the recall of elective officers, *held* not to entitle an officer, attempted to be recalled, to a judicial hearing as to the truth of the charges before the question of recall could be submitted to the people at an election called for that purpose.—*Cudihee v. Phelps*, 136 P. 367.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 95 (Kan.) A de jure county treasurer is entitled to recover, from an occupant holding under a certificate of election and a judgment not stayed pending appeal, the salary received by him as such officer, less the amounts necessarily paid out by him for clerk hire and in transacting the business of the office.—*Lawrence v. Wheeler*, 136 P. 315.

In an action by a de jure county treasurer for salary received by an occupant holding under a certificate of election and a judgment not stayed pending appeal, defendant is entitled to no deduction for his own services, or for profits or earnings acquired by plaintiff during the time defendant withheld the office from him.—*Id.*

§ 99 (Kan.) The ordinary meaning of the term "compensation" as applied to officers is remuneration in whatever form it may be given.—*State v. Bland*, 136 P. 947.

"Salary" is generally regarded as a periodical payment dependent upon time, while "fees" depend on services rendered, the amount of which is fixed by law and payable when the judgment allowing them is entered.—*Id.*

§ 100 (Kan.) Gen. St. 1909, § 4377, authorizing the allowance of attorney's fees to the Attorney General on convictions for violating the prohibitory law, is not repugnant to Const. art. 1, § 15.—*State v. Bland*, 136 P. 947.

OPENING.

See Judgment, §§ 145, 155.

OPINION EVIDENCE.

See Criminal Law, §§ 448-476; Evidence, §§ 471-570.

OPTIONS.

See Vendor and Purchaser, § 18.

ORDERS.

See Justices of the Peace, § 147.

ORDINANCES.

See Municipal Corporations, § 111.

PARDON.

§ 4 (Okla. Cr. App.) The Governor is without lawful right in all cases, to nullify or set aside the law inflicting the death penalty for crime, upon the ground that he is opposed to capital punishment.—*Henry v. State*, 136 P. 982.

§ 8 (Okla. Cr. App.) The Governor's promise to pardon a convict is not a pardon.—*Ex parte Hawkins*, 136 P. 991.

Paroles and conditional pardons do not become effective until they have been received and accepted by the prisoner.—*Id.*

§ 10 (Okla. Cr. App.) Paroles and conditional pardons may be revoked by the Governor.—*Ex parte Hawkins*, 136 P. 991.

PARENT AND CHILD.

See Bastards; Divorce, §§ 295, 324; Indians, § 13.

§ 1 (Colo. App.) Where assured's mother had never been the legal wife of a certain man by a common law or ceremonial marriage, there was no presumption of law that such person was assured's father, and the burden of proving that fact was upon the person asserting it.—*Mutual Life Ins. Co. of New York v. Good*, 136 P. 821.

Evidence held to sustain a finding that a certain man was not assured's father.—*Id.*

§ 14 (Kan.) Moneys expended by a stepfather for the benefit of his stepson while a member of the family, cannot be recovered upon any im-

plied contract, where neither intended that the moneys should be repaid.—*Huber v. Roth*, 136 P. 794.

§ 17 (Kan.) A father is punishable for failure to support his minor child in violation of the Desertion Act, where he does not provide for its support, though the necessities of life are supplied by relatives or friends.—*State v. Waller*, 136 P. 215.

PAROLE.

See Pardon.

PAROL EVIDENCE.

See Evidence, §§ 384-461.

PARTIES.

See Appeal and Error, §§ 334, 878-882; Bankruptcy, § 215; Certiorari, § 5; Criminal Law, § 1137; Dismissal and Nonsuit, § 24; Forcible Entry and Detainer, § 12; Husband and Wife, §§ 221, 270; Mechanics' Liens, § 263; Mortgages, § 608½; Municipal Corporations, § 538; Specific Performance, § 106; States, §§ 41-62; Taxation, § 697; Trial, §§ 127, 311, 328; Vendor and Purchaser, § 151.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 56 (Idaho) An order of the trial court bringing in new parties to the action does not amount to an amendment of the pleading requiring service of the amended complaint upon the original parties.—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 76 (Cal.) Under Code Civ. Proc. §§ 430, 433, 434, legal incapacity to sue will be deemed waived, unless it is taken advantage of by demurrer, if it appears on the face of the complaint; otherwise by answer.—*Crittenden v. Superior Court of California in and for San Luis Obispo County*, 136 P. 287.

§ 84 (Okla.) On foreclosure of a mechanics' lien by a subcontractor, failure to make the original contractor a party is waived when not objected to by demurrer or answer.—*Eberle v. Drennan*, 136 P. 162.

§ 84 (Or.) Where a debt is joint, the creditor must sue all the debtors or those sued may demur or plead in abatement or may waive the defect.—*Ryckman v. Manerud*, 136 P. 826.

PARTNERSHIP.

See Courts, § 201; Creditors' Suit, § 13; Executors and Administrators, § 20; Joint Adventures; Judgment, § 628; Reference.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

§ 63 (Okla.) Though a partnership is not a person, it is a legal entity under Rev. Laws 1910, §§ 4431-4474, and for some purposes is recognized as a quasi person having powers and functions exercisable by one of the partners severally or all of them jointly.—*Red River Valley Cotton Co. v. J. W. Stalcup Mercantile Co.*, 136 P. 1115.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Representation of Firm by Partner.

§ 136 (Or.) Each partner is agent of the firm and may sign the firm name, but one partner has no right to sign another's individual name without express authority.—*Baker v. Seaweed*, 136 P. 870.

(B) Nature and Extent of Firm Liabilities.

§ 165 (Or.) Debts of partnerships are joint and not several obligations.—*Ryckman v. Manerud*, 136 P. 826.

(C) Application of Assets to Liabilities.

§ 181 (Or.) A judgment creditor of a partner is not entitled to any of the proceeds of judgment in favor of the firm, unless there is a balance, after firm debts are paid, to the credit of the defendant partner.—*Ryckman v. Manerud*, 136 P. 826.

V. RETIREMENT AND ADMISSION OF PARTNERS.

§ 239 (Wash.) Where a contract of partnership expressly related back and covered a prior enterprise of one of the partners for the purpose of which goods were furnished him by a third person, the other partner was liable therefor.—*Leavenworth v. Brandon*, 136 P. 375.

PART PAYMENT.

See Frauds, Statute of, § 95; Limitation of Actions, § 155.

PASSENGERS.

See Carriers, §§ 239-347.

PAYMENT.

See Bills and Notes, §§ 425, 426; Carriers, §§ 239; Corporations, §§ 83, 411; Counties, §§ 122; Frauds, Statute of, § 95; Guardian and Ward, § 163; Limitation of Actions, § 155; Sales, § 82; Vendor and Purchaser, §§ 34, 76.

V. RECOVERY OF PAYMENTS.

§ 85 (Kan.) A voluntary payment can be recovered, where the payment was not made with full knowledge of all facts.—*Bradshaw v. Glasscock*, 136 P. 933.

§ 86 (Kan.) A voluntary payment can be recovered, where the payment was induced by fraud.—*Bradshaw v. Glasscock*, 136 P. 933.

That plaintiffs paid money to defendant instead of paying it into court, that the claims of defendant and another thereto might be litigated, did not estop plaintiffs from recovering from defendant, where the latter procured the payment by false representations.—*Id.*

PENAL STATUTES.

See Statutes, § 241.

PENALTIES.

See Damages, §§ 79, 81.

PENSIONS.

See Election of Remedies; Municipal Corporations, § 200.

PERJURY.**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 9 (Okl.Cr.App.) Perjury cannot be predicated on testimony given before a justice of the peace while presiding over the trial of a case outside the district for which he was elected or appointed.—*Berry v. State*, 136 P. 195.

PERPETUITIES.

§ 4 (Kan.) A conveyance to one for life, the remainder to his wife for life or while a widow, and then to the grantee's heirs, and, in default of such heirs, reversion to the grantor, held valid as to the remainders, though the son refused to accept the conveyance; the common

law restrictions on the creation of future estates being abolished by Gen. St. 1868, c. 22, § 3.—*Miller v. Miller*, 136 P. 953.

PERSONAL INJURIES.

See Carriers, §§ 239-347; Damages, § 132; Death; Electricity; Indemnity; Landlord and Tenant, §§ 164-169; Master and Servant; Municipal Corporations, §§ 762-821; Negligence; Railroads, §§ 273½-398; Release; Street Railroads, §§ 84, 98-118; Trial, §§ 105, 192, 234, 236, 250-253, 256, 260, 296, 412.

PETITION.

See Pleading.

PHOTOGRAPHS.

See Criminal Law, § 438; Evidence, § 359.

PHYSICIANS AND SURGEONS.

See Evidence, § 535; Jury, § 92; Master and Servant, §§ 92, 270; Trial, § 250.

§ 5 (Okl.) A physician whose license was canceled by the territorial Supreme Court for fraud in its procurement, and to whom no other license had been issued, was not entitled to registration under Williams' Const. art. 5, § 39, making physicians practicing in Oklahoma Territory eligible to registration since statehood without examination.—*Board of Medical Examiners of Oklahoma v. Gulley*, 136 P. 1083.

§ 18 (Wash.) In an action against a surgeon for malpractice, the question of his negligence held, under the evidence, for the jury.—*Simon v. Hamilton Logging Co.*, 136 P. 361.

PLATS.

See Dedication, § 19; Evidence, §§ 387, 461.

PLEADING.

See Abatement and Revival, § 17; Appeal and Error, §§ 345, 917, 1042; Cancellation of Instruments, § 37; Contracts, §§ 337, 346; Corporations, § 211; Counties, § 222; Courts, § 163; Forcible Entry and Detainer, § 24; Fraud, §§ 45, 46; Frauds, Statute of, § 152; Judgment, §§ 106, 145; Livery Stable Keepers; Malicious Prosecution, § 47; Mandamus, § 154; Master and Servant, §§ 258, 264; Mines and Minerals, § 78; Negligence, §§ 102, 113, 117, 119; Parties, §§ 76, 84; Principal and Agent, § 78; Quieting Title, § 34; Reformation of Instruments; Replevin, § 65; Sales, §§ 52, 340; Specific Performance, § 114; Trespass, § 43; Trial, §§ 250-252; Venue, § 77; Wills, § 282.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8 (Cal.) An allegation that it was an employer's duty to construct an elevator in a building in course of construction in a particular manner held a conclusion of law, which would be disregarded.—*Colen v. Gladding, McBean & Co.*, 136 P. 289.

§ 8 (Utah) An allegation that the effect of a transfer was to enable defendant to obtain a greater percentage of his debts than any of the other creditors of the same class was not a conclusion of law.—*Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572.

§ 11 (Okl.) As it is not good practice to plead evidence and grant of motion to strike out the evidence when pleaded will not be disturbed.—*Cahill v. Pine Creek Oil Co.*, 136 P. 1100.

§ 34 (Cal.App.) An allegation that goods sold at a "value" stated meant that they were of that market value.—*Wickersham Co. v. Nichols*, 136 P. 511.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 64 (Okl.) Under R. L. 1910, § 4738, claims affecting several defendants, which might have been brought in a single suit in equity, may be regarded as one cause of action; but, when there is more than one primary right to be enforced, the petition is demurrable.—Coody v. Coody, 136 P. 754.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 76 (Or.) The system of common-law pleading perfected by the Code requires the defendant either to demur, or to controvert the facts averred, or to set forth facts exonerating him.—Edlefson v. Portland Ry., Light & Power Co., 136 P. 832.

(C) Traverses or Denials and Admissions.

§ 126 (Cal.App.) Plaintiff's denial of allegations in the cross-complaint of certain of the defendants for labor and services in connection with the construction of an irrigation canal and dam held fatally defective as a negative pregnant.—Dunaway v. Anderson, 136 P. 309.

(E) Set-Off, Counterclaim, and Cross-Complaint.

§ 148 (Or.) Under L. O. L. § 390, providing that, in an action at law, where defendant is entitled to relief, arising out of facts requiring the interposition of a court of equity, and material to his "defense," he may file a complaint in equity in the nature of a cross-bill, matters constituting a counterclaim may not be so pleaded.—Haaland v. Miller, 136 P. 9.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 177 (Mont.) In claim and delivery, defendant's allegation as to his purchase from a third person held merely an argumentative denial of plaintiff's title, a failure to reply to which did not admit its truth or justify the exclusion of evidence in its support.—Cuerth v. Arbogast, 136 P. 383.

V. DEMURRER OR EXCEPTION.

§ 194 (Idaho) In an action to recover money in hands of one defendant as trustee and appropriated by all the defendants pursuant to a conspiracy, a demurrer to answers consisting of denials and of affirmative defenses was properly overruled.—Dearing v. Hockersmith, 136 P. 994.

§ 204 (Okl.) A general demurrer to a petition as a whole will be overruled where any paragraph is good.—Coody v. Coody, 136 P. 754.

§ 214 (Kan.) Allegations of a petition placing a practical interpretation on the bond sued on were not to be taken as true on demurrer, when inconsistent with the language of the bond.—Rettiger v. Dannelly, 136 P. 942.

§ 214 (Wash.) An answer, in an action against a city, for a city fireman's wrongful death that the fireman's widow had applied for a pension for herself and daughter and both were thereby estopped, held conclusions admitted by demurrer by the daughter, who was over 16 and not eligible to a pension.—Longfellow v. City of Seattle, 136 P. 855.

A demurrer admits only allegations of fact which are well pleaded and, where the pleader attempts to set forth compliance with a statute, the court will consider the allegations as intended to meet its provisions, though the facts demurred to may warrant another conclusion.—Id.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Kan.) Where the petition had been once amended and there has been considerable delay before the case came to trial, and a demurrer was sustained to plaintiff's evidence, it was not an abuse of discretion to then refuse to permit plaintiff to amend by changing the cause of action from one to recover a forfeit from a stakeholder to one for damages for breach of contract.—Benfield v. Croson, 136 P. 262.

§ 237 (Kan.) Where, on foreclosure of sub-contractors' liens, it appeared that the contractor was really the owners' agent, the court properly permitted amendments to the petition to conform to such proof.—Southwestern Paint & Wall Paper Co. v. Perkins, 136 P. 324.

§ 237 (N.M.) The word "claim" as used in C. L. 1897, § 2685, subsec. 82, providing for amendment to conform to the facts proved if it does not substantially change the claim or defense, is synonymous with "cause of action."—Loretto Literary & Benevolent Society v. Garcia, 136 P. 858.

§ 248 (Or.) L. O. L. § 102, forbidding amendments substantially changing the cause of action, does not apply to amendments before trial, and before trial of an action of replevin the court might allow the complaint to be amended so as to exclude some of the articles sought to be replevied, and include others.—Zimmerle v. Childers, 136 P. 349.

§ 249 (N.M.) Under C. L. 1897, § 2685, subsection 82, the trial court was unauthorized in ejectment to permit a trial amendment, seeking specific performance of a contract to convey realty.—Loretto Literary & Benevolent Society v. Garcia, 136 P. 858.

VIII. PROPERT, OYER, AND EXHIBITS.

§ 310 (Okl.Cr.App.) Where a petition for a writ of habeas corpus had attached to it a parole granted to petitioner and accepted by him and a revocation thereof which recited that the Governor was within the state when the parole was granted by the Lieutenant Governor, the petitioner was bound by such recital.—Ex parte Hawkins, 136 P. 991.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

§ 327 (Cal.App.) A bill of particulars served upon defendant is only an amplification of the complaint, intended to inform defendant of the specific demands made, and is not admissible as substantive evidence.—Campbell v. Rice, 136 P. 512.

XI. MOTIONS.

§ 343 (Colo.) Where the answer tendered a good defense to a complaint stating a cause of action, the court could not render judgment for plaintiff on the pleadings.—Weaver v. New Jersey Fidelity & Plate Glass Ins. Co., 136 P. 1180.

§ 343 (Okl.) A motion for judgment on the pleadings should be denied where the pleadings raise a question of fact.—St. Louis & S. F. R. Co. v. Kerns, 136 P. 169.

§ 343 (Okl.) Where an answer states a defense to plaintiff's cause of action and plaintiff files a verified reply putting in issue the existence of such facts, it is error to render judgment on the pleadings.—Goodman v. Broughman, 136 P. 420.

§ 354 (Wyo.) Motion to strike out answer and counterclaim as a whole held properly denied, where it stated a defense.—Iowa State Savings Bank v. Henry, 136 P. 863.

§ 364 (Wash.) In an action on an open account evidenced by notes, paragraph setting out the notes held properly stricken.—Leavenworth v. Brandon, 136 P. 375.

XII. ISSUES, PROOF, AND VARIANCE.

§ 376 (Cal.App.) Where the answer admits the employment of the broker, no proof need be made of the written employment, as required by Civ. Code, § 1624, subd. 6.—*Konda v. Fay*, 136 P. 514.

§ 376 (Mont.) Where the complaint, in an action for malicious prosecution, alleged, and the answer admitted, that the prosecution in question terminated by plaintiff's discharge, it was not necessary to prove that fact.—*Grorud v. Loasl*, 136 P. 1069.

§ 376 (Or.) An employer which pleads in its answer that it piled the boxes which fell and injured a servant is charged with notice of a defect in the piling.—*Anderson v. Meier & Frank Co.*, 136 P. 660.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 418 (Or.) A demurrer to an answer was abandoned, and any error in overruling it waived, by filing a reply to the new matter contained in the answer.—*W. H. Stanchfield Warehouse Co. v. Central R. of Oregon*, 136 P. 34.

Plaintiff, by pleading over after a demurrer to the answer was overruled, did not waive the objection that the answer did not state facts sufficient to constitute a defense, which could be raised at any time during the trial, or on appeal.—*Id.*

§ 428 (Okl.) An objection to the introduction of any evidence presents the same question as a general demurrer to the petition, and raises no issue of fact.—*Cowart v. Parker-Washington Co.*, 136 P. 153.

POLL TAXES.

See Highways, § 150.

POLLUTION.

See Waters and Water Courses, § 74.

POSSESSION.

See Property; Public Lands, § 35; Sales, § 300; Vendor and Purchaser, §§ 232, 243.

PREFERENCES.

See Witnesses, § 392.

PREMIUMS.

See Insurance, § 756.

PRESCRIPTION.

See Adverse Possession; Highways, § 1; Waters and Water Courses, §§ 151, 152.

PRESUMPTIONS.

See Appeal and Error, §§ 900-938; Criminal Law, §§ 1141, 1144; Evidence, §§ 82, 83; Trial, § 252.

PRINCIPAL AND AGENT.

See Attorney and Client; Banks and Banking, § 105; Brokers; Corporations, § 423; Evidence, §§ 244, 253; Insurance, § 695; Partnership, § 136; Trial, § 328; Witnesses, § 56.

I. THE RELATION.**(A) Creation and Existence.**

§ 23 (Cal.App.) Evidence held to sustain a finding that K. in purchasing the goods sued for by plaintiff acted as agent of and with authority from defendants.—*Weill v. Danziger*, 136 P. 308.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.**(A) Execution of Agency.**

§ 76 (Colo.App.) Where an agent to collect a money demand, due to his principal and himself jointly, accepts land in satisfaction thereof without authority, he and his executrix are estopped to object, when sued in assumpsit by the principal for his share, that assumpsit for money had and received would not lie, and that some other remedy should have been adopted.—*Brown's Estate v. Stair*, 136 P. 1003.

§ 78 (Or.) A complaint by a principal against his agent for an accounting, not alleging a demand, or facts rendering a demand unnecessary, is bad.—*Haaland v. Miller*, 136 P. 9.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.**(A) Powers of Agent.**

§ 132 (Or.) Where defendant, who had a contract with a city for the construction of a pipe line, had the work done by A. under an arrangement by which defendant paid the men employed by A. to do the work and paid the merchants who furnished supplies for the men while working, A. was, in substance, a mere overseer or foreman for defendant, so as to make defendant, and not A., liable for such supplies.—*Baker City Mercantile Co. v. Idaho Glazed Cement Pipe Co.*, 136 P. 23.

(D) Ratification.

§ 171 (Okl.) A person who voluntarily accepts the proceeds of an act done by one assuming without authority to be his agent, ratifies the act.—*Chicago, R. I. & P. Ry. Co. v. Newburn*, 136 P. 174.

§ 172 (Or.) Where an agent offering a leasehold interest in exchange made false representations as to its condition and income, the principal, by availing himself of the benefits of the transaction, was bound by such representations, whether he authorized them or not, since he could not ratify the transaction in part, and repudiate it in part.—*Owen v. Jones*, 136 P. 332.

(F) Actions.

§ 184 (Wash.) One who, with full knowledge of the material facts, including the existence of the agency, elected to hold the agent liable, thereby discharged the principal.—*McDonald v. New World Life Ins. Co.*, 136 P. 702.

PRINCIPAL AND SURETY.

See Appeal and Error, § 458; Bail, §§ 80, 84.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 59 (Cal.App.) Sureties are entitled to stand by the letter of their bond.—*Wickersham Co. v. Nichols*, 136 P. 511.

§ 59 (Kan.) The rules of strict construction usually applicable to accommodation sureties do not apply in the construction of a surety company bond.—*State v. Massachusetts Bonding & Ins. Co.*, 136 P. 905.

Where a surety company bond is open to two constructions, that most favorable to the insured will be adopted; but, where there is no ambiguity, the plain intent of the parties cannot be nullified by construction.—*Id.*

§ 78 (Cal.App.) Under a suretyship obligation, held that the sureties were liable for the market value of jewelry intrusted to the principal for sale, whether samples or otherwise, if sold or appropriated by the principal.—*Wickersham Co. v. Nichols*, 136 P. 511.

IV. REMEDIES OF CREDITORS.

§ 144 (Cal.App.) The sureties of a salesman could deduct from the market value of goods

sold any commission to which the salesman was entitled under any personal agreement between the salesman and his employer.—*Wickersham Co. v. Nichols*, 136 P. 511.

PRINTING.

See Appeal and Error, § 764.

PROBABLE CAUSE.

See Searches and Seizures, § 3.

PROBATE.

See Wills, §§ 227-327.

PROBATE COURTS.

See Courts, §§ 201, 202; Executors and Administrators, § 315.

PROCESS.

See Appearance; False Imprisonment, § 8; Garnishment, § 103; Judgment, §§ 155, 418, 490; Justices of the Peace, §§ 83, 174; Searches and Seizures; Witnesses, § 2.

II. SERVICE.

(C) Publication or Other Notice.

§ 85 (Colo.) To give a court jurisdiction by publication of the summons, the statutory requirements must be strictly complied with, and nothing excuses omissions or insufficient statements.—*Gibson v. Wagner*, 136 P. 93.

§ 96 (Colo.) Defendant's post office address, if known, or the fact that it is not known to the affiant, must be alleged positively; and an affidavit that affiant was informed and believed that such address was unknown to affiant was insufficient.—*Gibson v. Wagner*, 136 P. 93.

An affidavit which stated as to a number of defendants that they resided out of the state or had departed therefrom or had concealed themselves, and which failed to give defendants' post office addresses or to state that they were unknown, *held* insufficient.—*Id.*

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 158 (Or.) The objection that the suit for divorce was brought in the wrong county may be raised by motion to quash based on affidavit.—*Hubner v. Hubner*, 136 P. 667.

PROHIBITION.

I. NATURE AND GROUNDS.

§ 3 (Wash.) The adequacy of a remedy by appeal in the ordinary course of law is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction.—*State v. Wright*, 136 P. 482.

Where interest on the contract price was still running in favor of a contractor for a municipal improvement, his remedy by appeal in cases appealed by owners from the order of confirmation and in injunction by an order to restrain collection of the assessment in the event of their wrongful determination would be adequate, and hence he was not entitled to a writ of prohibition against such actions.—*Id.*

§ 6 (Cal.) Whether bank commissioners, after securing a judgment dissolving a bank under Act March 24, 1903 (St. 1903, p. 365), or a receiver succeeding them, had capacity to continue an action to recover on a note belonging to the bank was not a jurisdictional question which could be determined on application for prohibition, but a legal question for determination in the action.—*Crittenden v. Superior Court of California in and for San Luis Obispo County*, 136 P. 287.

§ 9 (Nev.) Under Rev. Laws, § 5708, the writ of prohibition will only issue where there is

an exercise of functions without or in excess of the jurisdiction of the prohibited tribunal.—*McComb v. Fourth Judicial Dist. Court in and for Elko County*, 136 P. 563.

§ 10 (Wash.) Whether the court would set aside a judgment of condemnation and retry the right to condemn as against interveners, or would relegate them to an independent proceeding, *held* not without or in excess of its jurisdiction, so that prohibition would not lie to prevent trying the question of damages.—*State v. Superior Court of Grant County*, 136 P. 144.

PROMISE OF MARRIAGE.

See Breach of Marriage Promise.

PROPERTY.

§ 2 (Cal.App.) Under Civ. Code, § 655, declaring that there may be ownership of all inanimate things capable of appropriation, there may be ownership of electric current even though the nature of the current is unknown.—*Hill v. Pacific Gas & Electric Co.*, 136 P. 492.

§ 9 (Nev.) In the absence of any showing of a better title or right, the bare possession of property is sufficient to indicate ownership.—*Shearer v. City of Reno*, 136 P. 705.

PROSTITUTION.

See Lewdness.

PROVINCE OF COURT AND JURY.

See Trial.

PROXIMATE CAUSE.

See Master and Servant, § 276.

PUBLICATION.

See Process, §§ 85, 96.

PUBLIC BUILDINGS.

See Mechanics' Liens, § 13.

PUBLIC DEBT.

See States, §§ 130-137.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 294-538.

PUBLIC LANDS.

See Mines and Minerals, §§ 20-38; Waters and Water Courses, §§ 7-30.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

§ 35 (Idaho) A "homestead or desert entry" is the initial step taken in the United States Land Office by the claimant towards acquiring ownership under the federal laws.—*Indian Cove Irr. Dist. v. Prideaux*, 136 P. 618.

The inclusion of lands entered under the homestead and desert land laws in an irrigation district organized pursuant to Rev. Codes, § 2372 et seq., and the apportionment of benefits thereto, cannot interfere with the disposal of such lands by the government.—*Id.*

§ 35 (Wash.) An intention to take possession of public land as an additional homestead would give the possessor right of possession as against mere trespassers; proof of complete title not being necessary as against them.—*Stofferan v. Okanogan County*, 136 P. 484.

(G) Grants to States for Internal Improvements.

§ 64 (Wash.) Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), providing that the

right of way for highways over public lands not reserved for public uses "is hereby granted," did not operate as a grant in present; the grant not taking effect until the highway is established under some public law.—*Stofferan v. Okanogan County*, 136 P. 484.

Public highways may be established over public lands, pursuant to Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), either by use by the public for not less than 7 years, if work is kept up at the public expense, pursuant to Rem. & Bal. Code, § 5657, or, where not so maintained, by continued use by the public for the 10-year period of limitation for quieting title to land.—Id.

Since the Indians are wards of the nation, the reservation of public lands for their use is a "reservation for public use within Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), granting the right of way for highways over public lands not reserved for public uses, so that the statute would not operate as a grant for a highway over an Indian reservation until the land was thrown open for settlement, in view of Act March 3, 1901, § 4.—Id.

Act 1903 (Laws 1903, c. 103; Rem. & Bal. Code) § 5607, authorizing boards of county commissioners to accept grants of rights of way for highways over public lands not reserved for public uses, and section 5608, ratifying any action taken by the boards accepting such grants, would not make a resolution of a board accepting the grant such an acceptance as would give the county complete title to a highway until it was actually established in a recognized legal manner.—Id.

(I) Proceedings in Land Office.

§ 106 (Idaho) While under Rev. Codes, § 5983, a land office certificate on a homestead entry is prima facie evidence that the holder owns the land described therein, this evidence may be overcome by proof that at the time of the location or filing the land was in the adverse possession of another, or that he is holding the land for mining purposes.—*Fall Creek Sheep Co. v. Walton*, 136 P. 438.

§ 106 (Wash.) The United States Land Department may contest the regularity of the proofs as to residence, etc., or the sufficiency thereof, after final certificate issues to a homestead applicant.—*Haumesser v. Chehalis County*, 136 P. 1141.

§ 108 (Idaho) Where two persons claim land, one as a homestead and the other as a mining location, and the government is not a party to the contest, and a certificate is issued upon the homestead entry, which is recognized as legal by the Secretary of the Interior the state court will follow such decision and recognize the entryman's right to protect his possession against trespassing hogs, by taking up same pursuant to Rev. Codes, §§ 1278-1283.—*Fall Creek Sheep Co. v. Walton*, 136 P. 438.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE COMMISSION.

See Gas, § 14.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Gas; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 182-247.

PUNISHMENT.

See Criminal Law, § 1206.

PUNITIVE DAMAGES.

See Damages, § 87.

QUANTUM MERUIT.

See Work and Labor.

QUASI CONTRACTS.

See Contracts, § 5.

QUIETING TITLE.

See Dismissal and Nonsuit, § 19; Indians, § 15; Injunction, § 143; Judgment, § 106; Jury, § 14; Limitation of Actions, § 165; Taxation, § 824.

I. RIGHT OF ACTION AND DEFENSES.

§ 4 (Or.) The remedy at law by ejectment is not adequate to determine the rights of a riparian owner to land under water, and equity has jurisdiction.—*Rasmussen v. Walker Warehouse Co.*, 136 P. 661; *Kronenberg v. Same*, Id. 318.

§ 34 (Idaho) Complaint held to state sufficient facts to constitute a cause of action to determine adverse claims to real estate and quiet title under Rev. Codes, § 4538.—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

II. PROCEEDINGS AND RELIEF.

§ 47 (Idaho) An action, under Rev. Codes, § 4538, to determine adverse claims to real estate and quiet title being an action in equity, the submission of questions of fact to a jury is within the discretion of the trial court.—*Fairview Inv. Co. v. Lamberson*, 136 P. 606.

§ 49 (Idaho) Where J. proved title by adverse possession and S. proved a lien for taxes paid, it was error to enter judgment quieting the title to each party to a part of the tract.—*Johnson v. Sowden*, 136 P. 1136.

§ 50 (Cal.) In a vendor's action against a purchaser to quiet title, judgment for the vendor for the amount due, quieting its title, and providing that it should convey upon payment of the amount due, held erroneous so far as it gave judgment for the amount due.—*Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 136 P. 57.

QUITCLAIM DEEDS.

See Vendor and Purchaser, §§ 224, 231.

QUO WARRANTO.

I. NATURE AND GROUNDS.

§ 17 (Kan.) Gen. St. 1909, § 6276 (Code Civ. Proc. § 680), held to authorize quo warranto against a corporation, the officers of which had mismanaged its affairs, misappropriated its money to the detriment of minority stockholders, and obtained an extension of its charter by fraud.—*State v. Masons' and Odd Fellows' Joint Stock Ass'n*, 136 P. 930.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 33 (Kan.) Under the express provision of Gen. St. 1909, § 6277 (Code Civ. Proc. § 681), a county attorney may institute quo warranto in the name of the state against a corporation for the abuse of its corporate rights, the mismanagement of its affairs, and the misappropriation of money to the detriment of its stockholders.—*State v. Masons' and Odd Fellows' Joint Stock Ass'n*, 136 P. 930.

RAILROADS.

See Carriers; Eminent Domain; Municipal Corporations, § 762; Street Railroads; Trial, § 253.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

§ 58 (Or.) Though L. O. L. § 6897, requires a carrier to maintain adequate depots, the Legislature has not determined where a carrier must establish stations, section 6888, relating to schedules of rates, leaving it optional with the carrier to determine its stations.—*Schanen-Blair Co. v. Southern Pac. Co.*, 136 P. 886.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 113 (Mont.) While a railroad company must exercise the highest degree of care to keep its track and roadbed safe, it, in so doing, injuring the property of another, though necessarily, is liable for the damage.—*Wine v. Northern Pac. Ry. Co.*, 136 P. 387.

§ 113 (Okl.) Where a railroad company, unlawfully entering on land, tears down the fences, thus permitting animals to destroy crops, it is liable for the damage.—*Missouri, O. & G. Ry. Co. v. Brown*, 136 P. 1117.

X. OPERATION.

(A) Duty to Operate.

§ 218 (Mont.) Railway companies are entitled to run through trains stopping only at principal stations, and are not bound to bring home to the public notice of the stations at which they will stop.—*Dahmer v. Northern Pac. Ry. Co.*, 136 P. 1059.

§ 218 (Or.) A carrier cannot be required, in absence of statute, to stop trains at places other than it may choose, and hold out as stopping places.—*Schanen-Blair Co. v. Southern Pac. Co.*, 136 P. 886.

(D) Injuries to Licensees or Trespassers in General.

§ 273½ (Utah) Where, with the knowledge and acquiescence of a railroad company, a building had been erected upon its right of way and used continuously for more than 40 years, the railroad was bound to use ordinary care to prevent injury to the occupant.—*Gilligan v. Denver & R. G. R. Co.*, 136 P. 958.

Where a railroad company permitted a house to be erected on its right of way, the duty imposed upon it to exercise ordinary care to prevent injury to the occupant is not limited to an injury occurring on its track.—*Id.*

§ 274 (Mont.) Where a person was knocked from station platform in front of approaching train, those in charge of the train held bound to stop it if within their power by ordinary care after discovering his peril.—*Dahmer v. Northern Pac. Ry. Co.*, 136 P. 1059.

Railway company held bound to use special care in operating trains at stations or other points, where the presence of persons might reasonably be anticipated.—*Id.*

Engineer of through train which passed remote station, where the presence of persons could not reasonably be anticipated early in the morning held under no special obligation to keep a lookout.—*Id.*

§ 282 (Utah) In an action against a railroad company for an injury to an occupant of a house on its right of way, evidence as to the use and occupation of the right of way by other persons near the house in question was properly admitted to show the character and extent of the use and the relationship of the parties.—*Gilligan v. Denver & R. G. R. Co.*, 136 P. 958.

(F) Accidents at Crossings.

§ 300 (Okl.) Where a track has been used by travelers as a public crossing with the knowledge and without the objection of the railroad, and it has treated it as a public crossing, it will be presumed to be such, and the railroad must exercise ordinary care to prevent injuring travelers.—*Midland Valley R. Co. v. Shores*, 136 P. 157.

§ 305 (Kan.) A railroad company is liable where its servant, observing the fright of a horse and able to have stopped in time to avoid injury, recklessly failed to stop his railroad tricycle, thus causing an injury.—*Baker v. Missouri, K. & T. Ry. Co.*, 136 P. 220.

§ 307 (Okl.) Where a railroad company customarily gives signals or keeps a flagman at a crossing, and such practice is notorious, its failure to do so may be considered in determining the question of defendant's negligence.—*Midland Valley R. Co. v. Shores*, 136 P. 157.

§ 350 (Kan.) Where reasonable minds might differ, the question whether plaintiff was guilty of contributory negligence was for the jury.—*Smith v. Joplin & P. Ry. Co.*, 136 P. 930.

§ 350 (Okl.) Where, in an action for personal injuries at a crossing, the evidence was conflicting as to whether plaintiff looked and listened before crossing the track, the question of contributory negligence was for the jury under Williams' Ann. Const. art. 23, § 6.—*Midland Valley R. Co. v. Shores*, 136 P. 157.

(G) Injuries to Persons on or near Tracks.

§ 376 (Mont.) An engineer was not bound to stop a train, though he saw a person who had been thrown on the track, where he was entirely clear of the track, except one foot which he would have gotten off had it not caught on a piece of wire.—*Dahmer v. Northern Pac. Ry. Co.*, 136 P. 1059.

§ 398 (Mont.) Evidence held insufficient to show that engineer of through train discovered the presence of a person on the track in the middle of the night in time to have avoided injuring him.—*Dahmer v. Northern Pac. Ry. Co.*, 136 P. 1059.

(H) Injuries to Animals on or near Tracks.

§ 434 (Colo.) In view of section 6 of Laws 1902, p. 26 (Mills' Ann. St. § 3713c), and of section 7, held, an action for damages for injury to stock by a defective fence was tried under the statute, and a judgment for plaintiff must be set aside; the statute having been declared unconstitutional.—*Denver & R. G. R. Co. v. Shaw*, 136 P. 1052.

RAPE.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 34 (Okl.Cr.App.) An information charging an attempt to rape, in violation of Rev. Laws 1910, § 2803, must aver some act done, and the failure thereof, and, where the female is over 18 years of age, allege a felonious intent to rape as defined by Rev. Laws 1910, § 2414.—*Williams v. State*, 136 P. 599.

(B) Evidence.

§ 52 (Okl.Cr.App.) Evidence held to sustain a conviction.—*McCarty v. State*, 136 P. 1122.

§ 53 (Nev.) In a prosecution for assault with intent to rape, evidence held sufficient to show that accused was the guilty person.—*State v. Nelson*, 136 P. 377.

§ 53 (Okl.Cr.App.) Evidence held sufficient to sustain a conviction of assault with intent to commit rape.—*Williams v. State*, 136 P. 599.

RATE.

Of charge, see Carriers, §§ 12, 20; Railroads, § 58.

RATIFICATION.

See Counties, § 124; Principal and Agent, §§ 171, 172.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer; Quieting Title.

REASONABLE TIME.

See Sales, §§ 91, 126.

REBATES.

See Taxation, §§ 908, 913.

RECALL.

See Statutes, §§ 107, 125.

RECEIPTS.

See Frauds, Statute of, § 110.

RECEIVERS.

See Corporations, § 262; Statutes, § 276.

RECORDS.

See Appeal and Error, §§ 501-717; Chattel Mortgages, §§ 84, 85; Criminal Law, §§ 1086-1121; Deeds, § 59; Judgment, § 279; Justices of the Peace, § 164; Physicians and Surgeons.

REDEMPTION.

See Mortgages, §§ 554, 591, 608½; Taxation, § 697.

REDIRECT EXAMINATION.

See Witnesses, § 286.

REFERENCE.

See Appeal and Error, §§ 981, 989, 1017, 1018, 1022.

II. REFEREES AND PROCEEDINGS.

§ 51 (Okl.) Under Comp. Laws 1909, § 2812, a trial before a referee is conducted as a trial by the court.—*Eberle v. Drennan*, 136 P. 162.

III. REPORT AND FINDINGS.

§ 101 (Colo.) Where the referee reported that the condition of partnership accounts was so incomplete and unsatisfactory that he excluded the accounts, the court properly set the report aside and ordered another hearing.—*Davis v. Wright*, 136 P. 1055.

REFORMATION OF INSTRUMENTS.

See Sales, § 279.

II. PROCEEDINGS AND RELIEF.

§ 36 (Okl.) In an action for reformation and specific performance of a written contract, and for compensation for improvements made under a subsequent parol agreement, plaintiff, in order to recover on the parol agreement, must allege the terms thereof in such language as to enable the court to form some conclusions as to what the agreement was.—*Mehlin v. Superior Oil & Gas Co.*, 136 P. 581.

REFRESHING MEMORY.

See Witnesses, §§ 255, 259.

REGISTRATION.

See Physicians and Surgeons.

REHEARING.

See Appeal and Error, § 835; New Trial.

RELEASE.

See Insurance, § 603.

I. REQUISITES AND VALIDITY.

§ 17 (Okl.) A release of damages for personal injuries obtained while the injured person is suffering from such nervous shock that he does

not understand its purport or obtained by false representations of a claim agent is not binding.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 57 (Okl.) Evidence held to sustain a finding that a release of damages signed by an injured passenger was obtained from him while he did not have normal use of his mind, and void.—*St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159.

RELIGIOUS SOCIETIES.

See Sales, § 481.

REMAINDERS.

§ 5 (Kan.) Remainders created in a gift by deed are not accelerated by the life tenant's refusal to accept the conveyance of the life estate.—*Miller v. Miller*, 136 P. 953.

REMEDIAL STATUTES.

See Statutes, § 236.

REMOVAL OF CAUSES.

See Venue, § 77.

RENT.

See Landlord and Tenant, §§ 184-260, 326, 328; Mortgages, § 199.

REPEAL.

See Statutes, §§ 158-172, 276.

REPLEVIN.

See Trial, §§ 127, 260.

I. RIGHT OF ACTION AND DEFENSES.

§ 10 (Or.) To maintain replevin defendant must have had either actual or constructive possession of the property at the commencement of the action.—*De Lore v. Smith*, 136 P. 13.

IV. PLEADING AND EVIDENCE.

§ 65 (Wash.) Where, in replevin to recover property, conditionally sold, from the buyer's transferees, the buyer and her husband appeared and filed an answer and a cross-complaint, which the transferees answered, claiming judgment over against the buyer, the court had jurisdiction to determine the issues so raised, though they were not germane to the issue in the original action.—*Grote-Rankin Co. v. Brownell*, 136 P. 145.

§ 71 (Mont.) In claim and delivery to recover cattle purchased by defendant from B., note and duly recorded chattel mortgage given by B. held admissible to re-enforce the presumption of his ownership arising under Rev. Codes, § 7962, subds. 8, 11, 12.—*Cuerth v. Arbogast*, 136 P. 383.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 88 (Okl.) Direction of verdict for defendant, in an action for possession of a mule, held error where testimony tended to show value and the evidence of ownership was conflicting and the entire evidence such that the court would not have been compelled to set aside a verdict for plaintiff.—*Jones v. First State Bank of Bristow*, 136 P. 737.

REPLICATION.

See Pleading, §§ 177, 418.

REPLY.

See Pleading, §§ 177, 418.

REPORT.

See Corporations, §§ 328-360; Reference.

REPRESENTATIONS.

See Sales, §§ 40, 114-126.

REQUESTS.

See Trial, §§ 250, 256-261.

RESALE.

See Sales, § 339.

RESCISSION.

See Sales, §§ 40, 48, 91-126, 180; Vendor and Purchaser, § 97.

RES GESTÆ.

See Criminal Law, § 422; Evidence, § 127.

RESIDENCE.

See Domicile.

RES IPSA LOQUITUR.

See Electricity, § 19.

RES JUDICATA.

See Judgment, §§ 582-751.

RESTAURANTS.

See Intoxicating Liquors, § 145; Licenses, § 7.

RESTRAINT OF TRADE.

See Contracts, §§ 116, 117.

RESULTING TRUSTS.

See Trusts, §§ 63½-88.

RETROSPECTIVE LAWS.

See Statutes, § 276.

REVENUE.

See Taxation.

REVERSIONS.

See Dedication, § 65.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1024-1186; Habeas Corpus; Municipal Corporations, § 508.

REVIVAL.

See Judgment, § 866; Statutes, § 172.

REVOCATION.

See Dedication, § 29.

REWARDS.

See Contracts, §§ 332, 352.

RIGHT OF WAY.

See Navigable Waters, § 18.

RIPARIAN RIGHTS.

See Navigable Waters, §§ 36-46; Waters and Water Courses, §§ 74, 89, 151, 152.

RISKS.

Assumption of, see Master and Servant, §§ 206-217, 265, 288.

ROADS.

See Easements; Highways.

ROBBERY.

See Criminal Law, §§ 438, 850, 1186; Indictment and Information, § 159.

§ 24 (Ariz.) Evidence on a trial for robbery held sufficient to support a conviction.—*Young Chung v. State*, 136 P. 631.

§ 24 (Wash.) Evidence held to sustain a conviction for robbery.—*State v. Fateh-Mohamed*, 136 P. 676.

SAFE PLACE TO WORK.

See Master and Servant, §§ 101-129.

SALARY.

See Officers, §§ 95, 99; States, §§ 59-62, 130-137; Statutes, § 107.

SALES.

See Account; Bills and Notes, §§ 209, 310; Chattel Mortgages, §§ 6, 34, 85; Commerce, §§ 40, 66; Evidence, §§ 423, 441, 445; Frauds, Statute of, §§ 83-95; Fraudulent Conveyances; Intoxicating Liquors; Logs and Logging, § 34; Mortgages, § 554; Municipal Corporations, § 921; Pleading, § 34; Sheriffs and Constables, § 92; Taxation, § 697; Trover and Conversion, § 16; Vendor and Purchaser.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 32 (Wash.) Letters and telegrams held to establish a contract for the purchase and sale of hops, though the parties contemplated a subsequent formal contract.—*Loewi v. Long*, 136 P. 673.

§ 40 (Okla.) Where a person who buys a piano is unacquainted with musical instruments and relies wholly upon false representations of the seller's agent as to its quality, he may rescind within a reasonable time after discovery of the fraud, by returning the piano to the agent.—*Couch v. O'Brien*, 136 P. 1088.

§ 48 (Wash.) A buyer of renovated butter after receiving deliveries marked "process," instead of "renovated," as required by Rem. & Bal. Code, § 5447e, could not repudiate the contract on ground of illegality.—*Armour & Co. v. Jesmer*, 136 P. 689.

§ 52 (Cal.App.) Evidence, in an action for the price of railroad ties, sold to one corporation and used by defendant, held to sustain a finding that no agreement was made by defendant to pay plaintiff for the ties.—*National Lumber Co. v. Tejunga Valley Rock Co.*, 136 P. 508.

§ 52 (Okla.) Where, in an action for goods bought, the answer admits the contract and the receipt of the goods, and the only defense is that the contract is illegal and procured by fraud, the burden of proof is on defendant.—*J. W. Ripy & Son v. Art Wall Paper Mills*, 136 P. 1080.

II. CONSTRUCTION OF CONTRACT.

§ 61 (Cal.App.) Where plaintiffs bought a sack of baled hay from defendant at a specified price per ton, differences in weight to be adjusted after the hay had been removed and weighed, the contract was not executory, but title to such hay passed at once.—*Reed v. McDonald*, 136 P. 506.

§ 82 (Wash.) Where the time of payment is not mentioned, the delivery of the goods and the payment of the price are to be concurrent acts.—*Loewi v. Long*, 136 P. 673.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

§ 91 (Wash.) An agreement by a seller of bonds to allow plaintiff to withdraw from her purchase at any time upon return of the bonds after consultation with third persons necessitates plaintiff's making an election whether to take the bonds or not within a reasonable time.—*Brooks v. Trustee Co.*, 136 P. 1152.

Where defendant agreed that plaintiff might withdraw from her purchase within a reasonable time, plaintiff's delay in exercising that right for more than six years was unreasonable.—*Id.*

(C) Rescission by Buyer.

§ 114 (Okla.) Fraudulent representations made as to the quality of a piano by the seller's agent to induce a sale to one unacquainted with musical instruments will justify a rescission by the buyer.—*Couch v. O'Brien*, 136 P. 1088.

§ 121 (Kan.) Where the buyer, after knowledge of fraud, retains the goods bought and sells a considerable portion of them, and makes payments on the purchase price note and submits to a foreclosure of a chattel mortgage given to secure same without expressing dissatisfaction, he affirms the contract.—*Sell v. Compton*, 136 P. 927.

§ 124 (Okla.) Where a person who buys a piano is unacquainted with musical instruments and relies wholly upon false representations of the seller's agent as to its quality, he may rescind within a reasonable time after discovery of the fraud, by returning the piano to the agent.—*Couch v. O'Brien*, 136 P. 1088.

§ 126 (Okla.) Where a person who buys a piano is unacquainted with musical instruments and relies wholly upon false representations of the seller's agent as to its quality, he may rescind within a reasonable time after discovery of the fraud.—*Couch v. O'Brien*, 136 P. 1088.

What constitutes a reasonable time for taking steps to rescind a sale contract for fraud is a question of law for the court under the evidence in each case.—*Id.*

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§ 151 (Cal.App.) Where title to an entire stack of hay passed at once to the buyers, subject only to an adjustment of differences in weight on removal, they were bound to protect and account to the seller for the entire stack.—*Reed v. McDonald*, 136 P. 506.

§ 180 (Wash.) A buyer of renovated storage butter who accepted a number of deliveries without objection that it was not marked as required by Rem. & Bal. Code, § 5447e, could not repudiate the contract, since the objection did not go to the substance of the contract.—*Armour & Co. v. Jesmer*, 136 P. 689.

§ 180 (Wash.) Where plaintiff delayed the delivery of lumber, that defendant, after time fixed for delivery, accepted a portion of the lumber was not a waiver of its rights to recover damages.—*Wisconsin Lumber Co. v. Pacific Tank & Silo Co.*, 136 P. 691.

§ 181 (Mont.) Evidence held to sustain a finding that there was not a delivery of property claimed to have been sold to plaintiff.—*Western Mining Supply Co. v. Melzner*, 136 P. 44.

VI. WARRANTIES.

§ 255 (Okla.) A second purchaser of an article is not subrogated to the first purchaser's right of action against the original seller for breach of warranty of quality, though he assumes payment of the original purchase price.—*Walrus Mfg. Co. v. McMehen*, 136 P. 772.

§ 279 (Wash.) Plaintiff executing a conditional sale contract, purporting to sell certain prop-

erty to defendant for \$800, with \$430 additional for a tobacco stock, held not entitled to have the contract reformed to cover an additional sum which defendant's son and an associate had agreed to pay plaintiff to induce the making of the bargain, plaintiff being estopped by his contract of warranty to claim any other lien than that specified.—*Pickford v. Borland*, 136 P. 128.

VII. REMEDIES OF SELLER.

(B) Lien.

§ 300 (Wash.) There is no seller's lien on personal property for the purchase price, where the possession is delivered to the buyer, in the absence of contract to that effect.—*Pickford v. Borland*, 136 P. 128.

§ 313 (Wash.) Where a seller makes a written contract of conditional sale limiting the security reserved to a specified sum, he thereby waives a right to a lien for any further or other sum.—*Pickford v. Borland*, 136 P. 128.

(D) Resale.

§ 339 (Wash.) Evidence, in a seller's action to recover the difference between the contract price and the resale price of certain butter which the buyer refused to receive, held to sustain a judgment for the seller.—*Armour & Co. v. Jesmer*, 136 P. 689.

(E) Actions for Price or Value.

§ 340 (Wash.) A complaint alleging sale and delivery of merchandise and also alleging giving of notes, held to state a cause of action on an open account, and not on the notes; they being merely evidentiary.—*Leavenworth v. Brandon*, 136 P. 375.

VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

§ 397 (Cal.App.) In an action by buyers to recover an abatement of the price paid for a quantity of hay sold on an estimated basis, the burden was on them to show the actual shortage between the amount of hay in the stack and that for which they paid.—*Reed v. McDonald*, 136 P. 506.

(C) Actions for Breach of Contract.

§ 418 (Wash.) On breach of a contract to sell and deliver 25,000 pounds of hops at 30 cents, where it was found that the fair market value of hops at the place and time of delivery was 40 cents, held that the buyer was entitled to damages in the sum of \$2,500.—*Loewi v. Long*, 136 P. 673.

(D) Actions and Counterclaims for Breach of Warranty.

§ 428 (Wash.) Where a conditional sale contract contained an express warranty against all incumbrances save the deferred payments mentioned therein, the buyer was entitled to set off money paid for taxes which were a lien on the property when the contract was made.—*Pickford v. Borland*, 136 P. 128.

§ 439 (Okla.) The burden is ordinarily on a party relying on a breach of warranty to prove both the warranty and the breach.—*Fifth Ave. Library Society v. Phillips*, 136 P. 1076.

In an action for the price of books, the burden of establishing breach of warranty as a defense was on defendant.—*Id.*

§ 442 (Wash.) A buyer who rejected goods of defective quality held entitled to recover the difference between the contract price and market value, and also the part of the price paid.—*First Church of Christ, Scientist, v. Southern Seating & Cabinet Co.*, 136 P. 127.

§ 445 (Okla.) In the original seller's action against a second purchaser who had assumed

the original obligation *held* error to instruct as a matter of law that defendant was so subrogated to the original purchaser's right on a warranty in the sale.—*Walrus Mfg. Co. v. McMeheh*, 136 P. 772.

IX. CONDITIONAL SALES.

§ 480 (Mont.) Where plaintiffs claimed that cattle delivered to B. were not sold to him, but bailed, and the contract was not reduced to writing, or filed, as required by Rev. Codes, § 5092, then in force, the court should have defined an agreement to sell, and charged that, if the transaction amounted to such an agreement, and if defendant purchased the cattle from B. while in his possession, to find for defendant.—*Cuerth v. Arbogast*, 136 P. 383.

§ 481 (Wash.) Where the title to pews sold to a church was retained by the seller, and, upon delivery, they were rejected because of their defective quality and the seller notified to remove them, their retention and use by the church did not prevent a recovery of damages as in case of a rejection.—*First Church of Christ, Scientist, v. Southern Seating & Cabinet Co.*, 136 P. 127.

SATISFACTION.

See Release.

SCHOOLS AND SCHOOL DISTRICTS.

See Evidence, § 387; Injunction, § 60.

II. PUBLIC SCHOOLS.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 24 (Idaho) Under Rev. Codes, § 1950, an order of county commissioners establishing a new school district, being appealable is not subject to attack in a collateral proceeding.—*Bobbitt v. Blake*, 136 P. 211.

§ 36 (Idaho) Under Laws 1911, c. 159, the board of county commissioners may create new districts or change the boundaries of existing school districts.—*Bobbitt v. Blake*, 136 P. 211.

(C) Government, Officers, and District Meetings.

§ 47 (Nev.) Under the General Appropriation Act for 1913 and 1914 (Laws 1913, c. 136) §§ 66 to 70, inclusive, *held* that a deputy superintendent was entitled to have his actual cost of living while away from home on official duties paid from the state fund.—*State v. Eggers*, 136 P. 100.

(E) District Debt, Securities, and Taxation.

§ 111 (Okl.) Resident taxpayers of a school district have no such special interest as entitles them to enjoin the officers of the district from discharging a teacher.—*Greer v. Austin*, 136 P. 590.

SEALS.

See Depositions, § 76.

SEARCHES AND SEIZURES.

See Sheriffs and Constables, §§ 98, 138.

§ 3 (Okl.) The determination of the existence of probable cause for the issuance of a search warrant under Rev. Laws 1910, § 3615, and for the issuance of a warrant under section 3616, is for the judge or magistrate before whom the complaint is filed.—*Knisley v. Ham*, 136 P. 427.

SECRETARY OF THE INTERIOR.

See Public Lands, § 108.

SEIZURE.

See Searches and Seizures.

SELF-DEFENSE.

See Homicide, §§ 112, 114, 174, 188, 300.

SEPARATION.

See Husband and Wife, § 283.

SERVANTS.

See Master and Servant.

SERVICE.

See Exceptions, Bill of, § 58.

SERVICES.

See Work and Labor.

SET-OFF AND COUNTERCLAIM.

See Dismissal and Nonsuit, § 19; Pleading, §§ 148, 354; Principal and Surety, § 144; Sales, § 428; Vendor and Purchaser, § 341.

SETTING ASIDE.

See Judgment, §§ 145, 155.

SETTLEMENT.

See Payment; Release.

SEXUAL INTERCOURSE.

See Lewdness.

SHERIFFS AND CONSTABLES.

See Execution, § 198; Trial, § 127.

III. POWERS, DUTIES, AND LIABILITIES.

§ 90 (Idaho) Where the jury called by a constable, under Rev. Codes, § 4478, to pass on a third person's claim to property seized under execution has decided against the execution debtor's title, the officer may require an indemnity bond from the execution creditor.—*Smith v. Graham*, 136 P. 801.

§ 92 (Idaho) Where a judgment creditor gives his indemnity bond on the officer's demand, as required by Rev. Codes, § 4478, the officer should sell, unless the property is taken from him under judicial proceedings.—*Smith v. Graham*, 136 P. 801.

In a judgment creditor's action against an officer and his bondsmen for failure to sell property on execution, where an indemnity bond has been demanded and given, it is no defense that the property belonged to the third party claimant.—*Id.*

§ 98 (Okl.) It is the duty of a ministerial officer to whom a search warrant is directed to execute the writ as demanded, if the same is issued by an officer having authority, and is regular on its face, and in such a case the writ is a protection to the officer.—*Knisley v. Ham*, 136 P. 427.

§ 138 (Okl.) In an action against a deputy sheriff for trespass in executing a search warrant, regular and valid on its face, it was error to instruct the jury that the burden was on defendant to prove that the facts set out in the complaint upon which the warrant was issued were true, though such officer verified the complaint.—*Knisley v. Ham*, 136 P. 427.

SIDEWALKS.

See Municipal Corporations, §§ 817, 821.

SIGNALS.

See Railroads, § 307.

SIGNATURES.

See Partnership, § 138.

SLANDER.

See Libel and Slander.

SODOMY.

See Criminal Law, §§ 415, 476.

§ 5 (Or.) Under L. O. L. § 1439, relating to forms of indictment, an indictment *held* sufficient charging that accused unlawfully committed "the crime against nature in, upon, and with one R. K., he, the said K., then and there being a male person; said crime against nature being too well understood and too disgusting to be herein more fully set forth."—*State v. McAllister*, 136 P. 354.

SPECIAL LAWS.

See Statutes, § 77.

SPECIAL PRIVILEGES.

See Constitutional Law, § 205.

SPECIFIC PERFORMANCE.

See Vendor and Purchaser, § 130.

II. CONTRACTS ENFORCEABLE.

§ 29 (Cal.App.) Specific performance of a contract for the sale of land cannot be decreed unless the property is so described in the contract that it may readily be identified.—*Hines v. Copeland*, 136 P. 728.

III. GOOD FAITH AND DILIGENCE.

§ 96 (Or.) A deed executed in another state, with only one witness, and not certified to have been executed in accordance with the laws of that state, is not evidence of performance by the vendor so as to authorize specific performance.—*Knolhoff v. Mark*, 136 P. 893.

A vendor cannot enforce specific performance unless he has executed a sufficient deed and tendered it to the vendee or brought it into court.—*Id.*

IV. PROCEEDINGS AND RELIEF.

§ 106 (Colo.) In an action for breach of the terms of a loan contract secured by a deed of trust to the public trustee, with prayer for specific performance, or in the alternative for a rescission of the agreement, the public trustee, while not a necessary party defendant, is a proper defendant.—*McKeown v. Lawrence*, 136 P. 1014.

§ 114 (Cal.App.) Under Civ. Code, § 1624, a complaint, in a suit for specific performance, which fails to show that the contract is in writing, is insufficient.—*Hines v. Copeland*, 136 P. 728.

SPEED.

See Evidence, §§ 492, 500.

SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

SPRINGS.

See Waters and Water Courses, §§ 7-30.

STALE DEMANDS.

See Equity, § 87.

STARE DECISIS.

See Courts, § 89.

STATEMENT.

See Mechanics' Liens, § 149; Witnesses, §§ 388-405.

STATEMENT OF FACTS.

See Appeal and Error, § 564.

STATES.

See Constitutional Law, §§ 73, 77; Criminal Law, § 1024; Limitation of Actions, § 11; Mandamus, §§ 3, 105, 147; Pardon; Sunday, § 2; Taxation, § 5.

II. GOVERNMENT AND OFFICERS.

§ 41 (Okla. Cr. App.) The Constitution and public necessity require that some one be vested with the powers of the Governor during his absence from the state or inability to act.—*Ex parte Hawkins*, 136 P. 991.

The Governor's powers become dormant when he crosses the state line, but revive when he returns.—*Id.*

§ 42 (Okla. Cr. App.) During the absence from the state or inability of the Governor to act, the Lieutenant Governor is vested with all the powers of Governor.—*Ex parte Hawkins*, 136 P. 991.

The Lieutenant Governor's power to act as Governor during the latter's absence from the state or inability to act depends solely upon the Constitution and not upon the Governor's pleasure.—*Id.*

§ 46 (Idaho) The librarian of the State Historical Society is an appointive and not a constitutional officer.—*Hailey v. Huston*, 136 P. 212.

§ 57 (N.M.) Acts 1905, c. 9, creating a force of mounted police, fixing salaries of its members, and providing for payment thereof was repealed by Acts 1909, c. 127, § 4, in so far as it provided for salaries and membership of the force.—*State v. Sargent*, 136 P. 602.

§ 59 (Idaho) Where a general biennial appropriation act makes a larger appropriation for salaries than the salaries act provides, the latter controls.—*Hailey v. Huston*, 136 P. 212.

§ 60 (Idaho) Under Rev. Codes, § 851, as amended by Laws 1911, p. 117, the salary of the librarian of the State Historical Society is fixed at \$1,200 per annum, to be paid in monthly installments.—*Hailey v. Huston*, 136 P. 212.

The General appropriation act for the biennial year beginning on the first Monday in January, 1913 (Laws 1913, p. 637), *held* not to amend or suspend Rev. Codes, § 851, as amended by Laws 1911, p. 117, which fixes the salary of the librarian of the State Historical Society.—*Id.*

§ 61 (Nev.) Under Act March 29, 1907 (Laws 1907, c. 185), §§ 3, 4, considered with sections 6, 8, 9, and 10, *held* that the secretary of the State Industrial and Publicity Commission was not entitled to have his salary paid out of the state treasury, but only out of the voluntary contributions made to the commission.—*State v. Eggers*, 136 P. 104.

§ 62 (Nev.) The Legislature has power to abolish or restrict the payment of traveling expenses of state officers.—*State v. Eggers*, 136 P. 100.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 101 (Kan.) The state *held* not estopped from suing on a contractor's bond because it failed to take precaution to see that the architect's estimates were correct or because they included items furnished but not used.—*State v. Massachusetts Bonding & Ins. Co.*, 136 P. 905.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

§ 130 (Nev.) Before the state controller is under a duty to draw a warrant for official salaries, it must appear by statute that an appropriation has been made, and that the state has

obligated itself to pay such salaries from the state treasury.—*State v. Eggers*, 136 P. 104.

§ 131 (N.M.) Where the constitution creates an office and prescribes the salary, such provision is an appropriation, and dispenses with the necessity for legislative appropriation for such office.—*State v. Sargent*, 136 P. 602.

Where a general statute fixes the salary of a public officer and prescribes its payment at particular periods, this is an appropriation, and dispenses with the necessity for subsequent legislative appropriations for such office.—*Id.*

The rule that, where a general law fixes a public officer's salary and prescribes its payment at particular periods, this constitutes a continuing appropriation is not violative of Const. art. 4, § 30, restricting the right to pay out public money except upon appropriation made by the Legislature.—*Id.*

§ 137 (Colo.) Under Rev. St. 1908, § 4409, fixing the pay of the militia, and providing for their expenses when in service, claims for the pay and expenses of the militia when called out by the Governor to suppress riots are claims against the state, for which certificates should be issued by the auditor under section 6239, unless there has been an appropriation therefor.—*People v. Kenehan*, 136 P. 1033.

The provisions of Rev. St. 1908, § 4409, for the payment of the expenses of the militia out of the general fund is not an appropriation within Const. art. 5, § 33, and hence the State Auditor is bound to audit the claims and issue his certificates according to section 6239.—*Id.*

V. CLAIMS AGAINST STATE.

§ 169 (Nev.) Under Const. art. 5, §§ 21, 22, and article 4, § 19, constituting certain state officers a board to examine claims against the state, and prescribing the duties of the State Treasurer and State Controller, and Rev. Laws, §§ 4157, 4158, 4159, and 4450, defining the general duties of the State Controller and providing for the presentation, audit, and allowance of claims against the state, *held* that the claims against the state insurance fund created by the workmen's compensation act (Laws 1913, c. 111), by sections 24 and 40, receivable and payable by the state, did not require presentation to the Board of Examiners or the drawing of warrants by the State Controller.—*State v. McMillan*, 136 P. 108.

STATIONS.

See Carriers, §§ 286, 347; Railroads, § 274.

STATUTES.

See Constitutional Law; Frauds, Statute of; Limitation of Actions.

For statutes relating to particular subjects, see the various specific topics.

I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 11 (Idaho) Under Const. art. 3, § 15, no law shall be passed except by bill.—*Hailey v. Huston*, 136 P. 212.

§ 16 (Wyo.) That the council journal recited the receipt of a proposed act from the House of Representatives immediately after it recited its own concurrence in a House Amendment thereto will not be taken to show that the council did not have the bill before it when it concurred in the amendment, where the journal also recited that the bill was taken from the table on motion and the House amendment concurred in.—*State v. Smart*, 136 P. 452.

§ 37 (Wyo.) The fact that the council journal, after reciting, under date of March 9th, that the chair announces the signing of "Council Enrolled Acts No. 29," etc., also recited the receipt of a message from the House of the passing of the act and the reporting back of the bill correctly enrolled, did not show that

the president of the council signed the bill before it was enrolled.—*State v. Smart*, 136 P. 452.

§ 39 (Kan.) Laws 1913, c. 111, § 1, was not validly enacted, where the journal states positively that the bill as shown by the enrollment did not pass the Senate, and the entry on the journal explains the discrepancy, and it clearly appears that the act as published did not receive the approval of the Senate.—*Ziegler v. Junction City*, 136 P. 223.

§ 61 (Wyo.) Where the journals of the Legislature showed prima facie that a statute was legally enacted, the burden was on one asserting the contrary to show affirmatively that the proceedings were so defective as to invalidate the statute.—*State v. Smart*, 136 P. 452.

It is presumed that the proceedings taken in the enactment of a statute are regular, which presumption is only overcome where it affirmatively appears from the legislative journals to the contrary.—*Id.*

§ 64 (Wyo.) Any invalidity in Laws 1888, c. 86, § 2, making it unlawful to keep open any place of business for transacting business therein on Sunday, but exempting certain businesses, *held* not to affect the validity of section 1, making every person guilty of a misdemeanor who, having a liquor license, shall keep open his place of business or dispose of liquor therein on Sunday.—*State v. Smart*, 136 P. 452.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 77 (Wyo.) Laws 1888, c. 86, § 1, making it a misdemeanor for one having a liquor license to dispose of liquor on Sunday, is not a local or special law within the Springer Act, prohibiting territorial Legislatures from passing local or special laws for the punishment of misdemeanors.—*State v. Smart*, 136 P. 452.

III. SUBJECTS AND TITLES OF ACTS.

§ 107 (Idaho) Since the general appropriation act includes one subject, and an increase in the salary of an officer is another and distinct subject, it is a violation of Const. art. 3, § 16, providing that every act shall embrace but one subject, for the two to be contained in one act.—*Hailey v. Huston*, 136 P. 212.

§ 107 (Wash.) The title to Laws 1911, c. 108, providing for the submission of a recall amendment to the Constitution, *held* not objectionable as embracing more than one subject.—*Cudihee v. Phelps*, 136 P. 367.

§ 109 (Nev.) An amending statute would not be effective to amend any act to which the title of the amendatory act was not germane.—*State v. Eggers*, 136 P. 100.

§ 114 (Wash.) The title of the Workmen's Compensation Act of 1911 *held* sufficient to cover a provision abolishing the right of the employees to recover for negligence against all persons, including individual officers of the employer corporation as well as against employers.—*Peet v. Mills*, 136 P. 685.

§ 119 (Idaho) The title of the general appropriation act for the biennial year beginning on the first Monday of January, 1913 (Laws 1913, p. 637), *held* insufficient to cover the subject of increasing the salary of the librarian of the State Historical Society within Const. art. 3, § 16, providing that the subject of every statute shall be embraced in its title.—*Hailey v. Huston*, 136 P. 212.

§ 119 (Nev.) Any provision for the repeal or enactment of a statute, authorizing payment of the traveling expenses of a state official, would not be germane to an act entitled "An act making appropriations for the support of the civil government of the state of Nevada" for certain years.—*State v. Eggers*, 136 P. 100.

§ 125 (Wash.) The title to Laws 1911, c. 108, providing for the submission of a recall amendment to the Constitution, *held* sufficient to cover the whole subject-matter of the amendment.—*Cudihee v. Phelps*, 136 P. 367.

IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 141 (Idaho) Under Const. art. 3, § 18, no act can be revised or amended by mere reference to its title; but the section as amended must be set forth and published at full length.—*Hailey v. Huston*, 136 P. 212.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 158 (Nev.) Repeals by implication are not favored, and are only permitted where the two acts cannot stand together.—*State v. Eggers*, 136 P. 100.

§ 159 (Okla.) Repeals by implication are never favored, and courts will not hold an earlier statute repealed by a later one unless the conflict between the two acts is irreconcilable.—*State v. Superior Court of Oklahoma County*, 136 P. 424.

§ 161 (Nev.) Statutes relating to the same subject which can stand together should be construed so as to make each effective.—*State v. Eggers*, 136 P. 100.

§ 161 (N.M.) Where a statute does not specifically repeal or cover the whole ground occupied by the common law, it repeals it only when and in so far as it is directly and irreconcilably opposed to it.—*Ex parte De Vore*, 136 P. 47.

§ 161 (Okla.) A repeal by substitution is effected where the latter of two acts covers the whole subject of the first act, contains additional provisions, and plainly shows it was intended as a substitute for the first act.—*State v. Superior Court of Oklahoma County*, 136 P. 424.

§ 172 (N.M.) Where a statute purports to repeal a prior law and substitute other provisions on the same subject, which are limited only until a certain time, the prior law does not revive after the repealing statute is spent.—*State v. Sargent*, 136 P. 602.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 178 (Colo.) Const. art. 18, § 4, relative to the meaning of the term "felony," held not merely a rule of construction, but to define the term and classify crimes on the basis of punishment.—*People v. Godding*, 136 P. 1011.

§ 181 (Nev.) Statutes should be construed so as to effectuate the manifest legislative purpose, and this is sometimes done contrary to the words of the statute.—*State v. Eggers*, 136 P. 100.

§ 181 (Nev.) The legislative intent in enacting a statute must govern, if ascertainable.—*State v. Eggers*, 136 P. 104.

§ 183 (N.M.) Where the language of a statute is doubtful, or an adherence to the strict letter would lead to injustice, absurdity, or contradiction, the statute will be construed according to its spirit or reason, even though this necessitates the rejection of words and substitution of others.—*Ex parte De Vore*, 136 P. 47.

§ 205 (Nev.) The whole act should be construed together to remove or explain any ambiguity in a particular statute.—*State v. Eggers*, 136 P. 104.

§ 206 (Nev.) If a statute may be differently construed, that construction should be given which will make it effective.—*State v. Eggers*, 136 P. 100.

§ 217 (N.M.) In construing a statute which was translated into Spanish prior to its enactment, where the Legislature was composed in large part of members speaking Spanish almost exclusively, it is proper to consult the Spanish

translation to ascertain the legislative intent.—*Ex parte De Vore*, 136 P. 47.

§ 225 (Nev.) Sections of the general appropriation act are in pari materia with the general acts relating to the purposes of the appropriation, and hence should be considered in connection therewith, so as to carry out the provisions of the general act, unless manifestly repugnant thereto.—*State v. Eggers*, 136 P. 100.

§ 226 (Colo.) Where a statute is enacted in a form closely resembling the statute of other states, the construction placed thereon by the courts of such states rather than of the state from which it was taken should govern.—*People v. Godding*, 136 P. 1011.

§ 226 (Colo.App.) The incorporation into the lien law of Rev. St. 1908, §§ 4025, 4026, relating to the recording of the contract in limitation of liability to subcontractors, held to be construed with the entire law and the general policy of the state and not necessarily in conformity with the decisions of the state whence the provisions were adopted.—*Great Western Sugar Co. v. F. H. Gilcrest Lumber Co.*, 136 P. 553.

§ 226 (Okla.) A statute adopted from another state does not bring with it the construction placed upon it by the highest court of that state, where such construction is contrary to the Constitution or well-defined policy of the adopting state or is contrary to the decided weight of authority of other states.—*Western Terra Cotta Co. v. Board of Education of City of Shawnee*, 136 P. 595.

The mechanics' lien law, though adopted from Kansas, will not be given the construction placed upon it by the Supreme Court of Kansas so as to permit liens on public property.—*Id.*

(B) Particular Classes of Statutes.

§ 236 (Wash.) Remedial statutes enacted to cure recognized evils should be construed with regard to the former law and the evils to be remedied.—*Peet v. Mills*, 136 P. 685.

Such statutes should be liberally construed.—*Id.*

§ 241 (N.M.) While penal statutes are to be strictly construed, they are not to be given a strained construction to work exemptions from their penalties, but are to be interpreted by the aid of the ordinary rules to ascertain the legislative intent.—*Ex parte De Vore*, 136 P. 47.

(C) Time of Taking Effect.

§ 255 (Or.) Under Const. art. 4, § 1, an act on which a referendum election is held cannot take effect till after the election, so that "June 30th next after taking effect of this act," within Act Feb. 25, 1913, c. 112, the "Workmen's Compensation Act," § 12, entitling workmen injured after such time to compensation, is June 30, 1914, the referendum election having been November 4, 1913, so that, within section 23 "workmen entitled to benefits hereunder," for whom the commission may provide hospital accommodations, must be injured after June 30, 1914.—*Salem Hospital v. Olcott*, 136 P. 341.

(D) Retroactive Operation.

§ 276 (Cal.) Where, after affirmance of a judgment in dissolution proceedings against a bank, as authorized by Act March 24, 1903 (St. 1903, p. 365), the act was repealed without a saving clause by Act July 1, 1909 (St. 1909, p. 87), pending an appeal from an order denying a new trial, such repeal did not affect the receiver's right to collect a note belonging to the bank in an action begun before the repeal.—*Crittenden v. Superior Court of California in and for San Luis Obispo County*, 136 P. 287.

Such judgment of dissolution was not affected by orders entered by the Supreme Court during

the pendency of the latter appeal, temporarily staying proceedings by the receiver until further order of the court.—Id.

§ 276 (Okl.) Under Const. art. 5, § 54, providing that the repeal of a statute shall not affect any proceeding begun under it, and Laws 1911, c. 39, § 2, to a similar effect, the omission of Comp. Laws 1909, §§ 372-381, from Rev. Laws 1910, does not abate a proceeding pending under such sections prior to the going into

effect of said Revised Laws.—In re Application of State to Issue Bonds to Fund Indebtedness, 136 P. 1104.

VII. PLEADING AND EVIDENCE.

§ 286 (Wyo.) The recitals of the legislative journals signed the date on which various proceedings in connection with the enactment of a statute were done import absolute verity.—State v. Smart, 136 P. 452.

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STIPULATIONS.

See Depositions, § 39.

§ 14 (Or.) A stipulation between plaintiff, defendant, and a third person for payment and note by defendant and third person or in case of failure that plaintiff may take judgment against defendant *held* not to authorize plaintiff to proceed against the third person as a partner of defendant, nor against the firm, after judgment against defendant.—*Ryckman v. Manerud*, 136 P. 826.

STOCK.

See Corporations, §§ 67-157.

STORAGE.

See Warehousemen.

STREET RAILROADS.

See Carriers, §§ 295, 320, 333, 347; Evidence, §§ 127, 500; Indemnity.

II. REGULATION AND OPERATION.

§ 74 (Cal.) A city may, by general ordinance, prescribe reasonable regulations under which street railroad companies shall operate their cars.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

§ 84 (Cal.) A city may, by general ordinance, prescribe reasonable regulations under which street railroad companies shall operate their cars, and a violation of such regulations, where they fix the rate of speed, is per se evidence of negligence rendering the company liable for any injury occasioned by the violation.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

§ 94 (Cal.) Where a municipal corporation in granting a street railroad company a franchise imposes reasonable regulations as to speed, a violation of such regulation has the same effect as a violation of a general municipal ordinance, being per se evidence of negligence.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

§ 98 (Cal.) It is the duty of one about to cross the tracks of a street railroad company to look and listen in order to avoid approaching cars.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

In an action for the death of one killed by a street car, which gave a signal before striking deceased, which deceased thought meant that the car would stop, *held* that the jury, in determining the question of his contributory negligence, might consider his right to rely on such signal rather than his observation.—*Id.*

§ 103 (Cal.App.) Where defendant's motorman saw decedent standing on the track oblivious of the approaching car when it was 650 feet away, and continued to observe him until he was struck, and could have stopped the car when within 12 or 14 feet of him, plaintiff was entitled to recover under the doctrine of last clear

chance.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 113 (Cal.) In an action for the death of one killed on tracks of a street railroad company at night, evidence that the glare of the headlights on similar cars was so blinding that a pedestrian could not determine their speed is admissible.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

§ 113 (Cal.App.) A witness of the accident was properly permitted to state what he saw after reaching the track where the accident occurred.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

In an action for death of decedent by being struck by a street car while he was standing on the track talking to L., in charge of a heavy water wagon, evidence of the weight of the wagon when full *held* admissible.—*Id.*

§ 114 (Cal.) Evidence *held* sufficient to support a finding that the servants of the street railroad company were negligent.—*Simoneau v. Pacific Electric Ry. Co.*, 136 P. 544.

A verdict finding that deceased was not guilty of contributory negligence *held* proper under the evidence.—*Id.*

§ 118 (Or.) The failure to inform the jury as to the duty of one about to cross a railway is error, though the court instructs that, if plaintiff did not exercise the care a man of ordinary prudence would have done, the verdict should be for defendant.—*Edlefson v. Portland Ry., Light & Power Co.*, 136 P. 832.

STREETS.

See Dedication; Municipal Corporations, §§ 346-568, 648, 654, 762-821.

STRIKING OUT.

See Pleading, §§ 11, 354, 364.

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See Mechanics' Liens, §§ 94-110.

SUBROGATION.

See Insurance, § 606; Sales, §§ 255, 445.

SUBSCRIPTIONS.

See Corporations, §§ 80-89.

SUBSTITUTION.

See Statutes, § 161.

SUMMONS.

See Process.

SUNDAY.

See Constitutional Law, § 208; Statutes, § 64.

§ 2 (Wyo.) The Legislature has plenary power to designate the Sabbath and require its observance.—*State v. Smart*, 136 P. 452.

SUPPORT.

See Parent and Child, § 17.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, § 115.

SURGEONS.

See Physicians and Surgeons.

TAXATION.

See Adverse Possession, §§ 79, 84; Commerce, §§ 66-77; Constitutional Law, §§ 229, 290; Counties, § 16; Highways, §§ 122-150; Judgment, § 735; Licenses; Municipal Corporations, §§ 406-518; Vendor and Purchaser, §§ 224, 341; Waters and Water Courses, §§ 182, 183½.

I. NATURE AND EXTENT OF POWER IN GENERAL.

§ 5 (Wash.) Under Rem. & Bal. Code, § 9140, expressly making land of a homestead settler, after final proof and certificate therefor, assessable, notwithstanding no patent therefor is issued, *held*, that the Land Department's filing of an adverse proceeding after issuance of the final certificate did not suspend the state's right to levy taxes upon the land.—*Haumesser v. Chehalis County*, 136 P. 1141.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 38 (Kan.) A statute requiring all rebates to be charged to the county fund and all penalties to be credited to that fund (Gen. St. 1909, § 9428), except those accruing to cities of the first class, which shall be paid to the city, does not violate Const. art. 11, § 4, providing that a tax shall be applied only to the object for which it is levied.—*Kansas City v. Stewart*, 136 P. 241.

§ 44 (Or.) A tax that is equal and uniform throughout the taxing district is not violative of Const. art. 1, § 32, and article 9, § 1, requiring equality and uniformity.—*Johnson v. Jackson County*, 136 P. 874.

City Charter of Ashland, art. 17, § 1, exempting city property from county road taxes, is not violative of Const. art. 1, § 32, and article 9, § 1, requiring equality and uniformity.—*Id.*

X. REDEMPTION FROM TAX SALE.

§ 697 (Idaho) A party in interest, within Rev. Codes, § 1770, providing that redemption of the property sold at tax sale may be made by any party in interest, includes a party who was in possession under claim of right at the time it was sold for taxes, and who continued in the exclusive possession until redemption was made.—*Johnson v. Sowden*, 136 P. 1136.

XI. TAX TITLES.

(B) Tax Deeds.

§ 789 (Colo.App.) Where a tax deed is offered to establish paramount title to real estate, the parties claiming thereunder must prove either that the statutory notice of application therefor was given, or that the assessed valuation rendered it unnecessary, before the deed can be admitted in evidence.—*Jackson v. Larson*, 136 P. 81.

(C) Actions to Confirm or Try Title.

§ 805 (Kan.) Where land was vacant when the tax deed was issued, and until defendants took possession within four years after tax deed was recorded, ejectment brought nine years thereafter was barred by the two-year statute of limitations. Code Civ. Proc. § 15, subd. 3 (Gen. St. 1909, § 5608).—*Andrew v. Reid*, 136 P. 793.

§ 810 (Kan.) Finding that defendants, owners of the fee subject to plaintiff's tax title, took possession of the land within four years after recording the tax deed *held* sustained by the evidence.—*Andrew v. Reid*, 136 P. 793.

(D) Rights and Remedies of Purchaser of Invalid Title.

§ 824 (Idaho) As against a person who acquired title by adverse possession, a person claiming title based on three annual tax receipts who had never been in possession or made

improvements or received a deed, had merely a lien for the taxes paid, with interest.—*Johnson v. Sowden*, 136 P. 1136.

In an action to quiet title, title by adverse possession, under Rev. Codes, §§ 4032, 4041, 4042, cannot be defeated by the lien of tax certificates upon which no deed has been received, where the holder has never gone into possession; but the adverse owner must pay the holder of the certificates the amount due for taxes.—*Id.*

XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

§ 908 (Kan.) A statute requiring that rebates granted on taxes laid by cities, townships, and school districts shall be charged to the county (Gen. St. 1909, § 9428) is not open to the objection that it operates to levy taxes upon one public body for the benefit of another.—*Kansas City v. Stewart*, 136 P. 241.

A statute requiring that all rebates granted on taxes laid by cities, townships, and school districts shall be charged to the county (Gen. St. 1909, § 9428) is not unconstitutional.—*Id.*

§ 913 (Kan.) A provision of the act in relation to the collection of taxes that "all penalties shall be credited to the county fund and all rebates charged to that fund" (Gen. St. 1909, § 9428) requires all rebates to be charged to the county fund, and Laws 1895, c. 260, § 1, which amends such act by implication and requires penalties on city taxes to be paid to the city, does not prevent the rebates on the same tax being charged to the county.—*Kansas City v. Stewart*, 136 P. 241.

TAXATION OF COSTS.

See Costs, § 203.

TEACHERS.

See Schools and School Districts, § 111.

TELEGRAPHS AND TELEPHONES.

See Sales, § 32; Witnesses, § 37.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 25 (Wash.) The mere "tapping" of a private telephone wire held not a violation of Rem. & Bal. Code, § 2656, subd. 6, making it a misdemeanor to willfully or maliciously damage or destroy a telephone line.—*State v. Nordskog*, 136 P. 694.

TENANCY IN COMMON.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 46 (Or.) Pending foreclosure of a mortgage given by the lessee of property on his interest, a statement to plaintiff by C., who before the giving of the mortgage had received a deed of a half interest in the leasehold, that he intended to pay the mortgage, and that he was responsible for half of it, does not constitute a contract.—*Barber v. Toomey*, 136 P. 343.

Even if cotenants had an intention to contribute to the payment of a mortgage loan obtained by one tenant, and though they put aside funds for that purpose, this would not have the effect of extending the mortgage over their interest.—*Id.*

Statements, made by a lessee's assignees of a half interest in the lease, indicating that they felt bound in some way for part of a debt by the lessee contracted, and secured on his interest in the lease, after he had made such assignment, held insufficient to prove the making of a contract by them to pay part of the debt.—*Id.*

A tenant in common, as such, has no power to mortgage or convey the interest of his cotenant.—*Id.*

TENDER.

See Insurance, § 756; Vendor and Purchaser, §§ 76, 97.

TESTAMENTARY CAPACITY.

See Wills, § 282.

THEFT.

See Larceny.

TIDE LANDS.

See Navigable Waters, § 36.

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See Appeal and Error, §§ 338-349, 564; Exceptions, Bill of, §§ 36-43; Homestead, § 193; Sales, §§ 82, 91, 126; Usury, § 50; Vendor and Purchaser, § 18.

TITLE.

See Courts, §§ 163, 212; Municipal Corporations, § 654; Navigable Waters, § 36; Public Lands, § 35; Quieting Title; Sales, §§ 61, 151, 481; Statutes, §§ 107-125; Taxation, §§ 789-824; Trover and Conversion, § 16; Trusts, § 70; Vendor and Purchaser, §§ 54, 130, 137, 232; Waters and Water Courses, §§ 89, 228.

TORTS.

See Assault and Battery, § 26; Contribution; Corporations, § 493; Execution, § 457; False Imprisonment; Fraud; Libel and Slander; Limitation of Actions, § 55; Malicious Prosecution; Municipal Corporations, §§ 741-821; Negligence; Trespass; Trover and Conversion.

TOWNS.

See Schools and School Districts.

TRAVELING EXPENSES.

See States, § 62; Statutes, § 119.

TRESPASS.

See Animals, §§ 91, 95; Carriers, § 244; Constitutional Law, § 293; Public Lands, §§ 35, 108; Railroads, § 118; Sheriffs and Constables, § 138.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 19 (Nev.) Where plaintiff had a license to cut timber on another's land, and to flume it or carry it out, he may maintain an action for injuries to the roads and the flume.—*Anderson v. Berrum*, 136 P. 973.

Plaintiff held not entitled to damages for injuries to the herbage on such land caused by defendant's trespassing sheep.—*Id.*

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 43 (Nev.) Where plaintiff had only a license to cut timber on the lands of a third person, he cannot, under a complaint alleging damages to the herbage on that land and other land owned by himself, recover anything for injury to the verdure; the complaint not alleging how much damage was done on the different lands.—*Anderson v. Berrum*, 136 P. 973.

TRIAL.

See Adverse Possession, § 115; Appeal and Error, §§ 263, 301, 701, 989-1022, 1064-1069; Bailment, § 33; Breach of Marriage Promise; Brokers, § 88; Burglary, § 45; Carriers, §§ 320, 347; Continuance; Contracts, §§ 29, 176, 352, 353; Costs; Criminal Law, §§ 622-898, 1038, 1056; Damages, §§ 208, 217; Electricity, § 19; Fraud, § 64; Homicide, §§

268-309; Husband and Wife, § 314; Jury; Larceny, § 83; Livery Stable Keepers; Master and Servant, §§ 284-297; Municipal Corporations, § 821; Negligence, § 136; New Trial; Physicians and Surgeons, § 18; Railroads, § 350; Reference; Replevin, § 88; Sales, § 445; Sheriffs and Constables, § 138; Stipulations; Street Railroads, §§ 98, 118; Venue; Wills, § 327.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 29 (Or.) The reproof of a witness for including argument in testimony, and for making demonstrations in courtroom, *held* not error.—Goodeve v. Thompson, 136 P. 870.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 34 (Wash.) Under Const. art. 1, § 21, providing that right of trial by jury shall remain inviolate, courts may not determine questions of fact.—Jensen v. Shaw Show Case Co., 136 P. 698.

§ 46 (Kan.) Plaintiff's offer of testimony was properly rejected where the materiality of the lost instrument about which he proposed to testify was not disclosed.—Work v. Work, 136 P. 236.

§ 48 (Colo.App.) Where an affidavit was admissible only to show the falsity of the statement in the application that assured had consulted only a physician named in the last five years, but defendant did not ask that it be admitted for that particular purpose, it was not error to exclude the whole affidavit under Mills' Ann. St. 1912, § 8072.—Mutual Life Ins. Co. of New York v. Good, 136 P. 821.

§ 48 (Mont.) If only part of the evidence embraced in an offer is admissible, it is all properly rejected.—Western Mining Supply Co. v. Melzner, 136 P. 44.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 84 (Wyo.) An objection that a certified copy of a chattel mortgage offered in evidence was immaterial, incompetent, and irrelevant was too general to raise the objection that the county clerk's seal was not affixed to the certificate.—Reynolds v. Morton, 136 P. 795.

§ 86 (Colo.App.) If evidence is competent for one purpose, though it might be considered incompetent for another, it is admissible for the purpose of applying it to the issues of fact which it is competent to sustain.—Town of Meeker v. Fairfield, 136 P. 471.

§ 96 (Mont.) The motion being to strike out certain testimony, refusal thereof is not error; part of it being admissible.—Westlake v. Keating Gold Mining Co., 136 P. 38.

§ 105 (Colo.App.) Where defendant without objection permitted witnesses for plaintiff to give their opinion as to the dangerous construction of a sidewalk and examined its own witnesses upon the same subject and elicited their unqualified opinion as to such fact, defendant waived its right to complain of the court's refusal to exclude cumulative opinion evidence.—Town of Meeker v. Fairfield, 136 P. 471.

In an action against a town for injuries from a fall upon a crosswalk, *held* that, where defendant did not object to the admission of evidence of work upon the walk after the accident but itself established that fact, error in its admission was waived.—Id.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 120 (Or.) Argument of counsel to the effect that a bill of sale had been recorded is improper

where the evidence did not show such recordation.—Zimmerle v. Childers, 136 P. 349.

Trial courts should not allow counsel to argue matters not within the issues and evidence.—Id.
§ 127 (Or.) In replevin against a sheriff for chattels taken upon attachment, the sheriff being the real party in interest though he has an indemnity bond, statement of counsel in argument that he was not the real party in interest, thus bringing before the jury the fact that he had the indemnity bond, is improper.—Zimmerle v. Childers, 136 P. 349.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 139 (Cal.App.) A motion for nonsuit should be denied if there is any evidence tending to support plaintiff's case.—Hill v. Pacific Gas & Electric Co., 136 P. 492.

(C) Dismissal or Nonsuit.

§ 159 (Wash.) Where an action does not involve property or personal rights having value in themselves, and is for damages only, a failure to prove substantial damages warrants a dismissal.—Hewson v. Peterman Mfg. Co., 136 P. 1158.

§ 165 (Cal.App.) A motion for nonsuit admits the truth of plaintiff's evidence and every inference legitimately drawn therefrom.—Hill v. Pacific Gas & Electric Co., 136 P. 492.

(D) Direction of Verdict.

§ 178 (Okla.) Whether or not a court is justified in directing a verdict depends upon the state of the evidence at the time the action of the court is taken.—Homeland Realty Co. v. Robison, 136 P. 585.

Where plaintiff introduces evidence to prove his case, and where defendant's evidence, considered in its most favorable aspect, together with all legitimate inferences that may be drawn from it, fails to present a defense, it is proper to direct a verdict for plaintiff.—Id.

§ 178 (Okla.) A directed verdict should be denied where, admitting the truth of all the evidence in favor of the party against whom the action is contemplated, together with reasonable inferences therefrom, there is enough competent evidence to sustain a verdict in such party's favor.—Jones v. First State Bank of Bristow, 136 P. 737.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 191 (Kan.) Where the evidence was conflicting as to whether plaintiff had first assaulted defendant, it was error to give an instruction referring to "the assault made or attempted to be made on him by the plaintiff."—Busalt v. Doidge, 136 P. 904.

§ 191 (Or.) An instruction in an action for services in digging a well *held* to invade the province of the jury in assuming facts.—West v. McDonald, 136 P. 650.

§ 192 (Mont.) Where the evidence in a servant's injury action as to the safety of the method of work was not contradicted, and accorded with common observation, the court could assume in its instructions that such method was reasonable and proper.—De Sandro v. Missoula Light & Water Co., 136 P. 711.

§ 192 (Okla.) An instruction, in a passenger's action for injuries while riding as a caretaker of stock, to find for plaintiff if defendant was negligent, *held* not erroneous as assuming that plaintiff was rightfully in the stock car, where the evidence showed that he had a right to be there.—St. Louis & S. F. R. Co. v. Kerns, 136 P. 169.

§ 199 (Utah) An instruction *held* erroneous as permitting jury to construe the contract sued on.—Bailey v. Spalding-Livingston Investments Co., 136 P. 962.

(B) Necessity and Subject-Matter.

§ 207 (Colo.App.) Where a party thinks that the jury might have misunderstood the real purpose for which evidence was admitted, he was entitled to submit a special instruction.—Town of Meeker v. Fairfield, 136 P. 471.

(C) Form, Requisites, and Sufficiency.

§ 234 (Wash.) Where, in an action for personal injuries, plaintiff admitted that he had been drinking prior to the accident, an instruction that there was a presumption of his sobriety, and that the burden was on defendant to overcome that presumption by a fair preponderance of the evidence, was error.—McKay v. Seattle Electric Co., 136 P. 134.

§ 235 (Wash.) An instruction on circumstantial evidence *held* erroneous as in effect instructing that such evidence is to be regarded only when it is strong and satisfactory.—McKay v. Seattle Electric Co., 136 P. 134.

§ 236 (Wash.) An instruction imposing on defendant the duty to establish to the minds and conscience of the jury by a preponderance of the evidence that plaintiff on the night of his injury was intoxicated to a degree that impaired his recollection *held* erroneous.—McKay v. Seattle Electric Co., 136 P. 134.

(D) Applicability to Pleadings and Evidence.

§ 250 (Or.) In an action for injuries, a request to charge that plaintiff could not recover for doctor's fees or hospital bills was properly refused, where no claim was made in the complaint, and no testimony offered as to any damage by reason of physician's fees or hospital expenses.—Scheurmann v. Mathison, 136 P. 330.

§ 252 (Mont.) An instruction not based upon the evidence should not be given.—Western Mining Supply Co. v. Meisner, 136 P. 44.

§ 252 (Mont.) Instructions stating the presumptions prescribed by Rev. Codes, § 7962, subds. 8, 11, 12, as abstract propositions without any concrete application thereof to the facts of the case *held* properly refused.—Cuernth v. Arbogast, 136 P. 383.

§ 252 (Okla.) In an action for damages from procuring an exchange of farms by fraud, it was not error to refuse an instruction based on the respective values of two farms, where the only evidence as to the value of one farm was that it was worthless.—Shuler v. Collins, 136 P. 752.

§ 252 (Or.) Refusal of an instruction as to liability for inevitable accident is not error where the question is not presented by the evidence.—Dunn v. Orchard Land & Timber Co., 136 P. 872.

§ 252 (Wash.) If there was evidence making the requested instruction applicable, the Supreme Court cannot say that it was error to give the instruction on the ground that the jury might have found the facts otherwise.—McDonald v. New World Life Ins. Co., 136 P. 702.

§ 253 (Okla.) Where an injured employé relied, in his action for injuries, upon the excessive speed of the car as well as upon the defective condition of the track, an instruction that he could not recover unless the defective track was the proximate cause was properly refused.—Great Western Coal & Coke Co. v. Malone, 136 P. 403.

(E) Requests or Prayers.

§ 256 (Okla.) Failure to define the word "imminently," in an instruction that the plaintiff mine employé did not assume the risk of the defects, which did not appear imminently dan-

gerous, *held* not error in the absence of a request.—Great Western Coal & Coke Co. v. Malone, 136 P. 403.

§ 260 (Okla.) It was not error to refuse an instruction covered by those given.—Great Western Coal & Coke Co. v. Malone, 136 P. 403.

§ 260 (Okla.) Requested instructions covered by those given are properly denied.—Moore v. Johnson, 136 P. 422.

§ 260 (Or.) In replevin, an instruction *held* covered by an instruction given.—De Lore v. Smith, 136 P. 13.

§ 260 (Or.) An instruction that proof of the accident did not entitle plaintiff to recover without proof of negligence, and if it was an accident without any negligence, plaintiff could not recover, *held* to cover a request to charge on the same subject.—Scheurmann v. Mathison, 136 P. 330.

It is not error to refuse to give an instruction in the language requested, where the same matter is given in other language in the general charge.—Id.

§ 260 (Or.) It is not error to refuse requests to charge, the substance of which is contained in instructions given.—Pilson v. Tip-Top Auto Co., 136 P. 642.

§ 261 (Mont.) The trial court cannot be placed in error for refusing to change an instruction, unless the instruction as modified correctly states the law and is applicable to the evidence.—Western Mining Supply Co. v. Meisner, 136 P. 44.

(G) Construction and Operation.

§ 295 (Utah) Instructions should be considered together.—Utah Ass'n of Creditmen v. Boyle Furniture Co., 136 P. 572.

§ 296 (Okla.) An instruction, though it misstates the law, is not ground for reversal, where, when taken with the other instructions, it appears that the jury were not misled.—Chicago, R. I. & P. Ry. Co. v. Newburn, 136 P. 174.

§ 296 (Or.) Failure of instruction as to misdelivery by carrier to state that a ratification of the misdelivery would relate back and validate it *held* not misleading in view of other instructions, stating such fact.—W. H. Stanchfield Warehouse Co. v. Central R. of Oregon, 136 P. 34.

An instruction, faulty by reason of the omission of some essential matters, may be cured by other instructions which set forth the omitted matters.—Id.

§ 296 (Wash.) Instruction as to liability for injuries sustained by stepping into excavation *held* not prejudicial because of omission of reference to the care required of the injured person where this was stated by other instructions.—Erickson v. Washington-Oregon Corporation, 136 P. 376.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 305 (Or.) It is the duty of counsel to keep away from jurors when out of the courtroom during trials, and not to converse with them beyond the usual salutations.—Sandstrom v. Oregon-Washington R. & Nav. Co., 136 P. 878.

Where, at the suggestion of some of the jurors, all of them were given ice cream by one of the attorneys, the jury should have been discharged.—Id.

§ 311 (Colo.App.) Jurors are permitted to use their common knowledge and observations of life in determining the question of paternity out of wedlock.—Mutual Life Ins. Co. of New York v. Good, 136 P. 821.

IX. VERDICT.

(A) General Verdict.

§ 321 (Cal.App.) Code Civ. Proc. § 618, requiring the rendition of a verdict by the foreman of a jury, *held* not to require that such

verdict be read by him; but it may be read by the clerk.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 328 (Mont.) That the jury, in an action against an employer and his agent, arbitrarily renders a verdict in favor of the agent from whose negligence the actionable wrong resulted does not require that the verdict against the employer, the principal, be set aside, if it is otherwise supported.—*De Sandro v. Missoula Light & Water Co.*, 136 P. 711.

§ 343 (Mont.) A general finding for defendant is equivalent to a finding in its favor upon every issue necessary to support the judgment.—*Maronen v. Anaconda Copper Mining Co.*, 136 P. 968.

(B) Special Interrogatories and Findings.

§ 365 (Kan.) In construing a jury's answer to a special question whether a belt got into gear automatically, it will be presumed that the jury understood the word "automatically" to mean having inherent power of action or motion; self-acting or self-regulating; not voluntary; not depending on the will; mechanical.—*Estes v. Edgar Zinc Co.*, 136 P. 910.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 370 (Okl.) Where the court calls a jury in an equity case, he may submit merely those issues upon which he desires to be advised.—*Oklahoma Trust Co. v. Stein*, 136 P. 746.

§ 374 (Okl.) The verdict of a jury in an equity case is advisory only.—*Oklahoma Trust Co. v. Stein*, 136 P. 746.

(B) Findings of Fact and Conclusions of Law.

§ 396 (Cal.) Defendant could not complain of the failure of the trial court to make a finding with respect to an allegation of its cross-complaint, in support of which it introduced no evidence.—*Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 136 P. 57.

§ 397 (Idaho) The trial court need not make findings on collateral or immaterial issues, where a finding either for or against the losing party could not change the judgment.—*Shawver v. Shawver*, 136 P. 436.

§ 405 (Wash.) Separate exceptions taken to each finding and each conclusion by number are sufficient, without a statement of the basis or reasons therefor.—*Pickford v. Borland*, 136 P. 128.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 408 (Okl.) Where, upon a case being called, both parties announce ready and a jury is impaneled and sworn and defendant amends with leave, he waives his right to thereafter object that the issues have not been joined ten days.—*Oklahoma Trust Co. v. Stein*, 136 P. 746.

§ 412 (Colo.App.) Where defendant without objection permitted witnesses for plaintiff to give their opinion as to the dangerous construction of a sidewalk and examined its own witnesses upon the same subject and elicited their unqualified opinion as to such fact, defendant waived its right to complain of the court's refusal to exclude cumulative opinion evidence.—*Town of Meeker v. Fairfield*, 136 P. 471.

In an action against a town for injuries from a fall upon a crosswalk, *held* that, where defendant did not object to the admission of evidence of work upon the walk after the accident but itself established that fact, error in its admission was waived.—*Id.*

TRIAL DE NOVO.

See Executors and Administrators, § 256.

TROVER AND CONVERSION.

See Execution, § 457; Venue, § 18.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 1 (Okl.) Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.—*Bilby v. Jones*, 136 P. 414.

§ 9 (Okl.) Where personal property is wrongfully taken and detained, no demand is necessary before bringing a suit.—*Bilby v. Jones*, 136 P. 414.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 16 (Cal.App.) Where a company sells railroad ties to another company, and such ties are converted by a third company, the seller cannot recover against the third company for conversion of the ties.—*National Lumber Co. v. Tejunja Valley Rock Co.*, 136 P. 508.

(C) Evidence.

§ 40 (Okl.) In an action for conversion of corn, evidence *held* sufficient to support a verdict for plaintiff.—*Bilby v. Jones*, 136 P. 414.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Action, § 28; Specific Performance, § 106.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 21 (Or.) That the parties called an instrument a trust deed when it declared no trust was not controlling.—*Cartwright v. Moffett*, 136 P. 881.

(B) Resulting Trusts.

§ 63¾ (Okl.) Where the beneficial interest is not to go with the legal title conveyed, a trust results in favor of the person for whom the equitable interest is intended.—*J. I. Case Threshing Mach. Co. v. Walton Trust Co.*, 136 P. 769.

§ 70 (Okl.) Where a corporation executed a deed to an officer without consideration that he might procure a loan for the corporation and shortly thereafter the land was reconveyed to the corporation which assumed payment of the mortgage, *held*, that the grantee's interest was merely a naked legal title; the equitable interest remaining in the grantor as the true owner.—*J. I. Case Threshing Mach. Co. v. Walton Trust Co.*, 136 P. 769.

§ 88 (Okl.) Resulting trusts, not being within the statute of frauds, may be established by parol evidence.—*J. I. Case Threshing Mach. Co. v. Walton Trust Co.*, 136 P. 769.

(C) Constructive Trusts.

§ 91 (Colo.App.) A "constructive trust" exists purely by construction of equity, independent of any intention of the parties, for the purpose of preventing fraud or doing justice, and is frequently called a trust *ex maleficio* or *ex delicto*.—*Brown's Estate v. Stair*, 136 P. 1003.

UNDUE INFLUENCE.

See Wills, §§ 163, 166, 282.

UNITED STATES.

See Adverse Possession, § 7; Courts, § 431; Public Lands; Taxation, § 5.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 50 (Okl.) In computing interest at the full legal rate before the adoption of the present Negotiable Instruments Act (Laws 1909, c. 24), it was not usurious to compute the same for a time including the three days of grace allowed by Comp. Laws 1909, § 4694.—Gault v. Thurmond, 136 P. 742.

§ 53 (Okl.) Fees paid by a lender for procuring an abstract of title to land offered as security for a loan, together with recording fees, when reasonable and legitimate, may be included in the note given without rendering it usurious, although the total cost to the borrower exceeded the lawful rate of interest.—Gault v. Thurmond, 136 P. 742.

(B) Rights and Remedies of Parties.

§ 114 (Okl.) In an action to recover usury paid, exclusion of evidence of a statement of plaintiff's account at a bank held not error, where the bank was not a party to the suit, had no interest in the controversy, and such statement could not be binding upon defendant.—Gault v. Thurmond, 136 P. 742.

VACATION.

See Judgment, § 418.

VALUE.

See Evidence, § 474.

VARIANCE.

See Indictment and Information, § 122.

VENDOR AND PURCHASER.

See Champerty and Maintenance; Fraud, § 23; Frauds, Statute of, §§ 129-139; Jury, § 14; Limitation of Actions, § 165; Sales; Specific Performance; Taxation, §§ 697, 824.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 17 (Colo.App.) Where plaintiff misdescribed land sold to defendants, causing them to examine other land than that conveyed, there was no meeting of minds sufficient to establish a valid contract.—Plank v. Maxwell, 136 P. 465.

§ 18 (Or.) Owner of land who gave option providing for monthly payments to keep it in force held, by rejecting installments, not entitled to claim a forfeiture because of a delay in tendering subsequent installment.—Scott v. Hubbard, 136 P. 653.

Promise by holder of option, providing for monthly payments to keep it in force, to advance the payments for one year held a sufficient consideration for the owner's agreement to extend the time of payment of a monthly installment, and hence the owner was estopped to insist upon a forfeiture because of delay in payment.—Id.

§ 34 (Colo.App.) Where plaintiff misdescribed the location of the land which he sold to defendants, and gave them directions for locating the land, indicating that he had actual knowledge of the location, such fraud constituted a defense to an action to enforce payment of a balance of the price, whether plaintiff had actual knowledge of the falsity of his statements or not.—Plank v. Maxwell, 136 P. 465.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 54 (Kan.) Where a vendee has fully performed the contract and taken and held possession for many years and paid all taxes on the prop-

erty, he has a complete equitable title.—Lasley v. Stout, 136 P. 249.

§ 76 (Cal.) Where a vendor after all payments become past due accepts partial payments, held, that he must tender a deed as a condition to demanding payment of the price, and cannot without such tender declare a forfeiture.—Sausalito Bay Land Co. v. Sausalito Improvement Co., 136 P. 57.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(B) Rescission by Vendor.

§ 97 (Cal.) Facts held to show that the purchaser by its abandonment of the contract had waived a previous tender of a deed as a condition to a forfeiture by the vendor.—Sausalito Bay Land Co. v. Sausalito Improvement Co., 136 P. 57.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 130 (Wash.) To be marketable within the specific performance rule, a title need not be free from every possible technical criticism but must be such that a reasonably well-informed and intelligent purchaser in the exercise of ordinary business caution would accept it.—Moore v. Elliott, 136 P. 849.

In view of Rem. & Bal. Code, § 1326, providing that a testator shall be deemed to have died intestate as to children not named, a title from testator's widow under a will giving each of testator's children \$25 and devising the residue to testator's wife would not be a "marketable title" of which specific performance could be compelled, where a fifth child was born five months after the will was executed and seven months before testator's death.—Id.

§ 137 (Okl.) Where a contract for the sale of land provides that the abstract shall be passed upon by a resident lawyer employed by the purchaser, either party may rely upon the opinion of such lawyer.—Farm Land Mortgage Co. v. Wilde, 136 P. 1078.

(B) Conveyance.

§ 150 (Or.) A vendee is entitled to a deed so subscribed, sealed, witnessed, acknowledged, and certified as to be entitled to public record.—Knolhoff v. Mark, 136 P. 893.

§ 151 (Okl.) A contract to convey by warranty deed, land the title to which is vested in a third person is not complied with by procuring a warranty deed from such third person to the purchaser.—Farm Land Mortgage Co. v. Wilde, 136 P. 1078.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

§ 224 (Kan.) That a person pays taxes on realty is evidence that he claims some interest therein, which should lead a person taking a quitclaim deed therefor to inquire as to his rights.—Lasley v. Stout, 136 P. 249.

§ 231 (Kan.) Where a person takes a quitclaim deed from a vendor many years after the vendee has performed the contract, he is not a bona fide purchaser as to outstanding equities in the vendee which are shown by the records.—Lasley v. Stout, 136 P. 249.

§ 232 (Okl.) Where the grantor retains actual possession of the land, wrongful delivery of an escrow deed to the grantee by the depository transfers no title which a subsequent grantee can claim as an innocent purchaser for value.—Wood v. French, 136 P. 734.

§ 243 (Okl.) Inadequacy of the price paid by the purchaser from a grantee held evidence of notice of claim by the grantor in an escrow deed wrongfully delivered, where the grantor retained actual possession of the land.—Wood v. French, 136 P. 734.

VII. REMEDIES OF PURCHASER.**(A) Recovery of Purchase Money Paid.**

§ 341 (Idaho) Evidence, in a purchaser's action to cancel a contract for the sale of land, with which contract neither complied, *held* to show that plaintiff should be charged with a certain sum for benefits derived while in possession, and could not recover a set-off for taxes voluntarily paid, but should have judgment for payment on the purchase price.—*Burgess v. Corker*, 136 P. 1127.

§ 341 (Okl.) Where, in a purchaser's suit to recover the purchase money paid, it appeared that the contract provided that the money should be returned upon a failure to do certain things, and the undisputed evidence showed such failure, a directed verdict for plaintiff was proper.—*Farm Land Mortgage Co. v. Wilde*, 136 P. 1078.

VENUE.

See Corporations, § 503; Criminal Law, § 125.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 18 (Colo.) In suit against smelting company for value of ore upon substitution of another party, also claiming its value, *held* that it became a suit in conversion against such substituted defendant; and, under Code, § 29, should be tried in the county where such substituted defendant resided.—*Price v. Lucky Four Gold Mining Co.*, 136 P. 1021.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 77 (Colo.) A defendant did not waive his right to have the venue of an action changed to the county in which he resided by filing a demurrer to the complaint with his motion for the change.—*Price v. Lucky Four Gold Mining Co.*, 136 P. 1021.

VERDICT.

See Appeal and Error, §§ 989-1005; New Trial, §§ 68-77, 143; Trial, §§ 178, 321-365, 374; Wills, § 327.

VINDICTIVE DAMAGES.

See Damages, § 87.

WAGERS.

See Gaming.

WAITING ROOMS.

See Carriers, §§ 286, 347.

WAIVER.

See Appeal and Error, § 1078; Appearance; Criminal Law, §§ 105, 868, 895, 1043; Estoppel; Exceptions, Bill of, § 42; Executors and Administrators, § 256; Habeas Corpus, § 92; Indictment and Information, § 196; Jury, § 110; New Trial, § 127; Parties, §§ 76, 84; Pleading, § 418; Sales, §§ 180, 313; Trial, §§ 105, 408, 412; Vendor and Purchaser, § 97; Venue, § 77; Wills, § 282.

WAREHOUSEMEN.

§ 25 (Wash.) Warehouse company upon notice of satisfaction of the only valid lien against wheat *held* bound to ship it to the holder of its warehouse receipts who had sent them to it or to return the receipts, and, having failed to do either, was liable for the value of the wheat.—*Northwestern Grain Co. v. Kerr Gifford Warehouse Co.*, 136 P. 1154.

WARNING.

See Railroads, § 307.

WARRANT.

See Municipal Corporations, § 870; Searches and Seizures.

WARRANTY.

See Landlord and Tenant, § 125; Sales, §§ 255, 279, 428-445.

WARRANTY DEEDS.

See Vendor and Purchaser, § 151.

WATERS AND WATER COURSES.

See Appeal and Error, § 1050; Contracts, § 321; Dismissal and Nonsuit, § 19; Injunction, § 24; Judgment, §§ 585, 589, 715; Limitation of Actions, § 55; Master and Servant, § 267; Navigable Waters; Quieting Title, § 4.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

§ 7 (Nev.) Where the waters of a spring flow in a natural water course, they are the subject of a beneficial appropriation.—*Campbell v. Goldfield Consol. Water Co.*, 136 P. 976.

§ 21 (Nev.) The location of a mining claim on land in which a spring rises gives locator no claim to the water flowing from the spring in a natural channel as against an appropriator.—*Campbell v. Goldfield Consol. Water Co.*, 136 P. 976.

§ 30 (Nev.) One having no right to the waters of a spring which flow in a natural water course cannot object that a prior appropriator has changed his use of the stream.—*Campbell v. Goldfield Consol. Water Co.*, 136 P. 976.

II. NATURAL WATER COURSES.**(C) Pollution.**

§ 74 (Kan.) Where several persons, by concurrent action, pollute a stream, the injured person may, in one action, recover against one or all.—*McDaniel v. City of Cherryvale*, 136 P. 899.

(E) Bed and Banks of Stream.

§ 89 (Idaho) A riparian owner on a nonnavigable meandered stream or body of water takes title to the center or thread of the stream.—*A. B. Moss & Bro. v. Ramey*, 136 P. 608.

V. SURFACE WATERS.

§ 115 (Mont.) Water driven over the banks of a river by an ice gorge, which on disappearance of the gorge will return to the channel, is not surface water, which the owner of the property, threatened thereby, may repel by breaking the gorge, without liability for injury thereby to lands further down the stream.—*Wine v. Northern Pac. Ry. Co.*, 136 P. 387.

VI. APPROPRIATION AND PRESCRIPTION.

§ 151 (Colo.) Abandonment of water rights defined.—*Parsons v. Ft. Morgan Reservoir & Irrigation Co.*, 136 P. 1024.

To prevent an abandonment of irrigation rights the user must be in good faith.—*Id.*

If water rights had been lost by abandonment, a subsequent attempt to use the water would not revive such rights.—*Id.*

§ 152 (Colo.) The burden was on the one asserting it to establish the abandonment of priorities to ditch rights.—*Parsons v. Ft. Morgan Reservoir & Irrigation Co.*, 136 P. 1024.

An abandonment of priorities to ditch rights must be shown by clear and convincing evidence.—*Id.*

Evidence *held* to sustain a finding that there had been an abandonment of water rights before an attempted use of the water in 1905.—*Id.*

Evidence, in an action to have priorities in

ditch rights adjudged abandoned, *held* to show that the acts claimed to negative the abandonment were not done in good faith.—*Id.*

VII. CONVEYANCES AND CON-TRACTS.

§ 156 (Idaho) Under a deed to water rights reserving a certain amount of water to the grantor subject to its proportionate share of keeping up the ditch, *held*, that each party was liable for his share of expense of repairing the ditch and the headgate at the point of diversion, though a new point of diversion was selected by one party, which selection was advantageous to both parties.—*Riverside Irr. Dist. v. Black*, 136 P. 611.

§ 157 (Or.) A millowner's implied assent to a city's diversion of water at a point above his "waterway" does not give the city a right to deprive the owner of his property in the stream or make his assent an irrevocable parol license to continue the diversion, if done without authority.—*Booth-Kelly Lumber Co. v. City of Eugene*, 136 P. 29.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§ 171 (Mont.) For defendant to break an ice gorge in a river, thereby throwing the waters on the land of plaintiff, further down the stream, is a direct violation of plaintiff's rights, making defendant liable for the injury, without regard to the question of negligence.—*Wine v. Northern Pac. Ry. Co.*, 136 P. 387.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 182 (Colo.) Sess. Laws 1905, p. 366, § 9, permitting a waterworks district to levy a special assessment against the lots in front of which water mains are laid to pay the purchase price and the cost of maintenance of the system, is unconstitutional as authorizing a special assessment for a general improvement which confers no special benefits upon the property assessed.—*Pomroy v. Board of Public Waterworks*, Dist. No. 2, of City of Pueblo, 136 P. 78.

§ 183½ (Colo.) So much of the purchase price of a waterworks system as is used to pay for the parts of the system which furnish water, not only where the mains are already laid, but where they may be laid in the future, are for the general benefit of the property and inhabitants of the district, and a special assessment cannot be levied to pay therefor.—*Pomroy v. Board of Public Waterworks*, Dist. No. 2, of City of Pueblo, 136 P. 78.

(B) Irrigation and Other Agricultural Purposes.

§ 224 (Idaho) "Irrigation districts" are "public corporations," although not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray the expense of constructing and operating irrigation systems and the conduct of the business of the district.—*Indian Cove Irr. Dist. v. Prideaux*, 136 P. 618.

§ 226 (Idaho) Under irrigation district laws, agricultural lands entered under the federal land laws may be included in an irrigation district.—*Indian Cove Irr. Dist. v. Prideaux*, 136 P. 618.

A United States Land Office receipt is sufficient evidence of title to authorize the inclusion in an irrigation district of lands entered under the homestead and desert laws and the apportionment of benefits to such lands.—*Id.*

§ 247 (Colo.App.) The decree limiting use of water by defendants, in a suit to settle rights to specified lands, allowing them to use it only when necessary, and providing that all surplus over and above that used by them for irrigating said lands shall go to plaintiff, sufficiently

guards plaintiff's rights against a prodigal use of water by defendants.—*Rollins v. Fearnley Investment & Real Estate Co.*, 136 P. 95.

WAYS.

See Easements.

WEAPONS.

See Homicide, §§ 3, 79, 309.

WILLS.

See Corporations, § 245; Descent and Distribution; Executors and Administrators; Vendor and Purchaser, § 130.

IV. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Testamentary Dispositions.

§ 82 (Colo.) A will leaving all testator's property to strangers instead of to contestant, his brother, *held* not objectionable as capricious or unnatural, where testator harbored a feeling that his brother had done him a great wrong and that the person whom he made beneficiary would care for him in his old age.—*In re Carey's Estate*, 136 P. 1175.

(C) Execution.

§ 116 (Colo.) Under Rev. St. 1908, §§ 7071, 7074, relating to attestation of wills, *held*, that the wife of a beneficiary under a will was competent to witness its execution.—*White v. Bower*, 136 P. 1053.

Under Rev. St. 1908, § 7071, requiring a will to be attested by two or more credible witnesses, the competency of attesting witnesses must be determined by the statute law relating to competency of witnesses and not by the common law.—*Id.*

Laws 1883, p. 289, expressly removes all disability in witnesses on account of interest, so that, if the wife of a beneficiary under a will had any interest, it did not disqualify her.—*Id.*

Under Rev. St. 1908, § 7274, providing that a wife shall not be examined for or against her husband without his consent, a married woman, who had attested a will under which her husband was a beneficiary and which he was seeking to establish, might testify for the will.—*Id.*

Under Rev. St. 1908, § 7074, providing that where a will leaves any interest to a subscribing witness it shall be invalid unless attested, etc., and sections 4181-4191, making a legacy to a husband his separate property, *held*, that the wife of a beneficiary who attested a will had no such interest thereunder as would forfeit the husband's interest.—*Id.*

(F) Mistake, Undue Influence, and Fraud.

§ 163 (Or.) Where a will was executed and acknowledged in the absence of the principal beneficiary, the testator at that time managing his own affairs, the contestants have the burden of proving undue influence.—*Simpson v. Durbin*, 136 P. 347.

§ 166 (Colo.) Evidence that testator's principal beneficiary, who was not a relative, had transacted considerable business for him and that they were warm personal friends and, though living some distance apart, visited each other frequently, *held* insufficient to show undue influence.—*In re Carey's Estate*, 136 P. 1175.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(B) Actions to Establish or Determine Validity in General.

§ 227 (Or.) Representations by the authorities of an abbey that deceased, dying at the abbey, had made over his property to it and had left no will will not estop the authorities from claim-

ing that the will was executed, where such representations were not believed by the heirs.—*Wendl v. Fuerst*, 136 P. 1.

(G) Petitions, Objections, and Pleadings.

§ 282 (Or.) Notwithstanding the proponent is bound upon the contest of a will probated in short form to re-probate the same by original proof, *held*, that the petition of the contestants which counted solely on the ground of undue influence and want of attestation waived the issues of testamentary capacity and execution by decedent.—*Simpson v. Durbin*, 136 P. 347.

(H) Evidence.

§ 289 (Or.) The burden of proof is on the proponent of a will to establish every fact necessary to show the proper execution of a valid will.—*Wendl v. Fuerst*, 136 P. 1.

§ 289 (Or.) Where a holograph appears to have been attested and executed in accordance with law, there is a strong presumption in favor of its validity, notwithstanding the absence of an attestation clause.—*Simpson v. Durbin*, 136 P. 347.

§ 302 (Colo.) Under Rev. St. 1908, §§ 7071, 7088, evidence *held* to sufficiently show that testator signed the will before it was signed by the witnesses.—*In re Carey's Estate*, 136 P. 1175.

§ 302 (Or.) Evidence *held* to show that the signature of decedent was not a forgery, and that the will was duly executed within L. O. L. § 7319.—*Wendl v. Fuerst*, 136 P. 1.

§ 302 (Or.) Evidence *held* to show that testator duly executed the will and acknowledged it before the attesting witnesses.—*Simpson v. Durbin*, 136 P. 347.

(I) Hearing or Trial.

§ 327 (Colo.) The court may direct a verdict in a will contest when the facts require it as in an ordinary civil action.—*In re Carey's Estate*, 136 P. 1175.

VI. CONSTRUCTION.

(E) Nature of Estates and Interests Created.

§ 597 (Or.) Under L. O. L. §§ 7103, 7344, a devise of real property is construed to pass testator's entire interest, unless it clearly appears a lesser estate was intended; the word "heirs" not being necessary to the transfer of an estate in fee.—*Irvine v. Irvine*, 136 P. 18.

§ 601 (Or.) Where an interest in fee is given in one clause of a will, it cannot be diminished by subsequent vague or general expressions of doubtful import, or by repugnant inferences deducible therefrom.—*Irvine v. Irvine*, 136 P. 18.

Will construed, and *held* that a clause limiting a widow's interest to a life interest was applicable only to a specified portion of the real estate devised to her, and that it was not effective to cut down a fee in the "home place" devised to her in a previous clause.—*Id.*

§ 625 (Kan.) Executory devise defined.—*Miller v. Miller*, 136 P. 953.

WIRE TAPPING.

See Telegraphs and Telephones, § 25.

WITNESSES.

See Continuance, §§ 28, 37; Criminal Law, § 594; Depositions; Evidence; Perjury; Trial, § 29; Wills, §§ 116, 282.

§ 2 (Okla. Cr. App.) Accused has an absolute right to compulsory process to compel the attendance of his witnesses.—*Romine v. State*, 136 P. 775.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

§ 37 (Or.) Where a witness called to testify concerning a telephonic conversation between others qualified himself by testifying that he recognized the voice of the speaker, he was not disqualified because he heard the conversation by means of eavesdropping or cutting in on the phone.—*De Lore v. Smith*, 136 P. 13.

§ 56 (Kan.) Husband and wife are competent witnesses for or against each other concerning transactions in which one acted as the other's agent, though Code Civ. Proc. § 321 (Gen. St. 1909, § 5915), contains no express provision to that effect.—*Treiber v. McCormack*, 136 P. 268.

III. EXAMINATION.

(A) Taking Testimony in General.

§ 240 (Nev.) The allowance of leading questions is a matter principally within the discretion of the trial court.—*Anderson v. Berrum*, 136 P. 973.

§ 248 (Ariz.) Where a witness was asked to describe the wounds on the bodies of two persons, an answer that they were similar in nature and in the witness' opinion inflicted by the same instrument was unresponsive.—*Marinoni v. State*, 136 P. 626.

§ 248 (Cal. App.) Where a witness was asked to describe the car by which decedent was struck and killed as he saw it when he turned, an answer that the car was carrying a current of wind ahead of her was not objectionable as non-responsive.—*Kramm v. Stockton Electric R. Co.*, 136 P. 523.

§ 255 (Kan.) In a shipper's action for damages to a shipment of cattle, the report of a commission company was competent as a memorandum to refresh plaintiff's memory touching sums realized for the dead and crippled cattle for which suit was brought.—*Cockrill v. Missouri, K. & T. Ry. Co.*, 136 P. 322.

§ 259 (Cal. App.) To allow the stenographer who produced a transcript of shorthand notes taken at the preliminary examination of the defendant to read directly therefrom to the jury was irregular practice.—*People v. Warr*, 136 P. 804.

Where a stenographer, asked whether a certain section of the Code had been read to defendant at the preliminary examination, said that he could not tell without examining his notes, and the record was long, he was properly allowed to refresh his recollection by use of his notes or verified transcript thereof.—*Id.*

(B) Cross-Examination and Re-examination.

§ 268 (Cal.) On trial for homicide, court *held* to have unduly curbed cross-examination of prosecution's witness by excluding questions relative to a libel suit pending against him, based on an article stating that accused had confessed.—*People v. Fleming*, 136 P. 291.

§ 268 (Nev.) The cross-examination must be limited to matters stated in the examination in chief and to tests of the accuracy, veracity, and credibility of the witness, though it is, of course, competent to call out anything tending to modify or rebut the inference resulting from the facts stated by the witness in his direct examination.—*Anderson v. Berrum*, 136 P. 973.

The rule limiting cross-examination does not prevent the cross-examining party from making the witness his own after the adverse party has concluded his case in chief, nor does it prevent the court from allowing a rigid examination if the witness be hostile.—*Id.*

§ 269 (Mont.) Where plaintiff testified that cattle purchased by defendant from B. were not sold to B. by plaintiffs, cross-examination as to the details of the transaction *held* im-

properly excluded, as Rev. Codes, § 8021, limiting cross-examination, is to be liberally construed.—Cuerth v. Arbogast, 136 P. 383.

§ 277 (Cal.) On trial for homicide, *held*, that it was error to permit it to be shown by accused's cross-examination that he participated in boxing contests held by a club under an assumed name.—People v. Fleming, 136 P. 291.

§ 286 (Cal.App.) As to new matter elicited by cross-examination, questions suggestive in form may be asked on redirect examination.—Eaton v. Locey, 136 P. 534.

§ 286 (Nev.) That plaintiff on his cross-examination was questioned as to why, in his former suit, he did not claim as great damage as in the present will not authorize his attorney on redirect to ask leading questions.—Anderson v. Berrum, 136 P. 973.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(A) In General.

§ 330 (Mont.) Where plaintiff testified that, on the security of \$300, he permitted a stranger to take cattle valued at \$1,400 under an agreement amounting to a bailment, with an option to purchase, question asked him on cross-examination as to whether he made any investigation as to such person's standing or character *held* improperly excluded.—Cuerth v. Arbogast, 136 P. 383.

(B) Character and Conduct of Witness.

§ 337 (Okl.Cr.App.) The state may ask accused, as a witness in his own behalf, whether he has been convicted of a crime to affect his credibility.—Busby v. State, 136 P. 598.

§ 349 (Kan.) The limit to which a party may be cross-examined as to his past conduct to affect his credibility is ordinarily within the discretion of the trial court.—Cockrill v. Missouri, K. & T. Ry. Co., 136 P. 322.

§ 349 (Kan.) The scope of cross-examination as to the past conduct of a witness, to discredit him, is largely discretionary.—State v. Moberly, 136 P. 324.

§ 350 (Cal.App.) Where one of accused's witnesses admitted that he was convicted of a felony upon his plea of guilty, and neither the merits of the conviction nor the reasons which induced the plea of guilty were relevant to the present prosecution, evidence thereof was properly excluded.—People v. Stirgios, 136 P. 957.

§ 355 (Kan.) A witness, who stated that he knew, relative to the character of the prosecutrix, only what he had heard from several families with whom she had lived, and that he had no knowledge of her general reputation, *held* incompetent to testify as to her general reputation for truthfulness.—State v. Evans, 136 P. 270.

(D) Inconsistent Statements by Witness.

§ 388 (Kan.) A foundation for impeachment cannot be laid by questions on cross-examination which involve collateral issues.—State v. Sexton, 136 P. 901.

§ 392 (Utah) In an action to recover a preference given by an insolvent contrary to the Bankruptcy Act, the schedules of assets and liabilities filed in the bankruptcy proceedings are admissible to contradict testimony of the bankrupt; his attention having been first called to the conflict.—Utah Ass'n of Creditmen v. Boyle Furniture Co., 136 P. 572.

§ 393 (Mont.) One's testimony at an inquest being admissible, under Rev. Codes, § 8025, only to impeach him by showing he had there made statements at variance with his testimony at the trial, not all of it, but only such part of it as tends to contradict his testimony at the trial, is admissible.—Westlake v. Keating Gold Mining Co., 136 P. 88.

(E) Contradiction and Corroboration of Witness.

§ 398 (Ariz.) In a prosecution for homicide, where the state asked accused's wife if she did not warn the wife of deceased to look out for her husband, and that there was going to be trouble, the matter being a collateral one not properly admissible, the state is bound by the witness' answer, and cannot impeach it.—Crowell v. State, 136 P. 279.

§ 398 (Okl.Cr.App.) A witness' answer on cross-examination as to a collateral matter is conclusive and cannot be subsequently contradicted by way of impeachment by the party putting the question.—Payne v. State, 136 P. 201.

§ 405 (Okl.Cr.App.) It is error to permit cross-examination of accused on any distinct collateral fact not brought out in his examination in chief, with the view of introducing witnesses to contradict him.—Payne v. State, 136 P. 201.

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